

## Kant on Marriage

In his *Metaphysical first principles of the Doctrine of Right* [*Rechtslehre*], Immanuel Kant offers his readers an extended discussion of the legal institution of marriage, under a unique category of contracts known as *Rights to persons akin to rights to things* [*Von dem dingliche Art persönlichen Recht*]<sup>1</sup>. This category is one of Kant's original contributions to political and legal philosophy, and therefore one which holds great potential to enrich our understanding of what makes his legal theory unique. It is my aim in this paper to trace the understanding of marriage which Kant lays out in this section, a section which I take to be enlightening in elaborating both the legal need for marriage as well as the particularities of its construction.

A fair amount of modern work has been done on this section in the *Rechtslehre* (and on his further explanations of marriage in the *Lectures on Ethics*). While some of the work touches on legal elements of Kant's view on marriage, this literature is primarily driven to understand how the description of marriage fits into Kant's larger views on ethics. Some of the work even goes so far as to entirely ignore the location of Kant's discussion (in his philosophy of law), and argue that, as an institution, it is most similar to his later account of friendship (a relationship which Kant maintains is a purely moral one).<sup>2</sup> As a result of this approach, there has been much difficulty in analyzing and a general rejection of Kant's views on marriage among modern scholars. While Barbara Herman maintains that certain elements of the view are salvageable, the most important element of Kant's view, the 'unity of will,' is deemed by her and others to be largely nonsensical.<sup>3</sup>

It is my hope that an examination of Kant's view on marriage which is driven by his legal work in the *Rechtslehre* can offer us greater insight into both the nature of the institution which he has described there, and also why such a legal entity might in fact be desirable. Using the location of Kant's discussion on marriage as a tool to understand its content, I hope to begin by analyzing marriage first as a kind of contract, then more specifically, as an instance of the kind 'rights to persons akin to rights to things.' Fortunately, Kant lists two other types of personal relationships as falling under this category: the relationship between parents and children, and the relationship between the master and his servant. It is my

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<sup>1</sup>Alternate translation: *Right to persons of the thingly kind*.

<sup>2</sup>See, for example, Papadaki (2010) and Korsgaard (1996).

<sup>3</sup>Barbara Herman, "Could it be Worth Thinking about Kant on Sex and Marriage?" 1993.

hope that we can use an understanding of these legal relationships (in particular the relationship between the master and his servant) to form a clearer picture of the relationship between two spouses.

Kant's ethical framework will still be relevant to understanding his discussion of marriage: in fact, I think that it will be essential to clarifying the unique difficulties which necessitate the institution. However, insofar as Kant does not take ethical problems to be the ones which primarily necessitate marriage between individuals, it seems to me a mistaken interpretive move to attempt to understand the foundations of the institution using only (or primarily) ethical tools.

By following Kant's discussion of property and contracts, I have developed an understanding of his view on marriage which departs from conventional understandings of Kant and marriage generally. While the bulk of this paper serves to justify the former move, I would note only the following about the latter: it seems clear to me that marriage (as it has been historically practiced) is an institution terminally infected with the cancers of sexism and inequality, and which has served as a principle venue of violence against and oppression of women. Insofar as there is very little to admire in marriage as it has existed thus far, a dramatic deviation from such an institution should not only be permissible to the open-minded, but in fact a possibility to be celebrated by feminists and others committed to equality.

## 1. 'RIGHTS TO PERSONS AKIN TO RIGHTS TO THINGS'

As mentioned above, Kant classifies marriage as a specific kind of right two parties hold toward one another: the right of one person to the other (hence akin to a thing, as a right 'to' a person as a *person* is rather a right *against* that person). The nature of the relationship between the parties is best spelled out in terms of the contents of these rights, and so I begin my investigation not with marriage proper, but instead in the juridical category in which it falls.

In order to shed more light on the category, let us consider another relationship that falls within it: the legal relationship between a master and his servant. Despite the dearth of attention paid to this relationship in modern discussion (due at least in part to the anachronistic nature of the topic) a closer look at it brings into focus important elements of the right to a person akin to a right to a thing, and, by extension, the relationship created under the institution of

marriage.

#### A. THE CONTRACT OF SERVITUDE VERSUS A CONTRACT TO LABOR

According to Kant, a contract with a professional to complete a single job establishes a right to that individual's choice, or a right against that person.<sup>4</sup> However, a contract for a servant will not be a right against a person, rather instead a right to a person akin to a thing (or according to their analogy with a thing).<sup>5</sup> The right to a person akin to a thing is a right to a person's body in a way that is separate from the right against that person as a person.

The contract with the servant will not be directed at that individual's person, or his ability to make choices. This is a result of an underspecification of the activities involved in the job 'servant'. Kant points out in the appendix to the *Metaphysics of Morals* that

What distinguishes such a contract [of servitude] from letting and hiring is that the servant agrees *to do whatever is permissible* for the welfare of the household, instead of being commissioned for a specifically determined job, whereas someone who is hired for a specific job (an artisan or day laborer) does not give himself up as part of the other's belongings and so is not a member of the household.<sup>6</sup>

When we hire a professional to complete some task for us, the possibility of contracting with that person requires at least that we are able to specific the content of the job we are hiring him for (that is, the choice of action we require the professional to make). However, when we hire a servant, we will not know ahead of time which tasks in particular we require him to perform. This creates a degree of underspecification in the contract that is not present in the case of the professional hired to, for example, repair a lightbulb or build a garage. In those kinds of contracts, there may exist some degree of underspecification as the exact means which that individual takes to the end of repairing the light or constructing the garage. Nevertheless, the end, or choice that we require that individual to make, is clearly stipulated in the content of the contract. In the case of the servant, however, we lack foreknowledge of the exact ends we will require him to set, and the means we expect him to take to them.

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<sup>4</sup>“ What I acquire directly by a contract is not an external thing but rather his deed, by which that thing is brought under my control so that I make it mine. . . This *right* of mine is, however, only a right *against a person*, namely a right against a *specific* physical person, and indeed a right to act upon his causality (his choice) to *perform* something for me.” [MS AK 6:273-4]

<sup>5</sup>“ Servants are included in what belongs to the head of the household and. . . his by a right that is like a right to a thing” [MS AK 6:238]

<sup>6</sup>[MS AK 6:361-2]

What the household requires of servant is simply that he be *there*, at the house, and *willing* to take on the tasks as they come up. Thus, insofar as the needs of the household are directed at the servant's body, and the servant's task itself seems to be defined in terms of where his body is, the content of the contract to servitude is best understood as a contract placing restrictions on the servant's body such that it may serve as a means to the household's later aims.<sup>7</sup> While it is true that there can be no contract to a person's body that doesn't, as it were, bring their person along, the focus on the body in the case of the servant is what radically differentiates his role from that of the electrician. Thus, the contract with the servant will be a contract to his body, the element of him which is analogous to a thing. Though the servant's body is always connected with his person, so a contractor could never have a right to it merely as a thing, the focus on the use of the body in particular changes the scope of the contract so as to subvert the normal order of things (person brings body) and introduce a treatment that is analogous to a right to a thing (body brings the person).

But if all of this is right, it seems as though servitude might not be the kind of contract into which we can actually enter. After all, the contract of servitude focuses on the body over the will of the servant, but this is a prioritization that fails to afford the will its rightful dignity. The will of the servant is not important insofar as it 'goes along with' his body; rather the will of the servant should be of primary importance. How can the servant allow his person to be treated this way via the prioritization of his body in the contract of servitude?

The problem of this possibility of objectification is addressed by the condition against contracting for lifelong servitude. The content of the contract of servitude must either include a definite timeline, or, if the contract is indefinite, it must stipulate mechanisms by which the arrangement could be terminated by either contractor. Whether or not the employment does, in fact, turn out to be lifelong is only accidental; what is important is the possibility of the contract being constrained by the choices of either party. If the servant can choose when the contract is ended, then his use of his body is in fact conditioned by choice (his person); it is conditioned by his choice to continue being in the contract. In this way, the person is returned to its position as the restricting condition on the body, instead of vice versa. Kant himself points out that "The contract of the head of a household with servants can therefore not be such that his *use* of them would amount to using them up; and it is not for him alone to judge about this, but also for the servants (who, accordingly, can never be serfs.)"<sup>8</sup>

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<sup>7</sup>In this paper, I follow Kant in using the term 'body' to refer to an individual's extended, physical structure. I will use the terms 'will', 'humanity', and 'practical reason' interchangeably to refer to the human faculty that exercises the capacity to choose and set ends freely. I will use the term 'person' to refer to the combination of these two things (body and will). Adults will be understood to be persons, unless otherwise specified. See, for example, [MS AK 6:239]

<sup>8</sup>[MS AK 6:284]

## B. THE MARRIAGE CONTRACT AS ESTABLISHING A RIGHT TO A PERSON AKIN TO A RIGHT TO A THING

It may seem initially unclear why the subject of marriage should come up in the same section as the contract of servitude. Although Kant introduces his discussion of the section on rights to persons akin to rights to things as a discussion of domestic society, this seems to be a fairly superficial connection between the two relationships. Marriage, it seems, describes a relationship between individuals which is marked by an intense, perhaps unparalleled intimacy between the partners involved- a relationship which we don't often take to hold between the master and his servant. How can it be the case that these relationships, which appear to fall at quite opposite ends on the scale of familiarity, are actually two instances of the same kind of contract?

In order to identify the similarities between marriage and servitude, I think that it will be helpful to distinguish several distinct phases of the relationship that they share. In both relationships, we have the initial phase which exists prior to any contract being formed between the parties; this transitions into a second phase, during which the parties actually contract, and ends in a third phase of indeterminate length which constitutes the execution of that contract.<sup>9</sup> The complaint identified above is one about the apparent differences between the final phases of the contract of marriage and the contract of servitude: that is, the difference between what the relationships created by the respective contracts look like in a day-to-day manner. However, I believe that for Kant, the important similarities between marriage and servitude lie primarily in facts about the first phase of the relationship, and the unique effects it has on the creation of the contract in the second phase.

### B.1 THE PROBLEM OF SEXUAL INTERCOURSE

For Kant, the contract of marriage serves to rectify the problem of the nature of sexual desire. This problematic relationship is the one which constitutes the first phase of marriage, and is in fact quite similar to the problem of how the servant is able to agree to let the master contract to use his body. That is, marriage begins as a result of the desire to enter into a relationship which seems both necessary (or extremely desirable), but which also problematically prioritizes the body over the humanity of the partner- the result of sexual desire.

The nature of sexual desire and the regard in which we hold those who become the object of it seem to inherently involve a kind of objectification of another person. In the *Rechtslehre*, Kant explains:

*Sexual union (commercium sexuelle)* is the reciprocal use that one human being makes of the sexual organs and capacities of another (*usus membrorum*

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<sup>9</sup>The existence of these three distinct phases surrounding contracting between two individuals is not, I think, unique to contracts which establish a right between the individuals to a person which is akin to a right to a thing.

*et facultatum sexualium alterius*). . . For the natural use that one sex makes of the other's sexual organs is *enjoyment*, for which one gives itself 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.<sup>10</sup>

In the Lectures on Ethics, he specifies the nature of the desire itself:

The desire of a man for a woman is not directed to her as a human being; on the contrary, the woman's humanity is of no concern to him, and the only object of his desire is her sex.<sup>11</sup>

The problem with sexual desire is that it is primarily aimed at the body of the object of the desire. This problem is two-pronged: it has a social element about how the parties treat one another, but it also has a personal, moral element about how each party treats him or herself in attempting to fulfill the desire.

Let us begin with the social problem, about how one party treats another as a result of sexual desire directed at the other. For Kant, to desire to engage in sexual intercourse with another person is to desire to engage in sexual intercourse with that person's body; it is a desire which does not take into consideration the fact that said body is occupied and directed by an individual with the ability to freely select and make choices for themselves.<sup>12</sup> Accordingly, when two parties sexually desire or engage in sexual intercourse with one another, they will each objectify the other. That is, they will each take the other as a means to his or her end, without at the same time treating their partner as the kind of being which can choose their own end freely (again, as the result of the nature of the desire).<sup>13</sup>

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<sup>10</sup>[*MS AK* 6:277-8]

<sup>11</sup>[*LE AK* 27:385]

<sup>12</sup>Of course, this is obviously a controversial opinion about the nature of sexual intercourse itself. While I will accept this claim at face value in order to focus on what Kant takes to be the resolution of this problem, a very compelling defense of this view can be found in Herman (1993), 59-65.

<sup>13</sup>Although the reader may not wonder why, despite the badness of sexual intercourse, there is substantial need in finding a moral solution to the problems created by it, I think it important to note. While Kant of course recognizes the necessity intercourse in procreation of the species, his interest in rescuing it is not constrained to that arena. Kant additionally notes the strength of the impulse itself, and its persistence in human life. Accordingly, he will not (as some of his contemporaries do) restrict the purpose of marriage to procreating, and even explicitly permits entering into marriage for the sole purpose of achieving sexual pleasure through use of one's partner. C.f. [*MS AK* 6:277-8]

But while it may seem as though this problem can be easily rectified, our second problem, namely the moral problem, will prevent us from straightforwardly reintroducing the humanity of our partner into the choice to fulfill our sexual desire. It seems as though a logical way which we might reintroduce consideration for our partner's ability to freely choose her actions is to restrain our use of her body to those times when she chooses to allow us to do so. Should I act in that way, I allow her freedom of choice to be the condition on which I use her body, and thereby restore her humanity to its rightful place in my regard. The problem with this solution is that it is morally impermissible for an individual to make just that choice: to choose to allow another to use her body as a means to their end of sexual gratification.

Why is it morally impermissible for the individual to choose to allow her partner to use her body as a means toward the end of sexual gratification? Because in doing so, that individual merely transfers the agent of objectification from her partner to herself. In the Doctrine of Right, Kant himself maintains that "the natural use that one sex makes of the other's sexual organs is *enjoyment*, for which one **gives itself up to the other.**"<sup>14</sup> That is to say that, insofar as the natural function of sexual desire is to take our partner's body as its object, our partner will then have to allow herself to be used *as an object* in order to fulfill that desire. So, sexual intercourse which involves two people will involve a kind of self-objectification similar to that which occurred in masturbation.

Kant fills in the way that the individual can objectify herself in intercourse in the section 'On defiling oneself by lust' in the *Tugendlehre*. There, he argues that

[I]t is not so easy to produce a rational proof that unnatural, . . . use of one's sexual attribute is inadmissible as being a violation of a duty to oneself (and indeed, as far as its unnatural use is concerned, a violation in the highest degree). -The *ground of proof* is, indeed, that by it the human being surrenders his personality (throwing it away), since he uses himself merely as a means to satisfy an animal impulse.<sup>15</sup>

Here, he points out that the end of achieving sexual gratification (either your own or your partner's) is an end supplied not by practical reason, but instead by our animal nature. It is our animal impulse that desires sexual intercourse, and so if we choose to act toward that end, our choice is determined in accordance with something external to our humanity, instead of something internal to it. By allowing our power to choose to be ruled externally (in this case, by our animal nature), we make its goodness conditional

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<sup>14</sup>[*MS AK* 6:278, bold mine]

<sup>15</sup>[*MS AK* 6:425]

on its ability to complete the tasks assigned by impulse, and not the tasks it selects for itself. Accordingly, we fail to correctly identify the goodness of practical reason (namely, something that carries its goodness within itself), and we fail to will autonomously (insofar as we require something external to supply our end). Thus, the choice to engage in sexual intercourse, insofar as the end is one supplied by animal nature, is not one that we can make freely and so not one that we can make morally. Moreover, insofar as the choice to allow our partner to use us as a means to his or her sexual gratification is not one which we can make freely, it is not one which would allow our freedom to constrain our partner's use of us, either.

We should note here that the problem is not that sexual intercourse interferes with one's ability to freely choose and set other ends- human participate in activities which do this all of the time. For example, when we sit down to eat a meal, we thereby prevent ourselves from choosing to do a whole slew of other things- taking a nap, brushing our teeth, and so on. Nevertheless, at least in certain cases of eating a meal this doesn't seem to be that problematic, insofar as 'eating a meal' is the kind of end we are able to freely choose. For example, I can freely choose to eat a meal in order to fuel my mind and restore my faculties. In choosing this, I have chosen to participate in the action (eating a meal) in accordance with a principle which values my freedom to choose and set ends.<sup>16</sup>

Now, I should note here that the problem is not strictly that sexual intercourse interferes with my ability to freely choose and set other ends. Humans participate in activities all of the time which prevent us from freely choosing and setting other ends. For example, when I sit down and eat a meal, I am preventing myself from freely choosing and setting other ends (such as exercising or going to the store) for around an hour or so. Nevertheless, at least in certain cases of eating a meal, this doesn't seem to be that problematic.

Why is it not problematic that eating a meal prevents me from choosing and setting ends for a little bit? Because choosing to eat a meal is an end itself which I can freely choose. For example, I can freely choose to eat a meal in order to fuel my mind and restore my faculties. Thus, I have chosen to participate in the task in accordance with a

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<sup>16</sup>This is not to say that there are not ways of eating which are not problematic- that is, that there are not ways which eating could problematically restrict my freedom. Kant himself points out "Brutish excess in the use of food and drink is misuse of the means of nourishment that restricts or exhausts our capacity to use them intelligently. . . When stuffed with food [a human] is in a condition in which he is incapacitated, for a time, for actions that would require him to use his powers with skill and deliberation." [MS AK 6:427] (*Article III. On stupefying oneself by the excessive use of food or drink*) When we eat in this manner, we restrict our ability to freely choose and set other ends while we eat, but we also do not do this as a result of a choice made in accordance with a principle which values freedom. Instead, the choice to overeat in a way which will prevent us from using our faculties later is made using an end of our animal nature, which enjoys indulgence in food.

principle which values my freedom to choose and set ends.

However, the choice to engage in sexual intercourse is made in accordance with my animal nature- that is, the choice interferes with my capacity to freely choose and set ends, and the activity itself is not freely chosen. The nature of sexual intercourse is such that choosing it will always be a product of the influence of animal nature: we choose to engage in sexual intercourse not to make us more free, but as a result of impulse or instinct. Note also that reason requires nourishment through food in order to operate correctly, but it is not obvious that reason will ever require sexual intercourse in order to function.

Hopefully from this discussion we can now begin to see the similarity that the first phase of the marriage relationship has to servitude. In the initial phases of both, there is a need by at least one party (in marriage, both parties) to use another person's body, without taking their humanity into primary consideration. As a result of this similarity, the *second phase* of the relationship, the contracting phase, will also be similar: it will be constituted by a contract which creates a right to a person akin to a right to a thing, and which therefore manages to permit the originally problematic use. This contract consists in some new choice that the vulnerable individual can make freely, and which thereby reinstates their humanity as a constraint on the use of their body.

Despite these similarities in form, we can also begin to see how the *differences* in the specifics of the use desired by the parties to the contract will lead to significant differences in the content of the contract established in the second phase, and dramatic differences in the relationship which results from that contract (the third stage).

### C. THE CONTRACT OF MARRIAGE AND THE ACQUISITION OF OUR PARTNER

The higher-order choice which so effectively constrains the relationship between the master and his servant (and partially constitutes phase two of the contract between them) will fail to translate to the partners who wish to engage in sexual intercourse. Insofar as neither partner will be able to freely will that the other use their body as a means to the end of sexual gratification, the choice to limit such a use to some fixed period of time will not be free and would therefore fail to impose the constraint of humanity on the overall interaction. The difficulty of the marriage relationship is that we must identify a choice which captures enough features of sexual intercourse and desire so as to relevantly restrict them, while at the same time adhering to those principles which will allow it to be chosen freely.

Instead of having to identify the choice itself, however, our difficulty lies in seeing exactly why the choice Kant *does* identify is the one which best serves the purposes outlined above. This involves understanding how the relevant choice affects the partners both in their relationship to one another, and also in their relationship to themselves.

The choice that Kant claims we will be able to make, to constrain the use of our body by our partner, is as follows:

There is only one condition under which this [sexual intercourse] is possible: that while one person is acquired by the other *as if it were a thing*, the one who is acquired acquires the other in turn; for in this way each reclaims itself and restores its personality.<sup>17</sup>

The choice which constrains the possibility of the partners using each other to achieve sexual gratification is the choice to exchange persons. Accordingly, the marriage contract (phase two) must be constituted, at least in part, by the choice of both partners to acquire the other partner as though they were a thing. This decision, we will see, is the kind of decision that can both be made freely (and therefore reinstitute humanity as a constraint on our use of our body), and which also relates sufficiently to the nature of sexual intercourse so as to condition engagement in that action *in particular*.

But what can it mean to exchange to acquire another person as though it were a thing? The reader has, up until now, followed me out on many a limb, and I request that she does it once more: that we tentatively attempt to parse the literal meaning of Kant's claim above, in the hopes that cloaked within the initial oddness and impenetrability lies a solution to a problem too great to give up on. Accordingly, let us begin by attempting an on-the-ground reconstruction of the choice to exchange persons with another.

Let us imagine this to be true: the individual is able to set the following maxim: I choose to exchange the person of my partner, in order to reclaim a new person. This maxim (as we will explore further), can be chosen in accordance with humanity, insofar as its aim is determined autonomously (that is, in accordance with the goodness of the freedom of the will), and will thus be a morally permissible choice for us to make. That is, we can choose whether or not we want to exchange persons with our partner in accordance with moral principles (principles which preserve and further our own freedom), and not merely principles of our animal nature (principles which, in this case, value sexual gratification). Thus, when we constrain sexual intercourse so that it can occur only at those times when we have made the decision to acquire the person of our partner, we find that the possibility of sexual intercourse (use of our partner's body) has in fact been constrained by the possibility of freely choosing to exchange persons with our partner.

Of course, we have made a rather large leap here: while it may in fact be the case that the choice to exchange persons can be made autonomously, and it may even further

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<sup>17</sup>[*MS AK 6:278*]

be the case that such a choice is the correct one to constitute the marriage contract and thereby constrain the sexual impulse, it is entirely unclear so far how Kant has come up with this choice. Are there other choices which we could have used, and, if so, what makes this one the best or most relevant? What does it even mean to exchange persons with our sexual partner, and how did the discussion of persons emerge from the discussion of use of another person's body? Because the choice which constrains the sexual impulse does not, at least in my mind, connect as obviously to the activity it constrains, we will need to spend more time examining it than we did the choice which constrains servitude. Moreover, because of the esoteric nature of the choice involved in the marriage contract, I think that some time will need to be spent examining the third phase of the marriage contract- that is, the relationship which is created as a result of the choice to exchange persons- in order to both better understand Kant's actual picture of marriage, as well as why such a choice is one which can be made autonomously.

The choice to exchange persons becomes the relevant choice to constrain the marriage contract as a result of the nature of intercourse. That is, once we look to the specific use which is made of each partner in sexual intercourse, we can see the ways that it fails to offer the appropriate dignity to the humanity of both partners. Thus, our choice will be exactly the one which fills in what is lacking in the action, and nothing more.

When Carol engages in sexual intercourse with John, Carol uses John's body in order to meet her end of sexual gratification. However, insofar as the person is a unity, Carol also uses John's person as a means to meet her end. Since John cannot consent to use of his person as though it were a thing (because this maxim would be determined in accordance with his animal nature, and therefore be immoral), when Carol uses John's person in sexual intercourse, she treats that person as a mere means. In order to treat John as a person, Carol would have to make sure that John took on her end as his own before she used John as a means to that end. There are two problems with Carol's use of John in this way: first, that no one can rightfully use a thing that is not their own, and second, that we are universally morally prohibited from using other people as things at all.

In order to solve the first problem, Carol must acquire John (add him to her possessions) in order to rightfully use him as a thing. Thus, insofar as Carol aims to use John's body as a means to her end (as an object of her choice), she must acquire John in accordance with right. This exchange constitutes the contract of marriage: namely, that each partner gives the other their person, so that the person of each can be used as means to their end of sexual gratification (in accordance with right). So, as Kant maintains, "There is only one condition under which [sexual intercourse] is possible: that while one person is acquired by the other *as if it were a thing*, the one who is acquired

acquires the other in turn. . .”<sup>18</sup> This, however, brings us to our second problem, which is just that morality prevents us from using persons as things (as mere means to our ends) at all.

The problem of legally being prevented from using another person as a thing is resolved by acquiring that person in accordance with right. But, can this solve the moral problem of using another person as though it were a thing? The quick answer to this question is yes, if done in a certain way. As we saw, using another person as thing (as a mere means) restricts their freedom, and is therefore morally wrong. This is what makes it impossible for Carol to freely will the maxim “it would be good for me to use John’s person as a mere means to my own sexual gratification,” because in this way John’s freedom is restricted by Carol’s use of him for her sexual gratification.

But John is unable to take the end of engaging in sexual intercourse as his own, which means that every time he does engage in sexual intercourse, both he and his partner treat his person as a mere means. That is, his freedom is restricted by his animal nature, which sets the end of engaging in sexual intercourse. For an action to be moral is for it to be consistent with respect for humanity, and subordination of humanity under animal nature fails to afford it that kind of respect.

Recall, though, that in the case of servitude, it was also impermissible for us to restrict our freedom in accordance with the end of making money. However, we were able to couch the choice of making money by being a servant in another choice (one we could freely make) by placing a limit on the duration of the contract. Thus, we included the choice of entering into or exiting the contract as conditioning the choice of making money through servitude. This higher-order choice *is* the kind of choice we were able to make freely, and so it reinstates practical reason as its own director.

So, with sexual intercourse, we need to reinstate practical reason as its own ruler by conditioning use of ourselves to achieve sexual gratification with a free choice. This free choice is the choice to exchange our persons- a choice which accords with freedom since, by acquiring another person while I give my own away, I maintain all of the faculties that I previously had.<sup>19</sup> Thus, the use of our sexual impulse is conditioned on our free decision to exchange persons, and so the use of our practical reason is itself once again determined by a free choice made by practical reason (and not one made by animal nature.)

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<sup>18</sup>[*MS* 6:278]

<sup>19</sup>The specifics of this will be addressed later in the paper, however, on the face of it, it seems that when I gain the person of my partner (body and will) in exchange for my own, I am left with all of the same faculties which I had at the beginning.

## 2. THE UNITY OF WILL, OR EACH PARTNER'S POSSESSION OF THE OTHER

What is created when my partner and I contract to take possession of each other's person? What are the activities involved in acquiring the will of another, and what are the results of such a mutual acquisition? What does it mean when Kant says: "There is only one condition under which this [sexual intercourse] is possible: that while one person is acquired by the other *as if it were a thing*, the one who is acquired acquires the other in turn; for in this way each reclaims itself and restores its personality"?

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To answer the question, we need to look only a little earlier in the text, to Kant's discussion of acquisition of external objects in the *Rechtslehre*. In his chapter 'How to acquire something external', Kant begins by explaining that "I acquire something when I bring it about (*efficio*) that it becomes mine." [6:258] where he has previously defined the concept of 'mine' in his definition of the concept of external objects that are mine or yours: "something external is mine if I would be wronged by being disturbed in my use of it even though I am not in possession of it (not holding the object)."<sup>21</sup> A thing can be properly called 'mine' only in those cases where disruption of my free use of that object (as an object of my choice) would wrong me. In the following sections, Kant explains that we can gain this right over things either originally (when we are the first possessors of the object), or by contract (when we acquire the object as a result of someone else's choice to give it to us). The case of marriage, in which each partner acquires each other's persons falls into the second case of acquisition: it is only by our partner's choice to give us their person that we are able to come into possession of it.

The kind of possession that each spouse has over the body and will of their partner will be an *intelligible* possession of each other. This means that neither need to make physical use of the other person in order to possess them, though this possession will also permit physical use of the partner.<sup>22</sup> What does an intelligible possession of our partner's person look like though? Insofar as I now have possession of my partner's body and will, I have permission to use them. Moreover, insofar as my partner has possession of my own body and will, she has permission to use them, and is licensed to prevent interference with that use of them by coercion.

If we accept the possibility of possession of another's person via the conception of

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<sup>20</sup>[MSAK 6:278]

<sup>21</sup>[MS AK 6:249]

<sup>22</sup>In fact, Kant takes all rightful possession to be intelligible possession- that is, although I often express my possession of an object through my physical use of it, the fact of my possession of an object is made true by a certain relationship between my will and that object (my will's free use of that object) and is therefore an intelligible fact. I bring out the intelligibility of the possession of our partner here only to remove the errant thought that the use of the partner in marriage is some kind of puppetry we play with their body.

possession as *intelligible*, then I suggest we turn now to look at another element of possession: its licensing our use of the thing possessed, and privileging coercion should another attempt to interfere with such use. But what kind of use can be made of another's person? And, to return to the larger conversation, how does permission for this kind of use resolve the problems Kant finds inherent in sexual intercourse?

To acquire an object and therefore have it available for my use is to have that thing as an object of my choice.<sup>23</sup> An object of my choice is a thing which I am able to use as a means to my ends, in accordance with right. So, when we ask what ways we might be able to use our partner's person (body and will), we are asking what ends we might be able to set using those two things as a means.

Obviously, Kant thinks that one of the primary ends that we might be able to use the person of our partner as a means to is intercourse, and when we have rightfully acquired that person, we can use it as a means to lawful sexual intercourse. Understanding this specific use of our partner's person will allow us to come to a better understanding of all of the other available uses of it and also what Kant means when he suggests that "for in this way [through the exchange of persons] each reclaims itself and restores its personality."<sup>24</sup>

Kant offers a more detailed explanation of the exact process by which the exchange of persons occurs in the contract of marriage in the lectures on ethics. There, he explains that

If only one partner yields to the other his person, his good or ill fortune, and all his circumstances, to have right over them, and does not receive in turn a corresponding identical right over the person of the other, then there is an inequality here. But if I hand over<sup>25</sup> my whole person to the other, and thereby obtain<sup>26</sup> the person of the other in place of it, I get myself back again,<sup>27</sup> and have thereby regained possession of myself;<sup>28</sup> 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<sup>29</sup>.<sup>30</sup>

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<sup>23</sup>“ But an object of my *choice* is that which I have the physical capacity (*vermögen*) to use as I please, that whose use lies within my *power* (*potential*) (*in meiner Macht*).” [MS AK 6:246]

<sup>24</sup>[MS AK 6:277]

<sup>25</sup>*weggebe*

<sup>26</sup>*gewinne*

<sup>27</sup>*so gewinne ich mich selbst wieder*

<sup>28</sup>*und hab mich selbst dadurch reoccupirt*

<sup>29</sup>*eigenthum*

<sup>30</sup>[LE AK 27:388]

This description fills in a little more of the mechanics: I give myself to my partner, which would be a problem if she doesn't give herself to me, but she does, and so I have myself restored to me. The question of what exactly this entails will inform the question I left the previous section off with, namely, what use of our partner's person consists in. On the widely accepted understanding of this view, originally suggested by Barbara Herman in her 1993 paper, "Could it be Worth Thinking About Kant on Sex and Marriage?" the answer is this:

I give myself (or rights over myself) and you give yourself; but since you have me, in giving yourself to me you give me back to me. And so on. The idea might be this: Suppose I give you every pencil I own or will come to own knowing that (or on condition that) you will give me every pencil that you own or will come to own. One could say that we thereby create a community of pencil ownership- a unity of will about pencils.<sup>31</sup>

On Herman's view, the use that we make of our partner is to use his person, which possesses our own, on the understanding that we then possess what he possesses and thereby gain our person, a possession of his, back again. In the pencil analogy, I use my ownership of my partner's pencils only to reacquire my own pencils, which he now owns and which therefore number amongst his pencils. According to Herman, "Marriage solves the problem [of sexual intercourse] because each grants the other 'equal reciprocal rights' and no one loses anything."<sup>32</sup> This view is appealing because the result- a "community of pencil ownership"- seems to bear strong similarity to the situation we were in before. While there may be more to the property regime, each of us at least (and in some sense) has their own will back, and, if desired, could go on largely as we had before.<sup>33</sup>

I would like to suggest a slightly different understanding of this section of Kant, one which will end in a relationship between the partners that is dramatically different from the status they bore to each other as two individuals. I suggest this alternate understanding of the text for two main reasons: the first is that I think it is a more straightforward reading of Kant, which cleaves better to his earlier discussion of contracts and external acquisition generally. Additionally, I think it is a simpler definition that does not force

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<sup>31</sup>(1993), 66.

<sup>32</sup>(1993), 66.

<sup>33</sup>Herman herself does not seem to think that the result of the trade is that each partner gets themselves back in a way that is similar to before. Instead, she claims that the parties "become parts of a new self that has two bodies," which she claims does not make any sense at all. My aim here is to point out why Herman's understanding is at least initially intuitive, and to preemptively bring out some of the reasons why my own view, in contrast, may seem initially counterintuitive.

us to read more steps into the contract of marriage than the ones Kant himself lists. But secondly, I think that this understanding is preferable because of the subsequent moves it will allow us to make in our understanding of Kant's larger practical views on marriage. Herman herself acknowledges that the interpretation of the text she offers does not offer a clear way to understand what a Kantian marriage, or Kantian unity of will, looks like on the ground. I think that an alternate reading of the text will allow us to answer more questions about what the unity of will looks like in everyday practical reasoning, and that the view will have desirable consequences when applied to questions about appropriate treatment of partners within a marriage.

I suggest, then, that we return to Kant's expanded description of marriage in the Lectures on Ethics. The elements of the contract are, as follows: "If 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. . ." <sup>34</sup> The results of the contract are: I get myself back again, and she gets herself back again. In order to unpack this, I suggest that we start at the ending, and ask about the kinds of things we are getting back: what is myself? and what is herself?

I think that returning to Barbara Herman's discussion of pencils could be a helpful place to begin a new discussion. I would like to slightly modify her example to draw attention to features of use of external objects that I think will be relevant in the ensuing discussion. Without explicitly mentioning it, Herman's original pencil analogy confines us to think about exchanging pencils in terms of only some of their features, while ignoring others (ones which I take to be quite relevant to the analogy). The focus on these specific features of the pencils, however, prevents her from easily pivoting from a discussion about pencils to a discussion of people.

When you and I combine our pencils in Herman's analogy, it seems as though the new pencils I receive are transformed when you give them to me: they switch from being *your* pencils to being *my* pencils. For that reason, these new pencils share relevant features to the pencils that were previously mine. While the pencils have maintained the same *physical* and *functional* features as the ones they had before, there has been a transformation in the normative features of the pencils. Prior to the exchange of pencils. You and I each had a set of pencils, which we were each able to use as a means to write, draw, etc. The fact that my pencils were mine made it possible for me to use them without other people being allowed to interfere with that use. When I give my pencils to you (and you give yours to me), we each thereby forfeit the right to write and draw with the pencils we originally owned, and yet at the same time are restored our means to write and draw through the acquisition of the pencils that were originally our partners. That is, when "I give you every pencil I own or will come to own" and you "give me every pencil that you own or will come to own" the pencils that my partner gives me are functionally transformed: pencils that I previously had no right to use as a

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<sup>34</sup>[LE AK 27:388]

means to my end are now available for me to use in such a way. In addition, the pencils are *normatively* transformed. Prior to the exchange, your possession of your pencils restricted my freedom to use them as a means. However, when you give me your pencils, my rightful uses of those pencils are transformed so that I am now able to rightfully use them as a means to my end. Accordingly, the pencils which I have received from you are now properly ‘my’ pencils, insofar as they are the pencils that I am now permitted by right to use.

The reader might object that it doesn’t seem precisely accurate to say that I have my pencils back again. Having pencils that I can do all of the same things with doesn’t seem to make the new pencils the same as my old pencils. My old pencils, for example, might have had different physical characteristics than these new ones: might have been different colors, different lengths, come from different places. Additionally, in philosophy, we often use phrases like ‘same’ to mean numerical identity, so that, when Kant says that I “receive myself back again,” what he means is that I am receiving back the thing that is numerically identical to the thing that I had prior to the contract. However, I think that there is good reason to think that *these* features of the pencils (the physical characteristics, or their numerical equivalence) are not analogous to the features of topmost relevance in Kant’s discussion of acquiring persons.

Suppose, for example, that my friend and I are taking a standardized test that requires the use of a pencil with a quite specific lead size in order for the answers to be scored. My friend and I are taking the test next to one another, and, at around the same moment, both drop our pencils on the ground. We each reach to the ground to retrieve our pencil, and, due to our focus on the test, accidentally grab the other person’s pencil. Let us also imagine that this person and I are good friends, and that each knows the other would be happy to share her pencil with her for the duration of the test. Each of us finish taking our standardized test with our partner’s pencil, and, at the end of the test, the proctor announces that we should “put our pencils down.” At this moment, we don’t each reach for the pencil in our friend’s hand, even if it is visibly identifiable as the pencil that we dropped. Instead, we put down the pencil we have been using to complete the test, because our use of it in this setting has temporarily allowed it to become ours. At least for the duration of the test, the new pencil that I picked up off of the floor was my pencil. The relevant features of the pencil, in the setting of the test, is that it is able to mark test answers in a way that will be legible for scoring, and that I am rightfully able to use it in this way (made possible by the nature of my relationship with my friend). In the context of the standardized test, the new pencil is the same as the old, and so the result of the switch is that I receive a pencil that is my own pencil back again.<sup>35</sup>

Thus, in marriage, even though I now have the person which previously belonged

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<sup>35</sup>I originally presented this analysis of Barbara Herman’s pencil analogy, as well as the altered analogy and the standardized-test pencil-swap in a 2016 paper for Nico Silins.

to my partner as my own, instead of the one which I had prior to the transfer, this new person is *functionally* and *normatively* the same as the person I had before the contract, and so, for all intents and purposes, I am restored to myself again. Functionally because, as it will turn out, we will be able to use our new person in the same way that we were able to use our old person, before- that is, we will be able to use our new person's capacity to choose and set ends in the same way we were able to use our own capacity to do so before. Normatively, because, prior to our contract, I was permitted to use my own person: I used my body as a means to my ends, and my will to choose and set those ends. I was prevented from using my partner as a means to my end by his innate right of freedom and the moral law- prevented from interfering with him physically and also prevented from using him as a mere means in my maxims. After the contract, however, I am permitted to use the person that was previously my partner's. I am permitted to use his body as a means to my ends, and permitted to use his will to set and choose those ends. From the perspective of my normative permissions and prohibitions, the new person that I have received is the same as the one which I gave away.

Kant's solution, therefore, to the problem of sexual intercourse is that, from now on, each partner chooses and sets ends with the will which is located in the spouse's body, and, moreover, that each has the right to use the body of their spouse as a means to execute those ends. The new location of each partner's will will change the way that they use and interact with it. When our will is located within our own body, our other faculties, such as judgement and understanding, may communicate with it through thought alone. When our will is located in our partner's body, we will need to communicate with it through speech or some other external mechanism, in order for it to receive information from our deliberative faculties. For some people, this may make use of the will more onerous or slow than it previously was, because they are not as quick as communicating externally as they are internally. Perhaps, with sufficient practice, partners will be able to communicate so effectively that speed and efficiency in use of our new will becomes almost identical to the use of our old one.

What do we have before us now? We have our spouses, who are each permitted to use the other as a means to their own end. They are permitted to use the will of the other to set ends, and they are permitted to use the body of the other to achieve those ends (should it be needed). In this way, there has been, in a sense, an element of exchange: I traded myself for yourself, you traded yourself for me. However, each of our result of the exchange is inextricably tied up with the result of the others. Unlike with pencils, I cannot walk away with what is mine and thereby leave you with what is yours. Whereas before our contract what was mine and yours were separate, parse-able entities, now they are interpenetrated and tied together in a permanent way. My reason, my judgement, my understanding, remain in the body that was originally mine. They inform and employ the will and body that was originally yours. The same is true in reverse for you; and so, while it is true that we began as two individuals, and have lost nothing that

we didn't gain back, the result can never be two separable beings. This is the abstract, perhaps mystical unity that is formed between the partners in marriage- the permeation of being in a way that prevents either from expressing their humanity without the other also participating in it.

There is a second, more concrete way that the spouses in Kant's marriage form a unity. Under the eyes of the law, what separates individuals is the right of freedom that comes between them. The legal line between myself and a stranger is marked by what I am permitted to use as a means to my end, and what I am prevented from using in that way by another's freedom.<sup>36</sup> This line is dissolved by the contract of marriage- where prior to the contract stood two individuals on either side of the wall of one another's freedom, after the contract, no such right separates them- each is permitted to use the other just as they would have used themselves. Thus, the legal barrier that previously indicated the presence of two individuals (two individuated wills) is gone, and instead both parties are surrounded by the protection of their contract.<sup>37</sup>

I persist in my belief that the view presented above is correct for a few reasons. I think that it is a more orthodox reading of the Kant than Herman's, insofar as it does not impute to the contract any more steps than those that are explicitly stated. Perhaps more importantly, however, I believe that the understanding I have offered (the mutual possession of the spouses that creates a legal unity between them) allows for a degree of analysis of Kant's views on marriage that are not available on some other readings. Barbara Herman denies the fruitfulness of Kant's statements on the exchange of persons later in her own article, claiming that

Even if this [the pencil analogy] makes some sense, a unity of will out of two persons or a 'union of human beings' does not. Although one sees what Kant may have wanted. . . it is not possible for him to get what he wants. If the problem with sex is that we are embodied selves, and use of the body implies title over a self, things are not greatly improved if we become parts of a new self that has two bodies (and sex would then be what?)<sup>38</sup>

It seems that Herman takes the result of the pencil analogy (when translated back to spouses) to be the creation of a new self that has two bodies, a kind of being which she takes not only to be senseless, but also a greater threat to the autonomy of the

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<sup>36</sup>An interesting effect of this being the ways that property can be seen as a legal extension of ourselves.

<sup>37</sup>„Denmach machen beyde Person eine Einheit des Willens aus.“ [LE AK 27:388] *trans.* “Thereby making from both person(s) a unity of the will.”

<sup>38</sup>(1993), 66.

individuals involved than the original problem of sexual intercourse was.<sup>39</sup> Accordingly, it is unclear how her view could explain any of the other features of marriage that Kant identifies in the *Rechtslehre*, nor how it could even be properly understood as establishing a right to another person that is akin to a right to a thing.

Additionally, however, I think that the view above is a more straightforward reading of Kant's claim that in marriage "I have given myself to be the other's property, but am in turn taking the other as my property, and thereby regaining myself, for I gain the person to whom I gave myself as property."<sup>40</sup> It seems much less contrived to me to read the final clause as explanatory of the penultimate one: that the way I am regaining myself is in gaining the person to whom I gave myself as property, full stop. That is, that the 'myself' I regain is the person to whom I gave myself as property. The step enumerated by Kant that allow me to gain myself back is just taking the other as property- nothing more is said. Kant does not say that I regain myself back because, when I gain the person to whom I gave myself as property, I also gain all of their intelligible possessions, among which my old self numbers. To read additional steps into Kant's solution might make sense if more steps were needed to resolve the problem created in sexual intercourse, but, as I have attempted to show, nothing more is needed in order for this choice to successfully constrain sexual intercourse. The addition of Herman's extra step seems instead motivated by a desire to produce a picture of marriage that bears a strong resemblance to historical practices, but, as Herman herself points out, even the view which involves my partner and I coming back into possession of our

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<sup>39</sup>(1993), 66.

<sup>40</sup>"den ich habe mich dem andern zum *Eigenthum* gegeben, ich nehme aber wieder den andern zu meinen *Eigenthum*. sogewinne die Person, der ich mich zum *Eigenthum* gegeben habe." [LE AK 27:388] I think it is worthy of note here that Kant uses the term *Eigenthum* (*Eigentum*) to mean "property" here; this is the same term he uses in the *Rechtslehre* starting at 6:270 to describe external property which can be acquired in accordance with the principle of practical reason. I take this to be a (perhaps small) point in favor for considering our relationship with our partner's person to be more similar to the property described in earlier sections of the text.

original selves seems rather unconventional.<sup>41 42</sup>

I think that there are pragmatic reasons to prefer this view as well. This view is simpler than the alternate view. It requires fewer steps and conforms more straightforwardly to a conventional picture of object acquisition. My view offers an avenue through which many of Kant's other claims about marriage can be made sense of, and, though odd, my view offers a clear picture of what married life looks like. I do not doubt that the understanding suggested here is at best unconventional and at worst outlandish, but I think it is at least sensible all the way to the end, which is more than Herman herself claims of her own understanding of Kant's language.

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<sup>41</sup>In fact, I think that the picture I have offered above bears a strong similarity to contextually conventional understandings of marriage. Contemporaneous thought on marriage suggested that the relationship of persons produced by a marriage contract between two individuals allowed the husband total possession of his wife: body and will. The husband was encouraged to think of his wife as an extension of himself, and the wife encouraged to think of her own person as a tool for her husband's use. The description I have offered above is somewhat like this, but mirrored across both parties: each bears the relationship to the other that the husband would have borne to his wife. Thus, the solution above would have been, I think, contextually the simplest and most straightforward way to transform an existing unequal relationship into one that preserved the equality and freedom of both parties. I am especially partial to this as I believe it opens up to us a new dimension of Kant's genius in his construction of marriage- that something which establishes a radical form of equality and freedom for both parties can be constructed through such a simple transformation of an institution so abhorrent and unequal. For one such contemporaneous view on marriage, see Fichte's *Foundations of Natural Law* (1797).

<sup>42</sup>Another place we can look for hints about convention is in the legal code surrounding marriage at Kant's time of writing. Three years prior to Kant's publication of the *Rechtslehre*, Frederick II produced a new codification of Prussian state law. While there is no record within Kant's own work which refers to the code, his friend and conversant Theodor Gottlieb von Hippel (mayor of Königsberg) worked on the commission to produce the statutes, and in particular on the sections pertaining to marriage and gender. It seems that, despite the specificity of the specific statutes of the section on marriage (First title of the Second section), there remains a great deal of space for interpretation of Kant's own understanding of the institution. The location of greatest convergence between the subject of the legal code and Kant's own writings seems to be in the discussion of the distribution of physical property between spouses. Kant seems to have attempted to work around this, for example, by claiming that, while physical property becomes shared between spouses as a result of marriage, "the partners are still authorized to forgo the use of a part, though only by separate contract." [*MS AK 6:278*] This leaves room for the decidedly unequal conditions of use of property laid out in the fifth section of the legal code [*Of the rights and duties of the spouses in relation to their property/ Von den Rechten und Pflichten der Eheleute in Beziehung auf ihr Vermögen.*] In fact, Kant spends decidedly little time in the section in the *Metaphysics of Morals* talking about the material property of the spouses, and I think it prudent to refrain from placing too much weight on the claims that are made there, given the degree to which they might have been influenced by fear of censure.

### 3. PRAGMATIC WORRIES: ON RAPE AND DOMESTIC VIOLENCE

The interpenetration of persons that results from the contract of marriage may leave the reader worried that the resulting relationship between the parties is, in being close enough to permit sexual use of each other, too close to prevent sexual misuse. Insofar as each party has rightful possession of the other's person and body, we may wonder what grounds either individual has to refuse sexual intercourse on, should the other party desire to engage in it. After all, the marriage contract permits my partner rightful use of me just so I no longer have to will the problematic maxim of sexual intercourse in order to engage in it, but this makes it, I think, initially unclear in what sense we might refrain from willing to engage in sexual intercourse.

Let us return to the married couple Carol and John. Carol and John are married in the Kantian sense, meaning that they have both committed (via marriage contract) to will the acquisition of each other's person when they acquire rightful use of the body. They have then engaged in the particular act, that is, the act of sexual intercourse in which they have each acquired the other's person in accordance with right. In the time since then, as seems probable, there have been instances where one partner has wished to engage in sexual intercourse with the other, but the other has been unwilling. On what ground might the unwilling partner refuse to engage in sexual intercourse with his spouse?

In our example, John would like to engage in sexual intercourse with Carol, but Carol is unwilling to engage in sexual intercourse (at this time). Should John nevertheless persist in attempting to execute the maxim of engaging in sexual intercourse with Carol, in what sense would he wrong her? John sets the following maxim: that he would use the body and person of Carol as a means toward his end of sexual gratification. Insofar as Jim has rightful use of Carol's body and person, this maxim seems as though it will be permissible. The things which John possesses in accordance with right are the kinds of things which he may permissibly use as objects of his choice, consistent with external freedom. Is John's use of Carol's body and person consistent with external freedom? It does not initially seem as though John will violate external freedom, insofar as the freedom to use Carol's person and body is, in fact, his own.

We now imagine that, at the same time that John is setting the maxim of using Carol's person and body as a means toward his end of sexual gratification, Carol chooses that she would rather not engage in sexual intercourse (act toward the end of sexual gratification) this evening. Accordingly, Carol sets the following maxim: that she will use Jim's body and person to not engage in sexual intercourse. Insofar as Carol has rightful use of John's body and person, it is permissible for her to use both (it is an exercise of her own freedom in using both) so as to choose not to engage in sexual intercourse. Just as use of Carol's body and person was how John expressed his freedom, use of John's body and person will be how Carol expresses her person.

Should John persist in trying to engage in sexual intercourse with Carol, he will have failed to allow her the use of his body and person which she is entitled to as a result of their marriage. After all, Carol wants to use Jim's body and person to choose not to engage in sexual intercourse. Should he nevertheless persist in attempting to engage in sexual intercourse, he uses what is rightfully hers, and so violates the contract in which he agreed to give her his body and person. Thus, John wrongs Carol by breaking their contract, and uses what is rightfully hers without receiving permission. Moreover, insofar as a contract is a legal entity, the wrong which John does by Carol in refusing her use of his person is the kind of wrong which Jim can be coerced by state force to resolve.

Why is it not the case that Carol wrongs John in her refusal of him? That is to say, in using John's body and person to choose not to engage in sexual intercourse, does Carol fail to allow John to use what is rightfully his (namely her own body and person)? I would like to suggest that Carol's choice will not be like John's, due to the difference in means required by each of them to achieve their ends. Carol, in our example, chooses to not engage in sexual intercourse, and uses John's body and person to make and execute that choice. Moreover, Carol can make and execute her choice not to engage in sexual intercourse using only John's body and person. The choice not to engage in sexual intercourse does not require use of her own physical body, which now belongs to John. This results from the means required in order to not engage in sexual intercourse: insofar as not engaging in sexual intercourse is a solitary action (or can be achieved by an individual), Carol only requires use of Jim's body and person. However, Jim's choice, to engage in sexual intercourse, is a choice which requires two people. For Jim to execute the end of achieving sexual gratification via sexual intercourse, he will need to use both Carol's body and person, as well as the body which used to belong to him. Use of Carol's body and person alone will be insufficient for him to achieve gratification in sexual intercourse.

To better illustrate the difference in Carol and John's maxims, it might be helpful to take a slightly different case of joint action. We can imagine John has a sofa he would like to take up a set of stairs, but needs Carol's help in order to do so. Thus, John sets the maxim of carrying the sofa up the stairs with Carol's help. Carol, on the other hand, does not want to carry the sofa up the stairs. She sets the maxim of not carrying to sofa up the stairs. Carol's maxim of non-participation requires use of only one person, while John's maxim requires two.

When both Carol and Jim choose to engage in sexual intercourse, they will have both of their bodies available as means to that end. When just one partner chooses to engage in sexual intercourse, that partner will only have one body to use as a means to that end, which will be insufficient. Should that partner nevertheless attempt to continue execution of their maxim, they will be forced to use something which they have no right to: namely the person which used to be their own, which is now rightly owned and used by their partner. Accordingly, persistence in that attempted use will violate

the initial terms of the marriage contract (to allow one's partner rightful possession of our own body and person), and therefore be wrong, and admit the use of coercion to prevent.

indent The above discussion will prove to be true in any instance of action between spouses which requires use of both bodies to engage in. Accordingly, unwanted violence directed at one spouse by the other will be wrong for just the same reasons as above (that it deprives the attacked spouse of rightful use of her partner's body and person), and so will be legally preventable by force.

It seems unlikely to me that domestic violence and rape will be the only kinds of behavior that fall under the type of willing laid out above. However, I take these two kinds of behavior to be worth specific notice due to both empirical and ideological reasons. As a matter of fact, domestic violence and marital rape are unfortunately extremely prevalent in modern marriage, and have only recently begun being considered as deviant, illegal actions in that context. I think that domestic violence and rape within marriage are additionally unique, incisive, and frighteningly effective tools of both modern and historical patriarchy, establishing a regime of murder and terrorization of women which has thus far prevented them from achieving equality even in their own homes. Any theory of marriage that seeks to posit what a moral, just sexual union would look like must address these two types of action in particular.

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