

# Kant, Political Liberalism, and the Ethics of Same-Sex Relations

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Several events over the last few years have contributed to the ongoing discussion of the ethics and politics of same-sex relations. The "Defense of Marriage Act," supporting the institution of marriage between heterosexuals, passed Congress in 1996, thereby attempting to limit or undermine state and local legislation expanding domestic partnership laws to include same-sex couples. In July 1998, full-page advertisements in several of the nation's largest circulating newspapers appeared, sponsored by a coalition of conservative and Christian organizations who claimed that homosexuals could be "cured" through a combination of religious and pseudoscientific treatment. Then in October 1998, the heinous torture and murder of Matthew Shepard, a gay University of Wyoming student, reinvigorated the national debate over whether hate crimes legislation should be expanded to include protection of homosexuals. Finally, the politics of same-sex relations pressed forward when Vermont passed legislation that expanded the *legal* rights of same-sex couples as a "civil union."

The national debate goes on. Noticeably absent from the more traditional philosophical discussions of ethical, political, and legal theory is the inclusion of same-sex relations as a specific area of inquiry. "Queer theory," the current paradigm for discussing issues of same-sex relations, has by and large remained at the margins of orthodox moral, political, and legal theorizing, relegated to cultural and literary criticism or the vague and opaque "language-games of postmodernism."<sup>1</sup> Philosophy has been slow to come to terms with gay, lesbian, bisexual, or transsexual dimensions of ethical theory, leaving such issues, for example, to feminist debates over gender and sex.<sup>2</sup>

The present paper assesses the traditional ethical perspective underlying the rhetoric of moralism condemning homosexuality. In contemporary Anglo-American moral and political philosophy, Kant figures large in discussions about personhood, autonomy, and justice. Yet Kant himself condemns same-sex relations with reference to his ethical theory. Feminist critiques of Kant's views on women and marriage play a prominent role in salvaging those features of his practical philosophy that remain important, while nonetheless "leaving behind" (to use Barbara Herman's phrase) those that are historically antiquated or eliminable on other grounds.<sup>3</sup> I shall attempt to do much the same thing here. I take Kant's views on same-sex relations to be the product of a certain religious and historical background, but it is important to note that the religious moral condemnation of homosexuality characteristic of his view continues even today. It is the aim of this

paper to argue that Kant's claims about same-sex relations are internally inconsistent with the formal moral theory he constructs.

Kant discusses the ethics of same-sex relations in the context of sexual relations generally. Although there are duties to others, especially within the governing terms of the marriage contract, I shall not focus on this aspect of his sexual ethics, since much has already been written on Kant's views of marriage and women. This essay takes as its subject what Kant calls the *crimina carnis*, or those sexual acts that so contradict one's own humanity that they are "unmentionable" and even "nauseating" (LE 170).<sup>4</sup> Although such acts include masturbation, bestiality, and homosexuality, I scrutinize only the assessment and moral condemnation of same-sex activity.<sup>5</sup> Kant advances two kinds of arguments to reach the conclusion that same-sex relations are immoral. The first argument is that from "natural ends," which holds that same-sex activity does not conform to the natural constraints of procreation that ground the ethical legitimacy of human sexual activity. The second (and most common) is his "means-ends" argument, which holds that individuals outside the marriage contract instrumentally use one another during sexual activity, thereby reducing themselves to a mere means, which is a violation of the categorical imperative.

I argue that there is nothing in Kant's moral theory that legitimates condemnation of same-sex relations and that the arguments from natural ends are unjustified by the constraints placed upon morality to avoid the empirical determination of judgments. In order to make clear why same-sex activity does not contradict the requirements of the moral law, we need to understand Kant's account of legitimate sexual activity. I provide this reconstruction in the first section, drawing upon the *Lectures on Ethics* and *Metaphysics of Morals*. In the second section, I critique the first kind of argument that grounds Kant's assessment, that from natural ends. I show how it is based upon underlying teleological premises and raise doubts concerning Kant's reliance on "regulative ideas" in making a consistent ethical theory. In the third section, I argue that same-sex activity that conforms to the conditions of the moral law, especially given the concepts of consent and reciprocity, are in conformity with Kant's formal requirement of the law of pure practical reason, and therefore cannot justifiably be condemned on those grounds. Finally, I conclude with some discussion about Rawls and political liberalism. I hope to show how the present Kantian revival in ethical theory can place itself in opposition to the conservative and homophobic hysteria surrounding debates on political and legal issues such as same-sex "marriage."

## I. Sexual Persons, Natural Ends, and Moral Duties

Kant positions the ethical question of sexual desire in the following framework: (1) a conception of the sexual person, (2) the natural ends of sexual activity, (3) duties to others in sexual relations, and (4) duties to oneself as a sexual person. I shall examine each of these briefly as the background against which I level criticisms of Kant's assessment of same-sex relations.

In large part, this requires an exegetical reconstruction of Kant's arguments in various texts, but it is important to situate Kant's sexual ethics generally.

### 1. *The Sexual Person*

Kant's conception of the person includes a sexual component, but as commentators elsewhere have noted, this component is marginal relative to the strict emphasis on reason without sensible influence. One commentator, in fact, calls this Kant's "subjection of the sensible."<sup>6</sup> For Kant, the condition of life "consists in the union of the soul with the body" (LE 155), so subsequent care must be exercised appropriately regarding its functions. Contrasting his own view with that of those "visionary moralists" who think "that everything is to be gained by weakening and destroying the whole sensibility of the body," Kant claims that "discipline of the body consists in the ability to live in conformity with one's *purpose*" (158, emphasis added). He holds the former views to be "fanatical and monkish" (presumably) compared to his own and ironically attributes such views to individuals like Diogenes the Cynic.<sup>7</sup> On his view, an individual must care for her body "made frugal in its needs and temperate in its pleasures" (158). Although one then cannot just deny the body those things it requires to function (nutrition, for example), he holds that "it is better to keep within the limits of these needs, *and even to fall a little short of them*" (159, emphasis added).

The sexual dimension of the person is conceptualized as purposeful in functional terms. Kant also views the body as the source of the sensible affiliation of sexual desire. Both of these features, however, are part of the complete picture constituting the human being. Human beings, embodied as they are, have a natural sexual dimension entailed by such embodiment. "It is true that without it [sexuality] a man would be incomplete; he would rightly believe that he lacked the *necessary organs*, and this would make him imperfect as a human being" (LE 164, emphasis added). The sexual dimension of persons is part of their somatic selves, especially their sexual organs. Within the constraints of rationality and the subjection of the body to the government of reason, these parts of the body become the focus of correct and appropriate action, a problem for ethics. Kant uses an analogy about control over the body to that of government, a clear allusion to Plato: "This mastery of the mind over the body, or, in other words, of intellect over sensibility, can well be compared to a state with a good or bad government" (158).<sup>8</sup>

### 2. *The Natural Ends of Sexual Activity*

In order to conclude whether sexual activity is moral or not, Kant has a conception of correct human functioning informed by natural ends. Much of this discussion takes place in the *Rechtslehre* of the *Metaphysics of Morals*. It is surprising that the discussion about the functioning of sex in natural terms should take place in that part of Kant's ethical theory concerned with legal and juridical questions. The parallels between the lawlike, regulative

quality that Kant identifies in natural processes and the lawlike regularity of the doctrine of right are important in this context.

Kant defines sexual union as “the reciprocal use that one human being makes of the sexual organs and capacities of another” and distinguishes a “natural” versus an “unnatural” kind (MDR 6:277). The proper sexual functioning of persons is placed squarely in the doctrine of right because of duties to others involved in the concept of contract, that is, marriage. “Natural sexual union takes place either in accordance with mere animal *nature* (*vaga libido, venus volgivaga, fornicatio*) or in accordance with law” (6:277). The institution of marriage is the form of law that separates out sexual acts that fall outside that form. (Later, we shall see how the special designation of sex between unmarried heterosexuals as “natural” is unwarranted.) The natural “form” of sex, then, is between man and woman. Over and above this natural form of sexual union there is a natural “use.” And the use of sexual organs in the natural form must also conform to their natural “end.” The natural end of this form and its use is procreation, “an end of nature, for which it implanted the inclinations of the sexes for each other” (6:278). There is a triad configuration in the natural end of human sexual activity: form, use, and purpose. Given these, it is clear what kind of sexual activity follows as a natural and ethically legitimate expression of the sexual component of persons: monogamous heterosexual marriage. We should note that each of the three parts has its source in separate, albeit related, concerns. The form (heterosexual) and the purpose (procreation) are to be viewed in terms of the natural teleology of human beings as reproducing organisms. The second part of use seems more troubling. Despite the natural ends that help to define the lawlike, regulative dimension of sexuality, why should use be constrained by this “proper” end? Is it possible to misuse “nature” in some respect when it comes time to use one’s sexual capabilities?

### 3. Duties to Others in Sexual Relations

It is at this point that the bulk of our ethical concerns supervene. We are now required to consider duties to others regarding the proper use of sexual activity in order to conclude whether it is moral. Since the sexual dimension of a person is “objectified” on Kant’s view, a kind of mapping of nature onto the body and especially the organs, he holds that in a sexual act, “a human being makes himself into a thing, which conflicts with the right of humanity in his own person” (MDR 6:278). There is only one condition under which a person can will himself into a thing for another’s use: “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 person-ality” (6:278). In other words, to ensure one is not *merely* reducing oneself to a thing, the reduction of oneself to a thing for use *must be mutual*. Both individuals must give themselves up in order to avoid just one of them being used merely as an instrument. The qualification “as if” that I emphasized is important to note, for it also indicates the underlying regulative judgments Kant is making regarding human sexuality, which I treat at length in the next section.

Kant's discussion is slippery at this point. We should note that in other places he indicates that the reduction of oneself to a thing in the sexual act is natural: "This is the only case in which a human being is designed by nature as the Object of another's enjoyment" (*LE* 163). Since transcendental freedom makes it possible for us to reflect on our natural desires and modify them accordingly, Kant thinks that this natural design of use can be regulated ethically. But in still other places, Kant indicates that using another's parts in sexual activity necessarily requires the use of the whole of the person, since "acquiring a member of a human being is at the same time acquiring the whole person, since a person is an absolute unity" (*MDR* 6:278). Marriage is the form of this natural use of sexual activity, and "it is possible for them to do so *only* under this condition." The logical connection is perplexing. In the sexual act, an agent reduces herself to a thing, since sexual activity is the use of a thing for one's enjoyment. But an agent cannot reduce herself to a mere thing, since her whole person is a unity. So, in order *not* to reduce herself to a thing, her whole person must be respected. In order to do this, she must ensure the *mutual reduction* of sexual organs between herself and her partner. But doesn't this just follow naturally from design? If persons are a unity, how can one thing be separated out? If this is the design of nature, then both agents automatically share in a mutual reduction of their persons during sexual activity. Why does Kant require the marriage contract in order to ensure that mutual reduction takes the form of law?

So there is an element of conceptual (sexual) confusion on his part. Kant thought that the natural design of the sexual dimension of individuals results in instrumental use. But since this is happening on the part of both agents involved, the mutual reduction that ensures one recovers one's whole humanity follows naturally. For Kant, the proper form and purpose of sexual activity is clearly driving the conceptualization of its proper use. Here, we must note the social institution of marriage creeping through the back door of the discussion of nature's design. Kant maintains that only the institution of marriage fulfills the conditions within which heterosexual individuals can have full disposable rights over one another, avoiding the reduction of themselves to mere things in sexual activity. But the idea of "acquirement" results in an excessively contract-oriented discussion of marriage, something for which Kant has been criticized from Hegel to contemporary feminists.<sup>9</sup> Disregarding statements elsewhere that men have full disposable rights over their wives that women do not have over their husbands, Kant's discussion of sexual activity founders on this question of proper use (cf. *A* 166–73). Duties to others on sexual matters turn out to be situated for Kant solely in the marriage contract, which falls within the domain of right. But why do we need marriage to sanction the mutual reduction of persons to things in sexual activity when this is already built into nature's design of persons as sexual beings? We should keep this objection in mind when examining the claim that same-sex activity is unnatural.

#### 4. Duties to Oneself as a Sexual Person

Regarding duties to oneself, Kant asks:

What is now in question is whether a person's use of his sexual capacity is subject to a limiting law of duty with regard to the person himself or whether he is authorized to direct the use of his sexual attributes to mere animal pleasure, *without having in view the preservation of the species*, and would not thereby be acting contrary to himself. (MDV §7, 6:424, emphasis added)

The duty to oneself on sexual matters turns on the interconnection of all prior considerations. But the most salient feature is that of natural purpose emphasized above. Kant himself claims that "it is not so easy to produce a rational proof that unnatural, and even merely unpurposive [*unzweckmäßigen*], use of one's sexual attributes is inadmissible as being a violation of duty to oneself (and indeed, as far as its *unnatural use is concerned, a violation in the highest degree*)" (6:425, emphasis added). Acting on animal impulses includes a whole set of physiological functions, ranging from sleeping to digestion. When we get a drink of water because we are thirsty, it seems counterintuitive to claim that we are mistreating our humanity or using ourselves as a mere means. Unlike Aristotle, Kant wants to hold that an individual gets a drink of water because she judges her thirst to be a sufficient reason for it. Again, transcendental freedom allows us to adopt a reflexive position regarding these biologically determined functions. But it isn't clear why so many constraints are placed upon sexual activity, since it is only natural that individuals involved in it reduce themselves *mutually* to mere things, thus avoiding the charge of *mere* use.

This is an important qualification to note about the categorical imperative and its formulation of the means-ends distinction. Kant holds that one can be a means as long as one is at the same time always regarded as an end: "Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (either by others or by himself) but must always be used at the same time as an end" (MDV §38, 6:462; cf. *G* 36, *CPrR* 91). Since Kant views sexual activity as the reduction of oneself to a means, one has a duty to oneself to avoid it. "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" (MDV 6:425). Kant singles out same-sex activity as an "unnatural use" and "violation of the highest degree" precisely because it falls in a category completely outside the configuration of natural sex as sexual activity among agents of the opposite sex in the marriage contract. The contract is a sanctioned relation that Kant claims restores humanity to the agents who engage in sexual activity that debases them instrumentally. Not only does same-sex activity violate natural ends, it also violates duties to oneself, since the satisfaction of a desire is not constrained by the proper form and ends of heterosexual marriage and procreation.

## II. *Crimina carnis contra naturam*

Kant groups homosexuality with other acts that count as contrary to nature, including masturbation and bestiality.<sup>10</sup> Masturbation is contrary to

nature because it fails to reciprocate the use of a thing with an appropriate corresponding object (another person) and is thus a mistreatment of oneself. Bestiality is even more culpable on this score, since it substitutes a non-human animal as its sexual object. Homosexuals substitute the same sex for their object, which is unacceptable on the grounds that it is contrary to the natural ends of human sexual functioning. All three examples are abuses, according to Kant, because they have as their correlating objects ones that do not fit within the framework described above: a natural form (heterosexual), use (mutual reduction sanctioned by marriage), and purpose (procreation). Given these constraints, sexual activity is ethically unproblematic if and only if conditions governing sexual activity itself have been met. These external (we may want to think of them as “contextual”) conditions are the form of marriage and the purpose of reproduction. The conditions established by Kant, however, do contain two implicit ethical constraints in terms of sexual use: consent and reciprocity.

The use of one another’s sexual organs is the main problem for Kant. For there to be a correct and unproblematic use we require as well the two concepts of consent and reciprocity. Consent is necessary in order to satisfy the requirement of not using others as means to our own ends against their will, and reciprocity is needed to ensure that one person isn’t merely reduced to a means in the sexual activity itself. What I want to argue is that the underlying premise of the natural purposes of sexual activity is unwarranted and that same-sex relations are morally unproblematic on this score. If we can demonstrate that Kant is unjustified in his use of teleological arguments from natural ends, then all other constraints being satisfied (consent and reciprocity), there is nothing morally condemnable about same-sex activity. The arguments from natural ends are unwarranted given Kant’s own claims about the practical deployment of reason as the form of law without appeals to empirical considerations. Once this is demonstrated, the constraints of consent and reciprocity serve as the only basis for making moral evaluations of human sexual relations. I shall turn to this last part of the argument in the next section.

In the *Lectures on Ethics*, Kant makes explicit use of two arguments from natural ends in order to identify the legitimate purposes of sexual acts. The first is related to a person’s use of her sexual functioning. He refers to sexual impulse as “an appetite for enjoying another human being” (163). Although there are many ways one person can use another with his consent, “there is no way in which a human being can be made an Object of indulgence for another except through sexual impulse” (163). Accordingly, he distinguishes “human love,” which includes such things as affection and promoting the interests of the other, as opposed to sexual desire, which “makes of the loved person an Object of appetite” (163). There is a teleological judgment in this formulation of human sexuality. For Kant, the sexual dimension of a person is designed by nature for instrumental use. He cannot allow the risk of the instrumental use of persons through nature’s design to be a justification for unconstrained sexual activity that runs counter to the moral law. Ensuring mutual reduction is necessary to avoid merely using one

another. And requiring the proper form and purpose to contextualize the sexual activity is necessary to avoid merely using oneself.

This second requirement amounts to the other argument from natural ends regarding the purpose of sexual activity. Since a person cannot use herself merely to enjoy an animal impulse, some other end is required to avoid violating duties to oneself. The teleological premise involved here is that sexual union is for the purpose of propagating the species. All sexual activity that falls outside marriage and is not for procreation is then viewed as *crimina carnis*. In order for sex to enjoy its natural functioning among ethical agents, we require both marriage, to have full disposable rights over the whole person, and procreation, because otherwise the end of the species has been violated. Same-sex relations meet neither of these requirements and so run afoul as contrary to both natural human “instinct” and “animal” nature:

intercourse between *sexus homgenii*, in which the object of sexual impulse is a human being but there is homogeneity instead of heterogeneity of sex, as when a woman satisfies her desire on a woman, or a man on a man. This practice too is contrary to the ends of humanity; for the end of humanity in respect of sexuality is *to preserve the species without debasing the person*. (LE 170)

On Kant’s own argument, if “marriage,” or some sufficiently legal recognition of union, is allowed between same-sex couples, then the debasement of persons would not take place. Marriage, as we noted earlier, however, is not required anyway, since the natural design of the sexual act mutually reduces persons, thus ensuring one person is not using another as mere means. We still have the violation of the end of humanity with respect to same-sex relations, but as I now hope to show, the arguments from natural ends underwriting the purpose of sexual activity are unjustified.

Are the arguments from natural ends legitimate ethical judgments, in this case dealing with sexual relations between persons? I do not think so for three reasons. First, the claim that sex by natural design is the only way persons can use one another seems problematic simply because if this is the case, then each individual is immediately reduced to a thing, thus ensuring that mutual reduction takes place in order to respect personhood. In addition, the argument from natural design about the strictly proper use of one’s sexual organs is not at all intractable. If sex really had a strictly natural design like some other analogous function, it would not be as conceptually and ethically problematic as it turns out to be. (Imagine us debating the ethically appropriate use of some other uncontroversial bodily function, say, digestion.) I take it that most of Kant’s ambiguity stems from trying to explicate human sexual functioning as a primary biological process without due emphasis upon or knowledge of its sociality and the secondary processes that are much more salient for persons than the actual sexual acts themselves.<sup>11</sup>

Second, the argument that the end of humanity is the propagation of the species is not at all incontestable. As a purely biological function between male and female members of the species, sexual intercourse does not always

have the “natural” results that a strict correspondence to this end would dictate. Sterility, low sperm counts, menstrual cycles, natural abortion, and the sheer contingency of conception are all counterfactuals against the strict purpose of procreation to which Kant subscribes. These contingencies in biological terms open the door, so to speak, to include other kinds of social contingencies, including the primacy of secondary processes, orientations, and even preferences. Again, the heavy emphasis Kant places on the biological aspects of sexual intercourse accounts for his inability to conceive of the sexual dimensions involved in being human. In addition, if the natural purpose of human sexual activity is procreation, then the ethical requirement that it take place within marriage has an extranatural premise. Procreating as a result of intercourse between men and women has no biological precondition in matrimony. In short, one’s reproductive capacities are not suddenly “turned on” when the marriage ceremony is over.

What Kant means by “natural” in his discussion of ends is really “rational” and in conformity with the moral law (although the distinction seems more arbitrary). He distinguishes extramarital sexual acts as being *crimina carnis contra secundum* (contrary to reason) and not at all as contrary to nature, even though sexual activity outside marriage often does not have procreation as its intention. The special distinction of same-sex relations as “unnatural” is unwarranted on this account. The possibility of procreation during heterosexual intercourse alone does not logically qualify it as “natural.” Heterosexual sex that does not intend procreation as its end must also count as contrary to nature in this way, even if it has the form of law. Such a counterintuitive rendering demonstrates the incoherence of the arguments from natural ends.

This brings me to my third argument, which specifically addresses Kant’s ideas on teleological judgment and the problems it raises for his ethical condemnation of same-sex activity. According to Kant, teleological judgments are *reflective* and not constitutive of experience: “If only the particular is given and judgment has to find to the universal for it, then this power is merely *reflective*” (CJ 179; cf. CPR A179/B222). In treating natural phenomena as purposeful, we are only making a synthetic operation that has subjective validity. In the present case, such claims about the natural ends of sexual activity are unwarranted in making ethical judgments that appeal to reason as the a priori form of law. In Kant’s ethical theory, morality has *objective validity*. It is one thing to ascribe to the biological function of sex a teleological purpose based on a regulative judgment; it is quite another matter for this “natural end” to serve as a basis for ethical claims about human experience. There can be no objective purposiveness in nature itself that humans can judge with validity and certainty. In order for the kind of rational willing involved in same-sex activity to count as contrary to nature, a teleological basis for making such a judgment is required. But this judgment is not an indisputably “true” claim about nature’s purposes at all, as if nature could be said to have “purposes” of its own, or that we could know them.

Here the arguments from natural ends collapse completely. There are serious doubts about whether such regulative ideas can legitimately serve

us in making ethical judgments. Furthermore, Kant makes it explicit that the basis for morality in transcendental freedom is “an independence from everything empirical and hence from nature generally, whether regarded as an object of inner sense merely in time or also an object of outer sense in both space and time” (CPrR 101). The moral law, of course, includes the formulations of universalizability, persons as ends, and the kingdom of ends, none of which same-sex activity violates as long as the constraints required by the form of the moral law are respected. One foreseeable objection is that same-sex activity cannot meet the universalizability requirement since the human species could not reproduce itself. But this kind of objection cannot survive closer scrutiny, since it too relies on arguments from natural ends. Such arguments are plagued by doubts concerning Kant’s use of regulative ideas for ethical procedures seeking some measure of impartiality from empirical considerations. Ultimately, there is no case to be made that same-sex relations will overtake the species, thus bringing its ability to reproduce itself to an end. In the final analysis, the arguments from natural ends do not hold because they import claims about empirical reality into the transcendental set of imperatives governing the procedure of pure practical reason.<sup>12</sup>

### III. Consent, Reciprocity, and Same-Sex Relations

So far I have argued that Kant’s views of human sexual relations can be constructed along ethically unproblematic lines by leaving behind the teleological arguments. Now I want to demonstrate that only the constraints of consent and reciprocity need to be adhered to in order for same-sex relations to be ethically unproblematic.<sup>13</sup>

If we unhinge human sexual functioning from the natural purpose judgments, the only conditions left to satisfy the claim that same-sex relations are moral in Kantian terms are consent and reciprocity. These constraints are the implicit ones in the means-ends argument Kant advances. His concern about the sexual capacities of persons results in the adoption of an argument from design about how to use the sexual organs appropriately. Within the contractual terms of marriage, individuals reclaim themselves as persons in the sexual act. But we have already concluded that the institution of marriage does not represent a “natural” condition for ethically legitimate sexual activity, since nature by design reduces both individuals to things, thus ensuring that no asymmetrical use of another person can take place. In sexual acts between persons, the constraints of consent and reciprocity, understood as *mutual pleasure*, are the only ethically relevant conditions to meet in order for such activity to conform to the moral law. Mutual pleasure is necessary, since an individual who consents to sex and receives no pleasure in return would allow herself (albeit unintentionally and in hindsight) to be used instrumentally by another. It would be a clear violation of the form of the moral law never to act in such a way as to use oneself merely as a means. (Whether one can know this about oneself in the first place is altogether another controversy.) Since it is the case that individuals could engage in sexual activity as a result of low self-esteem or a lack of

self-respect, the additional condition of reciprocity provides grounds for understanding their behavior as at least ethically compromising.

A number of objections can be raised: whether someone can have sex and not feel pleasure, or whether sexual acts for the purpose of pleasure can already be associated with some kind of impoverished sense of oneself. Both of these objections basically amount to the charge of hedonism. Has sexual ethics on this account been reduced to mere hedonism? Admittedly, these are all complex questions, but they are not unmanageable. Recall that we have refused as conceptually incoherent the separation of the sexual functioning of humans as biological from other processes related to the whole person. The reciprocity of mutual pleasure expands the sexual experience beyond just the physical enjoyment of the act to the pre- and postsexual activity as well, including the affection and recognition involved in intimacy. Much of human sexuality is not directly involved with sexual acts themselves and the mere enjoyment of the pleasure they involve. This fact alone provides good reasons to see why reciprocity between agents is a key condition for ethically unproblematic sex.

What follows from these constraints is precisely that sexual activity between persons of the same sex is ethically legitimate on the Kantian view. If both consent and mutual pleasure are adhered to (and I take it that most consent is based on the preference of mutual pleasure), then there is no mere instrumental use of persons involved, either for others or for oneself. Is there an ethical problem when, contrary to the anticipation, there is no mutual pleasure involved? It seems to me that there is still nothing ethically condemnable about the sexual activity *per se*, since the person willingly engaged in it with the hoped-for preference in view. If, in the end, the activity is judged unpleasurable, then this should indicate to the individual that he should be more circumspect about his choices and better selective in his decisions about whether to engage in sexual activity.

One common objection raised against the possibility of reciprocity in sexual intercourse between men, of course, is that the function of anal intercourse requires a penetrating and receptive role, resulting in the use of one partner as a mere sexual receptacle. These roles are then instated as sexual stereotypes in which one gay male plays the wholly active role while his sexual partner remains purely passive. (This is the ridiculous distinction between "top" and "bottom" sexual roles.) Such an objection is clearly uninformed. First, it is hard to conceive why an individual would engage in passive anal intercourse if it were not pleasurable. A person involved in this kind of sexual activity must know what he prefers and finds pleasurable. Second, the idea of sexual stereotypes is analogous to the claim that women are purely passive in sexual relations, something which Kant himself argued (cf. *A* 166–73). Third, anal intercourse in men places in anatomical proximity the stimulation of sexual organs with the prostate gland, making the experience pleasurable for both partners. The rectum is also extremely innervated, and in biological terms considered a sexual organ, so women are not excluded from this sexual activity on physiological grounds.<sup>14</sup>

Same-sex relations between consenting persons intent upon the mutuality of pleasure, including the constitutive nonphysical processes, are not

morally condemnable on this view. Religious objections to same-sex activity may still occur, but the poverty of such assessments as *moral*, as in Kant's own view, follows from the inability of such an account to be grounded in the requirements to pure practical reason. *If one examines Kant's arguments for the formal moral theory of the pure practical law of reason, one is hard-pressed to say just how homosexuality is immoral.*<sup>15</sup> The idea of free agents who exercise their decision making constrained by the moral law and act accordingly is one that homosexuals are not excluded from. That social practices, religious backgrounds, and comprehensive moral doctrines have all marginalized and condemned homosexuality as immoral is not a proof of the correctness of these accounts. I now turn to the contemporary moral and political debates over justice inspired by Kant's revival in order to show that same-sex relations can be incorporated into these arguments unproblematically as well. I shall briefly deal with the topic of same-sex "marriage" in the context of Rawls and political liberalism.

#### IV. Political Liberalism and Same-Sex Marriage

John Rawls has offered a defense of political liberalism as the most appropriate form of justice available in a democratic society characterized by "the fact of reasonable pluralism."<sup>16</sup> The fact of reasonable pluralism is this: citizens in a democratic society share different comprehensive religious, philosophical, or moral backgrounds, but none of these should be allowed to infringe upon or circumvent the democratic rights and liberties that are guaranteed by citizenship. Political liberalism thus remains neutral on questions of the good. It does not enforce one vision of the good at the expense of other competing versions held by different individuals. The basic structure of society is characterized as "freestanding" by this framework, and institutions must be organized around the kinds of structural constraints of neutrality toward any one comprehensive doctrine. The idea governing political liberalism is that of "public reason." According to his most recent defense of political liberalism, "the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity."<sup>17</sup>

The problem is that such a conception of public reason leaves open the question of how to incorporate same-sex relations into a democratic polity with a tradition of homophobia and religious hysteria regarding the status of homosexuals. It is clear that the comprehensive religious, philosophical, and moral doctrines condemning homosexuality seek to do more than just verbally condemn. In addition, they also actively promote political curtailment of same-sex relations by means of legislation aimed at keeping marginalized or actively marginalizing sexual difference for legal and political consideration. Those who hold such doctrines, however, see their efforts as being in line with the norms of a constitutional democratic society. Enfranchising homosexuals, either through legal protection or political expansion of their rights, is viewed as an endorsement of homosexuality on the part of the state, which should remain neutral. Of course, more extreme

versions of such doctrines condemn homosexuality outright and have no problem in using the coercive mechanisms of the state to deny homosexuals basic political rights. The former view, however, has become the recent strategy of the conservative right, which wants to avoid alienating a large portion of the public who do not advocate explicit and outrageous homophobia. The strategy achieves the same results, however. By holding the neutrality doctrine toward competing and incompatible comprehensive doctrines, conservatives are covertly denying gay, lesbian, bisexual, and transsexual individuals their basic political rights, which should be protected by legislation and, more importantly, secured through adequate enforcement.

How can we maintain an idea of public reason governing the basic structure of society while expanding legislation to protect and enforce the rights of groups marginalized because of their sexual difference? I think this is the wrong way to pose the question. The idea of public reason constructed by Rawls cannot be maintained within the current ethos of thinking that the state has to remain neutral on questions of competing visions of the good, which then means that no "special" rights should be extended to homosexuals. The real question is this: how can we maintain an idea of public reason if some citizens continue to lack the basic rights requisite of citizenship because of a state-adopted neutrality driven by an implicit comprehensive doctrine of homophobia? Furthermore, how can state-adopted neutrality that continues to marginalize such individuals be an authentic neutrality when it serves *de facto* the interests of certain comprehensive doctrines seeking to deny other groups their basic rights as citizens? The kind of rights I have in mind are those enjoyed by other individuals whose membership in a particular marginalized group leaves them open to discrimination in employment, housing, family law, education, and other important aspects of public life.

The criterion of reciprocity is one Rawls constructs in order to answer this problem: "By what ideals and principles, then, are citizens who share equally in ultimate political power to exercise that power so that each can reasonably justify his or her political decisions to everyone."<sup>18</sup> The assertion of political power as a force arising from collective decision making must have constraints placed upon it in order to avoid the imposition of one comprehensive doctrine upon others. As Rawls notes, "The criterion of reciprocity requires that when those terms are proposed as the most reasonable terms of fair cooperation, those proposing them must also think it at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position."<sup>19</sup> Surely, citizens marginalized by their sexual differences cannot reasonably agree to allegedly neutral political decisions that continue to deny them basic political rights extended to other marginalized groups.

The Kantian influence is central to such a constraint placed on political society. As Kant makes clear, "*Right* is the limitation of the freedom of each to the condition of its harmony with the freedom of everyone insofar as this is possible in accordance with a universal law; and *public right* is the sum of

*external laws* which make such a thoroughgoing harmony possible" (TP 8:290; cf. MDR 6:230–1). It is clear that Rawls's criterion of reciprocity demands, much like Kant's formulation of the kingdom of ends, that free and equal persons must agree to fair terms of cooperation that do not unfairly burden others because of the political or social positions they occupy. In terms of those individuals marginalized politically and socially because of their sexuality, such terms may require a political intervention that restores them as individuals *at least within the basic structure of a political society governed by the principles of justice reflected in democratic constitutional regimes*.

In this way, the controversial political question of same-sex "marriage" can easily be settled by appeal to political liberalism, at least as Rawls constructs it. Same-sex relations must have the same protections and legal entitlements that heterosexual relations enjoy, including the right of "marriage."<sup>20</sup> Granted, there is widespread religious hostility involved in such a move, but these comprehensive doctrines cannot be allowed to exercise force as a collective body that unfairly denies the same rights to others whose comprehensive doctrines differ.<sup>21</sup> Although there is not a consensus among gay and lesbian communities about the political and social efficacy of same-sex "marriages" ("civil unions," "domestic partnerships," whatever) recognized by the state, it is clear that expanding legal protection to same-sex couples is an extension of basic democratic principles that does not unfairly take sexual orientation into consideration when making political decisions. The argument for maintaining state neutrality can turn out to be a covert way of denying same-sex couples the same political and legal recognition as heterosexual couples. The problem is that the decision to remain neutral occurs *de facto* through the claim that granting such basic rights is tantamount to state "endorsement" of homosexuality. If such legal enfranchisement is understood as endorsement, however, heterosexual marriage as well is an illegitimate endorsement of a political framework purported to be neutral in its conception of the good. Such a counter-intuitive claim demonstrates the pitfall of the position that holds to heteronormativity at the cost of compromising basic democratic principles. As Charles Mills has recently argued, the lack of acknowledgment of the marginalized status of some groups follows from a naturalized epistemology of ignorance.<sup>22</sup> The very assumption of heterosexuality effaces the actually existing same-sex relationships that should enjoy the same basic rights and privileges as their heterosexual counterparts.

Rawls's idea of the original position strips us of our ability to formulate principles of justice with knowledge that unfairly advantages us at the expense of others. In such a choice situation, then, in which sexual orientation is not a kind of knowledge we have of ourselves, we could not reasonably be expected to agree to principles that recognize only heterosexual relations. The legal protection and expansion of entitlements that accompany marriage cannot be denied to homosexuals on the grounds that they are sexually different. Such a political decision informed by a comprehensive doctrine of the good (whether explicitly or *de facto*) simply cannot pass

the test of public reason, and thus cannot reasonably demand our normative allegiance.

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## Notes

<sup>1</sup>Charles Mills, *The Racial Contract* (Ithaca: Cornell University Press, 1997), p. 111.

<sup>2</sup>Judith Butler has explored the issue of same-sex relations in its numerous dimensions. See her *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990). In addition, Butler has tackled the theoretical and practical complexities of hate crimes legislation in a recent work, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997).

<sup>3</sup>Barbara Herman, "Leaving Deontology Behind," in *The Practice of Moral Judgment* (Cambridge: Harvard University Press, 1993).

<sup>4</sup>References to Kant's works will be internally cited using the following abbreviations:

- A        *Anthropology from a Pragmatic Point of View*, trans. Mary Gregor (The Hague: Martinus Nijhoff, 1974).
- CPR     *Critique of Pure Reason*, trans. Norman Kemp-Smith (New York: St. Martin's Press, 1965).
- CPrR    *Critique of Practical Reason*, trans. Lewis White Beck, 3rd ed. (Upper Saddle River, N.J.: Prentice-Hall, 1993).
- CJ       *Critique of Judgment*, trans. Werner Pluhar (Indianapolis: Hackett, 1987).
- G        *Groundwork of the Metaphysics of Morals*, in *Ethical Philosophy*, trans. James Ellington (Indianapolis: Hackett, 1983).
- LE       *Lectures on Ethics*, trans. Louis Infield (Indianapolis: Hackett, 1963).
- MDR    *Metaphysical Principles of the Doctrine of Right*, Part I of *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996).
- MDV    *Metaphysical Principles of the Doctrine of Virtue*, Part II of *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996).
- TP       *On the Common Saying: That May Be Correct in Theory, but It Is of No Use in Practice*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996).

<sup>5</sup>I shall use the terms "activity," "acts," "relations," and "desires" interchangeably. In addition, I often refer to the vague and broad category of "sexuality," in reference to all the different aspects of human sexual functioning. I understand the controversy in doing so, but as I hope to make clear, I do not think acts can be levered away from the desires upon which they supervene. Also, it is arguable whether secondary,

nonphysical processes are less important in discussing human sexual functioning than the actual physical acts themselves.

- <sup>6</sup>Robin Schott, "Kant's Treatment of Sensibility," in *New Essays on Kant*, ed. Bernard den Ouden and Marcia Moen (New York: Peter Lang, 1987), pp. 213–26; also see Schott, *Cognition and Eros* (Boston: Beacon, 1988).
- <sup>7</sup>For a man who never married (and it is questionable whether he had sexual relations), the claim that he does not hold "monkish" views does seem ironic. Nietzsche derogatorily called him an "old moralist" and a "preacher of morals" in *Beyond Good and Evil* and said worse things about his "moralizing" on numerous other occasions. For a warmer reception of Kant's views on pleasure, see Mark Packer, "Kant on Desire and Moral Pleasure," *Journal of the History of Ideas* 50 (July–September 1989).
- <sup>8</sup>An interesting psychoanalytic reading of Kant's "discipline of reason" in relation to the body can be found in Andrew Cutrofello, *Discipline and Critique: Kant, Poststructuralism, and the Problem of Resistance* (Albany: SUNY Press, 1994), chap. 3.
- <sup>9</sup>For Hegel's critique of Kant, see *Elements of the Philosophy of Right*, ed. Allen Wood (Cambridge: Cambridge University Press, 1991), ¶¶161–69. For a discussion of Hegel's overall critique of Kant's "empty formalism," see Karl Ameriks, "The Hegelian Critique of Kantian Morality," in *New Essays on Kant*, ed. Bernard den Ouden and Marcia Moen (New York: Peter Lang, 1987), pp. 179–212. Finally, the feminist critique of the contract can be found in the exemplary work of Carol Pateman, "Hegel, Marriage, and the Standpoint of Contract," in *Feminist Interpretations of G.W.F. Hegel*, ed. Patricia Mills (University Park: Penn State Press, 1996), pp. 209–23; also see Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).
- <sup>10</sup>In this way, Kant follows the standard view of homosexuality made popular and standardized by church authorities and civil officials near the end of the twelfth century. For a groundbreaking (and controversial) historical study of the Christian reception and transformation of ancient sexual relations, see John Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (Chicago: University of Chicago Press, 1980), especially his discussion of various Christian debates about "nature," pp. 303–32.
- <sup>11</sup>For a critique of this way of thinking about sex, especially in terms of secondary processes, see Thomas Nagel, "Sexual Perversion," in *Mortal Questions* (Cambridge: Cambridge University Press, 1979), pp. 39–52. For an extension of that critique using the metaphor of sex as "language," see Robert Solomon, "Sex and Perversion," in *From Hegel to Existentialism* (Oxford: Oxford University Press, 1987), pp. 122–36. Solomon has also recently defended sexuality as important to an ethics of virtue in "The Virtues of a Passionate Life: Erotic Love and the 'Will to Power,'" *Social Philosophy and Policy* 15 (Winter 1998): 91–118.
- <sup>12</sup>For a different treatment of Kant's use of teleological judgments in relation to sexual ethics, see Vincent Cooke, "Kant, Teleology, and Sexual Ethics," *International Philosophical Quarterly* 31 (March 1991): 3–13. Cooke is concerned only with showing that teleological judgments are operative in Kant's ethical theory, and he uses Kant's discussion of sexual ethics to substantiate this claim. There are a number of conceptual difficulties Cooke fails to address regarding whether such premises are allowed to influence a moral theory whose ground is supposedly purged of empirical influence. Since Cooke's only concern is to show the presence of teleological judgments, he does not take on the various problems that such judgments raise for Kant's moral theory. Another approach to sexual ethics that claims to hold for same-sex couples, based on a conception of consenting adults, is given by Raja Halwani, "Are One Night Stands Morally Problematic?" *International Journal of Applied Ethics* 10 (Summer–Fall 1995).
- <sup>13</sup>For a detailed analysis of Kant's views on consent, see Onora O'Neill, "Between Consenting Adults," *Philosophy and Public Affairs* 14, no. 3 (Summer 1985): 252–77; the essay also appears as chapter 6 in her *Constructions of Reason: Explorations in Kant's Practical Philosophy* (Cambridge: Cambridge University Press, 1989).
- <sup>14</sup>See Simon LeVay, *The Sexual Brain* (Cambridge, MA: MIT Press, 1993), chap. 6.
- <sup>15</sup>For a different treatment of Kant's arguments against "unnatural sex," see Laura Denis, "Kant on the Wrongness of 'Unnatural' Sex," *History of Philosophy Quarterly* 16, no. 2

(April 1999): 225–48. This essay came to my attention after the completion and acceptance of the present article for publication.

<sup>16</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 4.

<sup>17</sup> John Rawls, "The Idea of Public Reason Revisited," *University of Chicago Law Review* 64, no. 3 (Summer 1997): 766. It is interesting that Rawls devotes a great deal of space to the role of the family as part of the basic structure in order to answer feminist critics of political liberalism, but he does not mention the democratic controversy of excluding nontraditional families, such as same-sex relations, from publicly accepted versions of the family (787–94).

<sup>18</sup> *Ibid.*, 770.

<sup>19</sup> *Ibid.*

<sup>20</sup> See Mark Strasser, *Legally Wed: Same-Sex Marriage and the Constitution* (Ithaca: Cornell University Press, 1997).

<sup>21</sup> Rawls makes this clear in numerous places; cf. *Political Liberalism*, pp. 190–95. In "The Idea of Public Reason Revisited" he argues, as well, that political discourse "aims for public justification," which means that no comprehensive doctrine can politically force others to accept institutions and policies based on unreasonable premises (786). Jürgen Habermas makes a similar argument in holding that "features of argumentation" can exclude contributions that attempt to exclude, coerce, or otherwise undermine the contribution of others. See Habermas, *The Theory of Communicative Action*, vol. 1, trans. Tom McCarthy (Cambridge: MIT Press, 1984), pp. 22–42; also see his "A Genealogical Analysis of the Cognitive Content of Morality," *The Inclusion of the Other: Studies in Political Theory*, trans. C. Cronin and P. De Greiff (Cambridge: MIT Press, 1998), pp. 43–44.

<sup>22</sup> Mills, *The Racial Contract*, pp. 96–98.