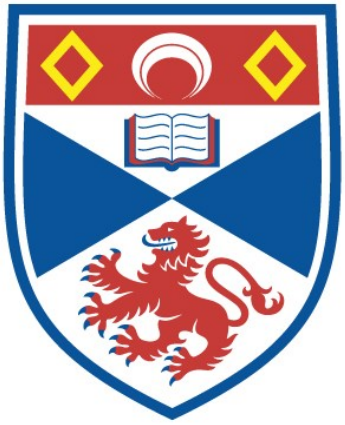
MARRIAGE, CONTRACT, AND THE STATE

Elizabeth Brake

A Thesis Submitted for the Degree of PhD
at the
University of St Andrews



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Elizabeth Brake

Submitted for the Ph.D. degree in Moral Philosophy

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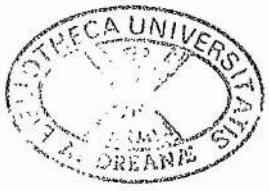

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for Ellen Shreve
with gratitude

Abstract: Marriage, Contract, and the State

This thesis is a work of applied moral and political philosophy which analyses the moral value of marriage and argues for a restructuring of the legal institution of marriage in accordance with principles of justice.

The first section contains exegesis and criticism of Kant's and Hegel's accounts of marriage. Kant's focus is on the contractual exchange of rights, Hegel's on the nature of the relationship between the spouses. In the second section, I consider Kantian, Hegelian, and eudaimonistic accounts of the moral value of marriage and conclude that moral value is found in the relationship between the spouses, not in the rights established through the marriage contract. In order to defend the position that loving relationships have moral value, I elucidate what moral value love for a particular other has within a universalist ethics. While I argue that marriage has no moral value which is not to be found in such relationships, I defend a Hegelian account which locates social value in the institution of marriage precisely because it promotes such relationships.

In the final section, I argue that the principle of liberal neutrality requires that the principle of freedom of contract should apply to marriage. While I defend the institution of marriage against certain feminist criticisms, I also argue that justice requires that the state recognize same-sex and polygamous unions as marriages. Freedom of contract may be limited under certain conditions in the interest of gender equality: I argue for an interpretation of Rawls' principle of equal opportunity which entails that liberalism is committed to addressing gender inequality even at the expense of freedom of contract.

(i) I, Elizabeth Brake, hereby certify that this thesis, which is approximately 80,000 words in length, has been written by me, that it is the record of work carried out by me and that it has not been submitted in any previous application for a higher degree.

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INTRODUCTION: MARRIAGE, CONTRACT, AND THE STATE

1. Defining characteristics of marriage
2. Moral and political questions

Marriage occupies an uneasy place in historical, and to some extent contemporary, moral and political philosophy. On the one hand, marriage has been regarded, popularly and by philosophers such as Kant and Hegel, as a morally valuable institution. On the other hand, marriage and the family have been mechanisms, if not the mainstay, of the oppression of women. These roles are interdependent: historically, philosophical defences or accounts of the moral value of marriage have presupposed, or attempted to justify, patriarchal values.[1] Wollstonecraft, Mill, Thompson, and other early and late feminists have criticised the injustices which accompanied marriage for women. In *The Subjection of Women*, Mill drew a sustained comparison between marriage and slavery: "no slave is a slave to the same lengths, and in so full a sense of the word, as a wife is."[2]

In this thesis, I will defend an account of the moral value of marriage and the rationale of marriage legislation which is compatible with feminism. I will also present a detailed account of how justice requires marriage legislation to be structured. Before developing these objectives, I will discuss the definition of marriage.

1. Defining characteristics of marriage

[1] See Okin 1979, Parts I-III, on Aristotle and Rousseau on women and marriage. Pateman 1988 discusses women and marriage in Hobbes, Locke, Rousseau, Pufendorf, Kant, and Hegel, among others.

First, marriage is a socially specific institution. My account of marriage is not of an ahistorical, unchanging entity, but rather the modern institution of marriage in contemporary liberal societies. This institution has legal, social, and religious dimensions. The major religions defend definite marital structures and provide interpretations of the meaning and value of the institution. Socially, there is a profusion of understandings of the practice of marriage. These include the understanding of monogamous heterosexual marriage in biological terms as the natural evolutionary unit, and the understanding of marriage in social and political terms as the smallest form of human association, which marks off the private from the public realm. Historically, marriage was motivated by the need to shore up property-owning dynasties, ensuring that power and property remained in the family. Marxist and feminist theorists continue to see the operation of power relations in the institution of marriage.[3] Finally, the dominant contemporary understanding, developed in the nineteenth century, is of marriage as a partnership, or the ideal of companionate marriage.[4] These different rationales of marriage have produced controversy over the right understanding of marriage, its social role, and legislation concerning it, including questions about same-sex marriage, pre-nuptial agreements, and the social effects of divorce and unmarried cohabitation.

In this thesis, I will define marriage in terms of the essential features shared by all the various conceptions of marriage. Insofar as it is possible to speak of *the* social institution of marriage (as distinct from the legal or any particular religious institution), a broad but coherent definition can be based on the shared elements of social understandings of marriage. To this end, I will identify the underlying characteristics of marriage. Marriage is constituted by an intimate relationship between adults. Generally, marriage is understood to be a relationship between *two*

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[2] Mill [1869], p. 33.
[3] See Engels [1891], Chapter II.
[4] For a discussion of the development of modern marriage, see Shorter 1976, pp. 227-254.

adults. However, polygamy is practised and recognised by many groups as a form of marriage. Similarly, marriage has been traditionally understood as consisting of one man and one woman and this is its legal form. However, many groups agitate for the extension of legal recognition as marriages to relationships between persons of the same sex. The concept of marriage as an intimate relationship between unrelated adults persists through these structural changes. Although there is resistance to the call for legalisation of same-sex marriage, it is evident in what sense such relationships can be understood as marriages.

Defining marriage by the features of the relationship it involves, rather than a fixed structure (such as monogamy or heterosexuality), is justified for two reasons. First, some groups claim the status of marriage for polygamy and same-sex marriages. There are widely held understandings of marriage which allow these structural changes. To define marriage as monogamous and heterosexual avoids addressing the question of whether other relationships should legally count as marriages. Second, even within the structure of monogamous heterosexual marriage, ideas about structure differ. For instance, there are disagreements between various religions on divorce and the roles of wife and husband. Defining marriage in terms of the emotional features of marriage relationships includes these various conceptions of marriage. Although there are competing conceptions of marriage, an inclusive, unified definition is possible.

The features characteristic of marriage are a loving or affectionate relationship, and, further, a relationship which is life-defining. 'Life-defining' here involves various criteria. The relationship is placed at the centre of the spouses' emotional life and forms part of their identity or self-definition. Their other goals and plans are affected by it. There is a commitment to continuing the relationship, shared daily life and domicile (through most of the period of marriage), and a presumption of exclusivity or at least priority for this relationship over other relationships. Finally, in

contrast to familial relationships, the other spouse is actively chosen. These characteristics reflect the dominant modern ideal of marriage as companionate.[5]

Marriage also involves the external aspect of formal legal or religious recognition. Loving, life-defining relationships are essential to the concept of marriage, but marriages, as distinct from the entire class of such relationships, are constituted by some formal recognition. Where specific religious recognition is at issue, requirements for marriage may be much narrower than the essential characteristics I have described (heterosexual monogamy, for example). But I will argue that legal recognition of marriage should be extended to all relationships which fit the broad definition of marriage which I have given. While my definition of marriage may be rejected by those who hold that only heterosexual monogamous relationships can qualify as marriages, this does not affect the argument of my thesis. First, I shall argue in Chapter V that the legal understanding of marriage should be drawn from features on which there is wide agreement. Legal recognition should not be extended only to a contested conception of marriage. Second, my account of the moral value of marriage focuses on the qualities of affection and life-definingness, which belong to heterosexual monogamous relationships as well as same-sex or polygamous marriages. In Chapter III and IV, I will explain why these qualities are the source of the moral value of marriage.

Several objections to my definition must be discussed. First, it might be objected that my definition of marriage applies to some friendships as well. One may have many friendly relationships which are affectionate and life-defining but are not marriages. However, the condition of life-definingness is strong enough to rule most friendships out. In the cases of intense, life-defining friendships which fall within my definition of marriage, the extension of legal recognition seems acceptable if desired by the parties. It might be thought that sexual intimacy is a necessary constituent of marriage. However, as a legal condition, this seems unjustified as well as difficult for

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[5] See footnote 4.

the law to determine. Further, marriages where spouses are not sexually intimate are recognisably marriages.

Sex and reproduction are associated with marriage, but neither is necessary or essential to it. Relationships not including either constituent are currently recognised, both formally and informally, as marriages.[6] In this thesis, I will discuss marriage wholly in terms of the relationship between spouses, making little reference to reproduction. This is for several reasons: first, not all marriages result in children. I am interested in the moral and legal status of marriages as distinct from families. Second, the rights and interests of children, as well as the nature of parent-child relationships, complicate the issue beyond what I can discuss in this space. There is more to be said, both regarding moral value and state legislation, about marriages with children. However, that is not the topic of this thesis. I am interested in what marriages with and without children have in common. Even in marriages with children, marriages often pre-exist and outlast the term of child-rearing. Finally, child-birth and child-raising takes place, and increasingly so, outside marriage. Thus, the topics are not co-extensive.

2. Moral and political questions

The first topic I will discuss is the moral value of marriage. There are two distinct ways in which marriage could be morally valuable. One account focuses on its institutional structure, that is, the contract and the formal exchange of rights and responsibilities which distinguish marriages from other similar relationships. The second focuses on the relationship between the individuals, a type of relationship which does not share extension with marriage. Marriages can lack this relationship, and it can exist outside marriages.

The first account is exemplified by Kant's, in which the moral value of marriage depends on the legal structure. The contractual exchange of rights is the source of the moral value of marriage, and this value cannot be found in loving sexual relationships outside marriage -- in fact, these are morally impermissible. The second account is represented by Hegel's, in which the value of marriage is found in the ethical love between the spouses. Hegel argues, implausibly, that ethical love could not occur outside marriage. In Chapters I and II, I will discuss Hegel's and Kant's accounts in detail. In Chapters III and IV, I will argue that the value of marriage is found in the type of relationship characteristic of it, but that this value can also be found in similar relationships not formalised as marriages.

This account of the moral value of marriage will provide a rationale for state recognition of marriages. One might ask why a liberal state is justified in extending recognition to marriages. I will argue that the legal institution of marriage serves a valuable purpose, that of promoting such relationships, which is justified as a legitimate purpose for the state in terms of social stability. Since the institution of marriage can be maintained only through state recognition, state legislation is justified. This raises the question of how marriage should be legislated.

Historically, philosophers have argued that the principles of justice applicable in the public sphere are not applicable to family life, that family life should be regulated *instead* by love. Susan Moller Okin shows that the family has been portrayed as "beyond justice." Within it, according to Hume, Hegel, and Rousseau among others, principles of justice are unnecessary and so do not apply.[7] In the past, this argument has licensed a (theoretically) benign paternalism on the part of the husband. Feminists have argued that principles of justice must apply within the family as well and that individuals do not lose their rights within the family. However, contemporary communitarians challenge the application of principles of justice within

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[6] By 'informally', I mean that the formalisation of such relationships as marriages is socially accepted.

[7] See Okin 1982, and 1989 Chapter 2.

the family. In Chapter IV, I will argue that love between spouses is compatible with their possession of rights against each other and that love is *only* of moral value in the context of rights and justice. The standards of justice between individuals are not superseded by marital roles.

In addition, I will argue that marriage, as a legal institution, should be structured in compliance with liberal principles of justice in a liberal state. Liberal neutrality between conceptions of the good should apply to marriage legislation. The legal institution of marriage is a basic structure of society, to which the principles of justice apply. Of course the state should not force religions to practice liberal neutrality in their celebrations of marriage. But marriage law, as the law regulating a major social institution, must be governed by justice.[8] There is no justification for the state to act unjustly in legislating one of the basic structures of society. This means, as I will argue, that no conception of the good marriage should be privileged (Chapter V), and that insofar as the liberal state is committed to addressing gender inequality (as I will argue that it is), marriage legislation must address this (Chapter VI).

While marriage law has steadily improved -- from the feminist point-of-view -- in liberal societies since the 19th century, new feminist criticisms of marriage, the family, and heterosexual relationships have developed. A crucial conceptual tool in feminism since the 1970's has been the theory of patriarchy, or how various and apparently non-political social structures, including marriage, operate to oppress women.[9] In light of this, feminist considerations of what justice between the sexes will require have altered. While one school of feminism continues to seek the application of principles of justice to relations between the sexes, another questions how far liberal ideals of justice, equality, and liberty can be effective as feminist tools,

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[8] Rawls 1971, p. 7, gives the monogamous family as an example of a basic structure to which justice applies. Rawls however is notoriously unclear and ambiguous on the application of justice to the family: see Munoz-Dardé 1998.

[9] See for example Figes 1970.

and whether they might in fact even subvert the feminist agenda. In Chapter VI, I will respond to some of these claims by arguing that liberalism is committed to pursuing feminist goals.[10]

[10] Issues concerning the moral and legal nature of contract are unfortunately too complex to be treated in this thesis.

CHAPTER I: KANT'S CONTRACTUAL ACCOUNT OF MARRIAGE

1. Kant's moral argument for marriage
2. Why Kant's solution fails
3. Kant's prudential argument for marriage
4. A better solution
5. Contract and marriage: Hegel's charges against Kant
6. Developing Kant's account

This chapter has three main objectives. First, I will develop a question which will recur later in the thesis: if marriage is a moral institution, what exactly is its moral significance, and in what does its moral value originate? Here I will give an exposition of Kant's answer to that question, and raise some problems with it. Second, I will draw attention to a morally problematic aspect of sex. Again, this theme will be taken up in a later discussion of the moral value of marriage. Finally, I will begin to study the notion of a contractual account of marriage by looking at Hegel's criticisms of the contractual account given by Kant.

Kant dealt with marriage primarily in the *Lectures on Ethics* (ca. 1780) and Part 1 of *The Metaphysics of Morals*, the *Doctrine of Right* (1797). His discussion of marriage -- in which he describes the source and the content of its moral value -- is influenced by two other concerns. First, the *Doctrine of Right* is an investigation of property rights over external objects, and the role of the state in creating them. The discussion of marriage occurs in a context of explaining how individuals are morally connected to property so as to exclude others from its use. Such a connection is necessary for persons to act on the world, since possession of external objects is "[t]he subjective condition of any possible use."[1] If rightful power to use objects did

[1] Kant [1797], p. 245 (following the page numbering of the standard German edition of Kant's works); italics throughout belong to the original unless otherwise noted. The arrangement of the

not exist, then "*usable* objects [would be placed] beyond any possibility of being *used*."[2] The existence of property rights depends on the existence of a state, since a body empowered by common agreement must enforce them and settle disputes.[3] The coercive power of the state is therefore justified as enabling, rather than encroaching on, freedom. The creation of property rights permits the exercise of freedom through the rightful use of objects, an exercise which would be impossible without the state. Only through the state can right -- in which "the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law" -- be realised.[4] In this context, the discussion of marriage is shaped by the agenda of explaining how rights like rights of possession are held by spouses over each other, and why state legislation of marriage is morally necessary. Why marriage right, like property right, should be a moral requirement is explained by the second theme which motivates Kant's account of marriage: the morally problematic nature of sex.

Kant's thinking on marriage is profoundly influenced by his perception of sex, and sexual desire, as fundamentally immoral. The immorality intrinsic to sexual desire and sexual relations stems from the tendency to objectification, use of another as a thing, and exploitation. Kant's analysis of these faults is distinct from, although suggestive of, contemporary feminist claims that sex involves the exploitation or use of women, or the claim that sex is immoral where power relations are unequal. Kant's discussion is based on general claims about human nature rather than gender relations. Yet there is some ambiguity in his analysis, and I shall suggest later that gender inequality acted upon his moral imagination in this context. The claim he explicitly makes, however, is that objectification and use of another as a thing are intrinsic to sex and sexual desire, and that sex without benefit of a marriage contract is exploitative.

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text differs in Ladd 1965. See "Translator's note" in Kant 1996. I will follow Gregor's arrangement.

[2] Kant [1797], p. 250.

[3] See Kant [1797], pp. 311-2. Acquisition may be in accordance with right in the state of nature, but the right is still only provisional.

[4] Kant [1797], p. 230.

1. Kant's moral argument for marriage

In Kant's account, marriage is a contract both necessitated and sealed by the sexual act. Both contract and sex are central to marriage. Kant writes that a marriage exists only if a contract has been made *and* sexual relations have occurred:

> *Acquisition* of a wife or of a husband ... takes place neither ... by intercourse without a contract nor ... by a mere marriage contract without intercourse.[5]

This requirement follows from Kant's rationale for marriage, for its purpose is the legitimisation of sex. A marriage must be consummated in order to be valid because marriage right exists

> as the rightful consequence of the obligation not to engage in sexual union except through *possession* of each other's person, which is realised only through the use of their sexual attributes by each other.[6]

The marriage contract transforms the sexual possession of another into a legal and moral bond.

According to Kant, marriage is the necessary condition for the existence of any morally permissible human sexual relations at all:

> there is in [sexual] conduct itself something which is contemptible and contrary to the dictates of morality. It follows, therefore, that there must be certain conditions under which alone the use of the *facultates*

[5] Kant [1797], p. 280
[6] Kant [1797], p. 280.

> *sexuales* would be in keeping with morality.... Matrimony is the only condition in which use can be made of one's sexuality.[7]

Kant holds that sex involves using another as a thing and objectifying the other and is therefore impermissible. Only within marriage does it become permissible. Marriage establishes exclusive and equal rights between partners, creating the only conditions in which sex can occur without moral violation. This is Kant's moral argument for marriage.[8]

In the moral argument, marriage solves a dilemma. Human beings have an appetite for sex, and sex is necessary for procreation, but sex is morally troubling. Marriage resolves this by making sex permissible. But Kant is too quick to assume that there must be certain conditions under which sex is morally permissible, for if it is morally impermissible in the way he has argued, there is no reason to think there will be a case in which it is permissible. And Kant's account of how marriage makes sex legitimate is, indeed, unconvincing.

I hope to show that Kant's attempt to reconcile sex with morality fails. If his account of the moral difficulty of sex is correct, a contract cannot make it morally permissible. If, however, sex is not morally problematic, then the foundations of Kant's argument are eroded, and my criticisms attack an argument already undermined. But, while I will reserve judgement on whether sexual desire inherently objectifies its object, Kant's reasons for finding it morally troubling are persuasive. Barbara Herman, in a sympathetic analysis of Kant's argument, points out that there are parallels between his thesis that sex is morally problematic and some contemporary feminist views that sex "turns women into things ... [and] is not compatible with the standing of the partners as equal human beings."[9] There is good reason to think that sex often involves inequality, domination, and objectification in

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[7] Kant [ca. 1780], pp. 165-167. Since marriage only comes about through a contract, one might wonder how sex can be permissible in the state of nature. This is just what justifies the existence of a political institution of marriage -- like a political institution of property, it is morally necessary.

[8] Emphases vary between *Lectures on Ethics* (ca. 1780) and *The Metaphysics of Morals* (1797): *Lectures* is concerned with rights of disposal, *Metaphysics* with the use of another as a thing.

[9] Herman 1993, p. 56. She cites Andrea Dworkin and Catharine MacKinnon as holding this view.

the way he describes, especially given almost universal gender inequality and objectification of women.

Sex -- Kant's claim goes -- entails objectification, making a person into a thing for use:

> *Sexual union* ... is the reciprocal use that one human being makes of the sexual organs and capacities of another.... [T]he natural use that one sex makes of the other's sexual organs is *enjoyment*, for which the 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.[10]

> Man is not his own property and cannot do with his body what he will.... A man cannot make of his person a thing, and this is exactly what happens in *vaga libido* [prostitution].... Concubinage [unmarried consensual sexual relations] consists in one person surrendering to another only for the satisfaction of their sexual desire.... But the person who so surrenders is used as a thing; the desire is still directed only towards sex and not towards the person as a human being.[11]

The use of another as a thing, or allowing oneself to be used as a thing, clashes with one of the fundamental principles of Kantian ethics. This principle, familiar as the second formulation of the categorical imperative, enjoins us to "always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."[12] But sexual desire violates the imperative. It does not respond to the humanity of another person, but only to their sexual characteristics. Sex is "a degradation of human nature" which causes "all

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[10] Kant [1797], pp. 277-8.
[11] Kant [ca. 1780], p. 166.
[12] Kant [1785], p. 429 (standard German edition pagination).

motives of moral relationship [to] cease to function."[13] Human nature is "dishonoured" by, "subordinated," and "sacrificed" to sex, and humanity is made merely "an instrument for the satisfaction of ... lusts and inclinations."[14] Sex is "a moral risk" because it involves using others as things.[15] Also, it debases the human nature of both parties, since each both gives himself or herself up to the other and is driven to do so by sub-human inclinations.

There are three important charges made by Kant against sex. The first is objectification. A person uses another as a thing (an object) in sex, and sexual desire is directed towards another person as an object, a set of sexually attractive qualities or parts, not as a person. This need not imply that sexual desire does not respond to personal qualities as well, but insofar as it is a sexual feeling, it is responsive to the biologically sexual aspects of the other. There are two elements to the claim that one uses another as a thing in sex. First, sexual use is incompatible with treating another as a person. Kant makes this claim, but he suggests another, that, in sex, a person treats another as an object, and this may lead to treatment inconsistent with that owed to persons. Kant thinks that sexual desire overrides the sense of moral duty: "as soon as a person becomes an Object of appetite for another, all motives of moral relationship cease to function, because as an Object of appetite for another a person becomes a thing and can be treated and used as such by one."[16] The second charge, of exploitation, suggests -- as I will seek to show later -- that Kant is thinking in gendered terms, so that a woman who surrenders herself to a man, even when she wishes to do so, is used by him as a thing, and not vice-versa. This non-reciprocity suggests exploitation. Finally, sexual desire causes the individual to forsake his rational and human nature. As a result the moral point of view (one's duty to oneself and to others) is abandoned.

Exploitation and abuse are connected to objectification. If sexual desire causes one to view someone as a thing, then one is more likely to treat that person as

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[13] Kant [ca. 1780], p. 163.
[14] Kant [ca. 1780], p. 164.
[15] Kant [ca. 1780], p. 165.
[16] Kant [ca. 1780], p. 163.

a thing. In Catharine MacKinnon's thought, "[s]exual objectification is the primary form of the subjection of women," objectification being the process in which women are seen and treated as sexual objects, particularly in pornography.[17] The use and viewing of women as objects is connected, according to MacKinnon, to the relationship of domination and submission which is constitutive of gender and which is the basis of male and female inequality.[18] As Herman points out, this view is similar to Kant's, except that objectification of the sexually desired woman is explained by MacKinnon as a consequence of socially constructed masculinity. I want to endorse this much of MacKinnon's account: pornography, rape, and the battering of women by their partners suggests that objectification of women -- viewing them as sexual objects and treating them as such -- is a widespread component of sexuality. Combined with socio-economic inequality which makes sexual exploitation of women by men possible, this gives reason to believe that it is legitimate to hypothesise that sex is, as Kant argued, an issue of moral concern. As I will argue in section 4, there are reasons to think sex may cause less moral damage when it occurs within committed, caring relationships between equals, and thus within equal marriages. But although Kant offers marriage as the solution for the morally troubling aspect of sex, his rationale is entirely different from this suggestion. I will now consider why his account fails.

2. Why Kant's solution fails

Kant holds that the sexual use of another is morally permissible only within marriage, that is, when it occurs between two people who have contracted certain rights over each other. Equality of possession and reciprocal rights of disposal flow from the contract, creating the conditions in which sex may be morally permissible.

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[17] Humm 1995, p. 191.

[18] See Haslanger 1993, pp. 98-101, and my discussion on MacKinnon in Chapter VI.2. This position is also held by Andrea Dworkin.

The explanation of how it becomes permissible, however, contains a number of inconsistencies.

For one thing, Kant holds that unmarried sexual relations in which "both persons satisfy their desire mutually and there is no idea of [financial] gain" (he calls this "concubinage") are impermissible because the rights held by the parties involved are unequal. He writes that the contract is "one-sided; the rights of the two parties are not equal."[19] Yet the marriage contract itself incorporates inequality: due to "the natural superiority of the husband to the wife," "he is to be [her] master (he is the party to direct, she to obey)."[20] Marriage, on Kant's account, is necessarily unequal. And yet since he gives inequality as a reason for the impermissibility of 'concubinage', he is inconsistent in holding that sex may be permissible when inequality still exists. Kant addresses this problem by arguing that it is consistent for the parties to have equal rights over each other and yet hold unequal shares of power in the relationship. But this is not convincing. Kant's claim that the concubinage contract is one-sided is based on an assumption of gender difference: "In this pact [concubinage] the woman surrenders her sex completely to the man, but the man does not completely surrender his sex to the woman."[21] Kant argues that concubinage produces unequal rights of possession, while marriage institutes equal rights of possession, although unequal power. But the concubinage contract, in which both parties satisfy their desire, can only be unequal due to gender inequality, which is equally present in marriage. Marriage does not alleviate this cause of exploitation.

There is a more fundamental inconsistency in Kant's account, however. His claim that marriage legitimates sex rests on an argument that in certain conditions it is permissible to use another as a means only, contradicting the categorical imperative. The right gained in the marriage contract, by which spouses acquire each other and can therefore legitimately engage in sexual relations, is named by Kant a

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[19] Kant [ca. 1780], p. 166.

[20] Kant [1797], p. 279. The sexism of Kant's writings is discussed in Mendus 1987 and Okin 1982, pp. 78-82.

> *right against a person ... akin to a right to a thing* [and it] rests on the fact that if one of the partners in a marriage has left ... the other partner is justified, always and without question, in bringing its partner back under its control, just as it is justified in retrieving a thing.[22]

This right, also called 'personal right' or a 'right of disposal', "is that of possession of an external object *as a thing* and use of it *as a person.*"[23] It allows a person "to make direct use of a person *as of* a thing, as a means to my end, but still without infringing upon his personality."[24] It is a right held by husbands over wives, masters over servants, and parents over children. Kant's description of how the right is held in marriage contains two puzzling inconsistencies. "A *man* acquires a *wife*" yet the partners enjoy "*equality* of possession": the rights are reciprocal, yet in some places Kant speaks as if they are held by the husband over the wife.[25] Second, the marriage right of possession is "realized only through the use of their sexual attributes by each other."[26] How then is the right of possession over a child or servant realised? Kant does not comment on how the right of possession is realised in those relationships.

The right to a person akin to a right to a thing makes sex allowable by permitting the use of another person. This right appears to be an *ad hoc* exemption from the categorical imperative, which enjoins that we should not use others as means only. But Kant provides no independent argument for the justification of this exemption, beyond the fact that we need to use others for procreative purposes. Kant's argument that sex is permissible within marriage forces him to contradict his own most fundamental moral rule. The moral consequences are dire. Since there is no justification given for this exemption, there is no rationale for why it licenses using others only for sex and domestic services. It is not clear that, if one may dishonour another's humanity by using him for sex, one may not by the same token imprison,

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[21] Kant [ca. 1780], p. 169.
[22] Kant [1797], p. 278.
[23] Kant [1797], p. 276.
[24] Kant [1797], p. 359.
[25] Kant [1797], pp. 277-8; compare 248, 359.
[26] Kant [1797], p. 280.

humiliate, or abuse him when circumstances make this the only way to achieve a desired end (just as procreation justifies sexual use).

The right to a person akin to a right to a thing also clashes with the Kantian principle that "man is not his own property and cannot do with his body what he will."[27] If one does not own oneself, one cannot contract away one's person as property. But the right gained in marriage "is that of possession of an external object *as a thing* ... this kind of right is neither a right to a thing nor merely a right against a person but also possession of a person."[28] Kant does hold that persons can forfeit their personalities through crime and become "bondsmen," or human property.[29] But marriage cannot be made to fit this explanation. Kant was aware of this discrepancy ("a human being cannot have property in himself, much less in another person") and attempted to explain it by arguing that under personal right, one does not possess another as property but as "usufruct ... to make direct use of a person *as of* a thing, as a means to my end."[30]

The distinction between possessing another person as property or as usufruct is not purely abstract. If we own another as property, we need not respect them as persons, for they become things. If we possess them, but not as property, we must respect them, except -- and Kant does not define the limits of use -- when we are using them as a thing. The distinction between use as property and as usufruct is tenuous. Possession of another under personal right entails that the owner may use the other's body for pleasure. This is disanalogous to possessing a field only in possessing its fruits. As Kant knew, the goods enjoyed in sexual use are not alienable from the person, as a person is a unity. This description of personal right seems closer to slavery (possession of others as property) than usufruct.[31] Personal right appears incompatible with the principle that persons cannot be property as well as with the categorical imperative.

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[27] Kant [ca. 1780], p. 166.
[28] Kant [1797], p. 276.
[29] Kant [1797], p. 358, 330.
[30] Kant [1797], p. 359.
[31] Carole Pateman compares marriage contracts and the civil slave contract in Chapter 5 of *The Sexual Contract*.

The marriage contract removes the immorality which Kant attributes to sex only if we accept that the right to a person akin to a right to a thing has moral standing. Why should we imagine that use of another becomes permissible, contrary to the categorical imperative, through the mechanism of such a right? The right to a person akin to a right to a thing is intended to explain how the marriage contract makes sex permissible. But this project fails. Rather than removing from sexual relations the morally undesirable feature of use, it licences use. It makes use of another as a thing permissible because, according to Kant, "one person is acquired by the other *as if it were a thing*, [and] the one who is acquired acquires the other in turn."[32] Herman elucidates 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."[33] In other words, one is using oneself. But the argument that reciprocal exchange of rights entitles a couple to use each other neglects the separateness of persons. Two people cannot form a single moral unit wherein they can violate each other's rights without transgressing the moral law. Herman suggests a more positive interpretation, that the institution of marriage establishes rights and obligations which locate sexual activity in a context of legally imposed responsibility. But in fact, if Kant's diagnosis of sex is correct, there is no way a contract of any sort can make it permissible, as I will try to show in the rest of this section.

In general, contract diminishes the likelihood of abuse by allowing contractors to consent to an arrangement. But Kant holds that the immorality of sex cannot be morally transformed by consent. It incorporates a basic disregard for human nature. In the concubinage contract, both parties give their consent, but the act is still morally impermissible. One cannot rightfully consent to being used as a thing. Elsewhere Kant claims that no lawful non-marital contract for sex is possible, since one may be consumed by sexual use (either through pregnancy, death resulting from pregnancy, or "exhaustion of [the man's] sexual capacity"):

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[32] Kant [1797], p. 278.
[33] Herman, p. 60.

> carnal enjoyment is *cannibalistic* ... each is actually a *consumable* thing ... with respect to the other, so that if one were to make oneself such a thing by *contract* [other than the marriage contract], the contract would be contrary to law.[34]

Sexual use cannot be made allowable by a normal contract or by mutual consent, which is why the marriage contract contains the extraordinary rights which permit moral violation.

The marriage contract, by establishing mutual rights of disposal between the parties (rights "over the welfare and happiness and generally over all the circumstances of that person"), ameliorates the moral difficulties of casual sex by directing concern to the whole person, not just his or her sexual aspects.[35] But having rights over the whole of the other's person does not amount to such concern for the other. Kant is clearly right to think that reciprocity and concern for the whole individual, as instituted by the marriage contract, are morally important in this context. But he is wrong to identify these qualities with possession. I may be concerned for my cat or my car because I possess it -- it is *mine* -- but this proprietorial concern is different from the altruistic concern found in loving relationships. If sexual relations are essentially exploitative, objectifying, and dehumanising, as Kant holds they are, the presence of reciprocal rights of disposal does not alter that fact, and thus Kant is forced to argue that use of another is allowable under certain conditions. The marriage contract sets up safeguards, but it does not alter the moral nature of the sexual act itself.

Herman suggests that the most useful interpretation of Kant's claim that reciprocal rights alter the moral status of sex is this: by making spouses into equal juridical persons with mutual responsibilities, these rights create conditions in which spouses treat each other as persons and not simply sexual objects. Herman's claim that instituting equal civil rights for husbands and wives will work against objectification is plausible. Her claim, however, bears little resemblance to Kant's

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[34] Kant [1797], p. 360.

view, since the marriage right is a right of ownership by which women are owned, and, moreover, in Kant's political theory women lack civil rights.[36] Her interpretation of Kant's charge against sex is also too optimistic. First, Kant condemns sexual objectification because one must always respect the essential humanity of other people. Sexual desire intrinsically denies the humanity of the desired, according to Kant, and does so even in marriage.[37] Second, on Kant's account, sex is inherently degrading to the sexual agent him- or herself, not just to the desired and used object. One's dereliction of moral duty to oneself cannot be remedied by gaining a right over the other.

Kant claims that in sex one uses oneself as an object and subordinates human to animal nature. The use involved in sexual acts is not only use of one's partner, but violation of one's duty to oneself, as Kant's discussion of masturbation makes clear. Masturbation "makes man ... an object of enjoyment" and is worse than suicide, "a violation in the highest degree" of a perfect duty of virtue to oneself.[38] But non-procreative sex is a similar violation, only of lesser degree because not 'unnatural'. Non-procreative sex between a man and a woman is also "inadmissible as being a violation of duty to oneself ... by it a man surrenders his personality (throwing it away), since he uses himself merely as a means to satisfy an animal impulse."[39] But the submission of humanity to desire must be equally present in procreative and non-procreative sex.[40] Although the purpose of procreation is said to legitimate sex, the elements which make non-procreative sex a violation of duty will still be present in procreative sex (unless it is only done without enjoyment or sexual desire, which

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[35] Kant [ca. 1780], p. 167.

[36] "On the common saying: That may be correct in theory, but it is of no use in practice," in Kant 1996, p. 295 (standard German edition pagination).

[37] See quotes below, at footnotes 41 and 42.

[38] Kant [1797], p. 425. See also Kant [ca. 1780], p. 169-70. A perfect duty is "one which allows no exception in the interests of inclination"; Kant [1785], p. 422, footnote. Duties of virtue are those which cannot be externally legislated "because they have to do with an end which (or the having of which) is also a duty," Kant [1797], p. 239. Duties to the self follow from the categorical imperative (see for instance the formulation at footnote 12 above).

[39] Kant [1797], p. 425.

[40] Procreative sex may even involve a further violation when a woman is forced to conceive children against her will.

make instruments of both self and the other, for the sake of the duty of species preservation).

Since the sexual agent violates the categorical imperative by using herself as a means, and not simply by using another, rights which are instituted to make one's use of another (but not of oneself) licit cannot make sex morally permissible. Even within the marriage contract, sexual activity violates human nature: "even the permitted bodily union of the sexes in marriage ... is in itself merely an animal union."[41] Non-procreative sex within marriage is admissible only due to

> a permissive law of morally practical reason, which in the collision of its determining grounds makes permitted something that is in itself not permitted ... in order to prevent a still greater violation [i.e. masturbation or adultery].[42]

This reasoning sounds suspiciously utilitarian! The marriage contract does not remove the moral illegitimacy of intercourse. Its degrading aspects overflow into marriage. Kant's moral argument for marriage as a contractual exchange of rights clearly fails, for the contract does not render sex permissible.

While sexual objectification and exploitation present grounds for moral concern -- particularly to feminists -- it might seem unclear why the claim that sex is dehumanising should now raise a moral issue. The claim suggests a natural law perspective that certain distinctively human goods and activities should be valued as such, and that acting without respect for such goods is immoral.[43] Even if one does accept that there is a duty not to degrade one's humanity (and I think that an ethics acceptable to feminists will need to value human dignity), the claim that sex is dehumanising seems to emanate from a philosophical tendency that feminists have

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[41] Kant [1797], p. 425.
[42] Kant [1797], p. 426.
[43] For example, Finnis 1993.

criticised in Kant and others. This is the prioritisation of mind over body, reason over emotion, which feminists equate with the valuation of male over female.[44]

Kant's remarks seem to fit into this scheme by claiming that sexual experience is not fully human, but animal, a degradation of humanity. This sort of claim is particularly worrying to feminists since women's roles have traditionally been associated with bodily and sexual functions: childbearing, domestic service, and sexual service. Kant's views certainly fall into this pattern, but there is a distinct and more significant aspect to the thesis that sex is dehumanising. If morality is essential to humanity (to rationality, as Kant thinks), then a drive may dehumanise by reducing moral capacity. And it is clear that Kant has this in mind in writing that when desire takes hold, moral motives are driven out.

This is a more compelling reason for finding sex a moral risk. The force of the point differs from the charge of objectification, in which treating the other as an object for use may lead to abuse or exploitation. The focus here is on the individual's relation to herself, not to the other, and the fear is that the operation of sexual desire may overwhelm moral obligations. The appetite for sex is not unique in this respect. The appetite for hunger may drive one to steal food. Of course, the drive does not determine action, as one may also abstain to let a hungrier person have the food. But the threat is double, for sexual desire competes as a reason with moral reasons for action, and the object of sexual desire, unlike the object of other drives, is a person. Thus both the opportunity and the motive for moral violation are greater, relative to other drives, in the case of sexual desire. Given that sex does constitute a moral risk, one might wonder why Kant defends such an inconsistent and inadequate solution. The answer lies in what I will call his prudential argument for marriage. While the moral problem of sex which Kant sets up is irresolvable, so that sex is not transformed by marriage, Kant has other, economic, considerations, to which I will now turn, for holding that sex should be confined to marriage.

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[44] The critique of the cultural devaluing or condemnation of the body and the bodily is central to most forms of feminism; see for instance (post-modern feminist) Cixous, 1980; (feminist moral

3. Kant's prudential argument for marriage

We have seen that the marriage contract cannot remove the morally troubling aspects from sex. Personal right does not suffice to remove objectification and the related threat of exploitation. In fact, a close reading of Kant's account reveals that there is another justification of the centrality of contract to marriage. His argument that only marriage, through contract, makes sex legitimate stems from prudential considerations. In short, women's end is the preservation of the species.[45] To accomplish this, they need male protection and economic support.[46] Without a binding contract, men will not carry out this role. Thus, the marriage contract creates the social conditions necessary for the reproduction of society. These consequences are not simply accidental side-effects of marriage, but are the true rationale behind Kant's argument that sex is only permissible in marriage, and that the moral status of marriage rests in contract.

Although Kant usually gives gender-neutral reasons for the moral impermissibility of sex, his specific arguments against extra-marital sex turn on gender difference. For example, the existence of this second, prudential, argument explains the apparent discrepancy in Kant's account of the exploitation involved in concubinage:

> a contract to be a concubine also comes to nothing: for this would be a contract to *let* and *hire* a member for another's use, in which, because of the inseparable unity of members in a person, she would be surrendering herself as a thing to the other's choice.[47]

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philosopher) Held 1987; (early 'second-wave' feminist) Ortner, "Is female to male as nature is to culture?" in Rosaldo and Lamphere, 1974.

[45] Kant [1798], p. 169.

[46] Kant [1798], pp. 80, 130, 167, 169-70. "A *woman*, regardless of her age, is under civil tutelage [or incompetent to speak for herself (unmundig)].... her husband is her natural curator." Kant [1798], p. 79

[47] Kant [1797], p. 279.

'Concubinage' refers to mutually desired sexual relations, not to prostitution. Both parties involved in the transaction are surrendering themselves sexually to the other, so why does Kant locate the moral illegitimacy of concubinage in the fact that "she would be surrendering herself as a thing"? So would *he*. This may reflect a view that women's moral selves are more intrinsically connected to their sexual activity.[48] But a reason supplied repeatedly in Kant's discussions of marriage is that a woman giving herself to a man without a contract of marriage is left without the economic protection, assured social status, and continuing relationship which is gained through marriage.

Kant views marriage as an economic necessity for women, but they can benefit from marriage only if sex is restricted to marriage. In the state of nature, woman is merely "a domestic animal," and in barbarism, polygamy is the rule.[49] But in civilisation, women gain power through the manipulation of male desire and resistance to extra-marital sex.[50]

> Scepticism about marriage ... is bound to have bad consequences for the entire female sex; for woman would be degraded to a mere means for satisfying man's desires.... It is by marriage that a woman becomes free: man loses his freedom by it.[51]

Marriage is largely instrumental for women, as the advantages of protection and status which it bestows are its whole point. Thus, women always desire to flirt with "the whole male sex":

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[48] "Honor is her greatest virtue, domesticity her merit," quoted in Buchner 1904, p. 226. Sexual activity is closely linked to women's "end" -- the perpetuation of the species -- and assumes disproportionate importance since this is their only end (Kant [1798], p. 169). "The woman does not ask whether the man was continent before marriage; but for the man, this question about his wife is of infinite importance." Kant [1798], p. 171

[49] Kant [1798], p. 168.

[50] See Kant [1798], p. 168.

[51] Kant [1798], p. 172.

> For a young wife is always in danger of becoming a widow, and because of this she scatters her charms over all the men whom circumstances might make potential husbands for her, so that, should this situation occur, she would not be wanting for suitors.[52]

Kant's prudential argument for the contractual nature of marriage reflects social structures which make women economically dependent on men and render it desirable that procreation be carried out in marriage. This argument rests on prudential concern about the likely consequences of sex without marriage, rather than on the principle of humanity.

Kant's language of acquisition and possession arises from the perceived need for a woman to have legal protection against the man whose children she bears, in order to provide for her and their social and financial standing.[53] This imperative explains why contract must be so central to marriage, for it ensures that husbands and fathers meet their responsibilities. The right to a person akin to a right to a thing which allows one to use another sexually has as its central feature the right to reclaim and retrieve a run-away spouse.[54] The prudential argument suggests contemporary feminist claims about sex as well, since Kant condemns extra-marital sex as exploitative in the context of women's socio-economic inequality.

Kant's project in "The Doctrine of Right" is, as mentioned earlier, to explain the basis of property rights, of moral connections between persons and things.[55] His discussion of the household fits into this as an attempt to explain how individuals can come to have special moral bonds, akin to possession, over each other. The right to a person akin to a right to a thing explains how "I [can] call a wife, a child, a servant, or, in general, another person mine."[56] The prudential argument shows why these rights are necessary as the moral argument does not. Prudential concerns show why Kant takes contract as the essence of marriage, for he holds that it is necessary that

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[52] Kant [1798], p. 168, also p. 173.

[53] See his concern over the problem of illegitimate children, Kant [1797], pp. 326-7, 336-7.

[54] Kant [1797], pp. 276, 278, 282-4.

[55] See Kant [1797], pp. 245 ff., and Herman 1993, pp. 52-54.

[56] Kant [1797], p. 248.

women come to possess men in order to receive support for themselves and their children. Marriage does not solve the moral problem of sex, but it does solve the prudential problem. In the next section, I will take up the question of how a solution to the moral problem might be approached, an issue which will reappear in my consideration of the moral value of marriage in Chapter III.

4. A better solution

Kant's charges against sex and sexual desire do have moral force. Within an ethic which values respect for persons (and here we can include Kantian ethics and ethics informed by the feminist aim of equality for men and women), moral motives are subverted by the sexual impulse, at least in one of its aspects.[57] Objectification is plausibly *part* of all sexual desire, for one views someone as a object if one views them as something to be used, for the purpose of pleasure. If sexual desire *merely* objectifies the other, it fails to respect him as a person, and insofar as sex involves using the other as an object, it may involve a failure to *treat* him as a person. Perhaps the pronouns in the last sentence should be feminine, since feminists claim that the objectification in both cases is systematically directed at women. Additionally, objectification combined with gender inequality can lead to exploitation, and the pressures of desire can lead to abandonment of the moral point of view.

We cannot conclude from all this, though, that sex is morally impermissible. So long as it is the morality of actions which are to be evaluated, the objectification inherent in desire and the abandonment of the moral point of view are only of moral concern in that they may lead to immoral actions. Likewise, exploitation of women as sexual objects (e.g. in prostitution, the widespread existence of which depends upon women's economic inequality with men) is not immoral because it involves sex,

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[57] But compare Hobbes: "The appetite which men call *lust* . . . is a sensual pleasure, but not only that; there is in it also a delight of the mind: for it consisteth of two appetites together, to please, and to be pleased; and the delight men take in delighting, is not sensual, but a pleasure or joy of the mind consisting in the imagination of the power they have so much to please," *Human Nature*, ix. 10, in Hobbes 1994, p. 55. I will take up this topic again in Chapter III.

but because it involves exploitation. The question of moral permissibility revolves around the question of what it means to treat another as a person. Is sex morally impermissible because it necessarily fails to treat the other as a person (that is, does the definition of treating someone as a person exclude the kind of interaction that takes place in sex, as Kant seems to think), or is it rather morally troubling because treating another person as a sexual object seems too close, motivationally and functionally, to treating them as an object in an impermissible way?

One might find either view odd -- that in sex one is either treating, or close to treating, another person in a morally impermissible way. Instead of referring to someone's co-participant in sex as his sexual *object*, we are used to speaking of his sexual *partner*. One might even conclude that Kant's belief that the sexual partner is treated like an object does not correspond with any necessary fact about sex, but reflects Kant's acceptance of the sexist paradigm that heterosexual sex is a subject-object (male-female) relation. In other words, one might claim that Kant's objection to sex is based not on its intrinsic moral properties but on his internalisation of beliefs about sex which Dworkin and MacKinnon claim construct social reality. Yet even if this were true, there is still some force to the 'gender-neutral' claim about the objectifying nature of sexual desire (i.e. that sexual desire intrinsically objectifies, apart from social construction of men as objectifiers of women) and of sex. To articulate where Kant might be right, I will turn to another analyst of sexual desire.

Roger Scruton attributes two major oversights to Kant. He claims that the "individualising intentionality" of desire and its "focus on 'embodiment'" are absent from Kant's analysis.[58] Scruton's normative account of sexual desire contradicts the Kantian claim that the other is desired as a sexual object, not as a person, at least in 'true' desire:

> In true sexual desire, the aim is 'union with the other', where the 'other' denotes a particular person, with a particular perspective upon

[58] Scruton 1986, p. 85.

> my actions.... [T]he aim of desire ... must involve the other *essentially*.[59]

Even so, the other is still rendered an object. Sartre saw a paradox in sex: "you can desire another only as an individual, and therefore only as a *subject*. And yet you can possess him only as an instance of his species -- since you can possess him only as an object."[60] Sex, and sexual desire, make an object of the other in the sense that sexual desire is for contact with a body, and sex the realisation of that contact. One necessarily sees, relates to, and acts on the other as a body. Moreover, according to Scruton, personality is overwhelmed by sex, so that each partner sees the other bereft of personality, as a body only: "the experience of your [the other's] embodiment in arousal is also the experience of your subjugation to your body."[61]

The interpretation which I am suggesting could be accused of relying on a mistaken subject/object distinction which assumes that to interact with someone physically is to treat them as an object. Why, someone might ask, is the body so devalued that to recognise someone as embodied is to fail to meet them morally? There is certainly a tension in Kantian ethics between personality, which is the source of moral obligations, and the body as physical object. The loss of personality in sex is thus a cause for worry. In Kant's ethics, the charge that sex involves objectification because it involves treating someone as a body, not a person, thus has some credibility. While feminists rightly want to break down the hierarchical moral dualism of mind (personality, reason) over body, it is still the case (and a cause of their concern) that men sometimes see women (or people see each other) as bodies in the inferior, hierarchical sense, that is, *only* as bodies. Feminists deny the morally evaluative distinction between body and person, but their critique depends on the existence of a practice of treating women as bodies and not as persons, which they find morally wrong. The hierarchical distinction which is the subject of feminist criticism (and for which feminists might criticise Kant's account) is also the source of

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[59] Scruton 1986, p. 89.
[60] Cited in Scruton 1986, p. 95.
[61] Scruton 1986, p. 131.

the objectification (the equation between object/body and lack of personality/moral worth) which makes sex morally troubling to feminists.

Scruton's interpretation of Kant's concerns seems to underestimate their force. He argues that Kant's analysis of sex fails to show a moral problem. He claims that Kant's view of desire as degrading is "characteristic of Kant's failure to see that our animal nature is not just conjoined with, but also entirely transformed by, ... 'practical reason'."[62] By "dismissing desire as ... an animal residuum," Kant cannot defend his charges against anyone who simply denies that our 'animal' nature is degraded.[63] Thus, "the Kantian inevitably tends towards permissive morality. No sexual act can be wrong merely by virtue of its physical character."[64] Scruton's thought is that Kant cannot hold that consenting, non-injurious sex is morally wrong if he gives up the idea that it is a reduction of human nature. But degradation of human to animal is just one of Kant's claims about sexual desire. As I said above, whether or not a Kantian can hold that consenting, non-injurious sex is wrong depends on what she takes it to mean to treat a person with respect. I cannot pursue these questions here, but the point I hoped to draw is not that sex is impermissible, but that sexual desire often objectifies the other (both in the Kantian and the feminist sense), that this tends to exploitation (a connection made by both feminists and Kant), and that moral motives are forced into competition with sexual desire. These aspects of sex are sufficiently troubling to warrant inquiry into how they may be ameliorated or neutralised.

Dworkin and MacKinnon hold that a thorough reconstruction of gender is required to remove the objectifying component from sex. Liberal feminists, who might disagree with Dworkin and MacKinnon but be concerned by sexual exploitation of women, rape, and sexual abuse, suggest that the culture of treating women as objects could be alleviated by socio-economic gender equality, and harsher social and legal penalties for rape and violence towards women. If we give credence to the Kantian/radical feminist claim that sex and desire do involve objectification

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[62] Scruton 1986, p. 84.
[63] Scruton 1986, p. 84.
[64] Scruton 1986, p. 347.

(which has the negative effect of increasing the likelihood of abuse and exploitation), like Kant we should be impelled to ask how this can be counteracted. For this inquiry to be meaningful, we do not need to assume that desiré is intrinsically objectifying (culturally or naturally), but merely recognise the prevalence of the connection between desire, objectification, and women's subordination.[65]

Kant's discussion of sexual objectification suggests a connection from which he fails to draw the obvious, and morally significant, conclusion:

> If one devotes one's person to another, one devotes not only sex, but the whole person.... If, then, one yields one's person, body and soul, for good and ill in every respect, so that the other has complete rights over it ... and obtain the person of the other in return, I win myself back.... In this way the two persons become a unity of will. Whatever good or ill, joy or sorrow befall either of them, the other will share in it.[66]

The difficulty with his view is that persons only attain "unity of will" by exchanging a "right to dispose over the person as a whole -- over the welfare and happiness and generally over all the circumstances of that person."[67] We should expect the exchange of rights between a married couple to make sex permissible within marriage because it fixes vulnerability within the context of stable and mutual relationships. It appears that sex within marriage is less likely to be objectifying because it occurs in an atmosphere of companionship and concern, where the other is recognised as a person. Kant seems to have it the wrong way round. If sex is somehow morally better within marriage, this is due to the nature of the marriage relationship, not because marriage grants a licence for objectification. In other words, certain aspects

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[65] Dworkin 1981 and 1987 present empirical evidence for this connection.

[66] Kant [ca. 1780], p. 167.

[67] Kant [ca. 1780], pp. 166-7. This explains why marriage only exists as a consequence of the contract and the sexual act -- one has not given oneself until one has given one's body.

of marriage tend to counteract objectification and prevent exploitation.[68] Kant, on the other hand, thinks personal right allows objectification, which, as we have seen, is not eliminated in marriage on his account. Nor is marriage valued because it reduces exploitation. In exploitation, one party does not benefit, or benefits far less than the other. But it is not the reciprocity of benefit in marriage which makes sex permissible in it, according to Kant, for he has ruled concubinage, in which each gains sexual pleasure, impermissible.

Kant does write that "sexual love can, of course, be combined with human love and so carry with it the characteristics of the latter," but he does not expand this point nor does he use it anywhere as the basis of the permissibility of sexual love in marriage.[69] He does not think that sexual feelings can be transformed by love, but only carried along with it. He assumes that "a unity of will" and sharing of "good or ill, joy or sorrow" can only be created by the spouses' ceding rights over themselves to each other.[70] This "unity" appears not to be an emotional state but a sort of merger and acquisition. The feature of permanence in a relationship is only an aspect of possession, not in itself a feature which makes sex morally permissible. Possession, rather than permanence or reciprocity, is the source -- for Kant -- of permission.

Why is the view that the exchange of rights creates a community within which objectification is permitted so flawed? Objectification is not neutralised by the possession of rights, although abuse and exploitation may be. Treating someone as a rights-bearer does not mean one will view them as such, as I will try to show. Rights are an external relation, which tell us how to relate to each other formally, but we must again distinguish between treating persons as persons and seeing them as such. In intimate relations, seeing a person as a person involves more than fitting them into the abstract category of 'person'. In civil or political life, one may recognise another as a fellow-citizen and treat them accordingly. But in intimate relations, these

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[68] I am aware that feminists hold marriage has been a site of women's exploitation. I am referring here to marriage as an affective, life-defining relationship in which the interests of both parties are considered equally.

[69] Kant [ca. 1780], p. 163.

[70] Kant [ca. 1780], p. 167.

categories are overwhelmed by knowledge of the other person as a personality. But knowing her as a person and recognising her as possessing the morally valuable attributes of a person are distinct. It is precisely because recognition of the other's formal status fades that one may cease to see what is due to her as a person.

Nor would it be appropriate continually to view one's wife as a bundle of rights, although her rights must be respected. It is certainly possible that a moral relation constituted by punctilious consideration of rights and obligations can exist between spouses. However, marriage is characterised as an emotional relationship and (though not necessarily) a sexual one. I will argue that the emotional aspect of marriage is the source of the moral value of marriage, since the relevant emotions distinguish intimate relationships from relationships characterised by recognising others primarily as rights-possessors. Emotion is central to marriage, and we would expect its moral value to supervene on this distinguishing characteristic if we wish to provide an explanation of why marriage has a distinctive moral value. This account would mean that long-term unmarried relationships have the same moral value derived from emotions as marriage, but this result is not one which I wish to avoid. I will say more in Chapter III about the moral value of the institutional structure of marriage.

The moral relevance of emotions is epistemological and motivational. In intimate relations, where public categories of rights-ascription fade, another way of recognising the other as a person must come into play. This recognition is especially important in a sexual relationship, where one's emotions may instrumentalise the other. It is preferable in marriage that recognition based on emotional response and concrete knowledge of the other supplements recognition of the other as a rights-bearer for two reasons.[71] First, an emotional response of the right kind motivates one to treat the other morally. Second, marriage is lived out through daily interaction on an intimate level. In these circumstances, sympathy and attention are required in order to know how to act for the other's good. One can treat one's husband morally without this concrete response to his needs, but only in a limited way. For a rich

[71] See Benhabib 1987, esp. pp. 86-91, on 'the generalized and the concrete other'.

interaction, one must have understanding of the other in order to know how to fulfil one's duties to him.[72]

Emotional moral recognition is possible through an attentive, responsive relation incorporating concern for the other's good. Through coming to know another person intimately, the public categories which mark her out as a rights-bearer become less visible relative to her particular personality. One begins to see her not as possessing obligating characteristics (human, rational, citizen, and so on) but as the possessor of her particular qualities. The danger is that as her status recedes in one's knowledge of her, one may begin to treat her in ways forbidden by her status. Another sort of recognition of the person must take place, and this recognition is also desirable for the reasons already cited. To recognise her as a person intimately, one must recognise her not just as the possessor of particular properties, but as a morally significant being. One does this by recognising her interests (just as rights protect her interests, so intimate recognition also responds to them) as morally significant, that is, as having a claim on oneself. Attention serves as a guide to her interests, and an emotional reaction establishes their claim. While her rights must always be respected, interacting with her morally on an everyday level will require an understanding of her particular needs and desires as those of, to use Seyla Benhabib's term, a "concrete other."

In this emotional response, the other's particular good as a person comes to motivate oneself because one sees from her particular point of view. This response is moral because it involves taking on the other's good and ill, joy and sorrow, as one's own. The response is not sufficient to motivate and guide moral conduct, and a principled theory of moral action is also necessary.[73] However, it is necessary to guide, if not to motivate, moral conduct in intimate relations. Objectification may be a psychological or social fact about sexual desire, but empathy and attention work against objectification by allowing one to enter the other's point of view and so re-recognise her personhood.

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[72] See Nussbaum 1990, pp. 156-7. See her Chapters 2, 5, and 6 for an argument that "in good deliberation and judgment, the particular is in some sense prior to general rules and principles" (p. 165).

The problem with Kant's account is that he does not recognise the (instrumental) moral value of this attentive, caring relationship, as he cannot, given his philosophical commitments:

> *pure reason* must be practical of itself and alone, that is, it must be able to determine the will by the mere form of a practical rule without presupposing any feeling and hence without any representation of the agreeable or disagreeable as a matter of the faculty of desire.

This is so because:

> If the determination of his will rests on the feeling of agreeableness or disagreeableness that he expects from some cause, it is all the same to him by what kind of representation he is affected.[74]

But on the contrary, as a matter of moral mechanics, intimate personal recognition seems to require a particular, emotional response to the other. If A wills herself from duty to respect B as an end while using B as a means, A's immoral motive (the use of B for A's benefit) remains and it is in fact only in virtue of this immoral motive that A wills herself to respect B. Given this, A's attempt to will respect for B must be compromised by her reasons for wishing to do so. A must desire to respect B as a person, not simply will it. Through the morally transformative emotion of empathy this desire and its fulfilment in the recognition of the other as a person can occur.

The insistence on the moral significance of emotions is in fact a Hegelian response to Kant's ethics (as well as, of course, a tenet of care ethics). In *Sittlichkeit* (ethical life) the Right becomes concrete through being embodied in the desires of the community: "[t]he 'right' fully exists if and only if it is integrated into the emotional life as a functioning social whole."[75] "[D]uty for duty's sake ... is an unreality.... No

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[73] See my discussion of care ethics in Chapter IV.

[74] *Critique of Practical Reason*, in Kant 1996, pp. 157-8 or (standard pagination) 23-24.

[75] Gauthier 1997, p. 103.

man is a hero to his valet," though he may be a hero. Analogously, there will always be a "*moral* valet" able to detect impurity of desire in actions seemingly motivated by duty alone.[76] Doing one's duty for duty's sake leads to hypocrisy, since selfish motives still remain.[77] Instead, duty must become integrated with desire.

Within intimate relationships, emotions have a moral content and significance. I have argued that in an intimate context, respect for another as a person requires an emotional response, a feeling of identity with the other. Kant's conclusion that intimate respect may be obtained through the exchange of rights, rather than emerging from love, is seriously flawed. Sexual desire may be incorrigibly object-centred, but the tendency to objectification can be transformed through the fusion of desire with other emotions. In Chapters III and IV, I will return to the issue of how features of marriage may diminish objectification. In the next section, I will return to Kant's project of identifying the moral value of marriage and his claim that it consists in rights over the other which are contractually obtained.

5. Contract and marriage: Hegel's charges against Kant

A contract theory of marriage, of course, need not look like Kant's. Feminists have criticised the traditional marriage contract as an improper contract since in it one party illegitimately cedes her rights to the other.[78] This criticism applies to Kant, whose account of marriage conflicts with what he elsewhere claims are universal moral principles. Kant holds that "no legal transaction on his part or that of anyone else can make him cease to be his own master," yet this happens in marriage.[79] As Pateman points out, Kant's "personal right exists only in the private

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[76] Hegel [1807], p. 404, par. 665. (I am including section numbers as an alternative to page numbers for ease of reference.)

[77] Hegel [1807], p. 405, par. 666.

[78] Pateman 1988, p. 154; Okin 1989, p. 172.

[79] Quoted in Okin 1982, p. 79, from "On the common saying: That may be correct in theory, but it is of no use in practice"; see also Kant [1797] p.82.

sphere of marriage and domestic relations."[80] Contractual regulation of marriage could be brought into line with the standards which apply to other contracts. But it is crucial to distinguish between historical legal marriage contracts (which were improper contracts), contractual regulation of marriage (which could take various forms), and an account of marriage as contractual, that is, a claim that contract is the essential or defining aspect of marriage.

Kant's account is of the third variety, identifying the essential feature of marriage as the contractual exchange of reciprocal rights, followed by sexual intercourse. This is not just a thesis about the definition of marriage, but about its moral status. The moral status of marriage derives from the marriage contract and consists in the equal rights of possession held by the spouses over each other and over their material goods. Contractually established equal possession is the moral essence of marriage.[81] This view should not be unfamiliar as marriage does consist of (among other things) contractually established rights and obligations. From a perspective which emphasises the institutional, rights-establishing nature of marriage, Kant seems idiosyncratic only in insisting on a right of *possession* as the chief feature of marriage.

Hegel, however, provides us with a counterpoint to this account. He dismisses it along with accounts of marriage which claim its essential feature is sex or romantic love. "Marriage should ... be defined more precisely as rightfully ethical love," which is the consciousness of unity, the joining of spouses into "a single person."[82] Hegel shifts the morality of marriage from institutionally established rights (and a derivative relation of possession) to a subjective unity corresponding to an ethical transformation. I will discuss Hegel's own account of marriage in the next chapter. Now, I will look at his criticisms of Kant.

Hegel's criticism of a contractual account of marriage and the family is part of his wider argument that contract is an unsuitable basis for the kind of community

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[80] Pateman 1988, p. 171.

[81] One could also describe Kant's account of marriage as rights-based. But within his discussion, the reciprocal exchange of rights through contract is the establishing feature of marriage; the relation of possession can only be created through contract, except in the case of children.

[82] Hegel [1821], p. 201, pars. 161 and 162.

which the state should be. Hegel is the chief historical critic of Kant's account. He writes, "*Marriage* cannot ... be subsumed under the concept of contract; this subsumption -- which can only be described as disgraceful -- is proposed in Kant," and "it is equally crude to interpret marriage merely as a civil contract ... [as] found even in Kant."[83] Hegel recognises that marriage originates in contract, but claims it does so only "*in order to supersede it.*"[84] The representation of marriage as essentially contractual is "disgraceful," according to Hegel, for three reasons. Contract, unlike marriage (or the state), abstracts from the contractors' identity, is contingent, and serves self-interest.[85]

First, abstraction characterises contract because "it is only as owners of property that the two [contractors] have existence for each other."[86] A marriage exists between two entire persons, but a contract exists between property owners who are only concerned about the features of the other which affect the contract. Kant tried to solve a parallel problem through the marriage contract -- in sex without marriage, he claimed, partners are only interested in each other's sexual attributes, but marital possession locates sexual interest in a wider context of concern. But on Hegel's account, one cannot recognise another person fully through contract. People cannot give themselves to each other in contract, as Kant would have it, but can only give services or alienable property:

> For Kant, *personal rights* are those rights which arise out of a contract ... [but] a right based on a contract is not a right over a person, but only over something external to the person ..., i.e. always a thing.[87]

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[83] Hegel [1821], p. 105, par. 75, and p. 201, par. 161.

[84] Hegel [1821], p. 203, par. 163. Pateman 1988, p. 179, holds that it is inconsistent for him to retain the contract in his account; but this misses the distinction between contractual regulation and contractual accounts of marriage.

[85] See Hegel's discussion of the family, Section 1 of "Ethical Life," and his discussion of contract, Section 2 of "Abstract Right," in Hegel [1821]. I am indebted to Westphal 1984 in this and the following paragraphs.

[86] Hegel [1821], p. 70, par. 40.

Contract implies that marrying persons exchange with each other rights to specific services, not their whole selves.

This Hegelian criticism seems limited since marrying couples can contract rights and obligations without recognising each other only as service-providers. However, Hegel's criticism is crushing for theories that claim marriage is essentially a contractual exchange in which partners acquire each other, precisely because one cannot give oneself in a contract. One can only give a right against one for performance of a service or provision of an alienable piece of property. This claim, that I cannot give myself to another as property through a contract, is supported not only by Kantian ethics (which Kant himself contradicted in his account of marriage), but by a wide consensus in contemporary political philosophy.[88] The essential marital relation of possession or union of selves cannot be conceived of as contractual, for contract simply cannot account for such a relation existing between two entire selves. Likewise, the moral content of marriage cannot be said to rest in rights. Rights held over another person in their entirety must be posited to explain the moral nature of marriage as a relationship between whole persons. Yet rights over whole persons (rather than just the performance of discrete services) would be unique to marriage as well as contradicting Kantian ethics and liberal theory.

Second, Hegel criticises contract as contingent, or optional. For Kant, the moral importance of marriage is instrumental. It makes sex and procreation permissible. Hegel insists that marriage is itself an ethical duty.[89] Contract "is the product of an arbitrary will," and it implies that the decision to marry and the commitment to the ensuing marriage are contingent in the individual will.[90] The will which has contracted contingently may capriciously turn from the contract. Kant certainly did not consider commitment to marriage contingent on the will, since the contract was lifelong. But the choice to enter it he held contingent, since marriage is necessary only for sexual relations. The criticism that contract makes the decision to

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[87] Hegel [1821], pp. 71-2, par. 40.

[88] Rawls is only one example. Nozick is a -- libertarian -- exception in defending the permissibility of slave contracts in a free society; see Nozick 1974, p. 331.

[89] Hegel [1821], p. 201, par. 162.

[90] Hegel [1821], pp. 105-6, par. 75.

marry contingent is plausible only to someone who holds that marriage is an ethical duty, but the criticism that commitment to a marriage should not be represented as contractual is more convincing.

Hegel's thought that marriage should not depend upon the vagaries of the individual will has an intuitive appeal. The validity of this criticism depends upon the views one takes on the nature of marital commitment and of contractual commitment. If marital commitment is viewed as always dependent on continuing emotions and free individual choice, then the contingency of contract is not a problem. If, however, commitment to marriage is held to be irrevocable, or if marriage is understood as an institution with claims on the individual which override his changing attitudes, the contingency of contract will prove a stronger criticism. I think that a balance must be reached between these two positions, the individualistic and the institutional views of marriage, and I will pursue the question in Chapter III. The second variable on which the criticism of contract as unsuitable for marital commitment depends is the claim that contract is contingent. Surely a contract is the strongest possible external sign of commitment of the will.

Finally, Hegel claims that contract wrongly represents marriage as self-interested. Marriage supersedes "the point of view of contract -- i.e. that of individual personality as a self-sufficient unit."[91] "One is present in [the family] not as an independent person but as a *member*."[92] Marriage may serve our interests, yet that is not its rationale. It is, like the state, an end in itself. The appropriate attitude to marriage, as to the state, is not to ask what benefit it will provide to oneself. This criticism is true in one sense. Altruism combines with self-interest in marriage, and someone who seeks their own interest in marriage is as misguided, and as unlikely to succeed, as the utilitarian who sets out to find friends because he thinks they will make him happy. This is a reason against viewing marriage as essentially a contractual exchange from which both parties benefit. Representing it as a contract to aggrandise one's interests is to misrepresent it. Hegel's account of marriage, as I

[91] Hegel [1821], p. 203, par. 163.
[92] Hegel [1821], p. 199, par. 158.

will show in the next chapter, goes too far in the other direction. He claims not only that self-interest is superseded, but that the individual self is too.

Kant's account of the moral status of marriage as essentially contractual neglects important features of marriage. More attention must be paid to the relationship between the individuals, rather than to the rights they have over each other. Among the chief moral qualities of marriage must be concern and reciprocity. Of course, these features are not only found in marriages, nor do all marriages reflect this ideal. But these qualities must be noted by a theory of marriage, and a view of marriage as essentially contractual is unable to incorporate altruistic concern. It is also unable to explain the relationship which exists between married persons as complete individuals. Ownership is an inappropriate metaphor and a dangerous moral fiction.

6. Developing Kant's account

The major failing of Kant's account is its thesis that individuals can be owned. Because he argues that the salient moral feature of marriage is mutual possession, he is forced to the conclusion that wives and husbands own each other, a view incompatible with an understanding of human beings as rights-holders. Kant's account fails because he was attempting to resolve an intractable problem. Given his view that sex is intrinsically exploitative, only an exemption from the duty not to exploit others could make even marital sex permissible. To avoid licensing exploitation, one would have to drop the thesis that sex is exploitative, or argue that certain situations render it less likely to be so.

This suggests one possible development of Kant's account of marriage. A Kantian could agree that marriage, or mutual possession, is the only possible condition for use of one's sexuality, and make such an account consistent by explaining how this removes the immorality of sex. The defender would have to allow that in some situations, sexual use is compatible with treating another person as an end, as Kant does not. Such an account would also have to deal with the problem

of cashing out the notion of possession. This would prove a significant problem, since a Kantian would not want to allow that persons can ever be owned as things. Possession could be interpreted as a metaphor for sexual exclusivity, but it is hard to see how sexual exclusivity is sufficient to alter the moral status of sex. The Kantian might want to focus on how a relationship between two persons might change the content of one's maxims or intentions, so that sex is no longer use but bound up with the larger end of the relationship. I will look at such an account in Chapters III and IV.

A second way of developing Kant's account begins with his prudential, not moral, argument, although it is not unrelated. This is the thesis that marriage right protects individuals in a context of vulnerability. Sex and intimacy create special vulnerabilities which marriage provides some protection against by giving the spouses rights against each other. This account focuses on marriage legislation, not the morality of marriage as such. This account is also problematic. How far can the state protect the vulnerable without invading individual privacy? For instance, should all sexual relationships be accompanied by these legal rights? If not, how efficacious is marriage in protecting the vulnerable? I will take up this account too in the later chapters.

Finally, I wish to reject a third possible development of Kant's account. The prudential argument might be expanded as a claim that marriage legislation is justified as providing a protected arena for reproduction and stabilising the environment in which children mature. This account, however, is no longer an account of marriage. For much reproduction takes place outside of marriage, and marriages exist without reproduction or reproductive intent. A reproduction contract between partners -- although this leaves out single parents -- or between parent(s) and child might be justified for the purpose of protection, but this is distinct from the institution of marriage as practised in late twentieth-century society. If we wish to come up with an account of this institution which justifies its legislation, reproduction cannot be the *sine qua non* of marriage in our theory.

CHAPTER II: HEGEL'S ACCOUNT OF FAMILY MEMBERSHIP

So they loved, as love in twain
Had the essence but in one;
Two distincts, division none:
Number there in love was slain....

Property was thus appalled,
That the self was not the same;
Single nature's double name
Neither two nor one was called.[1]

1. Self and duty in Hegel's ethics
2. Marriage as ethical union
3. What kind of union is ethical union?
4. The threat to autonomy
5. The role of contract
6. Moral rationalism and the critique of rationality
7. Developing Hegel's account

Kant saw the defining moral feature of marriage as the joint possession of personal right. From a different perspective, feminists have argued that rights of a different kind should extend into the traditionally 'private' sphere of marriage and the family. Hegel attempted to refute Kant, and his reply prefigures modern communitarian responses to feminism. Both claim that individual rights are superseded, though not removed, by the higher virtues present in marriage. Hegel's account of the family moves beyond rights in that family membership ideally takes place on a level at which rights are inapplicable. While this account of marriage is problematic, Hegel's critique of Kant's ethics provides a resource for considering the

[1] Shakespeare, *The Phoenix and the Turtle.*

ethical value of marriage. Hegel gives the emotions a place in morality and attributes value to institutions which allow the appropriate systems of desire to develop.

Marriage occupies a crucial position in Hegel's political philosophy: it is the immediate phase of ethical life (*Sittlichkeit*), which in turn is the third, and highest, stage in Hegel's system. In ethical life, freedom becomes actual, manifest; and it is only in ethical life that individuals are able to achieve substantial freedom, which is their essence and aim.[2] Duty is the key to this fulfilment. Ethical life is the realm of duty, customary and habitual as well as moral. It is through the constraints of duty that the individual, though she may seem to lose her freedom, actually attains it, through the purification of the unchosen drives of the will and the firm acceptance of a particular self, a particular set of goals, motives, and values.

The *Philosophy of Right* charts the individual's psychological progress from the unlimited freedom of the arbitrary will to full personhood. In the former, she realises that she has a limitless choice of actions, yet has no basis for choice. In ethical life, by assuming a social role -- a nexus of duties -- she is able to bring herself into the world, that is, to act in a manner which she endorses. And the family is the immediate, or spontaneous, phase of this process.

In section 1, I will provide some background to Hegel's ethics. His account of the development of the will and the stages of right will be crucial to understanding his account of marriage. In section 2, I will describe Hegel's theory of marriage, the thesis of which is that spouses are subsumed into an ethical unity. Ethical unity will be the subject of Section 3. Sections 4, 5, and 6 will raise criticisms of Hegel's account: individual autonomy is superseded by ethical unity, the retention of contract as a morally significant feature of marriage is puzzling, and despite Hegel's critique of rationality, he is liable to charges of rationalism himself.

1. Self and duty in Hegel's ethics

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[2] See Hegel [1821], p. 189, par. 142; p. 192, par. 149.

In the tradition of Platonic Idealism, Hegel holds that the universe exists only in thought. The universe embodies spirit (*Geist*), which is "self-thinking thought or the self-knowledge of the universe," but it is also spirit thinking itself, manifesting or realising itself, like "a text in which God says what he is."[3] The world is developing to the point at which spirit is perfectly realised in it, the end of history. The system of right is the journey of history, and of the individual, towards the rational order in which spirit is fully manifest and in which human freedom is realised.

> The basis of right is the *realm of spirit* in general and its precise location and point of departure is the *will;* the will is *free*, so that freedom constitutes its substance and destiny and the system of right is the realm of actualized freedom, the world of spirit produced from within itself as a second nature.[4]

Becoming a substantially free person is a development towards spirit. This process tames the arbitrary will through "purification of the drives" and gives the will content through its assumption of the roles and duties of ethical life. The reflective will, which has mastered its drives and posited itself as its content, is free when it thinks itself "as identical with the will which has being for itself," which is "the universal will," spirit or the collective spirit of the age.[5] As the individual will travels along the asymptote to spirit, it becomes free. Hegel's ethics and political theory make sense without reference to spirit as a metaphysical entity.[6]

The ultimate goal of the will is to actualise the freedom inherent to it. Hegelian freedom is a type of positive freedom, for it is not the absence of restraints, but instead the development of personhood through integration into the ethical substance of the family, civil society, and most importantly, the state. This process frees the will from its drives -- indiscriminate urges such as hunger and thirst -- and so

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[3] Mills 1996a, p. 5 (first quote), and Taylor 1975, p. 88. Taylor translates *Geist* as 'God'; I will use 'spirit'.
[4] Hegel [1821], p. 35, par. 4.
[5] Hegel [1821], p. 135, par. 106.
[6] See Wood 1990 and 1991 for such an interpretation.

"from the subjectivity and contingency of their content." This ordering process "is the content of the science of right."[7] Hegel holds that what is usually called freedom, the ability of the undetermined, apparently unrestrained, will to choose among options, is not true freedom, because such choices are in fact determined by arbitrary factors:

> Since I have the possibility of determining myself ... I possess an arbitrary will, and this is what is usually called freedom.... [But] The choice lies in the indeterminacy of the 'I' and the determinacy of the content ... the will is consequently not free.... When I will what is rational, I act not as a particular individual, but in accordance with the concepts of ethics in general.[8]

Hegel, like Kant, holds that we only truly exercise our freedom in choosing what is rational.

Right is rational, and so it embodies our freedom: "*Right* is any existence in general which is the *existence* of the *free will*."[9] Right is also, in Hegel's terminology, 'universal'. 'Universal' describes a state in which all limitations are removed, as in "the pure thinking of oneself," and the "universal which has being in and for itself" is the rational.[10] But 'universal' also signifies collective social practice, as "the substance of self-consciousness, its immanent generic character or immanent idea; it is the concept of the free will as the *universal which extends beyond* its object."[11] Because Hegel holds that right is fully realised in ethical life, he argues that we are free when we internalise the practices of ethical life as the content of our wills. Subordinating our arbitrary will to ethical life saves us from the contingency of

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[7] Hegel [1821], p. 51, par. 19.
[8] Hegel [1821], p. 49, par. 15.
[9] Hegel [1821], p. 58, par. 29.
[10] Hegel [1821], p. 37, par. 5, and p. 55, par. 24. I will discuss the meaning of "in and for itself" below in section 3.
[11] Hegel [1821], p. 55, par. 24. See also Gauthier 1997, p. 8: "what is unique about actions within the context of society is their 'universal' (*allgemein*) character, that is, their function

arbitrary whims. However, Hegel's dictum, "What is rational is actual; and what is actual is rational," should not be understood to mean that whatever exists is rational, or that any communal way of life is ethical.[12] What is actual is what exists in a way which actualises spirit.

Hegel marks out three levels of the development of right, corresponding to the development of the individual will but also to the evolution of the human spirit through history. The first stage, abstract right, consists of formal right, and the person in this stage is a being with an ability to make arbitrary choices and the right to a dominion of property (including body and life) over which she can exercise her will. This corresponds to Kant's sense of personality, in which the person is conceived of as belonging to the rational and accountable order as opposed to the natural. In this sense, 'person' is taken from the Roman *persona*, defined as "man when considered in his social status," and used by Kant "to indicate the capacity of an individual to bear rights ... an individual ... considered as 'status' constituted by his or her community."[13] At the stage of abstract right, the individual is considered as holding the status of rights-bearer but still as separate from the social bonds of his community.

The next stage is morality, correlating to the individual as subject, whose consciousness is reflected back into herself. This is the level of subjective freedom, which is the individual's ability to form herself through her choices, and her consciousness of doing so. Morality is inadequate because it remains subjective rather than integrating with the objective good. Hegel criticises Rousseau's appeal to conscience, or what he calls subjective morality, in which judgements of right and wrong are made by the individual independent of society. On the contrary, the individual must assume his ethical duties and make ethical judgements in a social context, because the self exists in relation to others. Abstract right and morality, Hegel claims, are incomplete developments of human freedom and of right.

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within a meaningful system of social practices." See also Taylor 1975, pp. 113-4: the concrete universal is used by Hegel to mean "the reality of the collective spirit."

[12] Hegel [1821], p. 20. For a discussion of the distinction between 'actual' and 'existent', see Wood 1991, pp. 364-7.

[13] Roberts 1988, p. 55; he quotes from Moyle 1912, p. 86. See Kant [1793], pp. 21-3.

"Morality and the earlier moment of formal right are both abstractions whose truth is attained only in *ethical life*."[14] The freedom of the individual is only realised at the level of ethical life, in which right is embodied in institutions and shared customs.

Ethical life, in each of its three levels, family, civil society, and the state, is the existence of freedom, "the *Idea of freedom* ... which has its knowledge and volition in self-consciousness, and its actuality through self-conscious action."[15] In civil society, men exercise subjective freedom through economic transactions, and come to recognise their interdependence which is made explicit in the state. Here men recognise each other as free, so that their subjective freedom is protected, and as fellow members of the state. Each is in turn recognised by others, which enables his full self-realisation. In the state men form a universal will which allows them to recognise themselves in other men and so overcome the opposition between universality and particularity.

The family is the immediate phase of ethical life because it is held together by the same non-contractual bonds which characterise the state. Its ethical spirit of non-contractual, non-individualistic union reappears, after being dissolved in individualistic civil society, as the principle of the state. In families or the state, individuals define themselves as members whose involvement is a duty and integral to the will, not alien to it or contingent. But in the family these bonds are reinforced by ethical love, not law. Freedom is not the principle of the family, in part because it is the immediate stage of ethical life, not yet self-conscious. Men are not fully realised in it, but only in the state. But the family is crucial for the existence of the whole, since it is in the family that men -- as sons and husbands -- learn to belong to a non-contractual association. In this sense the family is the "model" of the state.[16]

Family membership is unreflective and so does not actualise the highest level of consciousness. Individual self-realisation is only fully achieved in the state. "Within the polis 'the community is that substance conscious of what it actually

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[14] Hegel [1821], p. 64, par. 33. See also pars. 141, 207, 209.

[15] Hegel [1821], p. 189, par. 142. I will not discuss the nature of the Idea of freedom -- whether it is part of an ahistorical human or spiritual essence or a historically contingent social construct. For discussions see Taylor 1975, pp. 80-94 and Wood 1991, pp. 378-391.

[16] See Westphal 1984, p. 77.

does', which is in opposition to the family as 'the other side' whose form is that of 'immediate substance or substance that simply is'."[17] The family is "ethical life in its immediate, relatively unreflective phase in which pristine universality is present, but in an unconscious (and therefore inadequate) manner."[18] The family embodies universality because it expresses the spirit of the collective, but it does not recognise this principle in itself. In the state, ethical life is expressed in definite structures of laws and institutions. In the family, it is not so defined and therefore unmediated by the representation back to the consciousness of its nature. Feminists have noted the implications of the immediacy of the family. Most notably, only men can fully realise spirit.[19]

Family membership, like the other roles of ethical life, paves our way to freedom by reconciling our desires with our duties. Hegel holds that we are free when we internalise the practices of ethical life as the content of our wills. In apparent paradox, he insists that duty is freedom: "A binding duty can appear as a *limitation* only in relation to indeterminate subjectivity or abstract freedom.... The individual, however, finds his *liberation* in duty." Subordinating our arbitrary will to the duties of ethical life saves us from the contingency of our drives. Duty also liberates the individual "from that indeterminate subjectivity which does not attain existence or ... action, but remains *within itself* and has no actuality."[20] Subjectivity remains locked within itself until it finds expression in reality and the recognition of others. Social roles are a way of imposing meaning on our experience, and the external world re-acts to support our interpretations.

Right consists of the actualisation of freedom in individuals within societies and states providing the conditions for this freedom. Individuals attain freedom when their desires are arranged so as to overcome the conflict between individual and community. The ethical takes the objective form of laws and institutions, and these laws are internalised so that they are "not something *alien* to the subject," but "*its*

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[17] Mills 1996b, p. 60; the quotes are from *Phenomenology of Spirit*, pars. 450 and 268.
[18] Cullen 1979, p. 73.
[19] See Mills 1996b; Pateman 1996; and Starrett 1996.
[20] Hegel [1821], p. 192, par. 149.

own essence."[21] The subject defines himself (e.g. as citizen) in a way which connects him to the universal. These duties are "substantial determinations," and the "inherently undetermined [individual] ... *stands in a relationship to them* as to his own substantial being."[22] Taking on ethical objective determinations is an ethical duty because only through them can the will be free. At the same time, Hegel does not disallow individual subjectivity: "The right of individuals to their *particularity* is likewise contained in ethical substantiality, for particularity is the mode of outward appearance in which the ethical exists."[23] Subjective right is preserved in civil society and the state.

The duties of ethical life effect three important reconciliations in the will on which the attainment of freedom depends. Particularity is reconciled with universality when the particular content of the will is also a universal determination, such as citizenship. Subjectivity is reconciled with objectivity when the individual's desire can be expressed in a way which others recognise and share. Determinacy is reconciled with indeterminacy when the will can understand its content as a determination chosen by the infinite, undetermined will and so recognise itself in its content.[24]

The arbitrary, "*immediate* or *natural* will" consists of crude appetite.[25] At this stage, the content of the will is contingent, but simultaneously, the will is infinite and undetermined, since it can be satisfied in multiple ways. The indeterminacy of the will is the capacity of the mind to abstract itself from its contents, "in which every limitation, every content ... is dissolved." A thinking being has "an ability to abstract from anything whatsoever, and likewise to determine himself, to posit any content in himself by his own agency."[26] Despite its inherent indeterminacy, the will must have some determinate content because it only exists "in so far as it makes any resolutions

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[21] Hegel [1821], p. 191, par. 147; see also p. 189, par. 144.
[22] Hegel [1821], p. 148, par. 191.
[23] Hegel [1821], p. 197, par. 154.
[24] See Hegel [1821], pp. 37-42, pars. 5-7.
[25] Hegel [1821], p. 45, par. 11; also see p. 46, par. 12.
[26] Hegel [1821], p. 37, par. 4.

at all."[27] Although we limit ourselves by willing particulars, and do so unfreely if caused to do so by the arbitrary will, we cannot be persons at all if we do not will anything particular:

> a will ... which wills only the abstract universal, wills *nothing* and is therefore not a will at all. The particular which the will wills is a limitation, for the will itself, in order to be a will, must in some way limit itself.[28]

Personhood requires that the will posit a content or particularity. But the content must be one which the will can recognise as its own, "by which it is not restricted but in which it finds itself merely because it posits itself in it."[29] In different terminology, the will affirms its content when its first-order desires are endorsed by its second-order desires as fitting into its plan of life.

Second, freedom requires that the particular content of the will, through thought, be "reflected *into itself* and thereby restored to *universality*." Here the will's infinity is returned to it, even in particularity, for its content is its own, chosen, and that content is also the universal: "[f]reedom is to will something determinate, yet to be with oneself in this determinacy and to return once more to the universal."[30] Particularity and universality are united because the particular ends of the will are at the same time universal, expressing and encompassing the collective social spirit.

Finally, the union of subjectivity and objectivity is a formal requirement of the freedom of the will. The end which is at first "only *subjective* and internal" to the individual is actualised and ceases to be limited to the individual by becoming objective.[31] An objective determination, which is an ethical duty, gives the will a particular content which is simultaneously a rational form of life recognised by the community. By being directed at goals which are part of a larger ethical community,

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[27] Hegel [1821], p. 46, par. 12.
[28] Hegel [1821], p. 40, par. 6.
[29] Hegel [1821], p. 41, par. 7.
[30] Hegel [1821], p. 42, par. 7.
[31] Hegel [1821], p. 43, par. 8.

our plans of life free us from the narrowness of the particularised will: "self-actualization ... includes also the actualization of the will's 'universality' ... we do not actualize ourselves fully *as individuals* unless we successfully pursue ends larger than ... anyone's individual good."[32] Freedom is only realised when the will becomes part of an ethical way of life. Community is not only significant because, through custom, it habituates the will into desiring to do its duty, but because the self exists in relation to others.

2. Marriage as ethical union

Hegel writes that in marriage (and the nuclear family) individuals form a larger union characterised by "rightfully ethical love."[33] Contending against views that marriage is essentially natural (i.e. sexual), sentimental, or contractual, Hegel claims that "[m]arriage is essentially an ethical relationship," and its "*ethical* aspect ... consists in the consciousness of this union as a substantial end, and hence in love, trust, and the sharing of the whole of individual existence."[34] Marriage, like the state, cannot be regarded as essentially a contractual relationship, since its essence is to overcome the self-sufficient contractual point-of-view. Hegel's account is explicitly intended as a rebuttal to the rights-based analysis of the marriage and the family found in Roman law and the contractual explanation given by Kant: "Marriage cannot ... be subsumed under the concept of contract; this subsumption ... can only be described as disgraceful."[35] Instead, "the substantial basis of family relationships is rather the surrender of personality."[36]

Hegel's chief claim is that "one is present in [marriage] not as an independent person but as a *member*."[37] The ethical content of marriage is the "identification of

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[32] Wood 1991, pp. 378-9.
[33] Hegel uses 'family' to refer to childless marriages as well as marriages with children.
[34] Hegel [1821], pp. 201-2, pars. 161 and 163.
[35] Hegel [1821], p. 105, par. 75.
[36] Hegel [1821], p. 71, par. 40.
[37] Hegel [1821], p. 199, par. 158.

personalities whereby the family is a *single person* and its members are its accidents."[38] Individual personality, and the rights which family members have *as* family members, are superseded by the union.[39] Hegel reiterates the point that spouses cease to exist independently and exist instead as members. They "consent to *constitute a single person* and to give up their natural and individual personalities within this union."[40] Marriage arises "out of the mutual and *undivided* surrender of personality" and "out of the *free surrender* by both sexes of their personalities."[41]

The union is brought about by the paradox which love produces and resolves. One limits oneself with reference to another but knows oneself through this very limitation. The consciousness negates itself, on the one hand, by limiting itself through a determination, but it is with itself again as it affirms its choice.[42] The union of marriage has existence as an ethical entity in itself, just as the state has existence as an ethical entity. The spiritual union is "indissoluble *in itself* and exalted above the contingency of the passions and of particular transient caprice."[43]

The idea that spouses form a union, relinquishing their individual personalities, is difficult to make intelligible. In the next section, I will attempt to make sense of the union which results from love's paradox. Then I wish to make three criticisms of this account. First, on the only plausible interpretation of spiritual union, marriage is an institution which necessarily threatens individual autonomy. Second, Hegel's attribution of ethical significance to the marriage contract is puzzling, given his view that the ethical value of marriage is not contractual. Third, his account locates the ethical value of marriage in the generic roles and duties it prescribes, with the result that natural feeling is inessential. Hegel's moral rationalism in fact undermines his own account of the ethical value of marriage.

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[38] Hegel [1821], p. 203, par. 163.
[39] See Hegel [1821], pp. 200-1 and 203, pars. 161-3. 'Family' is here used as Hegel uses it, as a broad term including childless marriages.
[40] Hegel [1821], p. 201, par. 162.
[41] Hegel [1821], p. 207, par. 167, and par. 168.
[42] See Hegel [1821], p. 42, par. 7A.

3. What kind of union is ethical union?

Hegel identifies the essence of marriage as ethical or spiritual union, the resolution which ethical love brings about. Ethical love is distinct from romantic or passionate love. Marriage should not be equated with romantic or passionate love, according to Hegel, "for love, as a feeling, is open in all respects to contingency, and this is a shape which the ethical may not assume."[44] Just as Hegel criticises Kant for reducing marriage to contract, he criticises the Romantics, particularly Schlegel, for identifying it with passion and the particularity of the loved one. Within the spiritual bond, sexual passion is subordinated to ethical love, and, *contra* Kant, this moment of marriage is not even necessary.[45] In marriage, the implicit ('in itself') union of the sexes is "transformed into a *spiritual* union, or self-conscious love," although this implicit union is not the chief potentiality realised by ethical love.[46]

Ethical union in marriage consists of the interdependence of personal identity and the surrender of the personality of abstract right. First, marriage as an objective determination limits the spouses' personalities (the undetermined wills of abstract right) so that their spousal roles are constitutive of their identities. Second, through a dialectic of recognition, each spouse depends on the recognition of the other for his or her self-consciousness. Third, the isolated personality of abstract right is relinquished, by which individual rights are relinquished and the good of each becomes the common good. Finally, marriage actualises the potential of the spouses, so that their development, and so their identity, depends on the marriage.

First, marriage is an objective determination of personality through an assumption of duty. Hegel's theory of personhood stresses the dependence of individual personalities on exterior sources. He claims, as we have seen, that one

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[43] Hegel [1821], pp. 202-3, par. 163. Despite this spiritual indissolubility, Hegel allows divorce although contingency is at odds with the "ethical substantiality" of marriage. See Hegel [1821], p. 213, par. 176.
[44] Hegel [1821], p. 201, par. 161.
[45] Hegel [1821], p. 204, par. 164.
[46] Hegel [1821], p. 201, par. 161.

attains freedom by taking on the determinations of right. Without this freedom, the individual is either a bundle of natural inclinations, an empty and undirected consciousness, or forced to depend on isolated subjective judgements. Through taking on a social role, that is, locating herself in society, the individual realises herself and overcomes these indeterminacies.

Identity can only be brought into being through a restrictive, and hence educative, socially provided self-definition. It is not inborn, but the assimilation of a ready-made set of values and duties. We become ourselves only through ethical limitation. Marriage is one such source of identity. Self-description involves specification of one's spouse as deeply and unalterably related to oneself. One's wife is central to who one thinks one is, just as one's nation is, but this has in the family a reciprocity unavailable at the national level. Marriage is not simply an extra self-ascription, but a source of individual identity, so that one can never be complete outside it.

Second, ethical love consists in "the consciousness of my unity with another, so that I am not isolated on my own, but gain my self-consciousness only through the renunciation of my independent existence and through knowing myself as the unity of myself with another and the other with me."[47] Self-consciousness exists in relation to others. This is the point of Hegel's famous parable of master and slave: "Self-consciousness ... exists only in being acknowledged."[48] In meeting the other, consciousness which is merely immediate, sunk into its own system of needs and desires, comes out of itself, then returns with a new self-apprehension: "They *recognize* themselves as *mutually recognizing* one another."[49] According to Hegel, self-consciousness comes into existence through action, but the agent can only understand the meanings of her actions through "the re-actions of others," and so "self-consciousness is utterly dependent upon its socially conditioned relationships with others in order to come to particular knowledge of itself."[50] The meaning of actions is determined by the meaning given to them by society: "the determinate

[47] Hegel [1821], p. 199, par. 158.
[48] Hegel [1807], p. 111, par. 178.
[49] Hegel [1807], p. 112, par. 184.

character of the action for itself is not an isolated content confined to one external unit, but a *universal* content containing within itself all its various connections."[51]

The consciousness of unity which defines ethical love is the consciousness of one's identity as a spouse, but it is also part of a dialectic of self-recognition. In marriage, spouses identify with the other so that they are incomplete on their own, but in gaining the recognition of the other, their own autonomy is reflected back to them.[52] But since the other's recognition is necessary for self-knowledge, the other becomes partly constitutive of oneself. Between the spouses, this unity exists in consciousness and so is still 'in itself'. Its physical realisation is found in the offspring of the marriage:

> The *unity* of marriage, which in substance is merely *inwardness* and *disposition* but in existence is divided between the two subjects, *itself* becomes in the children *an existence which has being for itself*, and an *object* which they [i. e. the parents] love as their love and their substantial existence.[53]

The marriage union realises the potentialities of the spouses, yet the union itself remains in a state of potentiality until it gains physical existence in the children.

However, this has not cleared up what Hegel means by saying that in marriage spouses agree to relinquish their individual personalities and constitute a single person. Because the spouses' identities are interdependent, they no longer think of themselves from the point of view of isolated individuals. Rather than simply gaining an extra source of identity, they have lost access to the individual standpoint and thus relinquished their individual personalities. If one gains one's self-consciousness from another, one can no longer think of herself simply in terms of 'I'. 'I' has become dependent on 'we'.

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[50] Gauthier 1997, p. 2.

[51] Hegel [1821], p. 147, par. 119. See Gauthier 1997, Chapter 1, for a discussion of Hegel's notion of collective moral agency.

[52] See Hegel [1821], p. 199, par. 158.

[53] Hegel [1821], p. 210, par. 173. Words in brackets are translator's.

One inadequate interpretation of Hegel's claim is that only (!) legal personhood is relinquished.[54] On this interpretation, what is relinquished is not individual personality, but the idea of oneself as a separate legal entity. But the alteration of consciousness which occurs in marriage, according to Hegel, is not limited to one's self-conception as a legal entity. One renounces one's "independent existence" and derives self-consciousness in its entirety through the union.[55]

Of course, as Westphal notes, the notions of love and trust presuppose difference, so that difference must survive marriage.[56] The notion of spouses' giving up their individual personalities in full would result in no content, for if both gave up their individual ends and preferences in order that their identities may converge, there would no longer be any self for the other to meet. Hegel does not imply that one's particular tastes, reactions, and other accoutrements of individuality are lost in the surrender of personality. But he does imply the surrender of more than *legal* personality: 'person' technically refers to the object of abstract right.[57] 'Personality' (which spouses surrender) refers to the subject's "consciousness of itself in general as concrete and in some way determined ... [and] as a completely abstract 'I' in which all concrete limitation ... [is] negated."[58]

It seems clear that 'person' is used in the sense of the person of abstract right: marriage as an objective determination limits the inherently undetermined personality, determining the content of the 'I'. Spouses do not simply surrender their legal rights, but they bind their "*infinite*, *universal*, and *free*" wills, surrendering personality in its

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[54] Westphal takes this as obvious: he quotes Hegel, "one's frame of mind is to have self-consciousness of one's individuality within this unity as the absolute essence of oneself, with the result that one is in it not as an independent person but as a member," and adds, "It is quite clear that Hegel here uses 'person' in its legal sense." Westphal 1984, p. 87 and fn. 20; he quotes Hegel [1821], par. 158. At the crucial point in the passage Westphal quotes -- "not as an independent person" -- Hegel's German reads "eine Person für sich." The German 'Person' is equivalent with the English 'person', and is customarily used by Hegel to refer to the individual in abstract right -- not just to the individual's legal rights ('legal personhood') but to his consciousness in the particular stage of development that constitutes personhood and is the ground for his legal rights.

[55] Hegel [1821], p. 199, par. 158.

[56] Westphal 1984, p. 89.

[57] Hegel [1821], p. 228, par. 190.

[58] Hegel [1821], p. 68, par. 35.

aspect as the ability to abstract oneself from any situation whatsoever.[59] They also give up the isolated individualism of the personality of abstract right, which has limited itself by marriage in such a way as to connect it to the universal.[60] Compare this passage which describes the freedom attained when the will has progressed from the person of abstract right to the self-determining subject of morality to the citizen (or wife) of ethical life:

> [W]e already possess this freedom in the form of feeling, for example in friendship and love. Here we are not one-sidedly within ourselves, but willingly limit ourselves with reference to another, even while knowing ourselves in this limitation as ourselves. In this determinacy, the human being should not feel determined; on the contrary, he attains his self-awareness only by regarding the other as other.[61]

This interpretation of 'person' as 'person in abstract right' not only corresponds more closely with Hegel's customary usage than the interpretation as 'legal person', but it makes much more sense. Ethical life represents the stage of development at which the will is limited and reconciled with its limitations, and marriage is the first stage of ethical life.

As a result of the relinquishment of the isolated individualistic viewpoint of abstract right, the differentiation between persons fade, to an extent, within the family. Trust is

> the consciousness that my substantial and particular interest is preserved and contained in the interest and end of an other ... and in the latter's relation to me as an individual. As a result, *this other immediately ceases to be an other for me*, and in my consciousness of this, I am free.[62]

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[59] Hegel [1821], p. 68, par. 35.
[60] See Hegel [1821], p. 42, par. 7A.
[61] Hegel [1821], p. 42, par. 7A.

Spouses are unified because they have abandoned the standpoint of individual personality. When this reconciliation between the individual and the larger association is repeated in the state, subjective freedom and the legal personality are preserved.

It might seem odd that family members should surrender their abstract personalities, when in the state, subjective freedom is preserved. But while, like marriage, citizenship constitutes an objective determination of the will, it does not require the surrender of abstract personality. In marriage, the personality of abstract right does not just receive a limitation, but is surrendered as a result of the dispositional state of ethical love, that is, the derivation of consciousness from the other.

A person has self-consciousness "*within this unity* [of marriage] as essentiality which has being in and for itself, so that one is present in it not as an independent person but as a *member*." This is so because the family's determination is "the spirit's *feeling* of its own unity, which is *love*."[63] To make sense of this we have to understand Hegel's terminology. That which is *an sich* (in itself) is the Idea, still unrealised, which contains the seeds of its essential nature (Hegel uses the Aristotelian plant metaphor). What is *für sich* (for itself) is the Idea "exteriorized," realised in the external, physical world. But at this stage its self-identity is lost because its self-consciousness is submerged in physical matter. When it becomes *anundfürsich* (in and for itself), spirit's self-consciousness returns to it in its physical realisation, so that it comes to self-knowledge within "fully developed external reality."[64]

Marriage realises the individual's essence as a married self, which was 'in itself', as yet unrealised, until she married. When she becomes conscious of her married self as "essentiality which has being in and for itself," she sees that her individuality always inherently contained this essence which has now been realised. And so she is present in marriage "not as an independent person but as a member."

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[62] Hegel [1821], p. 288, par. 268, my italics.
[63] Hegel [1821], p. 199, par. 158.

Because one only comes to existence through marriage, that is, one's potentiality is only actualised in marriage, one's existence depends on the union.

Both husbands and wives realise their potential in marriage, though women's development stops at this point while men's continues in civil society and the state. Note that, at least for men, other determinations play similar actualising, and therefore ethically necessary, roles. Due to its rational nature, the state's existence is a necessity and men's membership in it an ethical duty. Just so, the institution of marriage is ethically necessary and membership in it an ethical duty.[65]

Ethical union is *ethical* because this type of association reconciles the individual to the larger community, in this case, the community of the family. The reconciliation does not depend on contingent, transient passion, but a love which because it is ethical is removed from contingency. Marriage is the immediate moment of ethical life, the natural and unmediated form of non-contractual association. The role of marriage in determining the will in accordance with the universal makes it, according to Hegel, an objective determination, or ethical duty.

The overcoming of subjectivity plays a significant part in the realisation of right:

> Ethical life depends upon marriage because marriage is the origin of the family. In the family, children learn, and adults are continually reminded of, what it means to be a small association based on love and trust; ... they gain experience of a noncontractual association and so are prepared -- or, rather, men are prepared -- for participation in the universal public sphere of the state.[66]

However, marriage has ethical significance as a non-contractual association even when children are not produced by it. Husbands as well as sons internalise the spirit of unity. In marriage, what a spouse is prompted to do by inclination converges with

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[64] Taylor 1975, p. 112. Knox translates *anundfürsich* as 'absolute'; Hegel [1821], Translator's preface, p. xxxix.

[65] See Hegel [1821], p. 201, par. 162.

his spousal duties, but he also develops the inclinations of trust and mutuality which are foundational to the political order.

Marriage is an ethical duty because it determines identity in a way which lifts the self out of its narrow interests. It overcomes subjectivity and purifies the drives of the will. It is a limitation in that spouses "give up their natural and individual personalities within this union ... but since they attain their substantial self-consciousness [the union of objectivity with subjectivity] within it, it is in fact their liberation."[67] It liberates spouses from one-sided indeterminacy and from narrow particularity.

Marriage is valuable, to Hegel, as a non-contractual association which determines the will in a way harmonious with the demands of ethical life, that is, in a universal determination. Its status as a social institution is also relevant in that this status gives objective meaning to its roles and duties. Hegel writes that "no one aspect [of marriage] on its own constitutes the whole extent ... of its ethical character -- and one or other aspect of its existence may be absent, without prejudice to the essence [i.e. the ethical union] of marriage."[68] Sex and procreation are part of the ethical aspect of marriage, but are not necessary for it to have ethical value (though Hegel certainly suggests that the physical intimacy of marriage is a route to the merging of identities).[69]

4. The threat to autonomy

As a consequence of the surrender of the personality of abstract right, spouses become one person in terms of rights and property ownership. Hegel specifies that "the family's resources ... are common property, so that no member of the family has particular property, although each has a right to what is held in common."[70] In giving

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[66] Pateman 1996, p. 215.
[67] Hegel [1821], p. 201, par. 162; and see p. 189, par. 144.
[68] Hegel [1821], p. 204, par. 164.
[69] See Hegel [1821], p. 200, par. 161; p. 210, par. 173.
[70] Hegel [1821], p. 209, par. 171.

up their personality they give up their personal right. Material wealth belongs equally to each family member, as if they were only one person. Equal ownership is possible because the rights-bearing individual who belongs to the sphere of abstract right is superseded in the family by the role-embedded person of ethical life.

In a functioning family, the terminology of rights is unnecessary:

> the *right* which belongs to the *individual* by virtue of the family unit ... takes on legal form ... only when the family begins to dissolve. In this situation, those who ought to be members ... receive separately and in a purely external manner -- [in the shape of] financial resources, food, costs of education, etc. -- what was formerly their due as a determinate moment within the family.[71]

The performance of family duties is motivated by virtue or love, not respect for abstract right. Further, the concept of right is insufficient because the child (for example) does not have an external right against the parents' resources. The resources are her own, as a member of the family unit. This analysis extends to other types of individual rights, the liberties required by personality to one's body and life.[72] These rights continue to exist in family life, but they are not relevant. Hegel assumes that in a functioning family a member does not think in terms of the others' right not to be harmed, but rather in terms of what they need, desire, and would benefit from, just as she thinks of herself.

The surrender of legal personality follows from the surrender of abstract personality, from the surrender of the individualistic viewpoint. The family constitutes a single person in law because its members have lost the abstract personalities on which legal rights supervene. This presents a threat to autonomy. In Hegel's account, the loss of abstract personality explicitly deprives women of legal

[71] Hegel [1821], p. 200, par. 159.
[72] Hegel [1821], p. 71, par. 40.

rights. Hegel holds that only women relinquish their legal personalities in marriage, for the husband becomes the legal representative of the family.[73]

Like Kant, Hegel is curiously ambiguous here. He states explicitly and repeatedly that both spouses give up their personalities to the union. Both parties "feel deficient and incomplete" on their own, and "gain ... self-consciousness only through the renunciation of independent existence and through knowing [themselves] as the unity" of both.[74] But it is the husband who represents the family in the outside world and controls its resources. This means, in effect, that the assertion of shared ownership is a claim without consequences, for the wife cannot access her property against her husband's wishes. She cannot cite a right to it, as rights are inapplicable in this context. Hegel fails to provide for the equality of which he speaks as belonging to the members of the family. He does not in fact support actual equality because he believes the sexes have different abilities: man is volitional, woman emotional. Hegel conflates the single person which the family constitutes with the male head of household.

Spouses give up their rights to each other, but the wife gives hers up to the husband -- so he has his own back, as well as hers. But on an egalitarian conception of the sexes, this simply will not work. Since neither spouse is superior, neither gains both sets of rights, but both yield their rights before the other. And this results in a real disadvantage for each. The loss of rights is clearly unacceptable. It would be unacceptable from the point of view of someone committed to a rights-based approach to moral theory, and, if the theory of marriage is to underpin its legislation, in political theory.[75]

But it is more broadly unacceptable than that. Hegel wishes marriage to be valuable to the participants. It must have value for them since it reconciles their individual desires with the needs of the community. But for marriage to structure someone's desires, he must internalise either a desire for it or a belief in its value.

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[73] Hegel [1821], p. 209, par. 171.

[74] Hegel [1821], p. 199, par. 158. Roger Scruton suggests that this description of love is of sexual love (Scruton 1986, p. 1).

[75] For example, it was the doctrine of spousal unity which underpinned coverture, and afterwards of the impossibility of marital rape.

Hegel's beliefs about the sexes enabled him to think that marriage could have value for a woman even though it removed her independent rights, so he was able to reconcile the demand that marriage be valuable with its removal of the basis for rights. The representation of spouses as a single person cannot survive if it is also held that the spouses are equal persons, neither of whom is subordinate or assimilable due to inferiority.

This issue is a significant difficulty for Hegel. In his account wives lose their identity in marriage. But if we assume that women and men are equal in all morally and politically relevant ways, and then follow his reasoning, it still turns out that either one or both of the spouses must lose his or her legal identity. This state of affairs is only desirable on the thesis of sexual inequality, in which women lose nothing by losing themselves in the family, and men are able to leave the family to gain their substantial personality. Otherwise it clearly threatens an important human good. If marriages are valuable, their essential nature should not be such as to diminish this good. If independence is an important prerequisite for human happiness, then its loss in marriage will be a loss of value.

It may be that marriage must deprive at least one spouse of a basic good. Perhaps the thesis that it is valuable for the individual will have to go, rather than the doctrine of spousal unity. But there is no good reason to accept that doctrine. First of all, it is metaphysically mysterious how a person can ever give up her abstract personality. Second, if it becomes impossible to say that spouses give up their moral or legal personhood, what is it that they give up? Spouses retain their separateness. In fact, as already noted, marriage is built on difference. This last point shows that the thesis of spousal unity does not correctly describe marriage. Hegel's account, in which individual identity is submerged in marriage, does not only fail to preserve individual autonomy, it fails to deliver a satisfactory answer to the question of what makes a marriage good. Trust and love, while drawing people together, both presuppose the separateness of selves.

5. The role of contract

In the marriage union, spouses transcend the standpoint of contract, as citizens do in the state. Marriage "begins from the point of view of contract -- i.e. that of individual personality as a self-sufficient unit -- *in order to supersede it.*"[76] But this makes it unclear why marriage should begin in contract at all. Marriage cannot be essentially contractual, since persons cannot exchange rights over themselves through contract.[77] Contract cannot bring about ethical union. So why retain the contract as ethically necessary? Carole Pateman asks this question and concludes that Hegel retains contract in order to maintain the fiction that everyone, including women, participates in freedom, when in fact women's entry into the contract is far from free.[78] But my question is not so much why Hegel is so inconsistent, but what the inconsistency means for the interpretation of his account of marriage.

There is a significant inconsistency in Hegel's account. The individual will continues to exist in contract.[79] But what the will decides in the marriage contract is to surrender itself to the determination of marriage. As Mill pointed out in *On Liberty*, freedom of contract is inconsistent with the ability to contract away one's freedom; can the will decide to unify itself with another and surrender its independence? In Hegel, one simply can't do so through contract. One can't give oneself but only something external, a service or alienable thing.[80]

We come to a dilemma: Hegel argues that contract cannot effect the kind of marital union he describes (one cannot give up abstract personality, or rights over one's self, through contract). Then, if ethical union exhausts the ethical essence of marriage (as Hegel suggests it does in paragraph 163), contract is inessential to the ethical value of marriage. Or else, if we insist on contract as a necessary condition of the ethical value (not just legal establishment) of marriage, spiritual union is not the

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[76] Hegel [1821], p. 203, par. 163.
[77] See my Chapter I.5, for a discussion of Hegel's criticisms of the contractual account of marriage.
[78] Pateman 1996, pp. 211, 217.
[79] Hegel [1821], p. 109, par. 79.
[80] Hegel [1821], pp. 70-2, par. 40.

sole ethical value of marriage. That is, contract is another source of the ethical value of marriage. But Hegel has said that it is not. Hegel tries to explain away the dilemma -- between contract as source of ethical value and spiritual union as exhausting ethical essence -- by attributing the significance of contract to the role it plays in spiritual union. But it cannot play any role in spiritual union!

Hegel writes that the significance of the marriage ceremony is not, as Kant held, that the ethical value of marriage flows from the rights created by the contract, but that the ethical bond is expressed in language and created by the spouses' consent and the recognition of the community. The "objective origin [of marriage] is the free consent of the persons concerned, and in particular their consent to *constitute a single person* and to give up their natural and individual personalities within this union."[81] This consent takes the form of a contract. But it's unclear why contract plays a role in the ethical value of marriage.

Hegel wants to say that contract is more than a merely legal formality, which would add nothing to the ethical value of marriage but is a useful instrument for state regulation: "It is accordingly only after this ceremony has *first taken place* ... that this bond has been ethically constituted."[82] Hegel tries to import contract as a necessary condition for the ethical value of marriage, not just an inessential instrument. Hegel states emphatically, against sexual liberals such as Schlegel, that the formal consent of the parties and its recognition by the community are necessary to complete a marriage.

Now, either contract is a necessary condition for the ethical value of marriage, or it isn't. But Hegel seems to have it both ways, because he also explicitly argues that contract cannot be the source of the ethical value of marriage. If it isn't the source (or a necessary condition for the source), it can hardly be a necessary condition for the ethical value of marriage. And since the source is ethical love, it's difficult to see why a contract could be a necessary condition for the source. After all, the same type of ethical relation exists in the state, without a contract. In trying to show that it is a necessary condition for the ethical value of marriage, he appears to

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[81] Hegel [1821], p. 201, par. 162.

contradict his earlier statements that it is not the source of the ethical value, as well as his arguments for that position.

The role which contract plays in establishing the ethical value of marriage is the completion of its substantial aspect by the sign, that is, by language. But in Hegel's theory of contract, the sign is used to give existence to a contractual agreement as a representation of the common will.[83] Just as the sign effects the transfer of property which may not yet be in actual possession, it effects the bond between spouses. The intention of the common will is secured and made actual through the sign.

Yet in contract, the sign binds wills which may prove recalcitrant to performance of that which the common will has agreed. Despite the agreement, the particular wills of the parties may be refractory. But marriage, according to Hegel, unites the wills of the spouses. How then could their wills be recalcitrant? Of course, the spouses may change their minds. But then in what sense is their common will as a married couple different from the common will of contract? How can the union Hegel imagines exists in marriage originate through contract? He has specifically argued that it cannot. In contract, "my will retains its determination as *this* will."[84] He explicitly states that marriage, like the state, cannot be understood as contractual.

Making sense of the role contract plays in creating ethical union illuminates Hegel's account. Ethical union is reconcilable with contractual origin because the spouses commit themselves to conjugal roles, not to each other. They cannot give themselves into each other's possession through contract, but they can contract to take on a set of duties. The point of the contract in Hegel's account is communal recognition of the relationship which the parties are entering. In this ceremony the "bond is expressed and confirmed as an ethical quality exalted above the *contingency* of feeling and *particular inclination*."[85] The bond is raised above natural or particular feeling to the substantial. The contract seals the bond by committing the spouses to the roles and duties of husband and wife.

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[82] Hegel [1821], p. 204, par. 164.
[83] Hegel [1821], pp. 104-113, pars. 72-80.
[84] Hegel [1821], p. 103, par. 71.

This shows how contractual origin is possible for ethical unity. The spouses are pledging to take on the roles of husband and wife rather than giving themselves to the other. They are contracting to take on a status, a curious contract, but not an incoherent one. The relation entailed by the status supersedes the contract because it is not the sort of relation which contract can instantiate. But note the shift of emphasis: the spouses are not pledging themselves to each other, but pledging to take on the status of wife or husband relative to the other. Notice too that all of the components of ethical unity -- self-definition in terms of the role, the realisation of potential, and the derivation of self-consciousness -- also attach to generalised roles rather than a particular relation to a particular other. This explains the contractual origin of marriage, but it also makes it apparent that Hegel devalues the emotional aspect of marriage, for ethical love is the assumption of a generalised role rather than a particular relation to a particular other.

6. Moral rationalism and the critique of rationality

While Hegel's system recognises the ethically motivational power of emotion, his account of marriage fails to attribute ethical value to the natural emotion of individuals for particular others. Ethical unity is based not on particular feeling for the other but on the assumption of the role of husband or wife which entails specific duties. The basis of family unity is not sentimental, according to Hegel, "for love, as a feeling, is open in all respects to contingency, and this is a shape which the ethical may not assume."[86] Natural feeling inclines husband and wife to perform their duties, but the value of their association does not spring from love in the sense of natural or sentimental feeling. Ethical value springs from the nature of the family as a non-contractual association which develops the ethical spirit of the community. Hegel argues that marriage incorporates a bond like the trust between citizens, except that its basis is emotional. A sense of identity arises between spouses through a

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[85] Hegel [1821], p. 204, par. 164.

spontaneous feeling of unity, rather than being enforced through law. But ethical love is a different state than a spontaneous feeling of love. It is identification with a duty which moulds emotional life rather than an individual's contingent feelings for her particular spouse. Insofar as the spouses' mutual recognition is immediate, and so gives rise to natural feeling, it is not ethical: the ethical aspect of their relation consists in "dutiful reverence of husband and wife towards each other."[87]

For the wife, the particular must not enter into the ethical aspect of marriage: "In the ethical household, it is not a question of *this* particular husband, *this* particular child, but simply of husband and children generally; the relationships of the woman are based, not on feeling, but on the universal."[88] This applies to the husband too, but he is permitted to desire his wife as a particular woman because he can connect to universality in the wider sphere of the state. As a mother and wife, as object of desire and as somehow "evanescent" (in both of these roles), the woman is a particular individual who is "for that very reason a contingent element which can be replaced by another individual."[89] The role is the ethical substance; the particular individual is replaceable.

But what is ethical love, which does not focus on the particular husband or child? It is 'sentimental' love removed to the ethical realm, removed from contingency, no longer spontaneous, and made the tool of duty. This is no longer love at all, but an act of will. Hegel's account by excluding contingency excludes 'natural' love. This reflects his moral rationalism: emotion is only valuable insofar as it is inhabited by reason, whose actualisation in individuals and society is the true source of ethical value. Hegel tries to analyse "the arrangement of institutions and practices that would make ... a coincidence [between universal law and particular will] likely to occur."[90]

My aim here is not to criticise moral rationalism, but to point out a flaw in Hegel's account of marriage. Hegel's picture is something like this: The family

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[86] Hegel [1821], p. 201, par. 161.
[87] Hegel [1807], p. 273, par. 456.
[88] Hegel [1807], p. 274, par. 457.
[89] Hegel [1807], p. 274, par. 457.
[90] Gauthier 1997, p. 28.

figures as the immediate phase of ethical life, the natural face of duty, because its obligations are honoured spontaneously. One does not fulfil these obligations simply because they accord with one's self-image, but because one authentically desires to. Desiring to do so is part of one's identity. This notion obviously needs qualification: a spouse may desire to break her pledge of fidelity, a mother may desire to spend her money on herself rather than her child. But the essential point, that the performance of family duties is motivated by feeling, survives these qualifications, for there is a clear contrast between providing food and shelter for one's children and paying one's taxes. Both, according to Hegel, are species of duty, but in family life duty is encouraged by one's emotions, whereas in the state it is promoted by the law. Hegel explains the naturalness of performing duties within the family as an effect of the merging of selves which takes place between family members. What's wrong with this picture is that ethical love cannot reconcile desire and duty. Ethical love is divorced from natural emotion, so it is not a desire inhabited by reason. It is not a desire at all, but a attitude appropriate to a role. As the essence of marriage, ethical love cannot actualise freedom, since it is not authentic desire. Of course, it is mixed with natural desire. But it is ethical love which is meant to do the work of reconciling desire with duty, since natural feeling is always contingent.

The integration of duty and desire is significant within Hegel's ethics as the source of freedom. The recognition of inclination as ethically valuable forms a distinctive component of Hegel's critique of Kant's ethics. Hegel thinks, as Kant does not, that universal law can be embodied in the particular will. The alignment of inclination and right is not just instrumentally valuable, in predisposing individuals to perform duties, but it contributes to freedom and to the realisation of right. When people internalise ethical life, their particular wills are reunited with the universal. The performance of duties ceases to represent a limitation and instead becomes an acknowledgement of one's freedom as a rational and social being: "*concrete freedom* requires that personal individuality ... should ... knowingly and willingly acknowledge this universal interest even as [its] own *substantial spirit*, and *actively pursue it* as

[its] *ultimate end.*"[91] The conflict between the individual and the community is happily resolved, since ethical conduct "fulfills me through satisfying society's demands on me. It takes care of my interests ... and it leads me without reluctance ... to help those to whom I am bound by concrete ethical relationships."[92] On the other hand, right is not fully actualised unless expressed in the desires of individuals: "the universal does not attain validity or fulfilment without the ... volition of the particular."[93] Not only does individual freedom depends on the unity of desire and duty, but so too does the existence of right: "'right' fully exists if and only if it is integrated into the emotional life as a functioning social whole."[94] But ethical love is not rooted in emotional life.

Freedom and the realisation of right follow from the embodiment of the universal in individual emotional life. Nevertheless, Hegel has been criticised as a moral rationalist, identifying morality with reason and devaluing emotion.[95] Indeed, Hegel does not attribute ethical value to emotional experience in itself. We saw that Kant identifies the moral value of marriage in reconciling sexual use with human rational nature, corresponding to the emphasis throughout his ethics on human rationality as the source of the moral law and of human moral agency. Kant's view can be accused of over-moralisation, that is, of being unable to acçount for certain kinds of value because it assigns moral worth only to moral motivations. Thus, for instance, a Kantian might explain a painter's devotion to his work as morally worthy because of the moral duty to develop talents. Kant can also be accused of over-rationalisation since he attributes moral value only to acting out of reason. Hegel gives the emotions a place in ethical life. As we have seen, Hegel locates the ethical worth of marriage in its non-contractual nature, corresponding with the larger thesis of the *Philosophy of Right.* But he still does not locate value in particular emotional responses.

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[91] Hegel [1821], p. 282, par. 260.
[92] Wood 1991, p. 381.
[93] Hegel [1821], p. 282, par. 260; see also pars. 124, 130, 187, 260, 263, 268.
[94] Gauthier 1997, p. 103, and see p. 28. See also Cullen 1979, pp. 94-5.
[95] See Gauthier 1997, pp. 109-11 for analysis of the charges.

While ethical life preserves subjective freedom, the highest stage of ethical development is communal, and in this sense Hegel is an anti-individualist, for his ethic of self-realisation involves transcending individualism. While Kant held up the cultivation of reason as the method of self-realisation, Romantics claimed the development of feeling was more important. Kantian self-realisation involves a universal self, a self motivated by reason and morality, which will be constant in all the individuals who embody it. The Romantics, on the other hand, aim towards development of the individual's particular faculties, especially those of the emotions.

Hegel accepts Kantian rationality although he criticises it as limited. However, he also criticises the Romantic emphasis on feeling. The Hegelian notion of self-actualisation is development towards spirit, so that particular emotional and personal development is of ethical value only insofar as it converges with dutifulness. Conjugal love is valuable in terms of the correspondence of the roles and duties it provides to reason, not on its own account. Lacking an ability to value emotion as it is actually experienced by particular human beings, Hegel's theory cannot locate the ethical value of marriage in the emotions which are central to it. Ethical love, as he has it, is but a dutiful revenant of these feelings.

7. Developing Hegel's account

Despite its failings, Hegel's account, in its focus on the psychology of marriage, was a substantial contribution to the philosophy of marriage. He drew attention to the internal and emotional aspects of marriage, its state of mind, and turned attention away from the marriage contract and the rights it creates. This is not to say that rights terminology is inapplicable: over the past decades, feminists have drawn aside the traditional veil of privacy shielding marriage from public scrutiny and legal jurisdiction. Rights are crucial within marriage, not least to protect spouses from each other. But the rights accounts which Hegel dismissed, those found in Kant and in Roman law, understood the right central to marriage as a right of possession

(in Roman law, of the husband over the wife). Also, a rights-based account *alone* fails to differentiate marriage from other types of institution and to explain why it is an end in itself, not a means to some other goal. Hegel's theory is able to include the strong psychological bonds that characterise marriage in an account of its value. By avoiding the external concepts of contract and rights, he concentrates on the unity of spouses rather than emphasising their ultimate separateness.

Hegel's account can be developed in various directions. The first is a neo-Hegelian account of the moral value of marriage in terms of natural and sentimental love. Such an account would have to attribute value to natural love, similar to that given by proponents of an ethics of care. In Chapter IV, I will argue that care ethics is inadequate and that a care-centred account of the moral value of marriage, which attributes intrinsic value to love, likewise fails.

In Chapter III, I will make positive use of the 'virtue' aspect of Hegel's account. This is the claim that family membership prepares individuals for relationships of commitment and trust in the world outside the family. This attributes instrumental, not intrinsic, ethical value to love. I wish to show that, while this account of the value of marriage shares some features with communitarianism, a liberal can accept it as a reason for marriage legislation.

One could also develop Hegel's account by attempting to rewrite it without Hegel's sexist premises. Hegel believed that women's ethical nature was unreflective so that they were limited to the inadequate sphere of the family. If the premise that women's ethical nature is unreflective is subtracted, then what role does the family play in ethical life? Could it cease to be inadequate, or, when women seek to actualise their freedom as men do, must the family dissolve?

Finally, how must the family be changed in order to correspond to right? Social practices must meet the criteria of right or the ethical development of the society and its members is limited. In a slave-owning society, for instance, true recognition of the value of human beings cannot occur. If Hegel's belief that women are subordinate to men is removed, then the institution of marriage, as he has it, would look very much like slavery. It would then require further developments in order to realise the universal, although Hegel would not call on the state to intervene

to effect this change. However, insofar as the family is a legal and not just a social institution, its legal structure could be made more rational. A Hegelian could develop Hegel's account of marriage in this third direction. However, as I will seek to show what legal structure marriage must have in a liberal state, I will lay this task aside.

CHAPTER III: THE MORAL VALUE OF MARRIAGE

1. Claims for the value of traditional marriage
    i. Marriage and morality
    ii. Citizenship
    iii. Society
    iv. Children
2. Other accounts
3. Kantian accounts
4. Hegelian accounts
5. Aristotelian accounts
6. The rationale of marriage law

Kant's discussion of marriage in *The Doctrine of Right* attempted to show that the political institution of marriage is morally required as a precondition of procreation, just as he had earlier demonstrated the moral necessity for legal property rights as a precondition for ownership. In this chapter, I will argue for the justification of the legal institution of marriage in terms of its moral value. I will discuss the moral value of the institution of marriage independently from its legal status (until section 6). I will claim, first, that an individual marriage has no 'added' moral value above the moral value of the relationship itself. However, given that this type of relationship does have moral value (as I will argue here and in Chapter IV), the institution of marriage is morally, and politically, valuable just insofar as it promotes or enables relationships like these. I will argue, in section 6, that marriages are necessarily constituted as state-recognised contracts. Given this, the legal institution of marriage is justifiable, as the state has a legitimate reason to recognise

marriage, and as the institution depends on this recognition. Unlike Kant, I will not argue that marriage legislation is morally necessary, but rather that the institution of marriage plays a socially valuable role which it can only perform with the backing of the state.

In this chapter, I will survey several attempts to attribute moral value to marriage. Then I will develop the previously suggested possibilities of Kantian and Hegelian accounts of marriage. I will defend a virtue account of the moral value of marriage. In the next chapter, I will argue against the 'care' account of the moral value of marriage and offer an alternative account of the moral value to be found in the relationships promoted by marriage. A fuller consideration of marriage and gender inequality will be pursued in Chapter VI.

1. Claims for the value of traditional marriage

What I will refer to as the traditional marriage contract is the marriage law of Britain and America from the 1880's to the 1970's, that is, marriage as a monogamous, heterosexual, ideally lifelong institution. This form of marriage has been defended as morally and instrumentally valuable. In this section, I will examine some of these claims.

The value attributed to marriage and its effects on society have been used to justify marriage legislation, as in the following ruling:

> [Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and

> of society, without which there would be neither civilization or progress.[1]

Traditional marriage has been claimed to contribute to social stability and public morality. From this viewpoint, easy access to divorce and the prioritisation of individual fulfilment over duty in marriage have been said to lead to a range of social ills, from undisciplined children to poor single-parent families to a breakdown of communal bonds.

Both instrumental and intrinsic value have been attributed to traditional marriage. Instrumental value has been claimed for the effects which it has on society or the benefits which accrue to the state from the institution. This claimed instrumental value of marriage legislation encompasses "promoting public morality, ensuring family stability, assuring support obligations, and assigning responsibility for the care of children."[2] The instrumental economic value of marriage derives from the fact that it shifts obligations of support to spouses, not the state. The work done by parents can also be included in marriage's economic value. However, these benefits could be achieved through many different kinds of legislation (such as the Poor Law) and in any case do not seem to amount to *moral* value.

Claims for the instrumental moral value of traditional marriage do not rest on its economic benefit, but on the contribution made by the practice to social stability or public morality. One claim is that marriage has instrumental value which supervenes on an intrinsic moral value, so that the legal institution promotes a form of life good in itself. This presupposes that traditional marriage has intrinsic moral value, that it is itself a morally good form of life -- or, even stronger, that it is the only

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[1]Maynard v. Hill, 125 U.S. 190, 211 (1888), quoted in Weitzman 1974, p. 1242. See Freeman and Lyon 1983, pp. 184-9, for rulings in British law based on the claim that restrictive marriage law safeguards public morality.

[2] Weitzman 1974, pp. 1242-3.

condition in which sexual intercourse is morally permissible.[3] A particular marriage is not only morally valuable in itself, but it also serves as a model of this form of the good life for the rest of society. This comes under the heading of promoting public morality and is dependent on the claim that it is morally valuable in itself. A second claim is that it has an instrumental value independent of any intrinsic value it has, in promoting social stability or fostering associative bonds.

In this section, I will look at arguments focusing on traditional marriage (heterosexual, monogamous, with an aspiration to permanence), as opposed to rights-based, virtue, or care approaches to establishing the moral value of institutions with certain features resembling those of marriage.[4] I will survey claims that traditional marriage is an inherently valuable form of life (and so promotes public morality), then look at two versions of the claim that it promotes social stability. Proponents of the first claim, that traditional marriage itself is a morally good form of life, may hold that other forms of sexual relationships are immoral, and thus properly excluded from the benefits of marriage. The second claim I will inspect is that the institution of traditional marriage creates stable and committed citizens. The third claim is that the affirmation of communal standards of right and wrong as embodied in the marriage contract enhances communal coherence and stability.

I will endeavour to show that claims that traditional marriage holds a unique moral value which cannot be found in other similar relationships, which differ by being unofficial, non-permanent, same-sex, non-sexual, or containing more than two partners, cannot be supported. The claims I will examine here appeal either to religion or custom. But in both cases, the controversy surrounding the conceptions of marriage makes them inadmissible as reasons for legislation in a liberal state on the basis of religious belief or established practice. I will argue that marriage law cannot be used to enforce a conception of the good, such as a particular sexual morality.

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[3] This claim is made for marriage independently of its legal status. It serves as a reason for shoring up marriage law; the value is attributed to a specific conception of marriage, which law should reflect.

Other forms of relationship can make similar contributions to social stability as traditional marriage, and in some respects would be better able to do so.

i. Marriage and morality

I will first examine the claim that traditional marriage is a uniquely morally valuable form of life. To this end, I will briefly list the major arguments one might advance for the moral value of marriage, and show that the only possible arguments are based on moral qualities which can be found outside traditional marriage: e.g. in same-sex marriages or relationships, unmarried cohabitation, marriages of more than two people, and friendships. The only arguments available to defenders of traditional marriage are arguments from religion, which are not adequate to the purpose of establishing the moral value of marriage, or custom, which do not purport to give marriage an intrinsic moral value. Further, arguments from custom or religion cannot be adduced as reasons for legislation of traditional marriage.

The value of traditional marriage is claimed to be intrinsic to it: in itself, marriage is part of the good life. According to this view, traditional marriage -- a monogamous, sexually exclusive relationship between a man and a woman established by a legal, and sometimes religious, ceremony -- embodies the only permissible form of marriage. Where is the intrinsic moral value to be found? The central elements of traditional marriage are the contract, and the rights established thereby, the type of relationship found in marriage, and sex and reproduction. A marriage must be established by the marriage contract. Therefore, a defender of traditional marriage will have to explain the moral necessity of the contract as well as of the requirements of heterosexuality, monogamy, endurance. Taking the elements which constitute marriage by turn, we can see that no intrinsic moral value attaches to

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[4] This is to exclude religious claims, in the tradition of modern moral philosophy.

any of these elements which would not attach to relationships which are not traditional marriages.

Locating the moral value of marriage in the contract itself is futile. There is a moral value to contract -- one ought to keep one's promises --, but this applies to all contracts, not just marriage. Is there something special about the marriage contract which gives it value? It cannot be (as Kant had it) because the marriage contract establishes rights of possession, since people cannot be possessed. Rights to sexual exclusivity, so far as they are cast as rights over another, are similarly dubious. First, the *right* to exclude others from sexual use of one's spouse raises the same difficulties involved in possession. Second, while sexual exclusivity between partners may involve virtues such as trust, it is unclear why a right to such exclusivity would have moral value, and in fact this may be a case where the right (for instance, if there are legal penalties attached to adultery) undermines the virtue. Rights to support -- safeguarding vulnerabilities -- are possible legal rights and more clearly valuable, but this explanation does not tally uniquely with *traditional* marriage. Someone might want to say that the contract establishes safeguards for love and trust. But again, if it is the type of relationship, or some combination of type and contract, which is valuable, the value extends beyond traditional marriage. Why should it only be found there? One answer is that it is the type of commitment to another made in the contract. But again, there is no unique correlation between this commitment and traditional marriage.

To defend traditional marriage, one must fall back on nature or reproduction. Neither provide overwhelming support for monogamy. And, besides, nature does not give us a test for moral value: the laws of nature are descriptive, not prescriptive. What, then, about traditional marriage as a stable site for reproduction? Again, polygamy, homosexual adoption, or unmarried cohabitation might be equally stable. But moreover, shifting the focus to reproduction effectively changes the discussion from the modern institution of marriage to an institution whose primary rationale is

reproduction. A virtue account might argue that commitment to a partner was a good.[5] But again, this can extend to non-traditional relationships and non-marital relationships. Also, the virtue account may find marriage instrumentally valuable, but it cannot locate intrinsic value in the contract, since (according to it) moral value is located in dispositions.

There is no possible argument for the value of traditional marriage which does not also grant value to other kinds of unions, except for arguments derived from religion. But religious reasons cannot appeal to everyone as moral reasons. Arguments from custom may seem more promising, but these do not establish any intrinsic value for traditional marriage. Custom does not entail anything about the moral value of a practice. Conservatives claim that traditional marriage promotes sexual morality, appropriate gender roles, and the natural form of the family. We will see the difficulties with an account which attempts to locate the unique value of traditional marriage in human nature in section 5. Such an argument must show (among other things) that same-sex relationships cannot possibly have the same moral value as heterosexual relationships.

Further, we are looking for arguments which establish the moral value of marriage as a legal institution. But from a liberal viewpoint, the attempt to establish marriage law based on arguments from religion or custom runs contrary to the moral principles guiding social organisation. Religious arguments can never justify prescriptive marriage legislation in a liberal society. Arguments from custom too fail to justify legislation of traditional marriage since there is great controversy surrounding the value of marriage. The conservative notions of sexual morality, gender roles, and the family are likewise deeply controversial. There are many dissenters to the claim that marriage embodies the morally good life. Therefore, prescription of traditional marriage on these grounds clearly adopts one conception of the good at the expense of a number of others.

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[5] See such an account in Scruton 1986. For a comparable argument that *parenthood* is a virtue, see

Prescriptive legislation of traditional marriage cannot be justified by the fact that some social group attributes moral value to it, for it is illegitimate for the state to impose a single contested conception of the good on its citizens. It is widely agreed by liberals that respect for liberty requires non-intervention in certain choices regarding one's personal life.[6] While government may attempt to preserve the necessary conditions for a life perceived as good, it should not do so by limiting individuals' abilities to choose different projects (under certain legal and moral restraints).[7] Traditional marriage legislation which excludes other forms of marriage cannot, therefore, be defended by the claim that it promotes a morally valuable form of marriage. Insofar as the state excludes certain types of relationships from the benefits of marriage, and forces marriages to conform to a single norm, it violates the liberal principle of neutrality.

One voice of dissent to the claim that traditional marriage is part of a morally good life has come from feminists. Feminists claim that the division of labour in traditional marriage disadvantages the married woman and thereby shores up patriarchal power.[8] Social policy -- in taxation and benefit distribution -- and courts' rejection of women's claims to equality have explicitly justified discrimination against women on the basis of the role proposed for them by marriage.[9] On this view, traditional marriage is not morally good, as conservatives claim, but a threat to women's independence and equality.

Traditional marriage has also been accused of being intimately related, even foundational, to the system of private property ownership. The tie to private property ownership may not worry liberals, but the claim that marriage right is

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Hursthouse 1991.

[6] Deriving from Mill's *On Liberty*; see Kymlicka 1990, pp. 247-262, and, for instance, Hart 1963.

[7] See Rawls 1971, p. 61 (basic liberties), sections 32-34 (liberty of conscience), and section 24 (members of the original position are ignorant of their conception of the good).

[8] See Okin 1989; Pateman 1988, Chapter 5; Sachs and Wilson 1978, Part Two; my Chapter V.2.i.

[9] For example, this rationale was given for excluding women from the vote, entrance to the professions, the right (for married women) to hold property in their own name, to transact on the stock exchange or to tend bar. See Weitzman 1974, Shultz 1982, and Sachs and Wilson 1978.

ownership of another person is worrying to those who value personal autonomy. Marxist critics have argued that marriage is private property in another person: "*the maintenance by one man or woman of the effective right to exclude indefinitely all others from erotic access to the conjugal partner.*"[10] Indeed, Kant's account of marriage supports this view. The Marxist critique alleges that traditional marriage reinforces or underlies the idea, fundamental to capitalism, that the basic relationship between persons and need-satisfying things (including persons) is that of the ownership right.[11] It is not appropriate to take up this line here. However, a feminist might wish to qualify the Marxist account of the patriarchal right of men as an effect of capitalism with the point that patriarchy has existed independently of capitalism.[12]

Conservatives may respond that even if these analyses of the origin of marriage in patriarchy and capitalism are correct explanations of how traditional marriage came to be structured as it is, traditional marriage is still a part of the good life. But my point is simply that the conservative position is deeply controversial. It is one conception of the good among others. Further, the particular good that has regularly been ascribed to marriage in 19th and 20th century American and British law -- the promotion of public morality -- is exceptionally controversial and inimical to liberty. Legal prescriptions concerning gender roles and sexual behaviour are now widely seen as invasive. Traditional marriage law has reflected patriarchal and religious conceptions, which have been understood as moral due to the connection with religious doctrine or with what was presumed to be the natural order of gender relations. A liberal society, however, is justified in framing law only around the companionate ideal of marriage, in which individuals freely choose an association which suits their needs.

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[10] McMurtry 1972, pp. 594-5; his italics. Compare Engels [1891], p. 104, "This was the origin of monogamy.... It was not in any way the fruit of individual sex love.... It was the first form of the family based not on natural but on economic conditions, namely, on the victory of private property [in the wife and children] over original, naturally developed, common ownership."

[11] McMurtry 1972, p. 597.

[12] See Pateman 1988, Ch. 2.

To summarise, the position that traditional marriage has unique moral value is deeply controversial. Any plausible claims about the moral value of marriage are true also of non-traditional marriages (such as same-sex marriages), so it is extremely difficult to defend a position that traditional marriage is the only morally good form of marriage. Moreover, liberalism is committed to state neutrality between competing conceptions of the good. Therefore, there is no basis in the intrinsic moral value of traditional marriage (even if someone were able to give a plausible account of this) for legislating it and not non-traditional forms of marriage.

ii. Citizenship

While the state must remain neutral between conceptions of the good (or at least not intervene to prevent the pursuit of non-harmful conceptions), individual liberty "is limited, everyone agrees, by the common interest in public order and security."[13] Furthermore, stability is a virtue in political systems, although one of less priority than justice.[14] Traditional marriage has been claimed to increase social stability. First, the increase in stability it may provide is not sufficient to outweigh the right to liberty. I also wish to dispute the claim that traditional marriage is foundational to social stability. This claim is that the traditional institution of marriage creates committed, responsible citizens, so that its breakdown has had terrible consequences for society. Loving relationships may promote the virtue of commitment. But there is no necessary correlation to heterosexuality, monogamy, lifelong endurance, or even the marriage contract.

In the first place, the de-privileging of marriage as an institution has been blamed for causing male irresponsibility, at a cost to women and children. This criticism points out that traditional marriage met a social need, that of women and

[13] Rawls 1971, p. 212.

children who benefited from the patriarchal system of male support of dependent families. But as traditional family structures have lost their dominance, men have refused to undertake these obligations, leaving impoverished single mothers and abandoned wives.[15] But the prevalence of divorce and the crumbling of male commitment to marriage produces socio-economic hardship for women only when their social and economic status depends on marriage. The problem is underlying social inequality, not male irresponsibility.

The claim may be interpreted more forcefully, however. The absence of pressure to commit to long-term obligations creates men and women who pursue their own interests at the cost of maintaining relationships, undermining the interdependence necessary for social stability.[16] Allan Bloom links the disintegration of social cohesion with divorce -- both as an effect and a cause -- which evidences the failure of married couples to unite their "particular wills" into a "general will": "In the absence of a common good or common object ... the disintegration of society into particular wills is inevitable.... Children who have gone to the school of conditional relationships should be expected to view the world in the light of what they learned there." For this reason, the "decomposition of [the unbreakable marital] bond is surely America's most urgent social problem."[17]

But same-sex relationships and unmarried cohabitation can manifest the same level of commitment as traditional marriage. To require parents, or partners, to adhere to a traditional family structure is arbitrarily to privilege heterosexuality and monogamy. Further, Bloom assumes that commitments to others can be established only through traditional marriage. The creation of stable, responsive citizens does not depend on marriage, but begins with schools and parents and may be maintained

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[14] See for instance Rawls 1971, section 29.

[15] See for instance Melanie Phillips, 'Losers in the war', *Times Literary Supplement* 20/3/98, p. 5. Francis Fukuyama gives a similar analysis -- female independence encourages male irresponsibility which leads to the "plague" of family breakdown -- in 'Who Killed the Family', *The Sunday Times*, 21/9/97, News Review, p. 6 and Fukuyama 1997.

[16] Melanie Phillips, as cited in fn 15, p. 5.

through friendship and larger affiliations. The claim also, again without sufficient reason, maintains that permanent commitment within sexual relationships is more fundamental to social cohesiveness than commitments in other settings. This claim may be plausible insofar as a consequence of committed sexual relationships is the raising of children in committed and stable environments, when they are produced by or brought into such relationships. But one parent can provide just as stable an environment as two. Commitment and sympathy, as character traits, can be fostered in a variety of ways.

However, although the inculcation of personal reliability does not depend on a social practice of stable marriages, it is also arguable that legal non-traditional marriages would not reduce the incidence of commitment but in fact increase it. Making marriage legislation less prescriptive would give it an advantage over the traditional arrangement in promoting committed relationships. Indeed, the requirement of permanence is decreased by making divorce accessible, but why need marriage be lifelong to create attitudes of commitment?

Bloom's point is that "conditional" commitment, which 'alters when it alteration finds' or 'bends with the remover to remove' in Shakespeare's phrase, is not true commitment.[18] But our commitments to projects or goals may be full and whole-hearted without being permanent. They come to an end. A marriage may be such a goal. Indeed, this is plausible, for our commitments to other people -- in various roles -- change with circumstances, their needs, and our ability. It is true that 'commitments' which shift like weathervanes are not commitments. Certain levels of reliability and constancy must be achieved. But why should the marriage commitment be lifelong, unlike other commitments? Friendships may be lifelong, but a lifelong commitment is not part of the plan. It is unclear why the marriage commitment should be for life in order to be true commitment.

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[17] Bloom 1987, pp. 118-9.

Emotions can be brought in on both sides of the argument. We know that emotions are inconstant, which might seem to imply that the emotional commitment in marriage cannot possibly be lifelong. But this is precisely why marriage must be lifelong, will come the reply, in order to safeguard the attachment from contingency and change. But again, this does not show why the relationship should have a right against ending, or why the commitment must be lifelong (although there is reason to provide safeguards for the spouses when it does end). The motive force here seems to be an idea that marriage entails an unbreakable unity.[19] But we have seen, in Chapter II, that this notion of unity cannot be rendered intelligible without threatening autonomy.

Perhaps the ideal of romantic love does require such a commitment. Certainly the intention of a lifelong commitment has value. But my point is not that spouses should not make such a commitment, but that the state should not recognise only marriages founded on such a commitment. First, this prefers one conception of the good -- what I have called the ideal of romantic love. Second, I have been discussing commitment in the context of creating committed citizens. The virtue of commitment may be developed in associations which are not lifelong. And one may question the value of inculcating citizens in unconditional commitment. Civil disobedience, like divorce, may be morally justified or even morally required.

Let me return to the point that legalising non-traditional marriages will in fact promote commitment. For a social practice to be stable, an equilibrium must be reached between desires and obligations. Commitments must be reconcilable with

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[18] Sonnet 116. "Love is not love/ Which alters when it alteration finds,/ Or bends with the remover to remove:/ ... Love alters not with his brief hours and weeks,/ But bears it out even to the edge of doom."

[19] "Have you not read that the Creator from the beginning made them male and female and that He said: This is why a man must leave father and mother, and cling to his wife, and the two become one body? They are no longer two, therefore, but one body. So then, what God has united, man must not divide." The Vatican 1975, section VII. The text cites Matthew 19:4-6.

individual needs and wants.[20] Non-traditional marriage will not only open marriage to more people, it will allow marriage to match their needs more closely.[21] This represents a step towards the reconciliation of obligation and volition. Not only would it make honouring one's commitments more natural, it would also extend the appeal of marriage, since marriage in its current form has many disincentives and few incentives. It is likely that non-traditional ordering would increase the rate of marriage and make it easier to conform to marital obligations and to fully accept them as one's own choice.

iii. Society

The claim that virtues of commitment, trustworthiness, and the like can only be promoted through traditional family structures is highly implausible. Let us now turn to an argument put from a communitarian or conservative point of view: marriage is a shared practice which for this reason has value as a form of social life. It is "a tradition -- a smooth handle on experience, ... worn ... into the shape required by human nature," and also a kind of narrative or archetype which informs our expectations and creates recognition, in our own marriages as well as those of others. "[R]espect and ... understanding" follow this recognition.[22] To reformers, "the *fact of familiarity itself* counts for naught"; ideal institutions are weighed against the actual, ignoring the value that accrues to practices just because they are ours.[23] Protecting traditional marriage does not simply promote virtues of commitment in

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[20] Compare Hegel: "Hegel is centrally concerned here that the demands of the moral law find expression in and through the desires of the individual, and with the arrangement of institutions and practices that would make such a coincidence likely to occur." Gauthier 1997, p. 28. See Hegel 1821, paragraph 7.

[21] In Chapter 5, I will argue that most terms of marriage should be left to individual choice. But this argument also applies to legalising same-sex, non-monogamous, non-exclusive, or non-lifelong marriages (all of which would be legally recognised under my proposal).

[22] Scruton 1986, p. 356.

individuals, but promotes a shared value-system which knits the social fabric together. Endorsing and perpetuating this set of social understandings and values promotes social cohesion and stability.

It would be entirely inadequate to claim that traditional marriage promotes stability due to the socially divisive nature of marriage reform (such as same-sex marriage). Marriage is central to the organisation of individual lives, and as such, one's own marital preferences outweigh others' feelings about those preferences, as long as such preferences do not materially affect third parties.[24] The importance of marriage to the individual over the course of her life outweighs other people's interest in suppressing her choices. Secondly, social instability caused by marriage legislation which those unaffected by it dislike does not give reason to avoid such legislation. On this criterion of the general palatability of a particular change, many morally necessary legal reforms (the abolition of slavery or extending the vote to women) would be precluded.

The same holds true for the claim that the endorsement of a shared practice in itself promotes social good. This claim has some initial plausibility. Fostering civic harmony through shared practices seems likely to create stability. However, it fails since social practices must be evaluated on other criteria than the breadth of their acceptance. Nor do (or should) social practices entail supportive state legislation. In Chapter V, I will argue that a prescriptive traditional ordering of marriage is discriminatory and inimical to liberty. Weighed against these violations, its prevalence does not provide sufficient reason to protect the traditional institution of marriage. The argument that prescriptive traditional marriage law should be retained in order to promote the social good parallels another argument made by

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[23] Lomasky 1987, p. 249.

[24] This raises the question of how to distinguish what effects on third parties are unacceptable. What if tax breaks extended to gay marriages raise taxes slightly? Unacceptable preferences are those having consequences which others may reasonably refuse. For example, if a gay couple moves in next door, the distress it may cause the neighbours doesn't justify heterosexual-only zoning

conservatives: that the social good is being harmed due to women's economic independence, which has brought about family breakdown and unemployment.[25] But the evident solution -- encouraging or forcing women out of the marketplace -- is untenable because women's freedom (as individuals in a liberal society) takes priority over the possible gain in social stability achievable through curtailing their freedom. Similarly, preferences about marriage, as I argued in the last paragraph, are of greater priority than the possible harmony achievable through limiting their exercise. Further, the predicted harmony is a risky prospect. Just as forcing women out of the marketplace would bring widespread and vehement reprisal, so too a shared understanding of marriage enforced by discriminating against homosexuals, restricting divorce, and reinforcing gender roles in marriage will result, as it has in recent history, in persistent discontent.

It is implausible that traditional marriage is a linchpin of social stability. But there is a more important question than the empirical issue of how marriage legislation affects society. The contribution, if any, made by traditional marriage to social stability cannot be secured without restricting liberties. This claim reflects a position in a higher-order debate over what kind of social effects should be taken as reason to limit individual freedom. This dispute reflects conflicts between liberalism, perfectionism, and consequentialism. As I have indicated before, I will take the liberal view that government should not interfere with liberty in the name of enforcing behaviour corresponding to a certain conception of the good or maximising such a good. In other words, I assume that the government should display neutrality between conceptions of the good.[26]

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regulations; it is only if they infringe upon the neighbours' own civil liberties that they materially affect them.

[25] Bloom 1987, pp. 122-132: women's adoption of male roles at work conflicts with their traditional roles; Scruton, 'The Party of Humbug', *The Times* 6/11/96, p. 18; Fukuyama 21/9/97, cited above in fn. 15; Phillips 20/3/98, cited above in fn. 15.

iv. Children

Traditional marriage may seem to be justified by its reproductive role, which provides an explanation for the requirement of heterosexuality, life-long commitment, and monogamy. As stated in my Introduction, marriage in its contemporary form has many aspects other than child-rearing. But I will say a little to clarify how the two issues can, and should, be separated here. Marriage is clearly not the only institution through which the raising of children can be accomplished. Various reforms have been suggested to the current practice of child-raising, from licensing parents to state-run child-raising which promotes equal opportunity.[27] None of these may prove to be compatible with liberal neutrality. However, the connection between marriage and child-rearing is by no means necessary.

Separating the issue of child-raising from marriage makes sense conceptually and socially, as the two practices become increasingly distinct. Some proponents of contractual ordering of marriage suggest that issues concerning children, such as child-care and support, could be settled in the marriage contract.[28] But there are stronger reasons against incorporating decisions about children into the marriage contract.

A separate child commitment contract would allow parents to decide on the distribution of obligations at an appropriate time.[29] Further, separating commitments to children from commitments made to spouses in marriage contracts would extend the scope of the contract to unmarried partners and single parents. It would make the commitment to children a separate issue from marriage, creating a binding

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[26] This is a standard liberal view: see Kymlicka 1990, pp. 199-205, and 1989; Lomasky 1987, p. 250; Rawls 1971, p. 94; Dworkin 1985, p. 127; Nozick 1974; Ackerman 1980; and Nagel 1987.
[27] See LaFollette 1980, Rawls 1971, p. 511, and Munoz-Dardé 1998.
[28] See for example Weitzman 1974, p. 1245.

commitment in the case of divorce. Not only would the contracts be separate, they would be independent of each other in the sense that neither was a prerequisite for the other. The creation of two contracts, one for marriage, and one for children, allows the greatest possible number of people to avail themselves of either or both. Governmental regulation of child-care and child commitment contracts is desirable, for children need protection. However, the issue of what this protection should be and how it should be effected is beyond the scope of this thesis.

2. Other accounts

I will now take up the possible developments of Hegel's and Kant's accounts of marriage which I briefly raised at the end of Chapters I and II. We have seen already that an account of the moral value of marriage must explain the role of the contract, or at least the legal institution of marriage (could it be established some other way than contract?). There is no plausible argument to establish the intrinsic value of the contract, and thus of marriage, although there is sufficient reason to justify its legal establishment.

The developed Hegelian and Kantian accounts, and one Aristotelian argument, exhaust the array of possible types of arguments for the moral value of marriage. Its value must be located in the type of relationship (love and commitment) or in the contract, or some combination of these aspects. Again, while someone might argue that reproduction plays some role, basing the moral value of marriage in reproduction does not make the value intrinsic to marriage. The argument from the type of relationship (that drawn from Hegel) must be that there is some moral value in love or in its effects on the individual. (Here we see Hegel's ethics as virtue

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[29] A recent report from the (British) Institute for Public Policy Research recommended legally binding 'child commitment' contracts. The report is entitled 'A Complete Parent -- Towards a New Vision for Child Support' and was released on April 6 1998.

ethics: marriage, like other objective determinations, develops character so that morality and self-interest coincide). The argument from rights (that drawn from Kant) must be that rights transform the relationship morally, or that marriage rights are morally valuable because they protect the vulnerable. Another type of virtue account, not previously mentioned, is that marriage is part of human flourishing. Unlike the Hegelian account, this argument does hold that there is a given human nature which will only flourish in committed relationships. Roger Scruton articulates such a view.

These possibilities also exhaust the different range of moral approaches (at least in the major moral theories).[30] A rights-based approach, which focuses on applying general principles to the issue of marriage, is represented here by the Kantian arguments. So too is virtue ethics, in Scruton's Aristotelian account. Reading Hegel's ethics as a type of virtue ethics (but one here focused on the consequences rather than the expression of virtues), I see his account of the transformative power of family relationships over individual character as explaining how proper dispositions can be fostered in us through this educative institution. This is not to say that other philosophers within these traditions might not have different things to say about marriage, but that the main types of possible arguments are discussed here, with the exception of a utilitarian argument. But a rule-utilitarian argument will have to be some variation on the theme of justifying the institution of marriage for the utility such an arrangements brings, either through protecting the vulnerable, or the virtue approach, so I will consider it dealt with there. I will discuss in turn the (Kantian) accounts that marriage rights morally transform the relationship, that they protect the vulnerable, the (Hegelian) account that love develops a

[30] See Minow and Shanley 1996 for an account of the 'three main orientations' of theories of the family as contract, community, and rights-based. The contract approach, which I will take myself, will be discussed in Chapter V; this view does not attempt to attribute intrinsic value to marriage.

disposition which is ethically valuable, and Scruton's Aristotelian account. In the next chapter, I will discuss the claim that love itself has intrinsic moral value.[31]

3. Kantian accounts

I will try to develop Kant's account as sympathetically as possible. Two renderings, one of the moral argument and one of the prudential argument, are most plausible. First I will examine the claim that sex is morally dangerous but that altering the content of the maxim of the act through the exchange of rights makes it permissible. Second, I will turn to the argument that individuals will be protected against vulnerabilities associated with sex, including reproduction, by the exchange of rights.

Remember that Kant's moral argument for marriage, that marriage rights instituting possession of the spouses by each other create the moral conditions necessary for sex to occur, was flawed because of the problem of reconciling possession of another with Kant's ethics, which hold that one does not and cannot possess oneself, let alone another. As well, the moral problem of sex (on Kant's account, that it involves use of another as a means only) was irresolvable, since marriage could not transform it. Now a Kantian could develop this kind of account, either keeping sex central to it or not. First, a Kantian could argue that sex does involve treating others as means, but that marriage right transforms this. Or, he could argue that the rights have some other moral content. These lines of argument, it seems to me, are susceptible to Hegel's criticism of Kant. One cannot have a right of ownership over another person. Nor can one have a right to unlimited use of another, and so on. Accounts which want to give some value to the institution of marriage will have to locate the value in the relationship and then explain the rights or

[31] This is not supposed to be Hegel's thought but to develop his account that ethical love is ethically

contract in terms of this. Both of the Hegelian accounts and Scruton's account can be read this way. I will first address a Kantian version of the same, which is closely tied to some of what Kant writes in the *Lectures on Ethics*.

People can use one another as means only in sex. This property can be removed, or contained, when a relationship is reciprocal and the parties respect each other. One route to this sufficient degree of reciprocity and respect is commitment. Marriages create a context of commitment. But this account fails to show why marriage itself is necessary. It safeguards commitment but isn't necessary to establish it. Nor is a life-long relationship necessary to establish reciprocity and respect. This just shows marriage is one form of the good among many, that whatever moral value it has may be possessed by other types of relationship or encounter. On Herman's interpretation of Kant, marriage right establishes the juridical equality of spouses and so creates conditions for respect. But their juridical equality is established simply by their both being citizens!

The second rights-based theory is drawn from Kant's prudential, not moral, argument. On this account, sex and intimacy create special vulnerabilities which legally sanctioned marriage provides some protection against by giving the spouses rights against each other. The moral value attributed to the marriage contract on this account is not a *sui generis* value held only by marriages. It applies to marriage the standards of justice which apply in cases where special vulnerabilities exist. This account might be thought to explain why the rights created in the marriage contract are morally *necessary* in the context of intimate relationships, as well as explaining (in Kant's manner) why the legal institution of marriage is morally necessary.

I noted in Chapter I that many feminists make a connection similar to that made by Kant between sexual desire, as constructed in our society, and objectification and exploitation. One theme here is the amoral nature of desire. Kant argues that as appetite for another it obliterates moral regard for that other. On this

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valuable by considering whether natural love could be ethically valuable.

picture, hunger and thirst too might count as appetites sufficiently powerful to overwhelm reason, and in themselves amoral. But sexual desire, as appetite for another human being, is far more troubling. Hunger may lead to moral violations only in cases where one may have to steal, or kill, to get food. But it is in the nature of sexual desire, as appetite for another person, to overwhelm moral judgement precisely where the treatment of another person is at stake.

Insofar as the question is empirical, this is not an issue that I can resolve here. Biology and psychology play a role in the answer.[32] But Alan Goldman's analysis of sex is relevant here. According to him, sexual desire is simply desire for contact with another person's body, and so has no special moral significance related to its natural end (procreation, love, communication) as some philosophers (Finnis, Scruton, Nagel, Solomon) claim. But this begs an important question. Is sexual desire merely desire for contact with another, or is it a desire to dominate, injure, or dehumanise him or her? For the purposes of the argument (since it makes my task more difficult), I will assume for a moment that sexual desire is intrinsically linked to violent impulses, either biologically or psychologically. Even so this (hypothetical) fact alone does not show that special rights and obligations -- marriage right -- must, morally, accompany sex. Use of someone who has not consented to sex, or someone incompetent to consent, is wrong, as in other circumstances. But are impulses to violence themselves immoral? On this (hypothetical) account, sexual desire and violent urges are one and the same. In one respect, the morally relevant issue seems to be what acts ensue. One might think if no-one is illegitimately harmed as a result, the act is morally permissible.

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[32] For instance, psychologist Robert J. Stoller argues that sexual desire is linked to a desire to harm. See Stoller 1976. This is not to say that I find such claims plausible, but to point to work done in other fields which is relevant here. His work is cited in Garry 1978.

But Kant's worry is that the moral nature of the action is determined by the maxim.[33] The same act may be wrong or right, depending on the maxim under which I do it. If the maxim under which sexual acts occur *must* contain violence (or exploitation), because the sexual impulse essentially is a violent (or exploitative) impulse, then the act is morally troubling. However, biological accounts of a connection between sex and violence do not show that maxims are configured this way. One impulse may be linked to another, but they are conceptually separable. Our chosen maxims are not biologically determined. Some psychological views, as well as feminist views which hold that desire is socially constructed by dominance and submission, are more problematic.[34] If the meaning of sexual words and acts is permeated with violent overtones, then maxims under which sexual acts occur are morally troubling. (For example, if an intrinsic part of having sexual intent regarding X is a desire to dominate X.)

If this troubling state of affairs is the case, we are back in Kant's dilemma. Let us see how Kant's solution -- that of the parties sharing joint ends -- works here. If the parties' union is an end other than sex, the maxim is altered in a relevant way. The intent is not just sexual, but includes an expression of love, or plans to create a child. But there are several problems here. One is the problem which Kant's moral argument faced: sexual intent remains part of the maxim. At least one component of the maxim remains treating the other as a means only. And if the act can be morally changed by taking on a broader significance, why think that it can only change in marriage or committed relationships where ends are shared? If the maxim can change, then why does it not change when the agent respects (as opposed to loving, or sharing ends with) the other as an end in herself? And, vice-versa, why think that sexual acts will always have this broader significance in marriage or in committed relationships? This is why Kant still holds that non-procreative sex in marriage may

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[33] See Kant [1785]: "An action done from duty has its moral worth, *not in the purpose* to be attained by it, but in the maxim in accordance with which it is decided upon; it depends ... solely on the *principle* of *volition*," p. 13 (standard German edition pagination).

be licensed only by a permissive principle of practical reason, which makes permissible something in itself impermissible in order to avoid a still greater violation.

If sexual desire includes harmful intentions, or intentions to use others as means only, then the only way the maxims of sexual acts can respect persons as ends is if they are broader than sex itself (on the assumption made for the purposes of this argument that part of the sexual intention is a violent, or exploitative, intention). But if maxims can be changed in this way, they can be changed simply by respecting the other. This can conceivably occur in a one-night stand as well as in a marriage. Having joint ends may or may not help. For example, A can share an end with B yet use B as a means only (for example, a company director and employee, or a commanding officer and a soldier). Even if A's end is the good of B, this is still compatible with lack of respect for B as an autonomous being. A could want B's good simply to discharge an obligation to a third party, for instance. Seeing B as an autonomous agent might be understood as being part of what it is to desire B's good. But while the marriage contract may be thought to force this recognition of the other (since she is capable of entering contracts), it is not a necessary condition of such recognition. Nor is it efficacious in doing so. Carole Pateman argues that historically, the marriage contract maintained the fiction that all human beings were treated as autonomous beings while it, in effect, deprived women of their autonomy, and did not represent an autonomous choice for them, since they were coerced into it.[35] Certainly it is not empirically true that every spouse has his spouse's good (either in the sense of interest, or in the sense of seeing her as an autonomous agent) as his end. And people cannot form associations where respect is built into the maxim by circumstances, such as sharing an end. Respect must be internal to the agent.

One could argue that Rousseau's contract of mutual surrender does provide a model of a collective association within which members do not use each other as

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[34] See my Chapter VI.2 for a discussion of Catharine MacKinnon, one proponent of such a view.

means only, since their purposes are jointly held. Kant's and Hegel's accounts echo this social contract, in which we surrender ourselves collectively, so that the will by which we are governed is our own and we are not subject to *external* authority. But they cannot consistently apply it to marriage, since neither recognises self-ownership, nor do they see contract as the basis of political authority. Recall Kant's argument that spouses are allowed to use each other since they have surrendered themselves to each other, so that each is simply using himself. But this was inconsistent, since Kant also argues that no-one is entitled to use himself. Similarly, even if marriage is seen as an association in which spouses have mutually surrendered and formed a general will, problems with a general will with violence as its content remain, even if we can (on this interpretation) see the violence as being directed by oneself at oneself. Willing violence against oneself raises moral problems too.

I have argued that even if sex is intrinsically linked to violent or demeaning impulses, marriage, love, and/or commitment are not morally necessary conditions for sex. Respect, or appreciation of the other's humanity, are possible outside love, commitment, and marriage. There are all sorts of situations where people may use one another as means only. In all of these, love and commitment are not thought to be moral preconditions. The postman, taxi driver, shop attendant, dentist, and all those whom one uses for some other end are treated as ends in themselves simply by respect. The nature of the relationship does not seem relevant -- even on the assumption that sexual intentions are exploitative or violent, these sorts of intentions arise in other circumstances as well. There is no reason why love should be necessary only in sex, since it is not elsewhere invoked as a precondition of proper regard. Even if sex is linked to violence or disrespect in the agent's intentions, there is no reason why love should be the precondition of respect. The moral rules appropriate to sex are those which govern other relationships. Further, as I will argue in Chapter

[35] See my discussion of this claim at VI.2.

VI, the claim that sex is intrinsically linked to a socially constructed dynamic of dominance and submission (which I have assumed here) is implausible.

It might be thought that I have not met the feminist claim mentioned above. Sexual desire is constructed as the urge to dominate or submit. A desire to dominate cannot be made more morally palatable by being part of a larger end, or by being combined with respect (it might be thought). It is quite clear that love or commitment cannot solve this problem, for they would simply be built upon dominance and submission, and would even mask inequality in sentiment. The feminist critique does not present a justification of marriage, but a condemnation, from the moral point of view, of heterosexual desire (and, according to MacKinnon, homosexual desire, which is constructed by the same mechanism of inequality as heterosexual desire). If the feminist critique is right, then we can never escape the violence inherent in desire, although future societies may. On this account, the nature of desire as an urge to dominate may only be altered (at least for social constructionists) by reconstruction of the human psyche.

Ironically, one could imagine a justification for marriage from the feminist critique which proceeded upon Kantian lines. Women are vulnerable in heterosexual relationships because of socio-economic inequalities and the intertwining of desire and domination. The rights established in marriage could act to protect women from this vulnerability by giving them legal claims upon their husband's income. These legal rights are morally necessary in the context of vulnerability. However, as a justification of marriage law, this is problematic.

First, as I shall argue at length in Chapter VI, a liberal state cannot intervene to protect people from their adaptive preferences, the desires internalised in oppressive circumstances. The state's efforts to protect the vulnerable should not extend (when they are competent) to protecting them against their will. This would amount to an invasion of individual liberty. So the state may offer marriage to the vulnerable as a means of protection, but leave the decision to enter marriage to

individual choice. In this case, marriage is not protecting all the vulnerable -- perhaps not those who need protection most.

If we claim that marriage law is morally necessary to protect the vulnerable, then we assume that protecting the vulnerable is morally necessary, and this seems to license too much protection. On the other hand, if marriage is not invasive because it is voluntary, then how is it supposed to fulfil its function of protecting those in unequal relationships? One might say that marriage is at least available for protection to those who want it. But why then have an institution of marriage, and not simply allow people to make contracts for their future protection?

Second, the institution justified by this account no longer seems to be distinctively marriage. If the purpose of marriage law is to protect the vulnerable, should not all sexual relationships be offered these legal rights? If sex is the source of the vulnerability which justifies marriage, then why should marriage law (as written for this justification) not apply to all (and only) sexual relationships?[36] Other features of marriage have dropped out of the legal picture. And how do we mark off sex? Shouldn't any relations characterised by unequal power dynamics be covered by such laws establishing positive rights of the parties against each other? This principle seems too wide.

What I have tried to argue here is that even if sex is linked to drives which threaten moral consciousness, this does not show a moral necessity for rights governing sexual relationships. On the Kantian account, all that is required is respect. On the feminist account, the rights would stretch over an intolerably wide range of cases. The link between sex and inequality has difficulties as the rationale of marriage law. However, as I will argue in Chapter VI, it might be used to constrain marriage legislation. I have argued in this section that marriage right has no special moral content, since possession is illegitimate. It may be valuable because it secures or promotes a certain kind of relationship. But then that kind of relationship has such

value, marriage or no marriage. I will focus now on such accounts. Marriage itself does not make a moral difference. Is there enough reason to think certain kinds of relationships have moral value to justify a legal institution of marriage?

4. Hegelian accounts

I will argue that marriage legislation can be justified through a virtue account drawn from Hegel, an account acceptable by Rawlsian liberals. On Hegel's account, humans are inherently undetermined. We can be satisfied in a variety of ways. I take Hegel's writings on the will in the *Philosophy of Right* in the spirit of the claim that 'existence precedes essence', at least as a description of the human condition from the inside.[37] However, Hegel also emphasises that in order to be particular people (and beyond that, in order to resolve the contradiction between our capacity for abstraction and our finite condition as humans) we must determine ourselves in concrete ways.

Hegel argues that rationality is expressed in our identities when we become determined in ways which will make for social harmony and at the same time in a social system which reflects and protects our freedom. Hegel's virtue account is not based on eudaimonia, a state of flourishing natural to humans. We could flourish in a variety of ways. But Hegel's emphasis is on the institutions and states of character required for the flourishing of a whole system within which human freedom is respected. A rational way of life must give human consciousness its due. Ethical life directs our growth in a way which is good for society and for us. It builds trust, which forges a unity among individuals, and at the same time inculcates respect for the freedom of others. The central point is that society should direct human

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[36] Here I am still focusing on the claim that the central dynamic of sex is inequality. In Chapter VI, I will discuss how the socio-economic inequalities between the sexes affect marriage law.
[37] See for example par. 35.

development so that our flourishing is achieved through trust and respect. Morality and self-interest are reconciled, as in Aristotle. Society should educate its members in such a way that what is required for their flourishing is identical with the demands of others.

Aristotelian eudaimonia is replaced in Hegel's theory by an artificial construct. Our social role makes us so that carrying out the demands of morality is fulfilling to us and determines the content of those duties (so that as a citizen, or husband, my duties are defined by my role). These 'objective determinations' (citizen, husband, civil servant) don't just define us but also create our dispositions. It is this which brings me to call Hegel a type of virtue theorist. On his account, the state should educate individuals to have certain dispositions. Though not necessarily part of each individual's flourishing (one can flourish many ways), they will contribute to the flourishing of all concerned in the modern state. These dispositions unite the demands of morality and self-interest.

I will say more in section 6 about how a Rawlsian liberal can accept this. Three distinct questions appear. Can the state engineer individuals in this way? How can it do so? And, most important in our inquiry, should it do so? My answer will be that a liberal can accept the virtue account of marriage as a reason for marriage legislation. The demand for a well-ordered society justifies the creation of institutions which will sustain social order, as long as liberty has priority over such institutions. For ease, I will refer to this as the virtue account of marriage (to be distinguished from Scruton's Aristotelian approach, to be discussed in the next section).

Hegel's virtue theory of the family is the claim that family membership creates dispositions of commitment and trust in individuals and so prepares them for relationships outside the family. This attributes instrumental, not intrinsic, ethical value to marriage, and gives a reason for its legislation. In 1.ii above I criticised the

idea that *only* traditional marriages can build commitment. But it is possible that commitment can be taught and that it is socially beneficial.

Dispositions can be developed through behaviour. The way we live, our customary activities, affect the way we respond and our knowledge of how to respond. We may not be determined by these processes, but we can be trained. Making a commitment to another person, sharing the details, crises, and goals of existence with him or her, and thinking not just in terms of oneself alter one's perspective on the world, one's dispositions, one's knowledge. In the next chapter I will argue that while this form of life has no intrinsic moral value, it does shape our dispositions in morally useful ways. In section 6 I will argue that these are ways the state should, and may, promote.

What are these virtues? Marriage habituates the individual into a frame of mind which does not instinctively put the self first, which considers other's needs, which relates to others rather than setting the self apart. Marriage does not necessarily do this, nor does love, which may set the couple apart from the world or even from each other. But as a mode of living it changes one's perspective. This is the value Hegel attributes to ethical union.

The moral value to be found in marriage is instrumental -- in promoting virtues -- not intrinsic, and in fact is not unique to marriage but found in committed relationships, as a matter of degree. This account does not make the institution of marriage morally necessary. As I argued in 1.ii above, to promote these values a marriage need not be traditional, and it is only one among many practices which can have the effect of promoting these habits and dispositions. This account does, however, begin to explain why the state has reason to recognise the institution. The relationship between spouses creates habits of commitment and altruism. The legal structure and element of legitimisation may also strengthen the commitment involved. Further, legitimising commitment as a way of life shows the value placed on it by the state. (Does this discriminate against those who choose not to commit? Not so long

as there is a distinction between legitimisation and preference.) For precisely the virtue-creating reasons, however, marriage should not be made lifelong. Not only would this violate freedom -- our freedom to break contracts so long as compensation is paid -- but the attitude of ownership implicit in this is not virtuous.

The issue of divorce brings us to the question raised in Chapter I about individualistic and institutional accounts of marriage, and that raised at the end of Chapter II about the success of a Hegelian account when women's equality to men is recognised. Recall the questions. Hegel argued that the individual's commitment to marriage should not be represented as contingent, as it is (he claims) by contract. We saw that two views of marriage were to be contrasted: the institutional view, which emphasises the nature of marriage as an institution with claims on the individual which override his changing attitudes, and the individualistic view, which places the value of marriage in individual fulfilment and sees it as dependent on continuing emotions and free individual choice. The institutional view implies that divorce should be more difficult than does the individualistic.

The inferior status of the family in Hegel's system is related to the question of which view of marriage to adopt. Hegel held that women's natural inferiority meant that they would be fulfilled in this sphere, while men could leave it to seek their fulfilment elsewhere. But if the premise of women's inferiority is dismissed, and it is assumed that both men and women will seek their fulfilment in the public sphere, then what role does the family play in ethical life? Will the family dissolve as women are freed from it, due to its inadequacy? But Hegel sees family life as fulfilling for all parties. It is simply that a higher fulfilment and self-realisation is found in public life. It is central to Hegel's view that family life, while an unreflective stage of ethical life, is satisfying for its members. And this has repercussions for the virtue theory of marriage.

If the institution of marriage is justified by its inculcation of virtues, it must be fulfilling in order to habituate individuals, to change their dispositions. This is why

the loss of individual rights in Hegel's account (see my Chapter II, section 4) is such a bad result, since one must come to desire and enjoy this mode of being, not feel threatened by it. This forces a compromise between marriage as fulfilling for the individual and marriage as an institution whose duties must be carried out even at the expense of individual fulfilment. On the Hegelian line, the institution doesn't make sense if it is not fulfilling for the individual. The rationale for its establishment can only be attained if it is fulfilling. This suggests, appropriately enough, that the individualistic and institutional views must be superseded. The duties generated in marriage, through the contract and promises, do not vary with feeling. But the marriage itself must be supported by feeling and so dissoluble when appropriate. Duties taken on in marriage are not for life, but for the duration of the marriage. The constraints on this claim, in terms of property division on divorce, will be discussed in Chapter VI.

5. Aristotelian accounts

Scruton gives us another virtue approach to love, sex, and marriage, in which the relevant virtue is linked not to political values but to essential human nature, to flourishing or *eudaimonia*.[38] The ability to experience erotic love is a virtue necessary for self-fulfilment. Scruton's estimate of the value of love echoes Hegel: "in erotic love the subject becomes conscious of the full reality of his personal existence, not only in his own eyes, but in the eyes of another."[39] Fulfilment requires that we have the capacity for erotic love, since in order to receive it we must be able to give it. Nurturing this capacity requires that we train ourselves through habit, cultivating the appropriate disposition. This rules out (at least as habits) sexual

[38] See Scruton 1986, p. 326.
[39] Scruton 1986, p. 337.

fantasy, obscenity, pornography, prostitution, masturbation, promiscuity, and 'perversion'.

Scruton also claims that the end or *telos* of desire is love.[40] His argument depends on this, since if love is not the end of desire, then he does not have the connection he needs between sex and love. Scruton's argument goes like this: Sexual desire is uniquely fulfilled by erotic love. Erotic love is part of human flourishing. Destroying the capacity for erotic love is therefore vicious. The capacity can be destroyed by misuse of sexual desire. So we should habituate ourselves to desire as reason requires.[41] A defence of marriage comes out of this. The marriage ceremony, according to Scruton, endorses virtuous (chaste) sexuality. Marriage draws its meaning from erotic love. The legal institution protects erotic love from society, carving out a private realm for it. The "'ethical idea of marriage' ... lies at least partly in this subsumption of the 'merely private' bond of love under laws that are open, disputable, and a matter of moral and legal right."[42] The privacy of love is both endorsed and protected by marriage law.

Scruton says that the view that "the obligations of love are private, [and so] they need no public institution to protect them" underestimates social pressures which threaten relationships.[43] Society puts "public pressure" on individuals, judging them. Marriage excludes others, removing their judging gaze. Scruton goes on to say that this judgement, when turned on ourselves, is the root of the moral sense. First, it's not clear that marriage is needed to turn away the public gaze. Scruton's metaphors of watching mislead: what kind of space is the private? He claims that the legitimacy of marriage creates a private space in moral consciousness. People avert their moral gaze from the married (Scruton cites Husserl who writes that 'the domestic' is "a separate 'phenomenological category'").

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[40] See Scruton 1986, p. 339.
[41] See Scruton 1986, Chapter 11, "Sexual Morality."
[42] Scruton 1986, p. 357.
[43] Scruton 1986, pp. 358-9.

This is rather contentious. Creating a space from which others are excluded -- beyond property rights and rights against trespassing, and so on -- may be an effect of marriage. Legal rights or religious vows may deepen the spouses' sense of this space. But this privacy seems to be a feature of the relationship itself, not of the established bond. Second, especially from a feminist perspective, the idea that marriage is removed from the judging gaze of society is chilling. A better definition of privacy needs to be given than the space inhabited by lovers. Some aspects of love are private. But even from those, the moral gaze should never be averted. Indeed, rather than averting the moral gaze, marriage invites further judgement, for instance, of how the spouses are meeting their obligations as spouses.

Further, I wish to dispute the claim about the relation between sex, erotic love, and flourishing which is the basis for Scruton's attribution of value to the sacrament and institution of marriage. Sexual desire, he writes, is "a social artefact," yet one "natural to human beings."[44] This is the kind of approach which Wood names in Hegel 'historicized naturalism', essentialist claims about human nature based on social structures rather than ahistorical, or biological, characteristics.[45] But Scruton's account still seems liable to the criticisms which can be made of essentialist accounts. He has nothing to say to individuals whose sexual and romantic needs differ. If someone's flourishing truly does not lie in 'erotic love' and mutual recognition, then chastity and purity may not contribute to the development of capacities which he or she needs to flourish.

Again, it is not clear that the sexual habits Scruton denounces will destroy the capacity for erotic love. This seems to be an unsupported empirical claim. There is no reason to think that, so long as promiscuous behaviour preserves the agent's capacities for respect and openness to others, his ability to love will be diminished. The habits are not intrinsically debilitating. Much seems to depend on how sexual acts are undertaken. A law of diminishing returns might be called upon here by a

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[44] Scruton 1986, p. 348.

defender of Scruton. Too many sexual encounters or fantasies will numb the agent's appreciation and thus make him unfit for love when he finds it. This seems to be the heart of Scruton's attack on sexual fantasy.[46] But first, the fact that some amount may be too much does not exclude all such activity. And again, it might be questioned whether the law of diminishing returns operates here. There is no *a priori* reason to think that promiscuous people cannot have virtues such as sensitivity and honesty which cultivate respect for others.

Finally, Scruton's approach to sexual morality becomes implausibly inward-looking. He writes that "the prime focus of sexual morality is not the attitude to others, but the attitude to one's own body and its uses."[47] In order to prepare ourselves for love, we must focus on our bodily integrity, so that sexuality remains an expression of the self rather than slavery to a drive. But here his account seems to go off the rails. Certainly, if sexual encounters are to be valuable to individuals, they must have a proper respect for their bodies. But insofar as there is a specific morality governing sex, its demands must focus as much on how one treats others in situations of intimacy with unique possible consequences -- pregnancy, disease -- and distinctive circumstances -- exposure, privacy, the societal norms governing sex.

Neither Kant's arguments not Scruton's show, I believe, that sex has specific moral circumstances which generate their own rules. Rather, its circumstances require us to apply general moral rules in special ways. Sex may be exploitative, as Kant claims, due to the social construction of gender, or to facts of human biology or psychology (this is at least possible). Even if this is true, what is required morally seems to be respect and sensitivity to the circumstances, not chastity. This weak criterion of respect seems to be all that is required for morally permissible sex by the

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[45] See Wood 1991 and Wood 1990, pp. 33-5.
[46] See Scruton 1986, pp. 344-6.
[47] Scruton 1986, p. 343.

exploitation thesis. And Scruton's sexual virtue theory seems to make too many assumptions about human nature.[48]

There are other accounts of sex which attempt to attribute it a special moral status through 'means-end' analyses, for example, the idea that sex has as a goal communication or interpersonal awareness, so that sex failing to reach this goal is perverse or morally wrong.[49] I refer the reader to Goldman's rebuttal of these accounts. Surely it is clear that sexual desire is desire for physical contact, as Goldman claims, not *necessarily* for love, interpersonal connection, and so on. Love (or communication or awareness) and sex are distinct experiences. Another claim might be that the emotions and expectations associated with sex are intense, and so sex may be more likely to cause emotional pain than other sorts of interaction. But even so, this requires only sensitivity, honesty, and directness in sexual behaviour, not chastity.

Marriage may be defended -- as Scruton and Michael Bayles defend it -- as an institution which contributes to human flourishing by protecting, legitimating, and strengthening a valuable kind of interpersonal relationship. This may be another reason for the legal institution of marriage. But such accounts do not show that marriage is a necessary moral condition of sex. Nor -- as Bayles admits -- would such arguments even show that traditional marriage, as opposed to polygamy for instance, is uniquely valuable.[50] Indeed, if marriage is justified by such reasons, there is all the more reason to legitimate same-sex and polygamous unions and unions of indefinite extent.

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[48] Michael Bayles also gives a eudaimonistic account. See Bayles 1998.

[49] See Goldman 1977.

[50] Bayles 1998, p. 127. "[It may be objected that] neither of the arguments [interpersonal relations or the welfare of children] supports monogamous marriage per se. Logically, the objection is quite correct. But it is a misunderstanding of social philosophy to expect arguments showing that a certain arrangement is always best under all circumstances." But if the justification supports, for instance, polygamy, this gives the state reason to legitimise that as well as monogamous marriages if some members of society so wish.

6. The rationale of marriage law

Both the Hegelian virtue account and Scruton's eudaimonistic accounts put forward in the last section purport to show that there is a distinctive value of marriage, which law should preserve. I will defend the Hegelian rationale for marriage. I challenged the universality of the eudaimonistic account, but if it holds true for a number of people, this may suffice to justify the legislation of marriage in order to provide for individual's ability to realise their conceptions of the good. But two considerations detract from this. Is marriage really necessary to enable this form of life? And why is it necessary for the state to provide marriage? If someone's conception of the good includes getting married, why should they not purchase their marriage from a religious or secular organisation? First, the state should provide marriage because citizens need it to pursue their conceptions of the good. But this really isn't an answer. Other things which citizens need to pursue their conceptions of the good -- careers, consumer goods -- are not provided by the state. The state's role is not to promote such conceptions but to deal equally among them by not privileging any.

A second, more relevant, reply is that only the state can enforce marriage right. If marriage right is necessary for the interpersonal relationships at stake, this might be a reason. But is it truly the case that state enforcement -- rather than community or religious enforcement -- is necessary to legitimate, strengthen, and protect these kinds of relationship? Why should the state provide this opportunity for individuals to pursue their conceptions of the good? Of course, only the state can enforce contracts. But why is it justified in recognising and providing a marriage contract, as opposed to an ordinary contract covering terms of individuals' lives together?

The rationale for the institution -- and the source of the state's justification in recognising marriages -- lies in the first, Hegelian, account. The institution of marriage, on the virtue account, contributes to a well-ordered society. The institution of marriage does not just allow individuals to pursue their conceptions of the good. It creates citizens with traits conducive to the stability and good of the state. However, this does not explain why marriages must be recognised by the state. If such traits can be established through marriages not backed by the state, then the state need not be involved. However, in the absence of state legislation, the institution of marriage cannot perform its socially valuable function. Marriages must be constituted by state-recognised marriage contracts.

The state's involvement is necessary for two reasons. First, it offers unique legitimisation and authority to marriages (at least from a secular perspective). Second, it provides a means to distinguish marriages. By recognising marriages, the state creates a category of marriages. Some relationships will fall outside this definition. This enables discriminations to be made between types of relationships. While a liberal state should not promote marriage by providing benefits, since this would be to prefer it as a form of life, marriage is sometimes rightly used as a category to discriminate legitimate claimants of entitlements. Consideration in this form offered by the state has been diminished by attempts to increase toleration of personal life. For instance, official discrimination against 'illegitimate' children has ended, and there is legal permission for cohabitation and sex between consenting adults.[51] But employers, insurers, immigration authorities, and others may still use marriage as a means to establish entitlements.

There is a more important purpose to state recognition of marriage, however. Consider a state in which marriages were offered by private contractors, with no state licensing or control. While religious ceremonies would still offer, to some, authoritative blessings to some marriages, it would become difficult to distinguish

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[51] Shultz 1982, pp. 228-9.

between legitimate marriages, those fitting the general definition, among those supplied by independent contractors. With no restrictions or regulations, marriages could be sold to any couples or groups, one person could buy multiple marriages, and nothing -- except the absence of companies providing this service -- would prevent someone from marrying an animal, or a possession, or providing a marriage ceremony for their pets.

Complete deregulation of marriage will allow marriages to be sold under any terms. In these circumstances, marriage will lose definition and value, except for the marriages provided by established religions. One might respond that some marriage providers will emerge as reputable. But, without state endorsement, what value will marriage have (for those outside religious traditions)? There is no apparent reason why people would choose to buy marriages rather than exchanging vows in private. This is why continued existence of the institution depends on state recognition, so that its value as a social institution can only be realised so long as the state continues to endorse it.

Additionally, if marriage entails obligations, it must be constituted by a contract which the state will enforce. I will argue in Chapter VI that gender inequality necessitates the imposition of certain financial obligations between spouses in heterosexual marriages. If marriage were completely deregulated, these obligations would no longer be imposed or enforced. For these reasons, marriage is necessarily constituted by state recognised contracts. The actual performance of marriages could be still devolved from the state: the ceremony could be performed by private contractors (religious or not), with the state endorsing only relationships which meet certain criteria as marriage ceremonies, or licensing and regulating these suppliers.

For the institution of marriage to continue, the state must endorse individual marriages. But why does the virtue account justify a liberal state's doing so? That is, given that state involvement is necessary for the institution of marriage to exist, why

is the state justified in enabling this institution? The answer lies in Rawls' conception of a well-ordered society in *A Theory of Justice*. In a well-ordered society, members desire to act justly. A well-ordered society has a stable conception of justice: "One conception of justice is more stable than another if the sense of justice that it tends to generate is stronger and more likely to override disruptive inclinations and if the institutions it allows foster weaker impulses and temptations to act unjustly."[52] And those in the original position, Rawls claims, will choose a more stable society over a less stable one when other things are equal.

The point is still Hegel's: relationships based on trust and love will foster the virtues of the well-ordered society. The state's recognition of marriage will maintain the institution, thereby promoting these types of relationships. Rawls himself gives an account of how the sense of justice is developed in the family. Of course, a major criticism of Rawls' *Theory of Justice* is that its principles of justice are not applied within the family. It is unclear how children can develop a sense of justice when inequality exists between their parents and in society at large.[53] For now, I want to see how marriage can create a more stable society, thus giving individuals in the original position reason to allow the legal institution of marriage.

Rawls argues that children first develop a moral sense in the family, acquiring through reciprocal love and trust 'the morality of authority', followed (developing within and without the family) by 'the morality of association', and finally 'the morality of principles'.[54] Rawls' own description of the development of the sense of justice depends on the family. But his description is also relevant to adults in the context of marriage. The morality of authority is developed in children from love of their parents. The morality of association is developed as children and adults take on various roles and learn the corresponding ideals. But attachment to the morality of principles also grows out of personal attachment:

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[52] Rawls 1971, p. 454.
[53] See Okin 1989, pp. 97-101.
[54] Rawls 1971, pp. 486, 488-9, 490.

> once the attitudes of love and trust, and of friendly feelings and mutual confidence, have been generated ... then the recognition that we and those for whom we care are the beneficiaries of an established and enduring just institution tends to engender in us the corresponding sense of justice.[55]

Further, ties of care deepen the moral sentiments.[56] On this account, ties formed in loving relationships between adults strengthen commitments to justice and the feeling of moral sentiments.[57] The value of marriage is as a social practice which inclines participants to attitudes of trust and a commitment to justice. This justification requires that liberal principles be applied to marriage, so that no controversial conception of the good life is preferred to others in marriage legislation.

Finally, there is another way in which marriage could contribute to the development of a sense of justice. This account is drawn from John Stuart Mill. He argued in *The Subjection of Women* that women's equality would require reform of the family and of marriage law. But he also endorsed marital friendship. Mary Lyndon Shanley concludes that "Mill's final prescription to end the subjection of women was not equal opportunity but spousal friendship; equal opportunity was a means by which such friendship could be encouraged."[58] Through personal interaction as equal companions, men would gain regard for women as equals. Of course, marriage, romantic love, and the family have been used to oppress women.[59] But real acceptance of women's equality by men may also be promoted through friendship. This may be another value of (heterosexual) marriage. For now, I will

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[55] Rawls 1971, pp. 473-4.
[56] See Rawls 1971, p. 475.
[57] Rawls does criticise the expression of a well-ordered society in *A Theory of Justice* as unrealistic in *Political Liberalism* (Rawls 1993, p. xvi-ii). However, he retains the notion in a revised form.
[58] Shanley 1998, p. 416.
[59] See for example Firestone 1998.

leave the issue of gender and pursue the question -- left unanswered above -- of what moral value love may have, and what virtuous dispositions it may create.

Certain virtues are fostered in marriage. In the next chapter, I will examine their value more closely. I have argued so far that these virtues are of value to the state, or society. Participation in certain types of relationships helps to develop these virtues. This development can occur within or without legal (or religious) marriage. However, the institution of marriage promotes these relationships and helps to maintain them (through peer expectations and the pressures of the contract). Without state recognition, this socially valuable institution might no longer be able to perform this function. This account justifies a liberal state in recognising marriages, although it does not necessitate the state's doing so. In Rawlsian terms, the institution is justified by its ability to promote a well-ordered society. One set of principles will be chosen over others in the original position if it offers greater stability. However, as I have argued above, marriage is not uniquely able to provide such stability. Other forms of association may develop similar virtues. What I have been concerned to show in this section is that the state is justified in recognising and regulating marriage contracts.

CHAPTER IV: LOVE, VALUE, JUSTICE

1. Care ethics and marriage
2. Love's value
3. Love and justice: their compatibility

There are two distinct ways in which moral value could attach to marriage. First, moral value could be generated by the institutional structure, so that the contract morally transforms the relationship. I argued against this view in Chapter III. I argued for a second view, which holds that loving relationships are valuable, and that the institution of marriage is only morally valuable because it promotes these relationships. The first type of account is exemplified by Kant's account, in which the moral value depends on the legal structure. The exchange of rights through contract which is identical with the marriage ceremony is the source of the moral value of marriage, and this value cannot be found in relationships outside marriage -- in fact, these are impermissible. The second type of account is represented by the Hegelian account, in which the moral value of marriage is found in the type of relationship, that of ethical love, enjoyed by the spouses. This emphasis, of course, forces Hegel into an inconsistent justification of the necessity of the marriage contract, since it seems that ethical love could occur outside marriage.

I have argued that moral value attaches to loving relationships, and so is not
tensive with marriage. Marriages can lack this type of relationship, and
hips outside marriage can possess it. The institution of marriage has
moral and political value insofar as it promotes loving relationships,
certain virtues. This value justifies state recognition of marriage
aluable quality found in the marriage relationship can also exist

outside legal or religious marriage, but the existence of the institution is justified as promoting this kind of relationship. Further, the relationship may be fortified by the contract. The institution does not add extra value, but enables trust and love to develop by fixing it in communal regard and by creating a framework of expectations and responsibilities. The usefulness of the contract in this regard may vary from case to case. In this chapter, I will discuss more fully the value of love, and hence, of marriage.

While the love relationship itself produces these virtues, the institution of marriage has instrumental moral and political value just so far as it recognises, endorses, and in some ways enables love relationships. Social pressure and the marriage contract provide support to the married couple. In section 1, I will discuss and reject one account of the moral value of love, the care ethics account of love as morally valuable independently of principles of justice. In section 2, I will outline a more plausible understanding of the moral value associated with love. I will argue that the type of love relationship associated with marriage is morally valuable in (at least) three ways: educatively, epistemologically, and motivationally. Finally, in section 3, I will defend the application of principles of justice to marriage against claims that justice is inimical to love. I will argue that the opposition between love and justice is misguided. To the contrary, love is only valuable in a context of rights, justice, and respect.

There are different senses of 'love' and 'care'. There is first, the bare feeling or sensation which, following Hegel, I call 'natural love'. In another sense (corresponding with Hegel's 'ethical love' or Noddings' 'ethical caring'), love is a more elaborate set of dispositions. I am focusing on natural love, first to argue that it is not sufficient for moral value, then to explain how it may be valuable when combined with attention to rights and duties. One viewpoint might be that *only* the more elaborate set of dispositions ('ethical love') is properly called love, and (in this sense) love is intrinsically morally valuable. This value would be compatible with my

claims. I will argue that natural love is only valuable in the context of rights, justice, and respect, so that if love is taken to include these, it has intrinsic moral value. I will not undertake a complete analysis of the value of love here, however, but only attempt to show that natural love may be morally valuable in the context of rights and justice.

1. Care ethics and marriage

My account of the justification of the political institution of marriage turns on a claim for the moral (and, derivatively, political) value of love. In this section, I will show that an account which locates moral value in love independently of justice, the kind of account which would attribute moral value to marriage precisely as a loving relationship, has serious difficulties. In Chapter II, I suggested a possible development of Hegel's account of marriage which would assign moral value to the emotion of love. While Hegel's account assigns value to ethical love, I queried whether one could attribute moral value to natural or sentimental love, that is, the bare emotion of love for a particular other. Such an account of the moral value of natural love would have similarities with care ethics. My purpose is not to attack care ethics, but to criticise any account (such as that put forward by some proponents of care ethics) which describes love, independently of rights, justice, and respect, as the source of moral value.[1]

Care ethics has been one of the most influential products of feminist theory. However, I should note here that, apart from the problems which I will discuss, I do not believe the ethics of care to be central to a feminist ethics. First, since the redistribution of the sexual division of labour is necessary to empower women, it is unfortunate that care ethics emphasises qualities associated with traditional

femininity, especially with domesticity. Second, a feminist ethics should be intrinsically concerned with justice between the sexes.

Care ethics originated as an attempt to gain recognition for female qualities which differ from the male qualities prescribed as normative. This project was based on a belief that the perspective claimed as normative in ethics and other areas of philosophy was in fact distinctly male. Women's perspective had been excluded from the account of humanity. In excluding women, philosophers have also crucially neglected those areas of experience historically relegated to women. For example, the assumption that women will perform necessary domestic work and child-care prompts its omission from accounts of the social distribution of labour.[2] In some arguments, the methodology of reason and abstraction is also connected with misogyny. The cultural opposition between reason and emotion as male and female, which takes reason as normative and sees emotion as an impediment to rationality and autonomy, has been linked to the personification of free and rational agents in moral theory, just as philosophical abstraction has been charged with valorising mentality, culturally identified with maleness, over the body, identified with women.[3] The features attributed to women in such arguments tend to be emotional capacities for empathy and compassion, and an epistemological stance marked by intuition, subjectivity, and attention to particularity, as opposed to abstract rationality.

Different theorists disagree about whether the qualities attributed to women are innate or historically conditioned and whether the attribution is even true. Psychological research done by Carol Gilligan purported to show that in considering moral dilemmas women do tend to believe that the narrative context and particularities of the case are morally relevant, whereas men judge from generalised principles. The moral perspective attributed to women is characterised as caring and

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[1] For critical work on care ethics, see Hoagland 1991, and for a sympathetic attempt to advance beyond these problems, see Friedman 1987.

[2] This is the theme of Okin 1989.

[3] This is a point made in Ruddick 1990, for example pp. 194 ff. See also Cixous 1980.

as aware of interdependence with others.[4] But the claim that moral theory should pay more attention to caring relationships need not presuppose anything about the relation between women and caring. The key argument is that these human features have been excluded from the account of humanity, and that this omission is connected with women's inferior status. This school of thought contends that philosophy has consistently undervalued or ignored important facts about human nature and interrelation. The ethics of care attempts to correct for a perceived bias towards impersonality and abstraction in ethical theory.

Care ethics furnishes a view of the self and of ethics which suggests that the concepts of autonomy and justice must be adapted in light of the fact of human interdependence and the moral power of natural sentiment. I will examine the claim that moral value is located in natural love and argue in this section and the next that love is only morally valuable in conjunction with universal moral rules. So far as love is part of the moral value of marriage (or other loving relationships), this is not because love is the only source of moral value, but because love can help agents perform their moral duties.

Nel Noddings' theory of care begins from the observation that relationships with and emotional response to other people are "a basic fact of human existence."[5] Human infants require nurture and most adult pursuits are impossible without co-operation. This is not a controversial claim. But Noddings holds that morality is *only* possible through emotion. She traces moral impulses to the basic fact of affective response to others. "The foundation of ethical response" lies in "caring and the memory of being cared for."[6] She proposes that an action "is right or wrong according to how faithfully it was rooted in caring ... in a genuine response," rather than in its compliance with a universal principle.[7]

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[4] Larrabee 1993, p.4.
[5] Noddings 1984, p. 4.
[6] Noddings 1984, pp. 1, 4.
[7] Noddings 1984, p. 53.

Noddings' argument that natural sentiment is the source of ethical action involves several claims. Ethical feeling is derived from the caring relations which are basic to human life. From these natural experiences, humans develop an ideal of themselves as carers. In practice, ethics depends on caring in two ways. First, it is only through caring that agents can behave ethically towards others. When one is dealing with, for instance, strangers, this may take the form of ethical caring rather than the natural sentiment. But, secondly, ethical caring is impossible if the agent has not experienced natural affection.[8] Only through a recollection of natural care can one care in other circumstances. This account is what I have described as attributing moral value to love, where love is a positive emotional response toward a particular other (as we will see, this is what Noddings means by care). Love is the source of moral value, since one cannot act morally without acting out of love (natural or ethical) for the other, and one can only do this if she has experienced natural love.

I have said that Noddings defines caring as an emotional response toward a particular other. Her claim is that morality requires full perception of other persons in the context of their lives and with an awareness of one's own relationship to them. The defining quality of the carer is receptivity to "the reality of the other."[9] This insight prompts the carer to act "as though in my own behalf, but in behalf of the other."[10] This pattern of reception and response occurs spontaneously in (natural) caring relationships, where one learns moral behaviour.[11] Thus morality is achieved through a translation of natural caring to ethical caring, that is, caring for everyone one encounters. Ethical caring focuses on the immediate other, which prevents the sacrifice of people to rules and abstract principles. Noddings' objection to universal moral principles is that they cannot meet the particular needs of individuals in specific contexts and so may cause more harm than good. In ethical caring, moral action

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[8] Noddings 1984, p. 79.
[9] Noddings 1984, p. 14.
[10] Noddings 1984, p. 16.
[11] Noddings 1984, p. 4.

responds to individual needs, and moral judgements cannot be made without consideration of particular individuals.

There are many problems with this account of love as the source of moral action. I will focus on two. First, Noddings' claim that caring is the locus and well-spring of all moral behaviour lacks plausibility. Caring, or love, is insufficient as a guide to moral action. In the first place, one can't always fully guess or understand another person's needs. Even when one can, caring may cause harm.' For instance, an agent may disclose information about her friend's state of health to his co-workers thinking it is in his best interests. Or she may decide not to tell her father that he is terminally ill. Or she may provide alcohol to an alcoholic to save him from short-term suffering. These dangers make an alternative ethical viewpoint (one which prescribes rights and duties) necessary. Noddings' insistence on eschewing principles in order to appreciate particular situations thus leads to a dangerous subjectivism. Love alone is not sufficient to guide moral behaviour.

Someone might respond that my counter-examples model the wrong kind of care. A caring person would consider the alcoholic's long-term best interests as well as his immediate suffering. She would consider her father's right to know the truth and respect her friend's autonomy. In other words, care presupposes judgements about rights and duties. If these constraints are built into love, then it does indeed begin to look morally valuable. But in Noddings' account, moral value comes from the emotion alone, which is quite independent of -- indeed opposed to, due to her particularism -- the rights and duties of justice. It is my claim that the emotion alone cannot be morally valuable, unless it is thought to contain intrinsically the desire to be just. Love is only valuable in the context of justice.

Second, on Noddings' account, moral value does not merely consist in acting towards others with care, or as if one cared for them, but in actually caring for them. Ethical caring depends on natural caring. However, on the contrary, the emotion of love is not required for an action to have moral worth. Loving another person may

motivate or enable one to act towards him or her in a praiseworthy way. But the emotion of love is separable from the moral action.

First, as discussed in the preceding paragraphs, to some extent love involves receptivity, a focus on the other. (I will discuss the nature of love in section 2.) If in love the other's project becomes my own, then I am only acting out of self-interest. This is what Noddings wants to capture: there is no distinction between 'ought' and 'want' in natural care.[12] Calling this 'self-interest' may seem mean-spirited or preposterous. One could also describe it as altruism. But the partiality here is troubling. For instance, if an agent takes on another's project and strives to help him accomplish it, her concern is limited to how best to help him. Why should she care about the effects on others? Noddings argues that she should. As it were, an infinite chain of caring should extend in the agent's deliberations, so that she cares for those whom her friend's action may affect. But what is really required, if that is the case, is an impartial extension of caring to everyone involved. This impartiality at first glance seems to conflict with the impulses of natural love, which singles out the beloved above all others. In short, the only way to make care ethics plausible as a moral theory is to argue that care should be impartially distributed. But this conflicts with the claim that love alone, independent of principles of application, is the source of moral value, since now we see that impartiality plays some role as well and in fact must even restrain natural love.

Universal impartial love might be possible. Noddings envisions concentric circles of love, at the centre of which are those close to the agent, at the periphery strangers. This is not identical with the concept of universal impartial love, since only those one encounters or comes into relation with come within the remit of care. Universal impartial love seems to require a principle of impartiality. As a particularist, Noddings cannot provide one. Noddings' account is vulnerable because it lacks this impartiality. Caring only for those whom one encounters creates

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[12] Noddings 1984, p. 81.

unfortunate lacunae in moral consciousness; morality should not function on an 'out of sight, out of mind' basis. Also, Noddings' caring calls for 'engrossment' in the other, a quality one can't spread very far!

Second, persons are considered praiseworthy and blameworthy as moral agents, but not for their feelings. Aristotle writes that virtues are not passions, or feelings: "For we are called excellent or base in so far as we have virtues or vices, not in so far as we have feelings. We are neither praised or blamed in so far as we have feelings."[13] We may be praised or blamed for our feelings in some instances (or is it only for our failure to control them, or how we express them in action?). One can control how one acts. However, emotions are not perfectly subject to rational control. Hegel therefore writes that "love, as a feeling [*Empfindung*], is open in all respects to contingency, and this is a shape which the ethical may not assume."[14] Morality cannot depend on caprice. Love's partiality, independence of will, and contingency mark it off from the dispositions required for moral action.

Sara Ruddick's *Maternal Thinking* improves on Noddings' *Caring* in that Ruddick claims that love contributes to the moral consciousness, not that action is judged by its fidelity to love. Unlike Noddings' ethical ideal, in which the agent was assessed by how faithfully her action was rooted in caring, the maternal agent is held successful insofar as she protects the other from damage.[15] Like Noddings, however, Ruddick also asserts the value of (maternal) love, rejecting abstract principles as the basis of morality. She argues that the practice of mothering provides a morality superior to abstract principles of justice. Mothering involves the primary goals of preservation and encouraging growth, what she calls "the logic of mothering." The characteristic attitude of the maternal viewpoint is a protective response to the vulnerable. Ruddick sets the protectiveness and concreteness of maternal practice against abstract theories or principles which deflect attention from concrete

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[13] Aristotle 1985, p. 41 or 1105b.
[14] Hegel [1821], par. 161, p. 201.
[15] Ruddick 1990, p. 166.

individuals. Knowledge of the other, or recognition of her life's value, is necessary for moral judgement. Loving attention to another prevents one from seeing the other as a means, for example, reducing him to an economic or military unit.[16]

In fact, maternal practice has a political dimension. Ruddick argues that bonding between mothers will cut across nations, race, and class to promote non-violence. In part, this involves "an imaginative grasp of what other children mean to other mothers."[17] This loyalty, not mediated through the state, should promote non-violence because it undermines nationalism and distorting abstractions.[18] Yet it still involves an impartial application of concrete recognition of others' value -- an inconsistency in the account as well as an impossible task! Impartial, universal justice is inconsistent with the particularised attention Ruddick promotes.

Both Noddings and Ruddick challenge the demarcation between private and public good, applying a single standard of moral good, drawn from the parent-child relationship, to all situations, as an improvement upon abstract principles of justice. But care contains no intrinsic guidelines for fairness.[19] Noddings suggests that agents should display care to everyone they encounter, but not that they should actively seek to encounter people who might need it. The ethics of care cannot prompt a commitment to correcting injustice so long as the injustice in question remains unencountered. Some degree of abstract concern is necessary to bring a privileged, sheltered individual to act on behalf of those less well-off. But as an ethic, care does not suggest any theoretical obligation for the better-off to care for the worse-off. Worse, without rights, caring for others may involve paternalistic (or maternalistic) protection infringing on what are generally thought to be individual liberties. Ruddick conceives of the family as a system which maintains respect and mutuality among non-equals, as children's inequality causes their parents to protect them.

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[16] Ruddick 1990, p. 150.
[17] Ruddick 1990, p. 177.
[18] Ruddick 1990, p. 240.
[19] I understand fairness to presuppose abstract and universal principles of justice. At least for Noddings and Ruddick, care does not contain these.

However, this cannot translate through analogy to a vision of mutuality between unequal power groups. Change would then depend on the voluntary gift of the powerful.

While Noddings and Ruddick insist on particularism at the expense of principles of justice, Marilyn Friedman argues that the dichotomy between care and justice is misguided. Justice is not irrelevant between those closely related by love, since among other things, one wishes to be just to those one loves. One's behaviour with loved ones, no matter how close, should be constrained by justice, particularly given the injustices wrought by the historical (and theoretical) removal of justice from the private sphere of the family.[20] This seems right. Care alone cannot guide moral behaviour. (Perhaps neither can justice alone, in all circumstances.)

The question is how the relation between love and justice should be modelled. We may think of the desire to be just as part of love, but the agent still needs to go outside love, as it were, to consult the principles of justice. Or we may think that justice is intrinsic to love, properly understood. When we begin evaluating love morally, it appears that ordinary usage is no longer a guide to love, and that only some forms of love pass the moral bar. But this again suggests that that bar is distinct from love. This question I will leave aside, since my intention is merely to show that love is only valuable in the context of justice, whether justice is considered necessarily connected to love or distinct from it.

Care ethics risks overlooking the necessary normative standards for interaction. For example, one effect of the feminist movement has been to bring justice into the home, from which it had been separated by laws protecting privacy. Domestic abuse, spousal rape, and divorce necessitate using principles of justice to arbitrate between parties whose involvement might seem to render them irrelevant. One might reply that care is absent here. But surely Victorian patriarchs, some of them, loved the wives over whom they exercised their power. Natural love alone is

[20] See Friedman 1987, also reprinted in Larrabee 1993.

not sufficient for moral behaviour, although, as I will argue in the next section, it may be helpful in treating others morally.

2. Love's value

I have argued that the moral value of the institution of marriage consists in its promotion of a type of loving relationship which is in itself morally valuable. In this section I will offer an account of what moral value natural love does have within loving relationships. Natural love -- the affection found in marriages and other relationships -- is characterised by intimacy and sympathy with another person. These qualities help individuals to fulfil their moral duties to others.

Different accounts of the moral value of marriage have started with a theory of value and tried to read that particular account into marriage. So Kant sees it as preserving human freedom in the face of animal nature, and Hegel as a kind of ethical glue. The priority should be reversed. What is characteristic of marriage is sympathetic intimacy, and the function it performs is morally relevant in any account of morality which holds that agents have duties to consider, in some sense, the interests of others. Sympathetic intimacy is instrumental in fulfilling, towards the person loved, the moral duties which agents have towards everyone, as well as the particular obligations created in the relationship.[21]

The moral value of marriage consists in the loving relationship typical of marriages. The institution of marriage is valuable because it promotes these relationships and reinforces them. The moral value of the loving relationships consists in the dispositions that they promote. Within the relationship love motivates

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[21] See Friedman 1991 for a discussion of the 'partialist' claim that "we are entitled to show favoritism, preferential treatment, partiality toward loved ones," or, stronger "that we have the *obligation* to show such treatment," p. 162.

moral behaviour. The relationship itself provides particular knowledge of the other which provides an epistemological aid to moral behaviour.

Politically, loving relationships are valuable because they create dispositions to trust and to regard others as particular others, enlarging the sympathies of the agent. A central feature of moral development is learning to perceive others. Loving relationships offer an education in this, since they necessarily involve deepening knowledge of another person over time, and this knowledge is conjoined with a desire (found in love) for the good of the other. I will make a case for the moral value of seeing the 'particular other', but argue that this does not lead to particularism and is in fact compatible with universal moral principles. Loving relationships on this account have the political value of educating the moral sensibilities of those who experience them.

First, I will discuss the moral value of loving relationships. Such relationships are characterised by sympathetic intimacy. This shares features with Noddings' caring, defined as receptivity and response. Sympathy suggests the emotional response to the other person, in which one is drawn to protect and further his interests and to share his projects. The intimacy developed in relationships is knowledge of the other in detail, not just recognition of the particularity of the other as an embodied self with his own interests, a recognition of what Benhabib calls 'the concrete other', but also particular knowledge of him, his history, psychology, and so on. Taken together, the knowledge of the other's self and desire for his good create a unique attentiveness.

This account may sound over-rational -- what about passion, transport, and rapture? They may co-exist with sympathetic intimacy, or exist without it. I am not trying to characterise all occurrences of love, but to gather features common to love between partners.[22] For the reasons already discussed, love is not sufficient to guide moral behaviour, but it can enable moral behaviour. It does so in two ways:

motivationally and epistemologically. Sympathy draws one to support the beloved, to weigh his interests when shared daily existence may make the question of conflicting interests a constant one. It motivates one to treat the other morally. Intimacy reveals what these interests are, so that they can be weighed. Love has moral value within a relationship because it motivates each to fulfil his duties to the other.

Part of the moral value love has within relationships is in motivating the parties of the relationship to fulfil their moral duties to each other. Noddings' central claim that behaviour towards others is only moral as it originates in caring is false. But it is true that natural love can motivate moral behaviour towards others. Kant wrote that actions done from sympathetic motives and not from duty have no moral worth.[23] (Incidentally, this makes it hard to see how love could effect the moral transformation of sex, as one might be tempted to read some of Kant's remarks in the *Lectures on Ethics.*) First, if we understand Kant to mean that one may enjoy doing one's duty, so long as one is doing it from the motive of duty, then the presence of love will not detract from the action's moral worth.[24] But this reply is not available to me, since I am assuming that love plays some role in determining action (since it 'motivates'). It is clear, at least, that Kant's view in the *Groundwork* is that only the motive of duty has moral worth.

Perhaps at this point, without broaching the questions about the nature of love which I set aside earlier, my account must part ways from the Kantian. That is, I might reply that love contains the desire to do one's duty by another. But this reply seems unavailable since I am explicitly focusing on natural love, not the more elaborate ethical love which contains such a notion. However, perhaps natural love

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[22] What of Catullus' line, "Odi et amo," "I love and I hate"? Or love between strangers? This is not the place for an extended classification of love relationships.

[23] Kant [1785], pp. 8-13.

[24] Paton rejects the interpretation of Kant which commits him to the "absurd" view that "the presence of a natural inclination to good actions ... detracted from their moral worth." Paton argues that Kant is merely trying to show that it is the motive of duty which gives an action its moral worth, not that other motives detract from moral worth so long as the motive of duty is present. Paton 1963, p. 19.

can sustain some of this burden. The sympathy which constitutes part of it includes a desire for the good of another (in the sense of desiring what is in her interest). I have argued above that this sympathy is not a sufficient guide to moral action, since this also requires principles of justice. (The question I have set aside is whether or not these principles are contained within love.) But sympathy, which motivates one to do one's duty by another, is in part the desire to behave morally by her. If Y loves X, Y will wish not to violate X's rights, though Y may have to look outside love to learn what those rights are. This sympathy may fail, as in the case of Othello. But we may say there that love has been outweighed by other motives.

The reply to the Kantian is that sympathy motivates one to do one's duty because it essentially contains a desire to do one's duty, so that acting out of sympathy is acting from the motive of duty. The sympathetic philanthropist in Kant's example was acting from duty all along. Love of humankind is in part the desire to do one's duty by them. His philanthropy expressed what he thought was the right thing to do by them. Love would not have led him to an action he knew (after consulting principles of justice) to be wicked. I have argued that love is of value, within relationships, as an aid to fulfilment of moral duties, because love contains the element of wishing for the good of the other and hence not wishing to act wrongly towards her, since to violate one's duty to another constitutes a harm to her. Now I will turn to the moral value of intimacy. From this is derived the political value of loving relationships, which provide an education in moral behaviour in complex interpersonal situations.

Loving relationships teach one how to see another person in the light of his particular needs, desires, and history, and in the context of one's own relation to him. I will argue that the moral value of love is linked to its focus on a particular other. The attention to another in her particularity is a component of moral awareness. The suggestion made by Noddings and Ruddick that morality requires full perception of other persons in the context of their lives and with an awareness of one's own

connection to them is important. The sense of connection to the other referred to here is not the connection forged by shared humanity, but the role one has played in their lives and the responsibilities one has assumed towards them. I will review the moral importance of attention for moral action, arguing that this attention to the particular other is compatible with universal moral principles. I will then show the relation between this attention and loving relationships.

The importance of framing morality in terms of a particular, or concrete, other emerged from the feminist debate over care, in conjunction with attacks on moral universalism.[25] Seeing someone as a particular other involves seeing him as a person with a certain history and personality, in terms of his distinctness from others. This is contrasted with the universalist standpoint in which persons are morally identified by what they have in common: rationality, autonomy, the ability to suffer. Seeing morality in terms of the particular other is a moral viewpoint from which other people are recognised as situated within the concrete contexts of their lives, and these contexts are taken to be morally significant. Persons have moral value due to their histories, relationships, and contexts, not simply in terms of abstract, general human characteristics. They have moral value because of their location within a social context, not as (impossibly) independent, autonomous agents.

I have criticised particularism above. In order to avoid moral oversights, care must be supplemented by universal moral rules of impartiality and justice. For the same reasons I do not find the replacement of universalism with the standpoint of the particular other plausible. For one thing, universalism is able to explain why rights attach to individuals whatever their context. Second, when we reflect on why recognition of another as particular is morally compelling, the dichotomy between the abstract view and the particular view of others seems fades. If others are valuable because they are in the process of leading a life, in which they have certain valuable relationships, a series of past experiences, and plans for the future, then the

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[25] See Benhabib 1987, esp. pp. 86-91.

description once again rises to a certain level of abstraction. Individuals are valuable because they share this feature of pursuing plans of life in the context of certain histories.

However, seeing others as particular -- recognising that they have specific needs, desires, and histories -- is part of moral understanding. In order to act morally towards another person, one must react to him as an individual, not simply as a human possessed of certain characteristic human traits. One must take into account his needs, desires, history, and other particularities: these make a moral difference. This attention to the other is stressed by Martha Nussbaum in her work on Henry James. She claims that James promotes the paradigm of "moral attention," that is, deep perception of others, of situational complexities, and of one's own responsibilities. He suggests, in Nussbaum's account, that moral action occurs as a response to others -- "without reliance on rules of duty" -- and that "[o]ur highest and hardest [ethical] task is to make ourselves people 'on whom nothing is lost'," that is, people of unbiased and full awareness.[26]

Seeing others as particular in this way is compatible with moral universalism, despite arguments against this claim. Arguing for the primacy of the particular over the general standpoint, Seyla Benhabib claims that universal moral principles fall into incoherence because they fail to recognise the concrete other. The "disembedded and disembodied" moral self -- the "generalised other" -- "is incompatible with the very criteria of reversibility and universalizability" required by a universalist ethics.[27] Although in universalist theories, "moral reciprocity involves the capacity to take the standpoint of the other, ... under the conditions of the 'veil of ignorance,' the other as different from the self, disappears."[28] If other people are represented solely as (for example) free, rational agents, the very individual who should be the subject of moral

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[26] Nussbaum 1990, Chapters 4 and 5, and pp. 148-9.

[27] Benhabib 1987, p.81. See also Whitbeck 1992, for an argument that liberal individualism loses sight of the particular other.

[28] Benhabib 1987, p.89. She refers to Kant as well as to Rawls.

reflection disappears. But it seems mistaken to say that universalist theories like Rawls' or Kant's cannot consider the particular other.

Benhabib's criticisms seem misguided because moral judgements *always*, by definition, require full apprehension of the context, that is, of all the features which are morally relevant. (Of course, we may need to revise our understanding of which features are morally relevant. But this does not undermine universalism.) For instance, Rawls' contract theory requires that each puts herself into the position of all other members of society. It is unclear how universal moral rules obscure the particularity of persons and situations. In a complex situation, it may require a good deal of investigation and deliberation to work out how they apply. But surely it is just their application which responds to the particularities at hand.

Seeing the particular other is not incompatible with the application of universal moral rules. But one can see why the complaint has been made. Rules rigidly applied may in some cases cause only harm. For instance, why does Kant, in "On a Supposed Right to Lie from Altruistic Motives," not see that the case at hand could be better described as a lie-in-order-to-save-a-life? As Anscombe points out, the Categorical Imperative must be supplemented with a description of what features of the situation count as morally relevant.[29] This is a difficulty for the Formula of Universal Law, since it is supposed to generate moral principles, not presuppose them before it does its work.

However, the charge that the Categorical Imperative is insensitive to particular circumstances seems misguided. All distinctive features of an action, including circumstances, consequences, and motive, can be counted in the maxim: "the maxim is always of the form 'if I am in certain circumstances, I will perform an action likely to have certain consequences'."[30] The material maxim serves the purpose of introducing circumstances into moral deliberation. Perhaps the concern of particularists is not that particular circumstances are not taken into account. What

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[29] See Anscombe 1958, p. 2.

may be worrying to them is that "the maxim, however specific, is abstract and general, while the action is individual and concrete."[31] But this expresses only that one would act likewise in relevantly like circumstances. If everything is considered in the maxim, the universalizability test may become unwieldy, but it is at least possible to answer the particularist objection that universal principles overlook the particular facts of individual cases.

Seeing the particular other in each case in which one applies universal moral rules is an important component of moral deliberation. I will now argue that the skill and habit of seeing others as particular are developed in loving relationships, and that this moral education is the source of the political value of marriage. Also, the ability to see the particularity of the other spouse is of moral value within the relationship.

The deliberative focus on the particular other is constantly limited by one's inability to perceive the full range of particularities which characterise the context. The best one can do, often, is to conjecture and infer. This inability diminishes as one's knowledge of the others involved in the situation grows. The connection between relationships to others and particular knowledge of them that suggests what moral role love plays. Relationships with others enable one to witness their particularity. Shared experience provides knowledge of others' particularities and of the context which is ordinarily inaccessible. In other words, loving relationships with others enable one to fine-tune the application of moral principles in particular circumstances as one is ordinarily unable to do.

Loving intimacy is valuable in aiding one to fulfil duties prescribed by general moral principles towards the loved one. There are also particular duties generated in close relationships, through promises, reliance, and expectation. In addition to explicit promises and agreements accrued, relations between persons over time may generate duties founded on reliance. If Sally has led her spouse to believe that he may rely on her, not through any explicit promise but through repeated interaction,

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[30] Paton 1963, p. 76.

then it becomes obligatory (over and above her general moral duties) for her to be reliable.[32]

Such duties accumulated during the relationship may only be carried out with this detailed knowledge of the other. These duties are not different in kind from ordinary moral duties. As one comes to deeper knowledge of the other, fulfilling duties towards her becomes more complex as, first, one sees the complexity of her character, and, second, she begins to hold interests in one's own behaviour. In the first instance, one's knowledge of how to carry out general duties towards another will increase as one knows her better. Second, when the relationship between two people becomes a strong interest for each party, both parties must weigh this newly created claim in their moral deliberations. For example, a spouse considering whether to accept a job offer in a far-off city should consider the effect on his relationship in terms of both his and his spouse's interest in it. These duties depend on the context and history of the relationship, not love itself. One does not owe any special consideration to an obsessed stalker.

Another relevant question is the duration of duties created in loving relationships. What is the status of the obligations created through reliance when love ends? Some of the duties created through sympathetic intimacy can only be carried out through sympathetic intimacy, through the knowledge of the other and the sharing of ends. Duties derived from intimacy, especially those whose existence depends on the framework of intimacy, cannot continue when the relationship is dissolved. Having once been intimate may have some claims, so that duties may be envisioned as trailing off rather than stopping cold. But if these duties, aside from explicit promises, depend on the existence of shared ends, it makes no sense to think of them as continuing when those shared ends have been dissolved and separated.

Love develops habits of considering others' interests. Its political value is in part the movement away from egoism that it effects, as one recognises the

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[31] Paton 1963, p. 137.

importance of another's good to her, and comes to desire it with her. Another part of the political value of loving relationships comes from the practice they provide in seeing another as a particular other. Seeing another as particular is not necessarily motivational. Its value is the knowledge it gives of the value of others' interests, histories, and needs to them. This may not be sufficient to motivate, but it is critical to understanding how to treat another morally. Moral action cannot proceed without (at least when this is possible) some sense of what the other sees as her good. Coming to know another person in her particularity reinforces, or provides, knowledge of the importance of considering others' interests.

Loving relationships create habits of weighing another person's interests with one's own and seeing the other's particularities. Politically, they are valuable because they can create the disposition to take account of others' needs. This in turn may promote a sense of justice. This point can be found in both Rawls and Mill. Mill writes that as society progresses, justice will be

> grounded as before on equal, but now also on sympathetic association; having its root no longer in the instinct of equals for self-protection, but in a cultivated sympathy between them.... The family, justly constituted, would be the real school of the virtues of freedom.[33]

If marriage were a society of equals, children would learn to treat others as equals.

What we need to see is how loving relationships promote the sense of justice. Rawls claims that attachment to particular others strengthens regard for principles of justice which are known to benefit and protect those loved ones. This claim must be weighed with the possibility that partiality towards one's loved ones may subvert

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[32] See Scanlon 1990 for a discussion of the principle of reliance.

[33] Mill [1869], pp. 46-7. See also Rawls 1971, pp. 473-4; the passage is cited in my Chapter III at fn. 55.

justice. Mill suggests that sympathy towards others may prompt justice towards them. This may occur through analogical apprehension, much like the transition suggested by Noddings between natural and ethical caring. The development of feelings of sympathy for one particular person may enlarge sympathies for others in general. This is an empirically verifiable -- or falsifiable -- psychological principle. I do not wish to assert it as a universal phenomenon of human nature. However, examination of the moral role played by love shows why this principle is plausible. In loving relationships, one is both motivated and enabled to treat another morally. This creates habits of considerate action on behalf of others. It also creates a habit of considering another's interests in decision-making.

I have claimed that the experience of loving relationships will extend an agent's sympathies, habituating her into modes of trust and relationality. Some philosophers worry that the opposite is true, that family sympathies conflict with the impartiality necessary for justice. This is a problem for Rawls where families interfere with equal opportunity.[34] Think of Plato:

> Does not the worst evil for a state arise from anything that tends to rend it asunder and destroy its unity ...? ... [The Guardian] must regard everyone whom he meets as brother or sister, father or mother, son or daughter, grandchild or grandparent.... A result that will be due to ... our Guardians' holding their wives and children in common.[35]

This argument applies equally to private property, of course, although the question here is not the abolition of private property or of the family, but of whether the state has reason to promote loving relationships.

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[34] See Rawls 1971, pp. 511-2.
[35] Plato 1965, pp. 163-5 (V.461-3).

First, there is no moral harm in partiality as long as it does not lead to injustice towards others. Justice does not require that a wife love her husband no more than she loves her neighbour's husband. Loving one's spouse more than one loves others does not entail that one has no concern at all for others. The 'disruptive' model of partiality pictures a marriage (or family) as a circle outside of which one is indifferent to the claims of others. But it can be contrasted with a harmonising model of love which does not divide the partners from the world, but locates them in it. Their relation reaches out (in lesser degree) to friends, family, acquaintances, connecting them to others rather than marking them off. This seems equally possible and plausible. Partiality does sometimes follow love, but love may also effect an enlargement of sympathies.

Moreover, the 'disruptive' partiality, so far as it occurs, may be a feature of certain individuals whatever position they find themselves in. Certain natures may jealously set themselves against the common good, and set the good of their families against society too if they have them. In other words, this tendency may pre-exist love relationships. Of course, one might think of parents being motivated to do more for their children than they would for themselves. But it seems unlikely that the institution of marriage will promote this partiality. Rather, it brings the relationship into the public sphere of judgement, expectation, and regard. Marriage seems likely to connect the partners to the rest of the world rather than pitting them against it, simply because it locates them in a public context.

The argument that experience of love will promote a disposition to trust and sympathise with others in general I trace back to Hegel. First, the habit of responding to others sympathetically may be developed through love. Hegel (like Aristotle) emphasises the role of one's habits in structuring one's desires. Where love meets the standard of sympathetic intimacy, the prolonged habit of caring for another may condition one to respond with sympathy in various situations. Coming to understand oneself as a self related to a particular other by trust will promote relations of trust to

others. There is also a learning advantage. In relationships, one learns how to treat others as they wish and comes to understand how other people are. Experiencing the reality of another person reinforces the reality of other people's experience.

3. Love and justice: their compatibility

Some advocates of care ethics argue that universal moral rules threaten the perception of the particular other. The contextualist criticism of universalism is allied to an attack on the liberal conception of individual and the primacy of justice, a position which allies communitarians and some feminists.[36] They hold that justice is inimical to love or altruistic virtues, for the application of principles of justice within certain associations, such as the family, distorts the commitment and shared relationship which takes priority here. Similarly, the model of the individual as a rational contractor is said to be distorted, since individuals do in fact have all kinds of attachments to each other, some of which may outweigh the claims of justice in value.[37] In this section, I will defend the relevance of justice to marriage.

This will in part lay the ground for my next chapter. In it, I will argue for the application of freedom of contract to marriage. The proposal that the marriage contract should be regarded as an ordinary contract raises criticisms that the principles of justice, including freedom of contract, are inapplicable to marriage or to intimate relationships more generally. Spontaneity, affection, altruism -- the crucial attributes of intimate relations -- should not be subjected to contractual ordering, a tool designed for economic transactions.

The relationship between contract and liberal justice is complex. Freedom of contract is implied by the prioritisation of liberty in liberalism (although the difference

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[36] For a discussion of the similarities between communitarians and comuunity-interested feminists, see Weiss 1995.
[37] See Held 1990.

principle takes precedence).[38] Rawls' theory is also, at another level, a contractarian account of the foundation of justice. The attack on liberal standards of justice has included criticism of contractarianism. The priority of justice in small associations where the circumstances of justice (mutual disinterest, conflicting claims on scarce resources) do not apply has been denied. It is precisely in these circumstances that the contractarian model of the individual as self-interested and unattached does not apply. Of course, the disinterested individual described as taking part in the original position is part of Rawls' thought-experiment which is not intended to involve claims about any "particular theory of human motivation."[39] But the contractarian model of the individual has met with criticism. For example, Benhabib notes that Hobbes' suggestion to "consider men ... as if but even now sprung out of the earth, and suddenly, like mushrooms, come to full maturity, without all kind of engagement to each other" denies the fact of infants' dependence on their parents.[40] Held argues that taking the contractual model of the individual as paradigmatic overlooks the relationships of dependence which are at least as fundamental to human experience.[41]

Of course, Hobbes and Rawls have good reason for describing the contract situation as they do. These suppositions enable them to determine what conditions will protect individuals when sympathy fails. However, communitarians suggest that the principles of justice generated in this way are inappropriate in, even inimical to, communities where the circumstances of justice described by Rawls do not apply. This brings Michael Sandel to argue that the individual rights theoretically secured on contractarian assumptions have no place in communities where these conditions do not obtain.[42]

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[38] See my Chapter VI.3 for a more thorough discussion.
[39] Rawls 1971, p. 130. See pp. 126-30 for his description of the circumstances of justice.
[40] Quoted in Benhabib 1987, p. 84, from Hobbes' 'Philosophical Rudiments Concerning Government and Society'.
[41] See Held 1987.
[42] See also MacIntyre 1985, pp. 244-51.

The criticism of liberalism made by Sandel is that virtues such as altruism take precedence over justice in associations like the family. Sandel does not discuss the contractual regulation of marriage, but his position implies that contract is inappropriate as a tool for negotiating intimate relationships. (We will see that community-orientated feminists claim precisely this.) Introducing a basis for concrete legal expectations into a marriage will produce self-interest and formality at odds with affection. One legal theorist points out that marriage contracts seem to invite invidious comparisons with commercial contract. Contract suggests "individualism in the sense of selfishness, and ... that one party has the right to break a contract so long as that breaching party pays damages."[43] But is the inference that contract therefore weakens marriage correct?

Before addressing the role of contract in marriage, I will consider the claim that justice is inapplicable within the family and even disruptive of the higher virtues which characterise the family. This view has much historical precedent. Susan Moller Okin has shown that there is a long philosophical tradition of viewing the family as governed by affection rather than justice.[44] On this view, the conditions of justice -- self-interested competition for scarce goods -- do not apply, as there is an "identity of interests" among family members.[45] Hegel and Hume both exemplify this tradition. Hume writes, in his account of justice, "Between married persons, the cement of friendship is by the laws supposed so strong as to abolish all division of possession; and has often, in reality, the force ascribed to it."[46] And we have seen Hegel's account:

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[43] Weisbrod 1994, p. 778.

[44] Okin 1982, and Okin 1989, Chapter 2: 'The Family: Beyond Justice?'

[45] Okin 1989, p. 26. Okin writes that Allan Bloom puts the family above justice, "acknowledging ... that the division of labor found within the gender-structured family is unjust ... but [claiming that it is] grounded in nature and necessary."

[46] Hume [1777], p. 185.

> The *right* which belongs to the *individual* [*dem Einzelnen*] by virtue of the family unit and which consists primarily in his life within this unit takes on *legal form* [*die Form Rechtens*] ... only when the family begins to dissolve.[47]

On this view, there is no need for allocations of rights within a functional family, since sentiment provides for distribution and precludes the possibility of separate claims.

I have already criticised Hegel's view in Chapter II. Moreover, modern feminism has concentrated on demonstrating why rights must be extended to reach inside families.[48] Most feminists would not challenge the importance of rights within the family, but challenges to the contractual conception of the self and the primacy of universal principles have come from feminists as well as communitarians such as Sandel. These criticisms are united by an understanding of intimate relationships as characterised by a trust and generosity which are devalued by the contractual model of the individual and disrupted by inappropriate applications of abstract principles.

Sandel takes issue with Rawls' assignment of justice to a pre-eminent status among the social virtues. He claims that justice obtains precisely where "nobler but rarer virtues" -- generosity, benevolence, affection -- are lacking.[49] He cites the family as an institution in which "affections may be engaged to such an extent that justice is scarcely engaged, much less as the 'first virtue'."[50] Not only is justice superseded in the family and other groupings in which there are shared ends and values, but the introduction of justice into such circumstances may in fact "represent a moral loss" if it occasions the "breakdown of certain personal and civic attachments ... [or] a rent in the fabric of implicit understandings and commitments."[51]

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[47] Hegel [1821], p. 200, par. 159.
[48] Wollstonecraft [1792]; Mill [1869]; Okin 1989.
[49] Sandel 1982, p. 169.
[50] Sandel 1982, p. 169.
[51] Sandel 1982, p. 33.

Sandel imagines an ideal family in which generosity, not justice, prevails, so that issues of what individual members are owed, or have a right to, are ignored. When this domestic peace is broken and affection begins to fail, the family dutifully uses the two principles of justice, instead of generosity, to determine distributions. Sandel argues that the former scenario, in which justice is not an issue but the family naturally pulls for the same ends, seems at least as morally good as the second.[52] The virtues which it supplanted were finer than justice. Okin responds that while associations may display higher virtues than justice -- such as altruism -- they are only "morally superior to associations which are *just* just only if they are firmly built on a foundation of justice."[53] Justice provides a remedy when affection fails, assuring that when nobler virtues no longer operate, each will at least get her own.

Sandel implies that justice detracts from love and affection. When spouses begin to assert their rights against each other, trust, generosity, and spontaneity may begin to take second place to considerations of justice. Too much attention to the terms and expectations of a marriage is at odds with the natural community which should arise between spouses. Voicing a similar claim, Minow and Shanley note that "the model of a self-possessing individual linked to others only by agreement ... fails to do justice to the complex interdependencies involved in family relations and child-rearing."[54]

Families may not manifest the circumstances of justice or function with justice as their primary virtue, but justice is still applicable to them. John Tomasi cites MacIntyre, Sandel, and Taylor as holding that individual rights have no place in "intimate harmonious communities" and concentrates on the passage from Sandel which I have already cited. Tomasi summarises Sandel's argument as follows: "If individuals conceive of themselves as individual holders of rights, that self-conception will preclude genuine commitment on their part and thus will weaken and inhibit

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[52] Sandel 1982, p. 33.
[53] Okin 1989, p. 32.
[54] Minow and Shanley 1996, pp. 11-12.

community."[55] Tomasi argues that not only is this false, but that communities without justice might no longer be virtuous.

Tomasi's strategy is to distinguish between withholding and waiving rights. Rights withheld are held but not exercised, remaining in one's possession. It is this active decision not to claim that to which one has a right that "gives definition and meaning to certain social virtues."[56] Altruistic actions are meaningful precisely because the agent had a right to some property or deed which she chose not to exercise. Performance of such acts strengthens interpersonal attachments since the recipients and spectators recognise that others gave over entitlements, and "helps to guarantee that these attachments are true" because the agent's act was voluntary.[57]

Tomasi claims that Sandel loses the distinction between possessing rights and insisting on them. Just because family members possess rights and can think of themselves as rights-holders does not mean they will choose to interact solely on these terms. Tomasi compares a third case with the two marriages Sandel imagines. In this case, a servile, deferential wife, takes her husband's goals as her own. She has no sense of her own identity or interests. This case seems to meet the communitarian standards of virtue, as well as Sandel's second example fits the liberal model. But this marriage is clearly sub-optimal: "if an intimate community is beyond rights, it may have slipped beyond virtue as well."[58]

Minow and Shanley's comments, and the concerns expressed by Sandel, are plausible in their insistence that marriage should not be depicted as a series of mutually rewarding exchanges. Ideally, marital relationships should involve trust, affection, spontaneity, generosity, and intimacy. A marriage in which these qualities are completely and permanently replaced by self-interested insistence on each partner's rights seems less valuable than one characterised by altruistic virtues. And a

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[55] Tomasi 1991, pp. 521-2.
[56] Tomasi 1991, p. 524.
[57] Tomasi 1991, p. 527.
[58] Tomasi 1991, p. 535.

description of marriage as a contractual exchange between two self-possessing individuals would seem to miss an essential aspect of it. But the conclusion that the possession of rights within marriage, or the contractual ordering of the institution, will have these negative effects is not warranted.

The fact that marriage differs substantially from a self-interested contractual exchange does not provide a good reason why it cannot be regulated through contract. In the first place, marriage is already contractually regulated. It comes with fixed rights and obligations. Were all rights and obligations stripped from it, it would cease to have any legal substance. So the picture of marriage as wholly governed by affection has always been disingenuous. But contractual ordering (that is, giving spouses the liberty to set their own terms to the marriage, a proposal which I will discuss in Chapters V and VI) may seem to be more inimical to love and affection than the traditional contract in this way: rather than taking on already decided rights and obligations, spouses would negotiate between themselves, as self-interested opponents. Haggling over who will get what in the event of divorce, and how earnings will be shared, may not seem the most propitious or appropriate way to begin a marriage.

There seem to be two steps to make in response to this. First, as Okin points out, there *is* a place for individual self-interest within marriage. Not only does justice demand the extirpation of abuse and exploitation when they are prevalent, but justice between the genders requires (in current social circumstances) that altruism be limited by considerations of rational self-interest. Second, the provision for protective self-interest may seem to create the wrong atmosphere for marital trust. As communitarians argue with regard to human rights, these terms and obligations create the wrong model of relation. But marital planning creates the conditions for trust by limiting the possible negative consequences. With security established, trust is possible. In order to be able to practice spontaneous generosity in marriage, each spouse needs the long-term security provided by contracting. But to recognise the

fact that individuals have reason to secure their own interests is not to deny the altruistic and affective elements of marriage.

Just as justice is compatible with small, harmonious communities, contract is compatible with emotional, other-centred, and committed relationships. Contractual regulation does not imply that the relationship is essentially contractual. The work done by the contract is to settle arrangements legally and to clarify expectations. Individuals' possession of rights does not mean that they will assert them in all circumstances. The marriage is initiated by a contract, but is constituted by it only as a legal status. Moreover, it is less likely that rights agreed on by the spouses themselves will lead to domestic disharmony than those imposed by the state in the current marriage contract. In both cases, rights and obligations exist, but in the case of private ordering, they are fully fore-known and agreeable to both parties. When each party agrees on the obligations she will take on, each party is less likely to have to insist that the other fulfils her own. A pre-written and universal agreement "necessarily alienates the partners from full responsibility for and freedom in their relationship. 'Profound closeness' between the partners -- or at least an area of it -- is thereby expropriated rather than promoted."[59]

There is another issue pertinent to the contractual regulation of marriage. This is the viability of contracts stipulating marital arrangements in detail. For example, the terms of a pre-nuptial agreement made in the U.S. in 1997 bind the couple in question to "'engage in healthy sex three to five times per week'; to go to bed at 11:30 p.m. and get up at 6:30 am; to 'pay cash for everything unless agreed to otherwise'; and ... not to 'raise voices or get snappy'."[60] Two feminist legal theorists propose that contractual agreements could include obligations such as "sexual access," birth control, recreation, "nature and extent of permissible social or sexual relations with others," children, and religion.[61]

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[59] McMurtry 1972, p. 592.
[60] Cited in *The Guardian*, 21/5/98, Section 2, p. 12.
[61] Weitzman, pp. 1252-3; see also Shultz, pp. 220-4.

One criticism of such pre-nuptial agreements is that they create a hidebound formality in a relationship where spontaneity should be the norm and preclude the exercise of altruism. The pre-nuptial agreement is at odds with the nature of the relationship. If agreements about the minutiae of everyday life are taken (even metaphorically) as contractual obligations to perform, the focus of the spouses seems to have shifted from the marital relationship with the other person onto a series of discrete acts to be performed. If marriage is life-defining, its give-and-take should determine everyday activities. Contracting on small issues has it the other way around. The marriage is prior (conceptually, logistically, emotionally) to choices on bed-time and leisure activities. However, the liberal conception of neutrality requires that the state not impose a conception of the good marriage by forbidding such contracting. The state may set definitional limits by simply ruling out some contracts as marriage contracts. A contract to trade a piece of land for some money could never qualify. But the limit invoked in this criticism is not a definitional limit on marriage, but rather a counter-principle to freedom of marriage contracting based on a conception of the good marriage. Because the criticism is based on a possibly contested conception, it cannot justify state proscription of such detailed contracts.

However, not all such pre-nuptial agreements are within the scope of contractual agreement. The limits on the reach of contract are described by June Carbone:

> contract, as a model to govern relationships, has its greatest influence where (1) the contract primarily concerns the interests of the parties to the contract with a minimal effect on third parties or society generally; (2) the parties to the contract are capable of reaching acceptable bargains; and (3) enforcement would not impose inordinate difficulties on the legal system.[62]

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[62] Carbone 1988, p. 147.

A further condition (4) is that matters subject to contract must be "capable of rational management and planning."[63]

Some elements of detailed pre-nuptial agreements do not meet conditions 3 and 4. They present an inordinate difficulty of enforcement and proof. In some cases, it would be a violation of rights to be forced to carry out some obligations, such as sexual access or religious observance. Further, at least some of these items are not subject to rational planning, especially the emotions. Choices about sexual activities, social life, and recreation depend on the flow of day-to-day life and the occurrence of the unexpected, although they are subject to rational planning in the legal sense. Some elements of marriage cannot be subjected to rational decision-making and planning without destroying the conditions within which the activities can be enjoyed.

Of course, one could contract (pre-nuptially or not) to meet someone every Saturday for a movie. What would such a contract mean? Performance of the act could not be legally enforced. However, compensation could be awarded for breach. If such a contract were not proscribed, a court would not find it void *ab initio*. But what compensation would be made for a breach of a contract to meet someone every Saturday in exchange for some consideration? It is difficult to see what damages could be claimed, other than a return of the consideration, unless the parties had also agreed upon damages in the event of a breach.

There is no difficulty with agreements on these issues between married persons, and in fact such agreements may be essential to married life. Spouses may arrange, explicitly or tacitly, to walk the dog alternate nights, or go to the movies every Saturday. Yet including such arrangements in the contract, as a legal tool, is inappropriate. The contract, while legal, is essentially meaningless, except as providing grounds for divorce. But if divorce is readily accessible, these extra

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[63] Shultz 1982, p. 220.

grounds make no difference. While due to difficulties of enforcement, proof, and planning some topics seem bad candidates for contractual negotiation, such as recreation, sexual matters, and domestic chores, financial matters can be legally negotiated because they are easily enforced and can be subjected to rational management and planning.

Contract does not threaten the complexity and spontaneity of marriage just as justice does not threaten the virtues of harmonious intimate associations. This is not to imply that marital virtues necessarily issue from the withholding of contractually acquired rights. The contract is a public statement of and legal agreement to the relationship, to be built upon from day to day. It neither reflects nor governs the day-to-day interaction between spouses. Hegel writes that marriage begins "from the point of view of contract ... *in order to supersede it* [*ihn aufzuheben*]."[64] The contract does bear some such relation to the lived marriage, which is the performance of the contractual agreement to marry: "Actual marriage, in any form which makes the parties in law husband and wife, is performance [not merely the contract]. Nothing short is."[65]

In this chapter, I argued that loving relationships between individuals promote virtues which are valuable in citizens, namely, dispositions to sympathise with others and to recognise and take into account the interests of others. I also argued that justice does not hinder love. Therefore, the institution of marriage is justified in terms of the valuable dispositions which it promotes. State regulation of marriage through contract does not conflict with loving dispositions. In the next chapter, I will discuss what form contractual regulation of marriage should take.

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[64] Hegel [1821], p. 203 or par. 163 -- his italics.
[65] Bishop 1881, §2, at 2; quoted by Weisbrod, p. 780.

CHAPTER V: A CONTRACTUAL ORDERING OF MARRIAGE

> A contract! where are any of the attributes of contracts, of equal and just contracts, to be found in this transaction? A contract implies the voluntary assent of both the contracting parties. Can even both the parties, man and woman, by agreement alter the terms, as to *indissolubility* and *inequality*, of this pretended contract? No. Can any individual man divest himself, were he even so inclined, of his power of despotic control? He cannot. Have women ever been consulted as to the terms of this pretended contract?[1]

1. The proposed re-ordering of marriage
    i. Weitzman: business and conjugal partnerships
    ii. Shultz: private decision, public enforcement
2. Deficiencies of the traditional marriage contract
    i. Sexism
    ii. Inflexibility
    iii. Enforcement
    iv. Incoherence
3. Liberal grounds for a contractual ordering of marriage
    i. The changing character of marriage: law and society
    ii. Liberty and diversity

My objective in this chapter and Chapter VI is to ascertain how marriage should be legislated as a basic structure of society within Rawlsian liberalism. I will argue that marriage, as a legal institution, should be regulated by the principles of neutrality between conceptions of the good and of freedom of contract which

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[1] Thompson [1825], p. 84.

characterise liberalism. In this chapter, we will see how marriage would be affected by the application of the principle of freedom of contract. I will consider arguments made by legal theorists in favour of, and liberal grounds for, re-ordering marriage as an institution regulated by private contracts. The legal theorists whom I discuss propose that marriage should be regulated like any other contract, resulting in greater latitude in its terms.

I wish to consider the implications of Rawlsian liberalism for marriage as one of the basic structures of society. In *A Theory of Justice*, Rawls provided a systematic argument justifying commonly held intuitions about justice. These intuitions, which are in conflict with utilitarian theories of justice, include beliefs that "[j]ustice is the first virtue of social institutions" and that "the welfare of society as a whole cannot override" the rights conferred by justice.[2] Rawls derives two principles of justice, first, that individuals should enjoy equal rights to basic liberties, and second, that social and economic inequalities should be arranged to the greatest benefit of the least advantaged, and that positions should be equally open to all.[3] Rawls' subsidiary argument for the more controversial "difference principle" -- that socio-economic differences should benefit the worst-off -- is that it follows from the widely accepted principle of equal opportunity, in that that principle holds that individuals should not be disadvantaged for morally arbitrary reasons. The principles are justified because they "match our considered convictions of justice or extend them in an acceptable way."[4] Rawls' chief argumentative strategy is the device of the original position, a thought-experiment in which all individuals in society are imagined to step behind a veil of ignorance which prevents each from knowing his or her particular social and economic status, talents and abilities, and conception of the good. The contractors then unanimously choose a set of principles to govern the basic structures of their society.

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[2] Rawls 1971, p. 3.
[3] See Rawls 1971, section 45; I will discuss the principles in greater detail in Chapter VI.3.
[4] Rawls 1971, p. 19.

While Mill's classical liberalism would restrict individual actions only to prevent harm to others, Rawls' difference principle gives the state wider powers of redistributive taxation. Nevertheless, Rawlsian liberalism values freedom of contract. First, market freedom is retained in Rawlsian liberalism for its efficiency and its role in providing the freedom to choose one's occupation. Also, since the liberal state does not prefer any conception of the good to another, but remains neutral between them, freedom of contract within the limits of justice enables individuals to pursue their own conceptions of the good through contractual agreements. Freedom of contract is valuable but restricted by higher liberal principles. In Chapter VI, I will consider how the difference principle and the requirements of equal opportunity limit freedom of contract, asking specifically whether liberal principles require state intervention to promote gender equality. In this chapter, I will discuss how marriage legislation could be revised to accord with the principle of freedom of contract and what reasons would support this revision.

In section 2, I will examine the deficiencies of the traditional marriage contract to show how it has been an anomalous contract. That is, the principles which apply to other contracts have not applied to marriage. I will suggest that the marriage contract should be brought into line with other contracts in these areas, as far as is possible. Further, the marriage contract has discriminated against women, which conflicts with the liberal principle of formal equality of opportunity. In section 3, I will discuss arguments given by legal theorists for the contractual ordering of marriage. Then I will show how the liberal values of liberty and neutrality between conceptions of the good are relevant to the ordering of marriage. Freedom of contract in marriage will be shown to be justified, within limits, by the fundamental principles of liberalism. I argued in the Introduction that marriage is one of the basic structures of society, to which these liberal principles apply. Moreover, marriage is not only a social structure, it is a legal institution and a contract. If it is to continue to exist as a legal institution (as I have argued that it should) then the principles which

govern institutions in a liberal society must apply to it. To begin, I will describe what the application of freedom of contract to marriage would entail.

1. The proposed re-ordering of marriage

i. Weitzman: business and conjugal partnerships

Lenore Weitzman proposes both that private marriage contracting should be available to individuals as an alternative to the current legal marriage contract, and that a private contractual ordering of marriage would be preferable to the current system. She describes what might be included in a private marriage contract:

> A man and a woman could decide, in advance, on the duration and terms of their relationship, as well as the conditions for its dissolution. They could specify their respective rights and obligations for the financial aspects of the marriage (support, living expenses, property, debts, and so forth) as well as those for their more personal relations (such as responsibility for birth control, the division of household tasks, child-care responsibilities). Further, they could make some decisions before entering the relationship ..., while reserving others for later.... They could also specify the process of making a later decision, such as an agreement to use an arbitrator in the event of disputes.[5]

She adds that if freedom of contract were consistently applied to marriage, the marriage contract need not be between a man and a woman, but could be made by

[5] Weitzman 1974, p. 1249.

same-sex couples and larger groups such as extended families.[6] In a 16-point list, Weitzman suggests as possible topics for the contract "aims of and expectations for the relationship," duration of the contract, property, income, debts, support and expenses, household arrangements, "personal and interpersonal relations" (including surname, sexual issues, birth control, and leisure), relations with others, children, religion, wills, "procedure for changing the contract," dispute resolution, damages for breach, and dissolution.[7] As an addition to the current system, these contracts could either stand in lieu of marriage, or exist within legal marriages. However, in either case, they are presently unlikely to gain legal recognition as marriages. As a re-ordering of marriage, contracts similar to those described above would regulate and constitute marriage.

Weitzman suggests that the conjugal contract could usefully be modelled on the business partnership contract outlined in the Uniform Partnership Act. This Act provides default terms governing partnerships, but allows contractors to alter the terms to suit their needs.[8] On this model, only agreements concerning income, property, arbitration, and dissolution would be fully enforceable, although some other breaches might result in monetary damages, as agreed. Due to the vagueness or difficulty of enforcement of some marital obligations, "some of the rights and obligations ... in [these] contracts may not be subject either to specific performance or money damages."[9] Some subjects of marital agreements, such as religious commitment and recreational priorities, would be included in the contract only in order "to clarify [the couple's] own thinking and to set forth ideals and aspirations," not as legally binding obligations.[10]

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[6] See Weitzman 1974, p. 1249, 1255.
[7] Weitzman 1974, pp. 1250-3.
[8] Weitzman 1974, p. 1256.
[9] Weitzman 1974, pp. 1270-1.
[10] Weitzman 1974, p. 1271.

ii. Shultz: private decision, public enforcement

Marjorie Shultz, another American legal theorist, writes that "the state may undertake two functions: channeling of behavior and resolution of disputes."[11] In the former role, "the law may ... regulate conduct ... for example, it may define the rights and obligations of spouses within marriage." In the latter mode, "legal institutions ... authoritatively interpret and enforce obligations, evaluate claims, and select remedies."[12] The state directs marital behaviour by defining in law the roles of husband and wife. In its other role as dispute-resolver, it adjudicates conflicts between spouses, enforcing obligations either as defined in the behaviour-channelling process or by the spouses themselves. If the state took this enforcement role in marriage, it "would mean making legal institutions available for authoritative resolution of disputes between spouses."[13] Currently, the state emphasises the first role, of directing behaviour, with respect to marriage, but downplays the other (as I will show in section 2 below).

Shultz argues that while traditional marriage law has channelled behaviour but avoided resolving disputes, it should instead leave definition of marital roles to private choice and enforce the choices that are made. She

> recommends that the state ... defer to private decisions about the obligations and conduct of marriage while providing to the relationship the legal tools of legitimacy and dispute resolution.... [M]arital partners could, within the limits of public policy, define and plan their relationships, giving them the content, character, duration,

[11] Shultz 1982, pp. 211-2.
[12] Shultz 1982, p. 212.
[13] Shultz 1982, p. 212.

> and structure that the parties themselves choose ... [and] have access to legal enforcement and dispute resolution.[14]

That is, marriage should be ordered as a private contract defined by the partners and enforced by the state.

Like Weitzman, Shultz suggests what subjects could be covered in a private marriage contract: income and support, property, housework, domicile, dispute resolution, and duration. She gives examples of an "open marriage" contract, a same-sex marriage contract, and a contractual exchange of "traditional vows."[15] However, she notes that not all of the subjects of such contracts meet the conditions of contractual ordering, that is, "that obligations should ... be capable of legal enforcement ... [and] capable of rational management and planning."[16] While financial matters, for example, meet all the criteria of legally enforceable contracts, for some subjects of agreement the contract is useful only as a metaphor (as it used by therapists, the service industry, and educators), and in some areas even the metaphor is inappropriate. The applicability of contract depends on the extents to which rational planning is possible, behavioural requirements can be specified, and recourse to law would be effective and appropriate.

Shultz's proposed ordering of marriage closely resembles Weitzman's, as a private contract covering financial arrangements and the incidents of a shared life, specifying obligations, most of which the state will enforce. Both writers leave open the question of which contractual obligations should be considered legally enforceable by performance or by damages, and that of what limits and basic formula the contract should have. Both intend the state to set public policy limits on personal choice, and to arbitrate between spouses both during the marriage and upon dissolution. It is this conception that I will refer to as a private contractual ordering of marriage, and

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[14] Shultz 1982, p. 329.
[15] See Shultz 1982, pp. 220-3.
[16] Shultz 1982, p. 220.

which the application of the principle of freedom of contract to marriage law would entail. In section 3, I will put the case for this. Marriage is a contract and as such, in a liberal state, the principle of freedom of contract should apply to it. Freedom of contract derives from the liberal principle of neutrality between conceptions of the good and the corresponding value of liberty. In the next chapter, we will see how these stronger liberal principles may override freedom of contract in the case of marriage. In the following section, I will show how the traditional marriage contract has been atypical of contracts in general.

2. Deficiencies of the traditional marriage contract

The 'traditional marriage contract' is in fact a useful fiction, for the contract "is unwritten and its terms are not defined" -- one major anomaly of the marriage contract.[17] Although marriage is spoken of as a civil contract between spouses, it is in fact governed by the body of marriage law, which gives the terms of the contract, and in its current form is a very unusual contract. The obligations it entails are not chosen by the spouses, but determined by pre-existing marriage law. These obligations are not made known to the marrying couple, and cannot be altered by them.[18] The role of the state is that of an unrecognised third party to the contract, as if it were a bargain between "both spouses on the one hand and the state on the other."[19] For ease of reference, I will speak of the body of marriage law as the 'traditional marriage contract'.

Time and place also matter. While I will begin by making some general points about marriage law, law governing marriage differs within the various legal jurisdictions of the U.K., and in America there are in fact at least 50 'marriage

[17] Sachs and Wilson 1978, p. 148.
[18] Weitzman 1974, p. 1170.
[19] Shultz 1982, p. 227.

contracts' since each state has its own marriage legislation, and different jurisdictions within each state may impose extra conditions. The law has also changed over time, with significant changes at the end of the 19th century, and then relative stagnation until the 1970's, when legislation gradually began to become more progressive. The law is still in a process of change. What I will refer to as the traditional contract is the marriage law of Britain and America from the 1880's to the 1970's, and I will note when statements about marriage law refer to a jurisdiction or time period more limited than this.

i. Sexism

The traditional marriage contract created gender-specific legal obligations disadvantageous to women. Under the doctrine of coverture, a woman ceased to be a legal person when she became a wife, her identity 'covered' by her husband's. This doctrine was part of English common law until 1882 when the Married Women's Property Act was passed, but the marriage contract retained its implications until very recently, especially in American state law, and in some jurisdictions still does.[20] For example, the Ohio Supreme Court in 1970 declared that a wife was "at most a superior servant to her husband ... only chattel with no personality, no property, and no legally recognised feelings or rights." A statute was made in Georgia in 1974 defining the husband as "head of the family" and the wife "subject to him; her legal existence ... merged in the husband."[21] The traditional marriage contract reflected coverture in various other ways. It recognised the husband as head of the household and required that the wife take his surname. It also gave him the right to determine their domicile, meaning that a wife who refused to live where her husband desired

[20] The doctrine existed in America as well, where its erosion began in 1839, when the first Married Woman's Property Act was passed in Mississippi.
[21] Cited in Sachs and Wilson 1978, p. 149.

was guilty of desertion.[22] The contract imposed upon the husband a duty to support his wife and family. While onerous to the husband, it resulted in his being ceded legal authority over the family finances. Finally, the wife was legally responsible for domestic and child-care services. Payment for them was precluded and contracts arranging this struck void by courts. This also provided explicit rationale for women's exclusion from various professions and from business.

In America these obligations were upheld in statutory law and in court cases.[23] In Britain they were unwritten but supported by case law and social policy:

> Very few of the rights and duties of husband and wife ... are laid down in legislation in Britain (although in other [European] countries there is a code detailing a normative relationship), but there is a consensus among lawyers, judges, and governmental bureaucrats about the nature of family relationships.... The law in Britain relating to national insurance, pensions, supplementary benefit, sickness and unemployment benefit, family income supplement and income tax are all based on stereotypical sex classifications which impute a dependent role to women ... [and consequently] nurture the position of women as low-paid, casual, or part-time workers.[24]

In 1980's Britain, the social security system and divorce law were based on, and encouraged to the point of prescription, women's roles as mothers and home-makers.[25] For example, the 'one-third rule', which suggests allocating one-third of marital property to the wife on divorce, was defended by Lord Denning in 1973 on

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[22] Weitzman 1974, pp. 1173-80.
[23] See Weitzman 1974, p. 1173.
[24] Freeman and Lyon 1983, pp. 26-7.
[25] See Freeman and Lyon 1983, p. 29.

the grounds that the husband will bear greater expenses, since he "must get some woman to look after the house -- either a wife ... or a housekeeper."[26]

Today most of the sexist obligations imposed by the traditional marriage contract have been removed or neutralised. For instance, the duty to support has been made non-gender-specific. But these changes have been made piecemeal and unevenly across jurisdictions. Patchwork revision of marriage law may eventually extirpate sexism, but creating such an *ad hoc* jumble may confuse couples and give marriage no clear legal standing or rationale, perhaps leading to its devaluation. And while sexist laws may be rewritten in gender-neutral fashion, their underlying rationale is that of an archaic institution. The duty of support is one such instance.[27] The sexist nature of traditional marriage law clearly contravened state neutrality between conceptions of the good and formal equal liberties and equality of opportunity. There is no place for arbitrary gender-specific obligations, or those based on contested notions of the nature of the genders, in liberal law. We will consider what gender equality demands from marriage legislation in Chapter VI. However, the imperative for a coherent non-sexist restructuring of marriage does not provide an argument for the private-contract system, as marriage could be revised in the form of a single, non-sexist contract.

ii. Inflexibility

The terms of the marriage contract have not been negotiable. This conflicts with the principle of freedom of contract. In making a contract, certain procedural criteria have to be met. Marriage requires more than this. This in itself is not anomalous, as other institutions in which the content of the contract is relevant have definite terms structured around the nature of the institution. For instance, joining a

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[26] Quoted by Freeman and Lyon 1983, p. 32.

professional organisation requires a certain structure of obligations. But the obligations imposed in marriage have been motivated by contested conceptions of the good, for instance, the idea that heterosexuality is preferable to homosexuality, and notions of different roles for men and women. Moreover, the behaviour required by these obligations has infringed on the area thought of as private, for example, the wife's duty to perform housework or sexual services. The inflexibility of the terms of marriage is problematic to the extent that the rationale of the requirements is based on conceptions of the good which are contested, and in that they encroach on the private sphere. The only form of marriage currently available is that corresponding to a certain conception of the good. Where different conceptions of the good might assign value to different forms of marriage, different terms should be available.

One singular aspect of the marriage contract is that it can take place only between two parties, a man and a woman. As discussed in my Introduction, the broad definition of marriage does not require that marriage be heterosexual or monogamous. Besides this threshold criterion, in American law marital obligations defining specific behaviour could not be altered by spousal consent, and both parties were liable for non-fulfilment. This inflexibility of terms directly conflicted with the principles of freedom of contract and neutrality between conceptions of the good. For instance, married women were forced to go through legal proceedings to retain their original surnames as their legal names, and such petitions were sometimes outright refused.[28] Again, a wife's legal domicile was her husband's residence, even when she lived apart from him and wished to be registered (for example, for tax purposes) at her own address. Wives and husbands could not change these requirements. Nor could spouses change their legal responsibilities or contract between themselves about income and support: "A prospective husband may not be absolved from his duty to support his wife ... [it] is an obligation imposed by law and

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[27] Weitzman 1974, p. 1244.
[28] Weitzman 1974, pp. 1173-80.

cannot be contracted away."[29] Contractual agreements to pay a wife for domestic services or assistance in her husband's business were ruled unenforceable. In one instance, a court decreed that it would not enforce such a contract and that the wife should repay what she had already received.[30] Marital duties were indirectly enforced in British law, but equally inescapable there.

These duties were made compulsory because they served state interests in promoting traditional values and preventing welfare dependency. The inability of spouses to alter their obligations to each other by mutual agreement also reflected the doctrine of coverture, which presents a theoretical impediment to the enforceability of contracts between husband and wife. Under coverture, "the assumed single identity of the husband and wife precluded any contract between them in the course of their marriage."[31] If husband and wife are a single legal person, contracts between them are impossible. But since the doctrine of coverture has long been rejected, it no longer provides a rationale for precluding contracts between spouses. Its descendant, the unit theory of marriage, which stands behind spouses' immunity from testifying against each other and the denial of the possibility of marital rape, has not been completely phased out, but some limited contracts between husbands and wives are now recognised.[32] The difficulty is no longer theoretical.

Two reasons for the unalterable status of the marriage contract remain. First, courts are reluctant to enforce additional contracts between spouses, amending the terms of the marriage contract, for fear of incompetence or for reasons of privacy. But this does not provide a rationale in cases where a court is competent to enforce a contract, as is the case with financial agreements. The second reason is state interest. As a matter of policy, the marriage contract has been enforced against contracts which supersede or conflict with it because its terms have been thought to benefit the

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[29] Weitzman 1974, p. 1181 fn. 61, quoting I. Grant, 'Marital Contracts Before and During Marriage', in *The California Family Law* 160 (Continuing Education of the Bar 1962).
[30] Weitzman 1974, pp. 1189-90.
[31] Weitzman 1974, p. 1172.
[32] Shultz 1982, p. 288.

state economically and to promote public morality. I have already examined the claim that traditional marriage promotes public morality in Chapter III, but the economic question I will treat briefly here. Is the inflexibility of the marriage contract justified by the state's economic interest? Marriage's economic benefit to the state has consisted in its shifting the burden of support for spouses from the state to each other. If contractual ordering were to render this obligation optional, the state would be forced to become responsible in cases where spouses opted not to take on obligations of support. While the benefit to the state is evident, the policy itself can be challenged on three grounds. First, the duty was traditionally gender-specific, that is, it was incumbent upon the husband to support the wife.[33] Support obligations are now formally gender-neutral, though substantive inequalities persist in public policy in some jurisdictions. The duty of support itself might be criticised as reflecting an anachronistic expectation that one partner to the marriage will be economically dependent on the other. But another rationale -- that of diminishing demands on state funds -- can be supplied. It was for this reason that the British Poor Law required support between members of the extended family (siblings, uncles, and so on). The question, then, is whether imposing duties of support between adult family members is justifiable.

The imposition is unacceptable because it violates liberty and equal opportunity, and because obligations of support fall on the state. First, the compulsory duty of support infringes upon liberty because individuals might reasonably wish to marry without incurring support obligations. Individuals should be able to pursue their own conceptions of the good where this does not harm others. Second, the financial requirement negatively affects the equal opportunity (of rich and poor alike) to marry: "[e]ven if the husband's support obligation were extended to the wife, it might still be overly broad and unconstitutional as an unreasonable burden

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[33] Under the Poor Law in Britain, liability stretched much wider, and the household means test was not gender-specific. See Finch 1989, pp. 116-124. But British law presupposed and indirectly

on the fundamental right of marriage."[34] Third, imposing duties of support between adult family members legally affixes responsibilities where they are presumed naturally to exist. However, the assumption that the family is the natural source of relief for the needy is ungrounded. Legalisation of these obligations proves invasive when familial affiliation simply does not bring such strong feelings of obligation. The onus of support, for those who cannot obtain any other source of income, falls on the state, or, through redistributive taxation, on society, when "[s]ocial and economic inequalities are ... arranged ... to the greatest benefit of the least advantaged," as they are under Rawls' difference principle.[35] In any case, enforcement is inefficient, and -- since the families of the poor are likely to be poor themselves -- imposes the costs on those who can least afford it.[36]

The traditional marriage contract may save the state money by requiring support, but within Rawlsian liberalism, this is not a good enough reason to limit freedom of contract, which requires that the choice should be left to the discretion of private marriage contractors, with constraints on procedure and content for fairness. In general, inflexibility clashes with the central requirement of Rawlsian liberalism, that the state treat its citizens as equals by maintaining neutrality between conceptions of the good.[37] The original position embodies this neutrality. Behind the veil of ignorance, contractors are unaware of their particular conceptions of the good. So they ensure that they will have the liberty to pursue their particular conception of the good, whatever it may be, so long as pursuits involving or resulting in harm to others are restricted.[38]

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enforced male support obligations through divorce law and public policy, and by preventing property ownership by females. See Sachs and Wilson 1978, pp. 136-46.

[34] Weitzman, p. 1244.

[35] Rawls 1971, p. 302.

[36] It is inefficient because those evading the duty must be taken to court. This is costly and ineffective.

[37] See Dworkin 1978, pp. 127-9. Chapter V.3 provides a detailed account of Rawls' position.

[38] Rawls 1971, p. 137.

If there is more than one set of marital obligations, or more than one definition of marital roles, which spouses may legitimately want their marriage to embody, making a highly specific code of marital behaviour compulsory infringes upon individual liberty by preferring one conception of the good. The state does not have a compelling economic interest which would justify its prescriptive definition of marital roles, nor, as I argued in Chapter III, does it have a justificatory reason in terms of promoting public morality. Given this, and given the diversity of desired marriage types, either individuals should be allowed some choice as to the obligations they undertake when they marry, or such obligations should be left unspecified. The alternatives are a diversification of marriage legislation, or a de-legalisation of marriage. In Chapter III, I found the de-legalisation option wanting both from the state's and the individual's perspective. The former option -- diversification -- leaves us again with two choices. The state could offer a range of marriage packages from which prospective spouses could choose, or spouses could agree on terms within a more or less defined structure. At one extreme, the state could provide a fill-in-the-blank form, and at the other, every couple could draw up their own contract. Section 3 will take up the argument that the state should diversify marriage legislation in the second way.

iii. Enforcement

Marriage creates binding obligations defined by the state, yet spouses in the U.S. have not been able to enforce the performance of these obligations through the courts. Again, this is a peculiar anomaly of the marriage contract, since other contracts are routinely enforced when their obligations are clear and their legality assured. While, as we have seen, public policy has been to disregard contracts made between spouses to supersede or redefine these obligations, the state has also refused

to enforce directly, at spouses' requests, the very obligations which it creates in the marriage contract.[39] Particularly, as a matter of policy courts have not upheld wives' claims to their statutory right to support, and awards of alimony or child support have been minimally enforced. It is evident that some aspects of the marriage contract, such as a duty to love, would be difficult or impossible to enforce, due to the vagueness of the obligation, and the difficulty of determining whether or not it has been fulfilled. But non-enforcement of the marriage contract clearly conflicts with its status as a contract when the obligations in question are clearly defined and remediable.

American courts have refused to enforce obligations of support at spouses' request within an ongoing marriage due to a "fear of disrupting domestic harmony ... [and] questions about the institutional competence of courts to deal with the issues that arise between spouses."[40] The possibility of disrupting domestic harmony is a weak rationale for refusing enforcement of marital obligations. When one spouse is suing another, dissonance would seem already to be the rule. Likewise, doubts about institutional competence do not rule out all such cases. Some marital obligations may prove impossible to specify, but some, like the duty to support, are definite and enforceable. Where a legal duty to support exists, determining whether support is being provided and ordering compliance seem to present no extraordinary difficulty to the courts.

The chief rationale for non-enforcement is the protection of marital privacy. This is partly explicable by the nature of legal marital obligations since a court upholding a husband's right to domestic services or 'conjugal access' would seem to violate individual freedom. Courts are reasonably wary of enforcing obligations whose compulsion would infringe on individual liberty. However, courts and public policy have upheld these very rights by failing to prosecute or criminalise marital rape, and by failing to recognise the cash value of domestic services either by voiding

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[39] See Shultz 1982, pp. 232-240, and Weitzman 1974, pp. 1185, 1194-7.

contracts to pay for them, or through benefits systems which fail to recognise home-makers as workers.[41] The state also upholds these obligations by refusing to allow individuals to contract out of them, and by basing public policy on the assumption of such obligations. Tax law, government benefits, and property division on death or divorce are part of this indirect enforcement. But the reluctance to interfere is not consistent. The duty of support has been enforced against the wife's wishes in cases where she was in danger of becoming a public charge, and where third party actions were involved.[42] The state has been inconsistent in its respect for marital privacy. When obligations are enforced in some instances by courts, and are widely enforced through indirect means, consistency requires enforcement at the behest of spouses.

Citing privacy as a reason for not enforcing support reflects a tendency to protect the family from outside scrutiny. Courts have been deemed incompetent to judge even definite marital obligations due to a belief that judicial arbitration is not appropriate to marital obligations. Legal resolution is not thought to be suitable for disputes within an on-going marriage. The reasons given for non-enforcement of marital obligations, namely marital privacy and court incompetence, reflect a belief that the private is not assessable by public standards of justice and that disagreements between spouses should not be resolved by the application of principles of justice by an independent authority. But the family must be liable to the appraisal of independent judges when its members seek to appeal to the arbiters of justice. It has no claim to immunity.[43] It follows from this that courts cannot refuse to consider claims from family members and to enforce legal obligations. Legal obligations do not cease to be legally obligatory because of their location within the 'private' sphere of marriage. If rights and public criteria of justice continue to apply within marriage (I examined arguments against this in Chapter IV) then there is a case for public

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[40] Shultz 1982, p. 235.
[41] See Weitzman 1974, pp. 1185 and 1193 and Freeman and Lyon 1983, pp. 26-9.
[42] Shultz 1982, p. 240.
[43] This claim is supported in Chapter IV.3.

enforcement of marital obligations. The fact that marriage is legislated as a contract suggests as much. In the next section, we will consider the other half of the argument for contractual ordering, that is, the case for private definition of marital obligations.

The state should enforce legal obligations in marriage and the reasons it gives for not doing so are insufficient. Whereas one of the peculiarities of the traditional marriage contract has been the difficulty of enforcing its legal obligations, under the private marriage contract system which I propose, marriage contracts will clearly resemble other contracts and be enforced as those are. Courts will not be expected to treat obligations whose performance cannot be judged or enforced as legal, just as they would not in other contracts. These arguments mirror changes in the legal climate, as courts are now beginning to enforce pre-nuptial agreements and other obligations within the family.

iv. Incoherence

Since the late 1970's, progressive legislation has made marital obligations equal between the genders by couching them in gender-neutral terms and removing restrictions on married women. The trend towards recognising pre-nuptial agreements has also meant that couples have increasingly been able to create their own agreed, legally enforceable terms governing finances and property for the marriage and on its dissolution. But these corrections of the more anomalous aspects of the traditional marriage contract -- sexism, inflexibility, and inconsistent enforcement -- while representing an improvement, do not satisfy the requirements of liberal principles.

First, sexism persists in the standard contract through its effect on the application of tax and benefits law. Additionally, shifting the contract to gender-neutral terminology may seem to remove sexual discrimination, but in fact may cloak

it, since the inequality between men and women is not addressed, but in fact may be substantively perpetuated despite the formal change.[44] The marriage contract also discriminates against same-sex and polygamous unions by not extending its recognition and benefits to them, thereby preferring a particular conception of the good. Second, while pre-nuptial agreements allow spousal definition of the terms backed by legal enforcement, the extent of their enforcement varies between jurisdictions and they may be successfully legally challenged. For those without pre-nuptial agreements, the standard terms apply, and these terms are not explained or made known to the spouses, a significant anomaly of the marriage contract.

Section 3 will present arguments for the necessity of further change to the marriage contract. But at the least, current marriage legislation is incoherent. The traditional legal marriage contract has been subjected to piecemeal reforms which mean there is no longer a unified legal conception of marriage. There are the remnants of an archaic system and *ad hoc* adjustments tacked on to meet current needs. Law will be more effective and efficient in dealing with particular cases if it is motivated by a few guiding rules. If a body of law is not governed by clear principles, there will be difficulty in deciding cases which fall outside pre-existing laws. For example, while marriage carries definite obligations, individuals will resort to private contracting to realise their particular aims. A contractual ordering of marriage will mean that the individual will make (and the law enforce) only a single contract, and it will give a clear rationale to marriage law -- public enforcement of private ordering, within well-defined limits. Efficiency is not the only rationale for greater coherence. Marriage conveys a status on those who participate in it. While the meaning of this status may vary between couples and between communities, legal recognition -- and thus the function of marriage law -- will be enhanced if it is seen to attribute some clear meaning to marriage. This suggests the need for a clear and

[44] See my Chapter VI.

generally acceptable restatement of the purpose of marriage and a corresponding reworking of legislation.

3. Liberal grounds for a contractual ordering of marriage

i. The changing character of marriage: law and society

My argument for the freedom of marriage contracting is that the principles of Rawlsian liberalism demand it, as I will try to show in section ii. There are two reasons for this: first, liberalism values freedom of contract within limits. If marriage is legislated as a contract, freedom of contract should apply to it. But why should marriage be legislated this way? State neutrality between conceptions of the good, a fundamental liberal principle, requires that marriage legislation recognise as many forms of marriage -- since each reflects a conception of the good -- as exist. The state can only do this by permitting couples to determine their own marital terms, within certain limits. I will return to this argument in section ii; I wish first to examine a separate argument made from a legal perspective, which maintains that marriage legislation must change to match changing social norms, and that currently social norms imply a contractual ordering of marriage. While this argument seems unsuccessful, it raises a theme which is relevant to my argument, that is, that the current marriage contract reflects a conception of the good which is in fact only one among many competing conceptions of the good marriage.

Marriage has changed significantly over the last fifty years, as it has been swept along in the wake of feminism and the sexual revolution. The argument which I will examine now holds that these changes indicate a need for corresponding changes in marriage law, and that the nature of the social changes points toward a contractual ordering of marriage, primarily because of increasing diversity. Weitzman and Shultz argue that the traditional contract fails to reflect social reality. They point

out that despite many reforms the contract remains anachronistic. It assumes, with statistical improbability, a lifelong commitment. It assumes that the marriage is a first marriage, which is less likely as more people remarry later in life. They claim that it favours the materially well-off and the white middle-class, whose families tend to be detached from the extended kin network. It also reflects the Judaeo-Christian ideal of a monogamous and heterosexual relationship.[45] As marriage undergoes a process of social change, marriage law structured around an older ideal no longer meets individuals' needs.

Multi-culturalism, marital impermanence, changing attitudes to sex and gender, and the diversification of lifestyles have produced a variety of needs which marriage law does not fulfil. But is the claim that law should reflect social change and respond to new needs compelling? If law should mirror reality thus, then Weitzman's argument that marriage law should be made more flexible to reflect social changes is plausible. She claims that "legal norms should conform to sociological reality," limiting this principle to cases where social change prevents law from fulfilling its original purpose -- in this case, legislating a form of marriage satisfactory to the public.[46] She argues that law cannot perform its function of legislating stable marriages if it fails to meet social needs. But, on the other hand, if the legal definition of marriage is rewritten, law will no longer be performing its original function of endorsing a certain kind of marriage. Some might say that the institution that it embodies is no longer marriage.

Revision of marriage law to match social norms must be checked by fidelity to a conception of marriage which both reflects our cultural understandings and provides a basis for differentiating marriage from other relationships. To hold that marriage law should adapt to social practice presupposes one of two claims. One might argue that the purpose of law is to meet needs rather than to perpetuate anachronistic social institutions, and so marriage law should reflect only the

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[45] These criticisms are discussed at length in Weitzman 1974, pp. 1198-236.

prevailing understandings and practices of marriage. But this principle could be used to endorse or eliminate all practices according to social norms. It might also lead to marriage law which does not reflect our conceptions of marriage, or to the deregulation of marriage. These results seem inadmissible. Alternatively, one might argue that there is a distinctive concept of marriage which must inform the law, for otherwise it will not be *marriage* law, but that it is also crucial for law to change with society. Law must adapt to social reality without abandoning its guiding concept. While more conservative, this is still controversial. For instance, laws reflecting the impermanence of modern marriage by permitting fixed-term marriage contracts will be seen by those who believe marriage is lifelong to conflict with the nature of marriage. So the position that law can and must adapt to social change and still retain a distinctive concept of marriage depends on an appropriate characterisation of marriage. On some characterisations of marriage, there can be no reconciliation between the idea and reality.

From the principle that law should adapt to social norms, there is a further step to the argument for a private contractual ordering of marriage. While Weitzman argues that the marriage contract should be made more flexible in order to accommodate changing marital expectations, Shultz pushes the point further. She argues that social changes in marriage are such that contractual ordering of it is appropriate. The high rate of divorce means that planning for the distribution of marital property is necessary. As contract is the premier tool for rational management and planning of future needs, this points to private ordering. Greater diversity in life choices is another feature of modern partnerships, including unmarried heterosexual and same-sex cohabitation and group marriages as well as legal serial marriages, open marriages, and deliberate childlessness.[47] The chief strength of contract is legitimising diverse relationships. Where agreements are characterised by variousness, private choice and individual needs, contract is the tool designed to

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[46] Weitzman 1974, p. 1197; also see p. 1199.

affirm the arrangements in all their variety. If marital relationships exhibit diversity, contract would appear to be their natural regulator. Contractual ordering of marriage could meet the need, across society, for the legitimisation of diverse relationships.

Weitzman's argument for the privatisation of marriage contracts is that law should adapt to changing social needs. Someone might respond that social changes are not necessarily either for the better or the worse, just as law need not minister to needs indiscriminately. Law must embody an independent standard of right and through its system of penalties channel individual behaviour to meet that standard. A rising rate of murder or tax evasion should not prompt legal reconsideration of the permissibility of these actions. It then appears that law should change with changing social norms only in special cases, if at all.

The social norms argument is not sufficient to motivate a theory of marriage law. It leaves unanswered the question of why marriage should be legislated at all, and how its essential definition should be shaped. Even if a separate answer to these questions can be provided to supplement the social norms account, social norms remain inadequate as a guide to legislation. We do not simply match law to the way people behave. However, there is reason for the recognition of a variety of forms of marriage not based on the social norms argument. Another principle is more plausible: when a number of different forms of a practice are all compatible with justice and with the rationale behind the legal recognition of the practice, the law surrounding that practice should be extended to recognise the variety of practices. This principle is justified by the liberal principle of neutrality between competing conceptions of the good, not by changing social norms. In one way this principle is more permissive than the social norms argument, since it holds that in theory all practices compatible with justice and the purpose of the institution should be recognised, whether or not anyone is actually seeking recognition. It does not wait on social change. But by introducing the notion of the rationale justifying the

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[47] Shultz 1982, pp. 245-6.

existence of the legal institution, it brings in a separate threshold criterion. This result is desirable, however, since a criterion which will rule out some kinds of contracts as marriage contracts is necessary. If social norms undergo a dramatic change, or large sections of society want certain transactions to be recognised as marriage contracts (for tax purposes, for instance), recognition might not be justified by the original rationale. This principle explains why it is not discriminatory for the state to rule some relationships as marriages. The state is not simply fulfilling a social need through marriage legislation. The institution has its own justification which guides what will be recognised as marriages. But there are other reasons, as I will show, why it is desirable to have a core definition of marriage.

The social norms theory is inadequate because some distinctive notion of marriage must govern the contract, and this cannot simply be compiled from social norms. If there is to be any substance to marriage law, it must incorporate a distinctive definition of marriage. I have tried to provide such a definition in the Introduction. When a contract is a marriage contract it must either implicitly or explicitly mark out the relationship it seals as marital. For instance, a contract with no other content than the disposition of mutually owned property on the dissolution of a partnership should not count as a marriage contract. So, for example, if a contract regarding property division on dissolution is a marriage contract, the relationship is implicitly (if no explicit statement is made) marked out as marital, whatever law defines 'marital' as entailing. If marriage law does not convey some such significance to marriage, it will not be able to serve its purpose of legitimating marriages.

A definitive description of marriage must be introduced into law because individuals seek recognition of marital relationships from the state. Marriage cannot be reduced to property arrangements, planning for dissolution, or legal benefits. Marriage law exists, in part, in order to allow individuals to stamp their relationships with the seal of legitimacy. Of course, marriage no longer plays the same role in

social organisation as it did when sex and reproduction outside marriage were illicit, when marriage was indissoluble and an economic necessity for most women, and when property and power were vested in the family. It might therefore be asked whether recognition of marital relationships is any longer necessary since marriage does not have the same functional importance. However, its significance continues undiminished for many. As well as being seen as the primary locus of intimate relations, marriage is protected against obsolescence by its role as the site of reproduction and as one of the basic social units.

But the definition of marriage cannot be written in response to social needs. That is, law cannot legitimate as marriage whatever individuals wish to be so legitimated. For one thing, there is no popular consensus. To many, marriage means a lifelong, exclusive, heterosexual union. To others, the legal recognition of only such unions, or those which aspire to this condition, is discriminatory. But if marriage law is adapted to satisfy all preferences -- for instance, by allowing same-sex marriage, limited-term marriage contracts, or group marriages -- many people will no longer consider the relationships legitimised by law to be marriages. Popular attitudes to marriage are irreconcilable and cannot guide a needs-oriented approach to law. If same-sex marriages and so on are to be legitimated, this must be because they fall into the category of marriage, not simply because the demand exists. A core definition is conceptually necessary. This core definition is drawn from the shared understanding of marriage which attributes to it those features which, as I argued in Chapter III, justify its presence as a legal institution.

Second, if there is no independent criterion of a marriage contract, the law would fall into incoherence. Social practice has diversified so that an unalterable marriage contract specifying a number of obligations will not meet all needs. The contract's specifications will have to be fairly sparse to render it widely attractive. But a total lack of specifications would make the contract a formality, and divest it of appeal. At first sight, making marriage a purely formal status, devoid of substantive

legal consequences, might seem to offer a solution to the problem of diverse needs. The marriage contract could be stripped of controversial obligations and its meaning left to individual understanding. But there would then be no way to define the grounds for recognising marriages, since this would lead to exclusions. The tendency would be for marriage to become a convenient legal status which two or more persons can enter together in order to qualify for certain state benefits and make arrangements concerning property. If the category of marriage collapses thus, it would no longer make sense to have a law of marriage. A common understanding of marriage must weigh against total diversification of its meaning so that some bargains just will not count as marriage contracts.

To sum up, I have rehearsed arguments that the existing body of marriage law fails to reflect social norms. This is convincing. I have also discussed and dismissed the claim that marriage should adapt to changing social reality. Another claim, justified by liberal neutrality and not (directly) changing norms, is plausible: when two or more competing conceptions of marriage exist, all should be recognised by law if they satisfy the demands of justice and if they are compatible with the core definition of marriage. Marriage law must be governed by a definition of marriage drawn from our shared understanding of what marriage is. This shared understanding in turn is the description under which marriage law is justified, which accounts for the principle I have formulated. I have suggested in the Introduction what is definitive about marriage and must therefore guide marriage legislation.

This definition is also, of course, temporally located. But it is widespread and persistent. It captures, and is informed by, what is distinctive about marriage in modern social practices. I wish to reject the strong claim that the law should recognise as marriages any relationships which individuals demand recognition for as marriages, and that marriage law should directly reflect social norms. Instead, under the liberal principle of neutrality, the law should recognise a variety of forms of marriage which are consistent with the central definition of marriage as an affective,

life-defining relationship. The rationale of the law is not meeting needs, but promoting social stability. This explains why marriage law will not recognise all social norms or individual demands. Marriage legislation is justified, as I argued in Chapters III and IV, by the role marriage plays as an affective relationship. Thus, if our shared understanding of marriage changed significantly enough, the legal institution might no longer be justified. The justification, and hence the law, would have to be re-evaluated. And this is why the state is also justified in not recognising as marriages those relationships which do not meet the criteria.

ii. Liberty and diversity

Liberty is fundamental to liberalism. This is embodied not just in the equal political liberties prescribed by Rawls' first principle of justice, but also in individuals' freedom to pursue their conceptions of the good, without the state disadvantaging some or preferring others, as long as their pursuit is consistent with the demands of justice. In the last section, I noted that real marriages are strikingly diversified in their understood obligations and commitments, and that many currently non-marital relationships with different needs and expectations bear a family resemblance to marriage. If marriage law should change with social norms in order to meet individual needs, then the diversity of marital and marital-type relationships provides a strong rationale for a private contractual ordering of marriage. But in fact the argument from diversity is not dependent on the claim that marriage law should change with social norms. The legal protection of diversity and the value of liberty are of greater fundamental importance than the law's conforming to social norms.[48] A contractual ordering of marriage is justified in terms of liberty and diversity.

[48] See, for instance, Weitzman 1974, p. 1197.

Defending the value of liberty is well beyond the scope of this thesis, but I will show its importance in liberalism. Mill's classical principle of liberty is that compulsion should only be used on individuals to prevent harm to óthers. Rawls limits this by extending the state's redistributive powers, but retains liberty as a fundamental value. His first, and lexically prior, principle of justice requires that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."[49] These include the political liberties, freedom of speech, assembly, thought, of the person, and the right to hold property. The underlying rationale for the value of liberty is that each person in the original position would act to secure their ability to pursue their conception of the good. The state should treat individuals equally by not preferring any one conception of the good, allowing all equal liberty to pursue their conception.

The idea that the ability to pursue relationships with others under mutually agreeable terms is an important part of individual liberty, is central to liberalism: "modern liberalism is concerned not only to protect the private sphere of social life, but also to carve out a realm *within the private sphere* where individuals can have *privacy*."[50] Personal life is conceived of as an area in which the individual should be able to express herself free from state intervention. The public-private distinction has been criticised by feminists when it has been used to claim that private life is or should be exempt from the standards of public justice. But while the state is required to intervene in private life to enforce laws, liberals, including feminists, maintain that the state should respect a zone of personal liberty within which individuals are free to act.

My first claim is that liberty to pursue one's conception of the good requires marriage legislation which recognises a variety of forms of marriage. The provision of a single marriage contract for all individuals limits their ability to enter into marital relationships of their choosing. Legitimating only one form of marriage unjustifiably

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[49] Rawls 1971, p. 60.

prescribes how intimate relationships should be conducted: "the conception of a single structure for all marriages is a tyrannical one: it implies that the state can decide what form marriage should have regardless of its citizens' needs and desires."[51] Allowing only one form of marriage discriminates by restricting marriage to a single set of terms and excluding others. Individuals' ability to pursue their conceptions of good relationships (without causing harm) should not be limited. But the state continues to prefer one contested conception of the good by banning same-sex marriages, group marriages, and marriages structured non-traditionally. State neutrality requires legitimisation of various forms of marriage.

Someone might respond that a single marriage contract is not illegitimately prescribing the terms of marriages. They might claim that this view rests on a mistaken polarisation of status and contract. A common (but, the critic would say, overdrawn) view is that status is inflexible and insensitive to individual differences, whereas contract is flexible, individualised, and a pillar of freedom. Thus Sir Henry Maine famously wrote that "the movement of progressive societies [was] a movement from status to contract."[52] But contract is not inherently individualistic. The American legal theorist Nathan Isaacs noted that the distinction should be drawn not between status and contract but between "standardized relations and individualized relations."[53] Standardised default contracts fill in the detailed terms of an exchange when no explicit agreement is made concerning them. The law is not prescribing terms in such cases, but second-guessing them for ease of transaction: "the idea of the law filling in contract terms from a presumed intent based on a standard transaction is very different from an idea in which law tells people what to do based on an imposed norm."[54]

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[50] Kymlicka 1990, p. 258; his italics.
[51] Weitzman 1974, p. 1200.
[52] Maine [1861], p. 100.
[53] Weisbrod 1994, p. 787, quoting Isaacs 1917, p. 39.
[54] Weisbrod 1994, p. 789.

So the marriage contract might be seen as filling in the terms which, given standard expectations about marriages, the law assumes that spouses intend to govern their relationship, rather than imposing a controversial conception of marriage. However, marriage is not like a standard default contract because there is no legal alternative. It is not the default option but the only option for legitimating marriages. So it does impose a norm rather than simply supplying the terms which it is expected will be desired. Even if the marriage contract were a default contract of this type, however, there is still an argument for private ordering. A default contract reflects social expectations concerning the transaction, but we have already seen the diversity of expectations about marriage, which only contractual ordering can fit.

The proposed contractual ordering asks more than that individuals be left free from government interference in the pursuit of their conceptions of the good. It asks that conferral of legal recognition be made available to their pursuits of different conceptions. A critic might respond that individuals are currently free to pursue their relationships as they wish outside of marriage. He might ask why their liberty requires that they should be able to formalise their non-traditional arrangements as marriages. But to bar, for example, same-sex marriages, is to prefer one conception of the good, that is, heterosexuality, in marriage legislation. Neutrality between conceptions of the good requires that the state legitimate different kinds of marriages. If it fails to do so, it discriminates against certain choices, depriving them of recognition and legal benefits. Extending recognition to private decisions is a basic function of government, as in the legitimisation and enforcement of wills and contracts. But the state only lends its power and authority to marriages which embody a very specific set of terms. Constraints on wills and contracts, by contrast, are procedural.

Individuals whose relationships are not eligible for state recognition as marriages are deprived of the means, which others enjoy as a right, of pursuing their conceptions of the good. Cohabiting without marriage is not an equivalent option to

marriage. Cohabitants are precluded from a range of benefits, including legitimisation. Moreover, in Britain and America, there has been a trend to impose the terms of the state marriage contract on long-term cohabitants who choose not to marry. Those who forego marriage due to the inflexible obligations imposed by the state are excluded from a valuable good. The benefits of marriage should be available to those with different conceptions of the good. The claim that the ban on same-sex marriage does not discriminate because it does not actively interfere with homosexuals is a chimera, since the state is arbitrarily refusing to provide for homosexuals what it provides for heterosexuals.[55] The state can interfere by refusing to endorse a contract since the presumption is that when contracts meet certain formal criteria, the state will enforce them.

In addition, the state discriminates against a range of conceptions of marriage by narrowly restricting its terms. American courts have spoken of marriage as a "fundamental right."[56] The implied right is the right to enter into the state-defined institution of marriage, not an entitlement to state legitimisation of personal relationships. But I want to suggest that the state-defined institution illegitimately prefers one conception of the good above others. If one has a right to marry, it should then be a right to state recognition of one's relationship and access to whatever legal benefits this carries, when one's relationship matches the definition of marriage. Non-discrimination calls for state recognition for all marital relationships, whatever terms the spouses set. Someone might dispute this on the grounds that what it means for a relationship to match the definition of marriage is for it to be heterosexual, between two people, with an aspiration to permanence. They might even claim that marriages must have the purpose of procreation, that they must be sealed by a religious ceremony, that the husband and the wife must take on certain defined roles. But such an idea of marriage is only one among many competing

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[55] Kaplan 1997 provides an extended argument for the right of homosexuals to marry based on a Foucauldian theory of identity.
[56] Weitzman 1974, pp. 1237-9.

conceptions. As I argued in the Introduction, there is a broadly shared conception of marriage as an intimate, lasting, companionable relationship between people. It is this 'overlapping' idea of marriage which the state should legitimate, not the narrower ideas based on certain contested conceptions of the good.

My second claim is that the protection of diversity in pursuits of the good is a liberal value which implies a contractual ordering of marriage. Only a private contractual ordering of marriage can enable marital diversity. Any single set of legally binding obligations incurred on marriage will prove burdensome in a diverse culture. Different individuals seek different marital arrangements. They may wish to undertake different obligations regarding income, financial support, property, domestic work, decision-making procedures, domicile, sexual exclusiveness, property allocation in the event of divorce, and so forth. Different issues will be of varying importance to different people. No single contract will satisfy all of these people. Even a limited range of contracts will not meet all their needs, so they will be compelled to draw up their own contracts, in addition to the marriage contract, to enforce other conditions they might want to set. Currently, many of these private contracts will not be legally enforceable, and legal difficulties will ensue as long as private contracts clash with the terms of the legal marriage contract. The only way to meet diverse needs is to defer to private ordering of marriage. Contract is the tool of private ordering, through which individuals can make their arrangements legally enforceable and legally sanctioned. If diversity is truly to be protected, and in the absence of countervailing conditions, only a private contractual ordering of marriage will do.

Diversity is to be protected, within limits, in a liberal society. I do not wish to claim that diversity is in itself valuable. It may be (for example, variety may be preferable to a monotonous lack of choice), but other considerations may override the presumption in favour of diversity. Our desire to preserve cultural differences is compromised when the practices they contain are injurious. Our obligation to

prevent harm is overriding. When harm is not at issue, however, protection of diversity of lifestyles in a civil order is required by liberalism. Diversity is valuable because of its intimate connection to individual liberty. First, diversity is the outcome of liberty. Given that people's preferences differ, when individuals follow their wishes, different arrangements will result. This freedom of choice is of great value. Diverse choices should be protected because they are the exercise of liberty. Second, diversity extends and enables liberty of choice by providing choices. When certain choices are denied recognition, the ability to pursue a conception of the good vanishes. Mill wrote, "it is important to give the freest scope possible to uncustomary things, in order that it may in time appear which of these are fit to be converted into customs."[57] Mill argued that liberty is the precondition for social progress, as new ideas emerge from freedom of choice. But in Rawlsian liberalism, diversity is not chiefly valuable because it enables progress, but because the ability to pursue one's conception of the good depends on the existence of social structures which provide for the pursuit of diverse conceptions.

We have seen that the liberal principles of freedom of contract, state neutrality, liberty, and equal opportunity provide compelling reason for contractual ordering. Non-discrimination requires the recognition of various types of marriage. The protection of diversity, which is needed in order to protect liberty of choice and to foster an atmosphere in which this liberty can flourish, also demands it. In the face of these reasons, only an overwhelming state interest can justify the imposition of a single marriage type on all. In Chapter III, I considered claims about the moral value of marriage which hold that same-sex marriage, divorce, and other forms of non-traditional marriage threaten public morality and a good social order, and found them lacking. In Chapter VI, I will consider whether freedom of marriage contracting conflicts with the demands of justice between the genders.

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[57] Mill [1859], p. 132.

CHAPTER VI: GENDER AND LIBERAL JUSTICE

> But, it will be said, the rule of men over women differs from all these others in not being a rule of force: it is accepted voluntarily; women make no complaint, and are consenting parties to it.[1]

1. Unrestricted marriage contracting would disadvantage women
2. The liberal principle of freedom of contract: failures of consent
3. The liberal conception of equality
4. Liberalism is committed to addressing gender inequality

The application of liberal principles to marriage requires that the state not privilege one conception of the good marriage and that the principle of freedom of contract be applied to marriage. Yet there are persuasive feminist arguments for restricting marriage contracting in order to prevent contracts which disadvantage women. In this chapter, I shall argue that such limits can be reconciled with liberalism by demonstrating that liberalism is in fact committed to addressing gender inequality through state intervention, and that the principles which so commit liberalism are prior to the principle of freedom of contract and do not violate liberal neutrality. This discussion will extend my analysis of the implications of liberal principles for marriage.

In the last chapter, I argued for the replacement of the current system of marriage with a state-run system of private contracts. Under this proposal, marriage would still be legislated by the state -- that is, the state would endorse and enforce the contracts as it does now -- but the terms of the marriage contract would be left to the

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[1] Mill [1869], p. 14.

discretion of individuals, as the terms of other contracts are. Of course there would be limits on these terms. There are limits on the terms of any contract: people cannot legally contract to become slaves, or, indeed, to trade sex for money. But secondly, there must be some definitional limits on the marriage contract. Not just any type of contract will count as a marriage contract. But there is a third area where we need to look at the limits on marriage contracts.

This third area of concern is to do with implications of deregulating the marriage contract for women. Feminists are rightly suspicious of the marriage contract: until the mid-19th century a woman lost her legal identity on marriage under the doctrine of coverture, and the after-effects of that doctrine lingered until recently. In March 1996, the Marital Rape Exemption still remained on the books in 33 U.S. states.[2] Feminists have identified the traditional institution of marriage -- in which a woman is economically dependent on her husband -- as a central cause of women's socio-economic inequality with men, as evidenced by lower average wages, less property holdings, fewer females in positions of authority. A feminist might therefore argue that because marriage, at least in its traditional form, is dangerous to women's life-prospects or well-being, contracts establishing marriages should be limited in ways that will protect women, for example by including mandatory property division on divorce.

The specific case at issue is this: a man and woman making a marriage contract wish to stipulate that on divorce there will be no alimony or support. There is a statistical likelihood that if or when divorce occurs, the woman will have no property and be unemployable as a result of her assumption of child-care duties. Can liberals allow a law stating that the marriage contract must include provisions for equitable division of property on divorce? Or will such a law violate the principle of freedom of contract or, more importantly, of state neutrality? Would such a law

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[2] In the U.S., the Marital Rape Exemption (which exempted husbands from prosecution for rape of their wives) remained until 1976. Information from the National Clearinghouse on Marital and Date Rape.

impose a notion of the good life on citizens? In section 1 I will review the problem. In section 2 I will consider two radical feminist arguments which seek to establish why entry into contracts should be limited. These arguments include in their scope the participation of women in any practices oppressive to women as a group and try to establish that women's entry into such contracts governing such practices should be subject to state intervention. I will show that the argument that social pressures on women invalidate their consent to such contracts fails within liberalism. In section 3 I will show that the principle of freedom of contract is subordinate to the liberal conceptions of equality and state neutrality. Finally, in section 4 I will show that these conceptions in fact commit liberals to endorsing state action to reform sexist social practices.

1. Unrestricted marriage contracting would disadvantage women

The traditional marriage contract contributed in many ways to women's oppression, from depriving wives of their legal personhood to denying them a right to control sexual access to their bodies. Contractual ordering of marriage would mean that sexist obligations would not be compulsory components of the contract. However, feminists have pointed out that a free contractual ordering would not preclude contracts disadvantageous to women. Freedom of contract does not guarantee contractual fairness. This objection involves a deeper criticism, borrowed from socialism, of contract itself: contract is compatible with exploitation or systematic disadvantage to a group. Another line of feminist criticism argues that marriage contracts are not rightful contracts. They claim that women are forced or coerced into marriage by economic conditions in which material goods are unequally distributed between men and women. A third feminist criticism argues that socialisation undermines the validity of women's apparent consent. Women's

acceptance of feminine roles is conditioned by their experience of an oppressive environment. In this section, I will set out the first position, concluding that the systematic disadvantage to women occasioned by their assumption of traditional wifely duties provides a good *prima facie* reason to build safeguards on property division into the contract. In the rest of the chapter, I will explore approaches to showing that such safeguards are compatible with liberalism.

Freedom of commercial contract has been widely held to be a fundamental entitlement in modern capitalist society. This explains the importance accorded by contract theorists and economists to Sir Henry Maine's statement that "the movement of progressive societies [was] a movement from status to contract."[3] The centrality of contract has emerged because it governs interactions characteristic of modern liberal society. Contract represents individualised, consensual exchanges, as opposed to externally determined and imposed status. The consent of parties to a contract connotes "choice (with its implications of available alternatives) and ... voluntariness (since one is free to choose no relationship at all)."[4] The binding enforcement of the contract by the state limits the freedom of the agent to breach the contract only in order to endorse the original free choice. Contract has been identified with liberalism in another way, as "contractual rationality" has been seen as definitive of justice by contemporary political philosophers such as Rawls.[5]

But this view of contract as typical of voluntary relations, as opposed to the status relations of, for instance, feudal or caste systems, has been challenged by socialist criticism. The fundamental mistake attributed to proponents of contract is the assumption that parties to contracts have equal freedom. To put it crudely, property owners set the terms of the contract, and under certain conditions -- as

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[3] Maine [1861], p. 100.

[4] Shultz 1982, pp. 213, 218.

[5] See Held 1987, especially pp. 111-114. Held claims: "Contemporary society is in the grip of contractual thinking," p. 111. Other examples are the hypothetical contracts of classical social contract theory and David Gauthier's actual moral contractualism.

when the alternative is starvation -- workers are forced to consent.[6] Formal freedom of contract is thus compatible with exploitation. Feminists who claim that marriage contracts may be exploitative accept that the consent is free, but argue that the contracts will systematically disadvantage women. Others claim that apparently rightful contracts are invalid because the consent given was insufficiently voluntary. The claim is either that women are forced to accede, or that their consent is brought about by social conditioning.

Setting aside for the moment arguments that women's consent to marriage contracts is not valid (because it is coerced or socially conditioned), let us turn to the claim that women's consent to certain activities, though free, may result in systematic disadvantages for them. In arguing against a free contractual ordering of marriage, many feminists make the point that a gendered imbalance of power may lead to inequitable agreements. Pateman emphasises women's lower earning power, writing that "only a few middle-class and professional women are likely to be in a position to negotiate an intimate contract."[7] Okin argues that marriage contracting would contribute to the feminisation of poverty, noting that "justice is by no means enhanced by the maximisation of freedom of contract, if the individuals involved are in unequal positions to start with." She goes on to ask sceptically "What would [wives being divorced] have to bargain *with*?"[8]

Women and men are not equal bargaining agents, but, as classes, occupy different social and economic positions. Women's consent to the terms of the marriage contract, though free, may be influenced by lack of alternatives, social pressures to marry, lack of bargaining power, and low expectations. Due to this inequality, and because the marriage contract will typically take place between a man and a woman, there is reason to fear that power relations will affect the agreement made. Opponents to contractual ordering point out that women would be better

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[6] See Elster 1985, p. 214.
[7] Pateman 1988, p. 155.
[8] Okin 1989, p. 173; and see Okin 1990, pp. 665-6. See also Sachs and Wilson 1978, p. 149.

protected if the state were to prescribe fair terms for marriage than if the terms were left to discretion. Flexibility and the ability to individualise the marriage contract are, they claim, a lower priority than the protection of women (and children) from poverty or dependence.

This set of priorities seems right. Legislation should not disadvantage a group of citizens arbitrarily, but moreover, when unconstrained individual agreement is likely to result in indigence, loss of dignity, or deprivation of any real freedom because of the substantial inequality of the parties involved, there is ample reason for the government to regulate contracts in order to protect the worse-off citizens. Within liberalism, freedom of contract is limited by justice, in order "to protect equal opportunity and to prevent exploitation."[9] Libertarians disagree; but, for example, a minimum working age, safety-at-work conditions, and equal opportunity laws are compatible with liberalism on these grounds. Some issues are more contentious, such as a minimum wage, limited working hours, or affirmative action. The question is whether relations between men and women constitute exploitation to such a degree that a liberal state would have reason to intervene. I shall argue in section 2 that a socialist analysis of men and women as classes is inadequate.

A consistent liberalism seems to demand the application of the principle of freedom of contract within certain limits to the family: applying "liberalism to the family would seem to require, or at least tolerate, the contractualization of sex, marriage, and parenting."[10] I have argued in Chapter V that the principle of freedom of contract and equal opportunity should be applied to the family. Policy limits on marriage contracting are not inconsistent with contractual ordering, but current restrictions on marriage far exceed restrictions on contract in general, defining the content of marital roles and structure. However, while prescriptive value-promoting legislation is unjustified, prescriptive legislation to secure equal opportunity is not. If

[9] Kymlicka 1991, pp. 87, 89.
[10] Kymlicka 1991, p. 88.

unrestricted marriage contracting is not compatible with equal opportunity, then procedural constraints on contract may, nevertheless, not be adequate. I will now discuss the minimum procedural constraints on contract and consider what disadvantages might accrue to women if marriage contracting is restricted only by these constraints.

The legal theorists who propound contractual ordering of marriage address the possibility of unfair contracts, concluding that the necessary safeguards already exist in current procedural requirements in commercial contract law.[11] Law legitimates only those contracts which meet conditions of competency and voluntariness and do not illegitimately harm third parties. Parties to the contract

> must have the capacity to plan and make decisions in their own interest. They must approach one another on a plane of equality ... at least in the generic sense of their equal right to accept or reject the bargain.[12]

Parties must also, of course, give their consent. This

> serves as a screening device to ensure that only qualified agreements gain access to contractual ordering.... The process leading to consent must be fair, free of fraud, duress, and unconscionable elimination of meaningful choice. The basic factual assumptions ... must be as the parties understood them. Additionally, the obligations assumed must be sufficiently clear, explicit, and definite for the consent to have substance and for a remedy to be ascertainable in case of breach.[13]

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[11] Weitzman 1974, pp. 1275-6.
[12] Shultz 1982, p. 217. See *Restatement (Second) of Contracts* (1981), sections 7 and 12-17.
[13] Shultz 1982, p. 218.

However, these constraints do not prevent individuals from willingly making contracts disadvantageous to themselves. As with the labourer and the factory owner -- though for vastly different reasons --, the relation between men and women in marriage as it is commonly realised tends to exploitation. The structure of marriage is so deeply ingrained that procedural conditions alone seem inadequate to ensure fairness.

Feminists worry that women will agree to contracts which will negatively affect their overall life-chances. The two issues most pertinent are those of support and property division on divorce. The argument that most strongly supports a claim for mandatory equitable property divisions is that women typically make compromises in marriage which irreversibly harm their life-chances, measured in social primary goods, so that the cumulative effect of their decisions is gradually to undermine their ability to choose anything but the relationship. Thus, a woman who spends twenty years bearing and raising children will lose career opportunities. Economic dependence on her husband will be compounded by divorce, since the cost of raising any remaining children will fall more heavily on her than her ex-husband.[14] Contractual ordering could spell disaster if, for instance, a woman makes a contract requiring no alimony on divorce and twenty years later finds herself jobless and unemployable.

From the standpoint of freedom of contract, requiring support between spouses, or imposing alimony payments, seems invasive. But in terms of preventing disadvantages to women, the absence of these restrictions is cause for worry. While it is undesirable that women are expected to be primary child-carers, it is nevertheless the case that they often are, and so they become economically dependent.[15] If support obligations were eliminated or limited to preventing dependence on the state, it would result in poverty for many women. Some feminists hold that the root

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[14] See Okin, 1989, Ch. 7; Delphy 1976; Sachs and Wilson 1978.

[15] This is argued to be a chief cause of sexual inequality. See Okin 1989, pp. 131-2, 185, and Chodorow 1978.

problem is that society and the state fail to recognise child-raising as an economically valuable form of labour. The way to redress this is for the state to pay full-time parents at a competitive rate. Another solution is to enable women to combine traditional and public roles, such as by restructuring work to allow for parenting. Finally, women's position would be improved if parenting were shared equally.

But while women continue to combine work and the major part of parenting, so that gender inequality is still perpetuated through the structure of heterosexual relationships, marriage legislation is one way to address inequality. This provides a rationale for prescribing equitable support obligations and guidelines to property division in marital contracts. In section 4, I will argue that this is a rationale which a liberal must accept. This also allows legal grounds for common-law marriage, for it would seem that the state could not with consistency impose specific divisions of property on common-law marriages and not in marriage contracts, since then living together would bring more onerous obligations than marrying. But common law marriage legislation protects the vulnerable.

The question is how support obligations should be envisioned. Okin suggests that both spouses should have "*equal legal entitlement* to all earnings coming into the household."[16] But while this is intended to remedy both women's poverty and the inequality of power within the enduring marriage, it does not sufficiently address the latter problem. A wife's legal entitlement to her husband's earnings will not detract from his power as the sole wage-earner, since he still gains emotional leverage as well as reserving the decision not to earn. More to the point, it might discourage couples from marrying, thus limiting its effect. The proposal also seems unreasonably strong, since the aim is to prevent women who give up paid employment from suffering from doing so, but it in fact makes everyone liable to share all of their income, opening up new avenues of abuse. Finally, a system causing property held by spouses to belong equally to both reflects the idea that there is no distinction between married persons.

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[16] Okin 1989, pp. 180-1.

Their separateness, however, must be respected. The idea that property rights are insignificant in the context of affection has been rejected by feminists.[17]

In conceptualising support obligations, we should turn from Okin's model of equal legal entitlement to a model of contractual exchange. Support should compensate traditionally unpaid labour and lost life-chances. The suggestion that spouses should share all income, or that the wage-earning partner should support the other independent of her contribution, fails to meet the problem at hand. The rationale of legislating support is that women typically forego economic independence in order to undertake labour for the benefit of both parties. The payment model -- unlike Okin's equal entitlement model -- recompenses this labour. If marriage did not routinely entail economic disadvantage and powerlessness for women, these restrictions would be unnecessary. If support is understood as payment, the wife will earn her share rather than depending on her husband; whereas promoting dependence by legislating it may reinforce inequality.

When women lack men's earning power as a matter of course, the structure of marriage disadvantages women economically, and the poor are increasingly women and children, there is good reason to limit freedom of contract in order to protect the vulnerable. However, if this is the reason for limiting freedom of contract, the constraints should target the undesirable outcomes more directly than Okin's suggestion does, by applying specifically to cases in which assumption of wifely duties has undermined a woman's earning power.

This leaves the question of property distribution when one partner has not foregone work, but has earned less due to her gender. Wives who have contributed to their husbands' careers, and those who have worked for pay but simultaneously performed household and maternal duties seem entitled to some portion of their husband's earnings as a return for their 'investment'. But the payment model does

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[17] See my Chapter II.3-4, on Hegel's doctrine of the unity of spouses, especially with regard to property ownership. And see Okin's rejection of Hume's statement to this effect, Okin 1989, p. 30.

not apply to cases in which the female partner simply fared worse in earnings due to her gender. A particular individual's partner has no obligations to recompense her for those conditions which cause women to fare worse. The task of changing them rests on society as a whole.

Restrictions on freedom of marriage contract would address gender inequality. Insofar as marriage *as an institution* contributes to sexual inequality, there is reason to limit contractual agreements so that women do not work for no, or inadequate, pay. The rationale of the constraints is to prevent the systematic disadvantage of women which is likely to occur if they are absent. Beyond that, restraints on the marriage contract do not serve feminist purposes. It remains to show (in sections 3 and 4) that such constraints are compatible with liberalism.

2. The liberal principle of freedom of contract: failures of consent

Liberals have defended different types of freedom of contract (different kinds of non-intervention). Notably, Rawlsian liberals differ from libertarians by holding that redistribution of property in the interests of equal opportunity does not constitute illegitimate use of government power. This reflects on Rawls' part a conception of moral equality between persons entailing that they not be privileged or penalised for morally arbitrary factors. There are tensions between traditional institutions of liberalism (primarily the free-market economy) and Rawls' ideal of liberal equality; I will examine these tensions in sections 3 and 4. In this section, I will show how restricting the marriage contract as suggested in section 1 cannot be justified by arguing that marriage contracts do not meet standards of procedural justice because women's consent to them is not free. I will leave aside the debates between liberals over the extent of freedom of contract.

Liberals have appealed to various principles in order to defend the freedom of contract. In Rawlsian liberalism, state neutrality implies that the state should not control the content of contracts, but simply provide a mechanism for enforcement. Unsurprisingly, many liberals have followed Mill in appealing to the principle that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[18] This "very simple principle" sets a necessary condition for preventing freedom of contract: it says that this freedom must be allowed unless disallowing it would prevent a certain type of harm.[19] The harm principle is endorsed by liberals in their rejection of legal paternalism, the view that prevention of harm to oneself is a reason in support of legal prohibitions.[20] Liberals have appealed to other principles, such as the principle of utility, in defending the freedom of contract. Thus, a liberal might allow freedom of contract in a case where such freedom causes third-party harm on the grounds that in this case the beneficial effects of such a contract will outweigh the harm. However, the feminist arguments which I am considering do not appeal to the harm principle or to the utility principle but to the procedural conditions which standardly govern the making of contracts.

There are two sets of conditions which qualify freedom of contract: procedural or 'entry' conditions, and outcome. Entry conditions to contract require that parties be competent, that they freely consent, and that the contracts do not illegitimately harm third parties. These preconditions to contractual validity are standardly endorsed by liberals. One might also criticise the *outcome* of contracts as unfair or exploitative. Rawls' difference principle might play such a role, by redistributing the benefits of contracts which met the entry requirements. Certain types of contracts are invalid: notably, those that illegitimately harm third parties.

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[18] Mill [1859], p. 68.

[19] This poses difficult questions of what constitutes harm to others. For discussion of the issue, see Ten 1980, Chapter 4; Rees 1985, Chapter 5; and Skorupski 1989, pp. 340 ff.

[20] See Feinberg 1984, p. 14.

But there is no liberal prohibition of individuals making contracts disadvantageous to themselves. Liberals reject legal paternalism, the view that prevention of harm to oneself is a reason in support of legal prohibitions.[21] Rawls' guidelines for entry are standard: competence, threshold understanding, absence of coercion or deception, preservation of "the equal liberty of the parties." He adds that contractors must occupy "a reasonably fair bargaining position," but the context makes clear that this requires only that the contractors be awake, sane, and undeceived.[22]

The harm principle demands that the state not interfere in individuals' voluntary actions except to prevent harm to others. But the application of this principle to contract has a paradoxical outcome. Since the state (or some regulatory body) must enforce contracts in order for the institution of contracting to exist, its non-interference consists in reinforcing the terms chosen by the parties to the contract. The state can depart from this position of non-interference in three ways: by making certain contracts criminal (examples in law are prostitution, murder contracts, bigamy), by stipulating the terms of contracts (marriage), or by failing to recognise a contract (until recently, pre-nuptial agreements, marriages of convenience). A contract may fall into the last category, in which it is not criminal but not enforced, because it conflicts with law, although its content is not actually criminal.[23] But the presumption of freedom of contract is this: when a contract does not violate the rights of a third party, when it is voluntary, when the parties are competent, and when it is enforceable (e.g. not nonsense, indefinite, or in conflict

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[21] Feinberg 1986, p. xvii.

[22] Rawls 1971, p. 345. Parties must be "fully conscious, in a rational frame of mind, and know the meanings of the operative words, their use in making promises, and so on. Furthermore, these words must be spoken freely and voluntarily, when one is not subject to threats or coercion, and in situations where one has a reasonably fair bargaining position, so to speak. A person is not required to perform if the operative words are uttered while he is asleep, or suffering delusions, or if he was forced to promise, or if pertinent information was deceitfully withheld from him."

[23] Feinberg argues that bigamy should fall into this category rather than being a crime: it simply is not a marriage, Feinberg 1986, pp. 265-7. This is also the basis on which pre-nuptial agreements were traditionally not recognised in American law; see Weitzman 1974, p. 1181 fn. 61, pp. 1258-66.

with law), it is a valid contract. The fact that a contract's outcome is inequitable is not in itself a reason to limit the transaction.

Limiting the marriage contract for the purpose of preventing female poverty seems to conflict with freedom of contract. If women who are informed and competent choose disadvantageous marriage contracts, then the state's role is to enforce the contract. One approach open to feminists is to claim that in these contracts the entry conditions are not met. Such contracts are not procedurally just. One such argument is that women are forced or coerced into oppressive activities by social or economic pressure. These include activities defined or prescribed by the traditional gender system such as heterosexual sex, dominant/submissive relationships, prostitution, participating in the production of pornography, surrogate pregnancy, or choosing to forego a career to raise children.[24] Women are said to be forced into such activities by financial hardship (e.g. women as a group earn less than men, unskilled and uneducated women can often earn more through prostitution or pornography than they could through other forms of employment), and by social pressures such as the expectation of peer group and family that women will perform certain roles, and the perceived need of male protection from violence. A second argument is that women freely choose to participate in oppressive activities, but that the desires which lead them to make these choices are the result of social conditioning. I will examine these arguments in turn.[25]

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[24] I am not expressing the view that these activities are oppressive but representing a view that these and/or some other activities are influenced by a system of oppression.

[25] Of those I will consider, Pateman and MacKinnon are socialist feminists and critics of liberalism. Perhaps the unacceptability of their arguments within liberalism confirms them in their dissatisfaction with it. But feminists who are committed to liberalism have used these views as arguments against the deregulation of marriage, and I am concerned to show the ineffectiveness of this strategy. But if feminists think some of Pateman's and MacKinnon's ideas are plausible, or point to a truth, we need to think how a liberal could, and could not, use them. Finally, both MacKinnon and Pateman argue that socialism, like liberalism, is limited as a tool for feminists. What is needed is a feminist political theory. I am more hopeful that an egalitarian liberalism could accommodate feminist goals. But I want to be clear about how it could do so by first showing how it could not.

The first feminist objection to contractual ordering of marriage claims that because women and men as classes possess unequal shares of social power, women are forced to participate in oppressive activities. On this basis, Carole Pateman writes that "women collectively are coerced into marriage" by economic pressures.[26] It is also argued that women will be forced to marry by social pressures such as "parental or peer pressure to marry."[27] Minow and Shanley suggest that the economic compulsion to marry constitutes force:

> [O]ne of John Stuart Mill's great insights in *The Subjection of Women* was his observation that the decision to marry for the vast majority of women could scarcely be called 'free'. Given women's low wages, scarcity of jobs, and lack of opportunity for higher or even secondary education, marriage was for them a 'Hobson's choice': that or none. Even the 'I do' of someone very much in love and desirous of marriage does not in-and-of-itself guarantee freedom.

But Mill was writing in 1869! Women now have access to education and jobs, and possess equal civil and legal rights; women are still concentrated in low-paying jobs, and others hit the glass ceiling, but the suggestion that women will be forced to marry out of economic necessity seems wrong. It was in fact a feature of the traditional view of marriage that contract was considered inappropriate to it due to the supposed inequality of husband and wife.[28] Women were then considered incapable of contracting; but now women and men are at least formally equal.

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[26] Pateman 1988, p. 132.

[27] Sachs and Wilson 1978, p. 149

[28] See Carbone 1988, p. 148. Contract was also considered inappropriate because husband and wife were one legal person.

The passage cited from Minow and Shanley continues with a discussion of contract pregnancy, interspersed with their remarks on contractual ordering of marriage:

> [T]o depict a woman who agrees to bear a child because it is the only way to bring her household income above the poverty line as exercising her 'freedom' ignores the restraints or compulsions of economic necessity.[29]

Yet these "compulsions" do not amount to force, in the case either of contract pregnancy or of marriage. Further, criticisms of contract pregnancy often involve claims that such contracts alienate women from their bodies, deny the intrinsic value of the reproductive capacity, cede control of women's bodies to the state or the employer, and perpetuate the objectification of women.[30] Whether or not these objections hold against contract pregnancy, they do not apply to the contractual ordering of marriage. Writers who treat the contractualisation of marriage, sex, and reproduction as of a piece obscure the important differences between them.[31]

The thought that women are forced to marry is not unique to contemporary feminists. Mill's argument in *The Subjection of Women* that lack of other employment forces women to marry is well-known.[32] If women who choose disadvantageous marriage contracts have been coerced into doing so, then restrictions on marriage contracts are justified, since the procedural criteria are not met. If women are forced by economic hardship or social pressures to participate in oppressive activities, this might establish why a neutral state should intervene in

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[29] Minow and Shanley 1996, p. 11.
[30] See Minow and Shanley 1996, p. 11; Kymlicka 1991, pp. 95-7; Pateman 1988, Chapter 7; Carbone 1988.
[31] Those guilty include Minow and Shanley 1996, pp. 9-13; Pateman 1988, Chs. 6 & 7, esp. pp. 184-8; Carbone 1988; and Kymlicka 1991, p. 88.
[32] See for example Mill [1869], p. 29.

certain voluntary oppressive activities.[33] But either claim is incompatible with liberal standards of procedural justice in contract.

In some cases, force or coercion renders consent to a contract defective, and the contract unenforceable. When coercion reduces voluntariness beneath a certain level, consent is invalid: "the act of consent is so deficient in voluntariness that it lacks legal or moral effect."[34] In order to argue that women's consent is not sufficiently voluntary for the contract to have effect, one must prove the presence of coercion (or force) capable of reducing voluntariness below the significant level. But the case is very weak.

First, "coercion ... impl[ies] the presence of an intentional agent or coercer":

> A coerces B into doing Y if A performs an action X that has the intended and actual consequences of making B do Y, which differs from the action Z that B would have performed had A instead pursued his 'normal' course of action W. (Elster 1985, p. 211-2)

If a woman were held at gun-point until she signed a marriage contract, she would be coerced, but the case at issue here is one in which she acts apparently freely. Can one make a case that social and economic pressures actually coerce her to act? It seems not, since no intentional agency lies behind the various and entrenched social and economic pressures. Further, as we shall see in the case of force, women do have meaningful alternatives.

Social pressures could more plausibly be seen as a case of force than of coercion, since force "need not imply more than the presence of constraints that leave no room for choice."[35] In other words, no agent need intend the effect. However,

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[33] This issue is controversial. But since I will argue that force is not to be found in this case, I am leaving it to one side.

[34] Feinberg 1986, p. 254.

[35] Elster 1985, p. 212.

the economic and social factors which influence women are not effective enough to count as force. In cases of force, the victim is deprived of alternatives, but social pressures influence rather than determine action. Women can clearly choose to act against them. Finally, there is the phenomenological aspect. In cases of coercion or force, the agent is caused to act against her preferred option by a threat or a lack of alternatives. But many women choose, apparently freely, involvement in oppressive activities as their preferred alternative.

In the case of marriage contracting, a woman might quite happily choose a contract with no alimony provisions. If so, her choice could not be called forced. Alternatively, a woman might agree to such a contract on her prospective husband's demand because, although she would prefer alimony provisions, she prefers to marry without alimony than not to marry. Her choice is not fully voluntary, but it is not a case of coercion or force, for she has a meaningful alternative -- not to marry.

Socialism provides examples of cases where such apparent freedom of choice is illusory, but they do not fit this case. Socialists argue that the apparent freedom of workers to leave the proletariat and become shop-keepers is not real freedom:

> proletarians, though formally free not to remain workers ... nevertheless are forced to sell their labour power.... Similarly, women are collectively coerced into marriage although any woman is free to remain single.... Coercion to enter the marriage or employment contract casts doubt on the validity of the contract.[36]

But the cases are disanalogous. Not all workers can leave the proletariat and become, for example, shop-keepers because the working class is necessary for the existence of property owners. But all women may act against social pressures.

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[36] Pateman 1989, pp. 131-3. Elster 1985, pp. 214-5 also refers to this argument, made by G. A. Cohen.

Catharine MacKinnon would disagree with that. "[T]o those who say, 'Any woman can'," she responds "*all women can't.*"[37] As with workers, a female elite may overcome sexism, but the system which permits pornography and lacks a law of sex equality keeps all women, except for the privileged few, in their places. But their choice is not like the choice for a labourer between working and starving, or working and surviving at an unacceptable level.[38] The problem for women is not that they are forced into a role by lack of alternatives, but that they freely choose roles disadvantageous to them.

The penalties may be as severe, but they are highly complex. In the case of marriage, however, choosing not to marry may have serious disadvantages (lack of male protection from violence, reduced social status) but we cannot conclude that women are forced to marry as the starving labourer is forced to work. In the example of marriage, women are less vulnerable (because less economically dependent) when they resist traditional roles. In this respect, social pressures resemble coercion more closely than force:

> A worker is *coerced to sell his labour power* if he would be better off were he to withdraw with his own means of production. A worker is *forced to sell his labour-power* if he would be unacceptably worse off were he to withdraw with his own means of production.[39]

There are similarities between sexual and class oppression. The exploitation of women and workers serves the interest of another class which therefore has an interest in maintaining the status quo. Both forms of oppression operate by becoming accepted as normal, so that the unfairness of the mechanisms which exclude women and workers from power and property-ownership becomes invisible. But there are

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[37] MacKinnon 1987, p. 77.
[38] See Elster 1985, p. 214 on the sense of 'force' as a choice between labour and starvation.
[39] Elster 1985, p. 216.

important differences, which render a socialist analysis of women's oppression inadequate. For one thing, sexual, racial, and class oppression intersect, necessitating different analyses of the condition of women from different social groups. For another, the intimate relations between men and women are fundamentally different from class relations. Women may be exploited as a result of conforming to traditional gender roles, but the system of socially constructed gender roles cannot be understood as the exploitation of one class by another. In any case, liberals would dispute the claim that exploitation blocks valid consent.

The claim that women's consent to oppressive activities is not free cannot carry political weight as a case of force or coercion. For the claim to act as a reason for state intervention which liberals can accept, it must mean that women are not free in a politically relevant way. Their freedom must be reduced to the extent that consent is invalid. But liberals claim that contractors are in the relevant sense free if they are not coerced. Social and economic pressures cannot be construed as coercion or force. More importantly, we cannot give content to the claim that such pressures render women's choices not free without undermining liberalism.

Imagine two possible manoeuvres someone determined to show that women's consent is not free could make. First, she could claim that the definition of coercion is inadequate and that social pressures do in fact constitute coercion. Second, she could claim that liberalism needs to redefine the level of voluntariness needed for consent, so that while social pressures do not amount to coercion, they are sufficient to invalidate consent. The first attempt must fail, for an attempt to stretch the definition of coercion wide enough to encompass social pressures will render an implausibly wide range of choices and actions as cases of coercion. The same problem recurs in the second manoeuvre. There are strong reasons against redefining the voluntariness required for contract so as to exclude consent based on social pressures, as this would raise the standard of voluntariness required for consent to an impossibly high level.

The second feminist argument against freedom of marriage contracting which I will consider is that women choose to participate in oppressive activities without coercion, but that the desires which lead them to make these choices are the result of social conditioning. It is therefore said that their choices are not truly free, or that they are not competent. But it is implausible to argue that women are rendered *incompetent* by social conditioning, since women raised in oppressive environments are still able to deliberate rationally.[40] So I will focus on the argument that women's consent is not free in certain types of exchanges with men because women are socially conditioned to accept subordination as the natural structure of heterosexual relationships.

The question of whether, if women are socially constructed to accede to their own oppression, a woman can be said to have truly consented has occasioned much discussion in contemporary feminist theory, specifically regarding the question of consent to heterosexual intercourse.[41] Some feminist objections to contractual ordering of marriage echo the claim that women's apparently free consent is the product of social conditioning. Okin cites "the history of gender in our culture and our own psychologies" as an impediment to fair contractual negotiation.[42]

Here, briefly, is MacKinnon's account. Sexuality and gender are social constructs and their central dynamic is inequality. Desire is not natural, but a social construct. And in our society it is structured by the inequality between men and women. "Stopped as an attribute of a person, sex inequality takes the form of gender; moving as a relation between people, it takes the form of sexuality."[43] This

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[40] Walker 1995, pp. 464-6, makes a convincing case that adaptive preferences do not affect the agent's competence. The point could be refined: certain oppressive circumstances, such as war, extreme poverty, and so on, could well damage an agent's deliberative and rational capacities; but I am referring to the experience of women in liberal societies, with civil and political rights, where forms of psychological, social, and economic oppression affect them.

[41] See Catharine MacKinnon, 1989, and Gauthier 1997, Ch. 4.

[42] Okin 1989, p. 173.

[43] MacKinnon 1987, p. 6.

inequality takes the form of dominance and submission.[44] MacKinnon's evidence includes violence against women and the nature and popularity of pornography featuring women. Male dominance does not just consist in social power, but in the construction of maleness as normative.

This inequality permeates all social relations. "[T]he molding, direction, and expression of sexuality organize society into two sexes, women and men. This division underlies the totality of social relations; it is as structural and pervasive as class is in marxist theory."[45] While people can cross boundaries, so that a successful female may take on the dominant viewpoint, in fact gender inequality is all-pervasive. All sexuality, even homosexuality, is defined by the heterosexual norm, that is, the dynamic of dominance and submission. Given this, sexuality is not truly consensual because it is based on female submission; what can a woman do but submit? MacKinnon writes "If 'no' can be taken as 'yes', how free can 'yes' be?"[46] She alleges that women cannot give meaningful consent to heterosexual sexual relations, conditioned as they are to submit.[47]

Social conditioning explains "how ... women come to want that which is not in our interest."[48] To those who find the universality of this claim implausible, MacKinnon asks, "[W]ould you agree, as people say about heterosexuality, that a worker chooses to work? ... If working conditions improve, would you call that worker not oppressed? ... Those who think that one chooses heterosexuality under conditions that make it compulsory should either explain why it is not compulsory or

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[44] "[T]he sex difference and the dominance-submission dynamic define each other. The erotic is what defines sex as an inequality, hence as a meaningful difference." MacKinnon 1987, p. 50.
[45] MacKinnon 1987, p. 49.
[46] MacKinnon 1987, p. 95.
[47] "Because the inequality of the sexes is socially defined as the enjoyment of sexuality itself, gender inequality appears consensual." "[W]omen's place is not only different but inferior, ... not chosen but enforced." MacKinnon 1987, pp. 7, 23. See Archard 1998, Chapter 6, for a critical discussion of this claim.
[48] MacKinnon 1987, p. 54.

explain why the word can be meaningful here."[49] In what follows, I want to take the former option.

MacKinnon's thesis does not raise a specific objection to contractual ordering of marriage, but to heterosexual relations in general. While it is implausible that consent is never possible, feminists such as MacKinnon are right to draw attention to morally troubling aspects of sex.[50] As I argued in Chapter I, sexual desire always contains *components* of objectification. Inequality between the genders and the erotization of domination which some feminists argue takes place in society may worsen this element. But these conditions are not sufficient to invalidate consent.

The second feminist argument for limiting freedom of contract in matters affected by the oppression of women admits that women may desire to participate in oppressive activities, but holds that these desires are instilled through social conditioning. We should be clear that the feminist argument does not attack all social conditioning as invalidating consent, only that which is part of a system of oppression. Preferences which have arisen due to oppressive social conditioning are 'adaptive preferences'.[51] The feminist response must surely be that social conditioning itself is not the threat to freedom. The relevant fact is that women's social conditioning is part of a system of oppression. On these grounds, feminists argue that "what liberals take to be women's voluntary consent to various social and political arrangements is spurious, because the beliefs and desires that give rise to the consent are simply oppression internalized."[52] This question of whether adaptive preferences invalidate consent has been much discussed in contemporary feminist theory. Carole Pateman claims that femininity and masculinity are "'developed within, and intricately bound up with, relations of domination'," so that women accept domination as natural.[53] Adrienne Rich claims that the 'erasure of lesbian

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[49] MacKinnon 1987, p. 60.
[50] See Archard 1998, pp. 84-94, for an argument against the view that consent is never possible.
[51] Walker 1995, p. 459.
[52] Walker 1995, p. 457.
[53] Cited in Walker 1995, p. 460.

existence' conditions women's preference for heterosexuality.[54] Again, the point was made long ago by Mill. In *On Liberty*, he writes ambiguously of polygamy:

> this relation is as much voluntary on the part of the women concerned in it ... as is the case with any other form of the marriage institution; ... this fact ... has its explanation in the common ideas and customs of the world, which, teaching women to think marriage the one thing needful, make it intelligible that many a woman should prefer being one of several wives to not being a wife at all.[55]

Women were socialised, in Mill's day, to believe that marriage was their chief end, so that they would prefer even a disadvantageous marriage to none at all.

Women's consent to occupy subordinate positions in intimate relations, the claim goes, is based on the internalisation of roles which are integral to a comprehensive system of oppression. The contemporary claims are grounded in feminist sociological criticism, a major theme of which is how women's political oppression is reinforced through intimate heterosexual relations. One prominent author defines "heterosexual desire ... as sexual desire that eroticises power difference,"[56] and another writes, "the idea of power and submission is built into the language and imagery of heterosexual encounter."[57]

Setting aside the implausibility of the universal claims made, the question is whether this sort of social conditioning can be admitted by a liberal as a reason for limiting freedom of contract. Under the standard liberal definition of free consent, the exercise of 'adaptive preferences' counts as valid consent which "renders it illegitimate for the state ... to interfere in the consented-to arrangement."[58] The

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[54] See Rich 1980.
[55] Mill [1859], pp. 160-1.
[56] Jeffreys 1990, p. 2.
[57] Segal 1987, p. 99.
[58] Walker 1995, p. 462.

choice is properly connected to the agent because it represents her preferences, even though these preferences arose in oppressive circumstances. They are not a momentary departure from selfhood, the result of intensive brainwashing or drug abuse, or a mental aberration unconnected to her personality structure. Instead, they are central to her personality and understanding of the world. Her beliefs may change over time, but to stop her from exercising her preferences because of their causal origin in oppressive social practices is an intolerable intrusion on her liberty, even though she would be better off not possessing them. The central principle of Rawlsian liberalism is that the state should treat agents equally in allowing them to pursue their own conceptions of the good.

Certainly some forms of manipulation of beliefs and desires negate consent. In Aldous Huxley's *Brave New World*, agents of the state deliberately manipulate individuals through drugs and social conditioning in order to mould them into desired personality types. This scenario is clearly objectionable to a liberal since it involves state intervention pre-empting individuals' ability to choose their own conception of the good. Likewise, someone who was brainwashed or drugged into consenting would not have truly consented. But to suppose that decisions made by women on the basis of social conditioning do not meet the procedural requirements of contract, failing the requirement of voluntariness, would result in undesirable practical implications and theoretical incoherence.

The practical implication is that most contracts cannot meet procedural criteria, since social pressures in some way related to oppression will be present in most if not all cases. One could try to limit the cases in which contracts will be invalid by appealing to a notion of individual good, so that the state intervenes only when the individual acts on desires which are formed through social conditioning and against her good. But this too runs into problems. Liberal reservations about the state acting coercively in the name of the good of the individual, but against the

preferences she actually holds, are famously expressed in Isaiah Berlin's 'Two Concepts of Liberty'.[59]

Theoretical problems arise if we accept the claim that social conditioning is a factor capable of rendering consent invalid. This would require a definition of freedom too rigorous for liberalism. Excluding the exercise of preferences based on social conditioning from freedom of contract would end with the result that freedom of contract never applies. And this result is unacceptable because the issue is not a metaphysical question of free will, of whether choices ever are free in the sense of undetermined, but a political issue of what conditions must obtain for a choice to be considered free. If the presence of social conditioning renders contractual agreement not free, then no contract can ever meet the conditions necessary for it to be valid. The principle of freedom of contract vanishes. Further, liberalism is based on a conception of human autonomy. Accepting that social conditioning leaves us unfree undercuts this. It is incoherent to try to solve this problem by restricting the claim to adaptive preferences: if we can act independently of social conditioning, then we can also act independently of social conditioning which arises in oppressive conditions.

Finally, consent has a morally transformative power. Some actions towards others are impermissible if consent is not given. If consent based on adaptive preferences is considered invalid, the set of illegitimate actions expands. This seems to lose crucial distinctions. To repeat MacKinnon's question, "If 'no' can be taken as 'yes', how free can 'yes' be?" Surely in this case we want to say that 'yes' carries a permission which 'no' does not.

3. The liberal conception of equality

[59] Berlin 1969, especially pp. 22-5.

In the last section, I criticised two arguments which seek to establish that entry conditions to contract are not satisfied under certain social conditions. However, it is possible that the exit conditions of contracts could be criticised under Rawlsian liberalism, despite its value on freedom of contract. In this section, I will seek to show that other liberal values outweigh freedom of contract in liberalism, so that restraints on property division and so on may be built into the marriage contract to prevent unacceptable outcomes.

Rawlsian liberalism is in tension with the free market. It is guided by an ideal of equality which overrides economic *laissez-faire*. Other principles are prior to the principle of freedom of contract. Notably, in *A Theory of Justice*, the liberty principle and the difference principle are the first principles governing the arrangement of the major institutions of society. In their final form, these principles read:

> First Principle: "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."
>
> Second Principle: "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under all conditions of fair equality of opportunity."[60]

The liberty principle is lexically prior to the second principle (that is, the liberty principle must be satisfied first, then the second principle may be satisfied), and the principle of equal opportunity is lexically prior to the difference principle. The liberties supported by the first principle are the political liberties, freedom of speech

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[60] Rawls 1971, p. 302.

and assembly, of conscience and thought, of the person, the right to own personal property, and "freedom from arbitrary arrest and seizure."[61]

These principles take priority over free market and freedom of contract. In fact, free market and freedom of contract are secondary in liberal theory to a particular ideal of equality. Kymlicka writes of Rawls and Dworkin,

> If they allow some kinds of inequality-producing economic freedoms, it is not because they believe in liberty as opposed to equality. Rather, they believe that such economic freedoms are needed to enforce their more general idea of equality itself.[62]

The common feature is that the free market allows individuals to be rewarded or penalised for their efforts and choices, just as the difference principle excludes rewards and penalties not causally related to desert. Rawls writes that his principles may be applied either in a property-owning democracy or a socialist system. Market freedom (within either system) has the virtues of efficiency and protecting the liberty of vocational self-determination.[63] Efficiency, however, comes into play only after the two principles of justice have been satisfied.

Dworkin argues that the capitalist free market is not essential to liberalism, but desirable insofar as it furthers the central liberal goals.[64] In a passage which serves as a summary of Rawls, Dworkin defines liberalism as the view that the government must "treat its citizens as equals" and that this requires that "political decisions must be, so far as is possible, independent of any conception of the good life, or of what gives value to life." From this follows a

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[61] Rawls 1971, p. 61.
[62] Kymlicka 1990, p. 85.
[63] Rawls 1971, p. 274.
[64] Dworkin 1978, p. 119.

> principle of rough equality: resources and opportunities should be distributed, so far as possible, equally .... Any other general aim of distribution will assume either that the fate of some people should be of greater concern than that of others, or that the ambitions or talents of some are more worthy, and should be supported more generously on that account.[65]

The liberal preference for a limited free market system follows from the egalitarian effect of the pricing system of a market economy. The free market efficiently provides measures of the costs of goods and labour and so enables the "egalitarian distribution, which requires that the cost of satisfying one person's preferences should as far as is possible be equal to the cost of satisfying another's."[66] The liberal "chooses a mixed economic system -- either redistributive capitalism or limited socialism -- not in order to compromise antagonistic ideals of efficiency and equality, but to achieve the best practical realisation of the demands of equality itself."[67]

So market freedom, and concomitantly the principle of freedom of contract, is subordinate to the demands of equality. The conception of equality which underlies Rawls' liberalism is that of moral equality. He claims that human beings are morally equal in virtue of possessing the potential "for a conception of the good ... [and] for a sense of justice."[68] The principles of justice are derived from the original position, a thought-experiment in which members of society, under a veil of ignorance which excludes knowledge of their social and economic status and natural abilities, choose the structure of their society. Their choice is just since it reflects their moral equality, because no participant has greater bargaining power than another. Much criticism has been directed at the use of the original position as an argument. However, we

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[65] Dworkin 1978, pp. 127-9.
[66] Dworkin 1978, p. 131.
[67] Dworkin 1978, p. 133.
[68] Rawls 1971, p. 561.

can see it as a device useful for representing equality. What renders the principles morally obligatory is not the hypothetical contract, but the fact that the principles chosen extend our own intuitions of justice, as they would appear without the bias of self-interest: "a particular description of the original position [is justified] if the principles which would be chosen match our considered convictions of justice or extend them in an acceptable way."[69]

The intuition about justice which Rawls develops is that people should not be disadvantaged in the distribution of social goods by undeserved differences, such as natural talents or social class: "justice ... nullifies the accidents of natural endowment and the contingencies of social circumstances as counters in the quest for political and economic advantage."[70] Morally, "social contingencies [and] natural chance ... seem equally arbitrary." Being born with a shrewd mathematical mind, like being born rich, is morally arbitrary luck. Justice "treats everyone equally as a moral person" by "not weight[ing] men's shares in the benefits and burdens of social co-operation according to their social fortune or their luck in the natural lottery."[71] The principles of justice act so that the undeserved accidents of natural distribution do not privilege their lucky possessors in the distribution of social goods, but instead pool these natural resources "so that these contingencies work for the good of the least fortunate."[72] Whether the difference principle is truly efficacious in this respect is an issue I will not pursue. The point I wish to draw is that at the heart of Rawlsian liberalism is a radical notion of what equal opportunity requires. What I will argue next is that the requirements of this conception of equality extend even further when gender inequality is viewed through its lens.

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[69] Rawls, 1971, p. 19.
[70] Rawls 1971, p. 15; see also pp. 128, 18, 72.
[71] Rawls 1971, p. 75.
[72] Rawls 1971, p. 102.

4. Liberalism is committed to addressing gender inequality

The conception of equality fundamental to liberalism commits it to state action to reverse gender inequality. Such action is not incompatible with state neutrality, or the subsidiary principle of freedom of contract, but required by it, although the issue has been ignored by liberal theorists such as Rawls and Dworkin. Others have called attention to their oversight: "it seems that that premiss [of equality] has more radical implications than either Dworkin or Rawls recognizes ... It might ... move us to radical changes in gender relations."[73] When liberal theory is applied to gender inequality and the gendered structures of society, it demands that the state actively address these conditions through redistributive measures such as state-supported child-care, and through coercive measures such as mandatory divorce settlements. In the Introduction, I said I would leave aside the issue of children, because the ethical duties parents have to them entail that child-care will require more state intervention than marriage. However, in this section, I must refer to women's connection to reproduction as a significant element in gender inequality. But my remarks here reflect on current social arrangements, rather than endeavouring to promote a normative view on how the state should regulate child-care.

Rawlsian liberalism provides a clear route to justifying state intervention addressing gender inequality. Rawls' principles of justice apply to "the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation." His examples include "competitive markets, private property in the means of production, and the monogamous family."[74] The family is therefore one of the institutions to which the principles of justice apply, but Rawls does not see this through: "the family is both treated as a distinct and fundamental

[73] Kymlicka 1990, p. 89. See also Okin 1989, p. 89 -- Rawls's theory "neglect[s] gender."
[74] Rawls 1971, p. 7.

institution, and never discussed in any detail."[75] In fact, Rawls seems to assume that the family as it stands is just. He makes the family the school of morality and differentiates the virtues of "a good son" from those of "a good daughter" as well as those of "wife and husband."[76] But Rawls recognises that the family is a major social institution. As such, the principles of justice must be applied to it.

Feminists have pursued this argument before. Karen Green's account of the application of the liberty principle to marriage illustrates the difficulties which arise when proposals to restructure the family clash with liberty and state neutrality. She holds that the liberty principle requires shared child-care responsibilities between the sexes such that "having children would be of no more importance to a woman in pursuit of her life's goals and conception of the good that [sic] it would be to a man."[77] But in what sense can the liberty principle require this, since women must be free to purse a conception of the good which consists in raising and nurturing children, if they so desire? Feminists hold that justice between the genders cannot be achieved so long as child-care remains primarily women's responsibility. But if shared parenting, flexible work hours, state-supported crèches, and so on, became the norm, but an individual woman chose to care for her children full-time, it would be intrusive to prevent her from doing so. Parents cannot be legally required to share child-rearing duties equally, since it may be part of their conceptions of the good for one or the other to devote him- or herself to child-raising.

Moreover, the liberty principle includes only formal civil and political liberties. Rawls denies that "the inability to take advantage of one's rights and opportunities as a result of poverty and ignorance, and a lack of means generally" count as a lack of

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[75] Munoz-Dardé 1998, p. 337.

[76] Rawls 1971, pp. 467-8 and sections 70 and 71; Munoz-Dardé 1998, p. 337, cites Rawls 1993, p. xxix, "I do assume that in some form the family is just." See Munoz-Dardé 1998 and Okin 1994 for discussion of inconsistencies in Rawls' treatment of the family in *A Theory of Justice* and *Political Liberalism*.

[77] Green 1986, p. 31.

liberty, "but rather ... these things... affect the worth of liberty."[78] On his definition, "persons are at liberty to do something when they are free from certain constraints either to do it or not to do it and when their doing it or not doing it is protected from interference by other persons." Lack of means does not count as such a constraint.[79] As we have seen, women *are* free in this sense. Rawls' liberty principle is not fruitful for feminists, first because liberty requires that we be free to pursue our own conceptions of the good within conditions of equality, second because the liberties it protects are formal.

Green also mentions that liberalism values the equal opportunity of members of society to develop fully. This theme is of more use to feminists. Women are free to choose a career, but unlike men, are forced to choose between a career or children. They are forced by the lack of alternatives, where good child-care costs more than women can earn, compounded by the fact that female occupations are paid less than male, and that the demands of raising children conflict with the hours and effort required by jobs. They are also forced to choose by the biological fact that women bear children. The structures for pursuit of social primary goods are fitted for someone without the responsibilities of parenting, so that women who parent are disadvantaged. If a man and a woman share parenting, they are both worse off in the work world than a man whose wife takes on the responsibilities. Finally, government incentives for parents often penalise mothers who work, so that a working-class woman will lose money by going back to work, and in addition to this loss, will have to pay for child-care. Women are forced to choose either children or work when they are made unacceptably worse off if they choose to have both. This is the case for women who lose financially -- due to losing state benefit -- when they take up employment. Women who have professional careers are forced to choose between children and career success by the fact that having both makes success less likely. All

[78] Rawls 1971, p. 204.
[79] Rawls 1971, p. 202.

workers must choose between devoting themselves exclusively to their work or careers and pursuing other interests, including family. But women -- due to biology, widespread social expectations, workplace discrimination, and poor provision for working parents -- pay a heavy penalty in career terms for choosing to have children. Men do not have to make the same choice between family and career, since they do not suffer such great disadvantages as women do as a result of having children.

Women bear far more costs of child-raising than men (besides simply giving birth): "[m]arriage, as it is conceived by the mainstream of our society, still entails a prima facie duty on the behalf of a mother, to limit her pursuit of goals other than the care of her children.... Her husband's liberty to pursue other goals is not similarly curtailed."[80] Using Rawlsian liberalism to argue against this inequality, Green draws on the idea that individuals should be equally able to pursue their conceptions of the good. But she does not explain why equal opportunity requires a restructuring of gender-based practices when, in fact, women already have formal equal opportunity. Do the principles of justice require more than that?

The implementation of the difference principle could improve the conditions of women as the worst-off members of society. But we are looking for arguments that the principles of justice must specifically address gender issues, and in doing so restructure the family. Okin presents several arguments that liberal justice requires state intervention including creation of equitable divorce law, law governing the ownership of property during marriage, subsidised day care, flexible working hours and parental leave for both parents, and gender-free schooling.[81] Okin identifies herself as a liberal and appeals to Rawlsian principles, the original position, and Rawls' discussion of the development of moral psychology to argue for her concrete proposals for change.[82] I will not consider here whether Okin's prescriptions are well-judged. Instead, I will rehearse her arguments to show why such intervention is

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[80] Green 1986, p. 35.
[81] Okin 1989, pp. 175-9.
[82] Okin 1989, p. 23; and see Kymlicka 1991, p. 87.

consistent with liberalism. She presents three reasons for the application of Rawlsian principles to the family. First, the family influences moral psychology. Second, agreement within the original position will be impossible within a gender-structured society. Third, the family is a life-shaping institution.

Okin's first argument is that citizens will not develop a sense of justice as long as fathers and mothers possess unequal shares of power. Mill too declared that children will not learn justice and that society will be morally retarded so long as conditions of inequality prevail between husbands and wives. He wrote that "the only school of genuine moral sentiment is society between equals" so that men's moral faculties will be stunted so long as their closest intimacies are with those subordinate to them.[83] The family is closely connected to our ability to develop morally:

> the true virtue of human beings is to live together as equals; claiming nothing for themselves but what they as freely concede to everyone else; regarding command of any kind as an exceptional necessity, and in all cases a temporary one; and preferring, whenever possible, the society of those with whom leading and following can be alternate and reciprocal.... The family is a school of despotism.... The family, justly constituted, would be the real school of the virtues of freedom.... What is needed is, that it should be a school of sympathy in equality, of living together in love, without power on one side or obedience on the other.[84]

Because the family figures more prominently in our daily lives than citizenship, in which others are recognised as equals, its nature greatly influences our moral

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[83] Mill [1869], p. 45.
[84] Mill [1869], pp. 47.

character. Mill's and Okin's claims are similar: habitual inequality in our personal lives ill equips us to treat others, in any circumstances, as free and equal.

In Part 3 of *A Theory of Justice*, Rawls gives an account of the development and nature of human moral psychology and moral equality. The family features in this account as the school of justice. But, as Okin argues, if children are exposed to injustice between the genders in the family, they will learn injustice rather than a sense of justice. The importance of inculcating a sense of justice in children arises from Rawls' notion of a well-ordered society. In such a society, "everyone accepts and knows that the others accept the same principles of justice, and the basic social institutions satisfy and are known to satisfy these principles."[85] A conception of justice lacking the ability to generate acceptance for itself is "seriously defective," and so Rawls sets out to show that his theory will be stable because individuals living within it will develop a sense of justice motivating them to support the principles of justice.[86] If the family is a school of injustice, his theory of moral development fails, and he has not shown that his theory will produce a well-ordered society. Okin concludes from this that "[f]amily justice must be of central importance for social justice."[87] Rawls himself has since dismissed the conception of a well-ordered society as it appears in *A Theory of Justice* as "unrealistic."[88] But in *Political Liberalism*, he ignores the question of children's moral development and fails to explain how citizens can learn a sense of justice when the largest portions of their lives are spent in non-political settings.[89]

Okin's other arguments address Part 1 of *A Theory of Justice*. She makes the following claims: i) the principles of justice require that social institutions be constructed so as not to discriminate on the basis of gender; ii) unless gender is

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[85] Rawls 1971, pp. 453-4.
[86] Rawls 1971, p. 455.
[87] Okin 1989, p. 100.
[88] Rawls 1993, p. xvi. Rawls tries in *Political Liberalism* to redefine the sources of political stability.
[89] See Okin 1994, esp. pp. 34-5 and 37-9, for a discussion of these problems in *Political Liberalism*.

eliminated, a nonsexist theory of justice will be impossible.[90] The latter argument is weak. Okin's thought is that women and men differ in their "basic psychologies, conceptions of the self in relation to others, and experiences of moral development," and thus will never be able to reach any agreement in the original position. If this is true, gender structures must be eliminated before we can come to a theory of justice through the device of the original position.[91]

First, the premise that men and women have different approaches to morality is highly controversial, as Okin knows. In the context of this argument, she wrote "[w]hat seems already to be indicated by these studies, despite their incompleteness so far, is that *in a gender-structured society* there is such a thing as the distinct standpoint of women" on moral issues.[92] But earlier in the same book, she wrote "the evidence for differences in women's and men's ways of thinking about moral issues is not (at least yet) very clear."[93] Second, if men and women differ essentially (not as a result of social conditioning), then an end to the gender system will not make agreements between them any easier. Third, the same comments can be made about people from different religions and ethnic backgrounds. The point of the original position is to transcend these differences, by securing the conditions for unanimity. Consensus will be reached because conceptions of the good and psychological features are excluded by the veil of ignorance.[94]

Finally, Okin's argument has been criticised because "the notion of the original position plays no interesting role in generating an argument for a truly genderless approach to justice."[95] The argument Okin sketches would bring gender equality to the original position as a pre-requisite for deliberation, rather than

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[90] Okin 1989, p. 105.
[91] Okin 1989, p. 106. She refers to care ethics; on care ethics, see my Chapter IV. She also cites psychoanalysts Nancy Chodorow (1978) and Dorothy Dinnerstein (1977) who analyse the effects on children of being primarily nurtured by women.
[92] Okin 1989, p. 106.
[93] Okin 1989, p. 15.
[94] Rawls 1971, p. 137.
[95] Russell 1995, p. 402.

generating it from the original position as a principle of justice. However, Okin's point has force as a criticism of the original position. If gender differences are so deeply ingrained that the veil of ignorance cannot block them out then the original position will fail as an embodiment of freedom and equality. What this suggests is that a description of the original position must attempt to identify and eliminate sexist presuppositions.

Okin's other use of the original position is stronger. She imagines what the contractors would choose if they were aware that they could be either men or women and concludes they would attempt to minimise the influence of gender on life-chances.[96] Although the family has been seen as private, it is a major determinant in the distribution of social goods, and thus arrangements in it must meet the demands of justice. It is a life-shaping institution, the "gender structure [of which] is itself a major obstacle to equality of opportunity," affecting the "opportunities of girls and women."[97] Okin marshals empirical evidence to show that the gender-structured family is a major source of inequality and the increasing feminisation of poverty. Russell points out that the contractors will know that they may be traditionalists and so will not choose to eliminate gender. To put it another way, the liberty principle requires that we be able to live as traditional men and women if we desire. But Russell's conclusion is too quick and demonstrates the need for searching attention to our construction of the hypothetical contractors. As far they know, they may be white supremacists or they may be black. So they will want to arrange society so that they are free to hold their opinions, but not so that they are disadvantaged by whatever race or sex they happen to be.

Okin argues that contractors would rule out "views ... that women are inherently inferior beings." They would minimise the socio-economic costs of

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[96] Similarly, one of the central claims made by Munoz-Dardé 1998 is that the contractualism in the original position should be individualistic rather than restricted to heads of families; see esp. pp. 348-52.

[97] Okin 1989, p. 16.

divorce to women and children, and they would structure society and public policy so that women were not disadvantaged by their gender, whether they chose to live traditionally or not.[98] The central Rawlsian conception of equality, embodied in the original position, requires that social structures be arranged to preclude disadvantage on the basis of sex. Furthermore, I will now show that state neutrality between conceptions of the good -- which is the rendering Dworkin gave to "treating people as equals" -- requires that the state act to eliminate gender-structured practices which disadvantage women.

Gender-structured social practices exclude women from equality of opportunity with men. They make it costlier for women to pursue their conceptions of the good, in terms of both economic and psychological costs. These practices -- including the gendered division of labour within the family, the devaluing of women's work, and working arrangements which disable those with small children in the competition for social primary goods -- share some features with cases of force and coercion: i) if the practices were absent, women would follow different courses of action; ii) these courses of action would be more beneficial to women than those they currently follow. We have seen above that i) does not carry political weight. But ii) deserves more attention. We must ask how women are worse off under these conditions, or how they might be better off. I shall argue that the gender structure of society displays the same characteristic as force in closing off alternatives which, under liberalism, should be left open. So i) should be rewritten as follows: i) if the practices were absent, women would follow different courses of action, *some of which are made unavailable by the social conditions themselves.* The exclusion of these courses of action is significant because they are the courses of action which women could follow if pursuit of the good were no less costly for them than for men, that is, if they had equal opportunity.

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[98] Okin 1989, pp. 174-5.

Many courses of action which defy gender structures and make women better off are available: having a career, asserting independence, and so on. But it is impossible for women to live as they could in a society in which women were not systematically disadvantaged and oppressed. The force of this point is not that women's lives would be better than they are. Increase in utility does not outweigh liberal principles. The point is that the world that is made impossible by social practices is one in which women could live without the impediments to success and the strains on their psychology, their social relations, their attitudes to and expectations of work, love, and parenting, which currently exist as a consequence of oppression. The closure of this possibility, I will seek to show, is unjust, which does have bearing on the application of liberal principles. In a world shaped equally by and for women and men, women could pursue their good on an equal footing to men. Women do not have equal opportunity because they lack the chances that men have. Women are formally able to pursue their conceptions of the good. But they are not able to pursue conceptions of the good without incurring costs which men do not incur. Women who choose to pursue the goods which men have traditionally pursued -- social primary goods and public standing -- are disadvantaged in their pursuit, as men are not, if they choose to have a child. Women who choose to live as women traditionally have -- raising children -- cannot gain the social and economic goods needed for a minimally decent standard of living. Even when individual women are able to overcome social barriers, they do not have access to conceptions of the good which would be available to them in a society where women were fully equal.

I am not suggesting that women are essentially different from men and would be free if social structures reflected this difference. I do not think we are in a position to know all the ways in which women are naturally different from men. However, women's roles are defined differently from men's. Social and political institutions privilege those with men's roles. Consequently, women have a lesser share in

primary goods (including property and self-respect) and worth of liberty than men. Individual women cannot attain shares equal to those of men without making sacrifices which men are not expected to make, including meeting resistance from society, their own psychologies, in some cases the law, trying harder than men, and sacrificing family life. Society (and most political theory) assumes that reproductive labour will be carried out by women. In our social structures, women are not usually able to have children and their share of social primary goods, whereas men are.

Women do not have equal opportunity to pursue conceptions of the good, and this provides a strong reason for a liberal state to intervene to create equality of opportunity. People in the original position would not want to be disadvantaged by their gender. They want to secure conditions in which each is equally able to pursue his or her conception of the good. Gender-structured practices eradicate a possibility of good to which women are entitled, that is, their pursuit of the conception of the good which men are able to pursue and grasp: success in both private and public life. Also eliminated are the unknown possibilities of the good, for women, of living as fully equal members of society. Dworkin holds that a liberal state is required to act to secure the good under threat in such circumstances (he uses the example of environmental conservation). A liberal state is not permitted to "support conservation" on the basis that it is part of "a superior conception of what a truly worthwhile life is." But a liberal can hold that the state is required to act on behalf on conservation on the basis that non-intervention "is not neutral amongst competing ideas of the good life, but in fact destructive of the very possibility of some of these."[99] If wildlife and nature are destroyed, the conception of the good which involves them will no longer be open to pursuit. Similarly, social practices have shut out the possibility of women's pursuit of the good which men pursue on equal terms with men and eliminated the prospect of women pursuing the good that would be available to them if they were fully equal members of society.

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[99] Dworkin 1978, p. 141.

It remains to prove the premise that the good life for women, which includes family and social goods, is closed off as an alternative by existing social arrangements. Some professional women can pay for good child-care and devote the same efforts to their careers as their male counterparts. But these cases are exceptional. Moreover, even these women are still systematically disadvantaged by perceptions of gender, often by an employer's notion that a mother cannot devote herself to her career as a father can. Further, women who manage to combine both roles are assailed by guilt and public opprobrium for not dividing their time between children and career, which men routinely do without guilt or shame. Finally, no woman is able to live in a society in which women are not oppressed (except for female separatist communities). Women are excluded from political power, property ownership, the higher echelons of business and the professions. The good life for women is shut out as a possibility by the operation of social structures.[100] To open up this possibility, the state must act on these institutions.

[100] See Okin 1989, Chapter 7, and pp. 1-6.

CONCLUSION

Marriage is best defined as a relationship characterised by love, intimacy, and an element of formal recognition. In Part One, I discussed Kant's and Hegel's accounts of the moral value of marriage. I argued that both accounts suffered from insurmountable internal inconsistencies, but that they suggested two different approaches to the moral value of marriage, which was the subject of Part Two. One approach to the moral value of marriage focuses on its institutional structure, that is, the contract and the exchange of rights and responsibilities which distinguish marriage. The second focuses on the nature of the relationship between the spouses. I argued that moral value is found only in the love relationship typical of marriage, not the institutional structure, and that this value can exist outside legal or religious marriage. I argued that love is valuable within a universalist ethics because it promotes dispositions which conduce to the fulfilment of duty. Further, I argued that love is compatible with justice and is only of value in the context of justice. I also argued that the existence of the legal institution is justified as promoting this kind of love relationship.

In Part Three, I argued for freedom of marriage contracting under the principle of liberal neutrality. But I also argued that liberal neutrality does allow restrictions on contract in order to eradicate serious gender inequalities which prevent women from equal opportunity to pursue their conceptions of the good. The strategy of claiming that women are not free is not compatible with liberalism. But liberalism can accommodate feminist goals through the principle of equal opportunity. Nor, as I argued in the final chapter, does the liberal view of the individual as an autonomous contractor subvert feminist goals. A liberal feminism will be able to use the restructuring of marriage to further gender equality, and it will be able to use liberal ideals of autonomy and justice to achieve its goal of justice between the sexes.

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