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# Could the State do Without Marriage Law?

DANIEL J HILL

Senior Lecturer in Philosophy, University of Liverpool

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*This article argues that marriage is a divine institution that pre-dates the state, and marriages are supernaturally effected by God consequent on the exchange of marital consent by the parties, whether or not the state recognises them as marriages. In fact, taking note of, and legislating about, marriage thus properly conceived is not within the state's remit. Despite this, the law in England and Wales is involved with the institution of marriage in three main ways: (1) it purports to define marriage, and its entry and exit conditions; (2) it passes laws affording or denying certain legal benefits or penalties on the basis of marital status; and (3) it registers marriages, and in practice imposes or denies the benefits or penalties just mentioned on the basis of registration of marriage, or lack of it. The supernatural action on God's part of creating marriages is not a fit subject for such involvement on the state's part. The underlying exchange of marital consent by the parties is, by contrast, within the state's sphere of competence, but it is argued that the state should be tracking a broader category of relationships than just those involving the exchange of marital consent. It is suggested that all marriage law should be repealed, and replaced by an Australian-style law of de facto relationships. If the law deals with de facto relationships there is no need for it to be involved with the institution of marriage as well, and that institution can be left to flourish outside the state's grasp. The article goes on to respond to some possible objections.*

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## WHAT IS MARRIAGE?

According to The Form of Solemnization of Matrimony in the *Book of Common Prayer*, marriage is 'an honourable estate, instituted of God in the time of man's innocence, signifying unto us the mystical union that is betwixt Christ and his Church'.<sup>1</sup> In the same service the minister, before pronouncing that the couple are married, says, quoting the Bible, 'those whom God hath joined together let no man put asunder'.<sup>2</sup>

1 The Form of Solemnization of Matrimony, *Book of Common Prayer*. This service's understanding of marriage is explicitly endorsed in Canon B 30.2 of the Canons of the Church of England. (The 1604 Canons do not contain a similar endorsement; no doubt it was thought unnecessary.)

2 Matthew 19:6 and Mark 10:9. The reason why one should not attempt to put a marriage asunder is precisely because it was created by God. Compare F Sheed, *Nullity of Marriage* (2nd edn, New York, 1959), available at <<https://www.ewtn.com/catholicism/library/nullity-of-marriage-11256>>, accessed 8 January 2021.

It can be derived from this that the Bible's and the Church of England's doctrine of marriage is that the institution of marriage pre-dates the state, and that marriages are not effected or constituted by the state, or even by the church minister (whose pronouncement is merely declaratory, not effective<sup>3</sup>), still less by any other official, but by a supernatural action on the part of God.<sup>4</sup> This is not to say, of course, that the human parties have nothing to do with it: on the contrary, the position of the church since the time of Pope Alexander III (1159–1181) has been that God supernaturally effects the union on the exchange of marital consent by the human parties.<sup>5</sup>

It has often been said that legal marriage is a different institution from the institution of marriage just described, legal marriage being purely a creation of the state's. Frank Sheed states:

Where two authorities claim to act in the same sphere, there is a strong suspicion (usually justified) that one of them is trespassing. Historically, it is clear that in England the State is the trespasser. For prior to the Reformation, marriage was a matter within the Church's sphere. The State has simply taken it over. [...] [W]hile both authorities make statements about marriage, the two sets of statements are not so obviously contradictory as one might suppose. [...]

The truth is that Church and State are actually talking about two different things. The Church is talking of marriage—a relation instituted by God and depending on His laws. The State is talking (in effect) of another institution—called, somewhat confusingly, by the same name—owing its validity and its nature not to God but to the will of the State.<sup>6</sup>

Sheed goes on to criticise the idea that the legal concept of marriage is the only concept of marriage:

[I]f marriage is only a relation drawing its validity from and controlled by the State, then it really ceases to be an institution. It becomes something fluctuating and uncertain, varying in meaning and value with the nation's spiritual condition, very much as the French franc varies in

3 It is true that in 1455, in Rouen, priests started saying '*ego vos conjungo in matrimonium*' ('I join you together in matrimony'), but the Council of Trent ruled that it was not this, but the verbal consent of the couple, that made the marriage: cf J Leonard, 'Rites of Marriage in the Western Middle Ages' in L Larson-Miller (ed), *Medieval Liturgy: A Book of Essays* (Abingdon, 1997).

4 Marriage is described as a 'profound mystery' referring to 'Christ and the church' in Ephesians 5:32.  
5 The rival theory was that God united the couple on sexual intercourse subsequent to the giving of consent. See J Jackson, *The Formation and Annulment of Marriage* (2nd edn, Oxford, 1969) p 12, and F Maitland, 'Magistri Vacarii Summa de Matrimonio' (1897) 13 L Q Rev 133, p 136. Of course, the exchange of marital consent is not sufficient: there is much debate about the other necessary conditions that need to be fulfilled.

6 Sheed (note 2).

meaning and value with the nation's financial credit. Indeed the franc suggests a further comparison, for it fluctuates not only with the nation's credit, but with the Government's; and marriage equally could vary in value not only with some change in the nation's spiritual condition but with a change of government or at the mere whim of a legislator. And it is important that an institution so basic as marriage should be put beyond the reach of those fluctuations and uncertainties which are inseparable from the normal working of human legislators upon subjects which they regard as entirely their own.<sup>7</sup>

While I agree wholeheartedly with Sheed's critique, it is worth pointing out that not all jurists have agreed that the state's concept of marriage was different from the Christian one. Sir William Scott in 1811 stated that:

Marriage in its origin is a contract of natural law; [. . .] it is the parent, not the child, of civil society. [. . .] At the Reformation this country [retained] the idea of its being of divine institution in its general origin[.]<sup>8</sup>

Sir William was speaking as an ecclesiastical judge, as this was before the determination of matrimonial cases had been removed from the ecclesiastical courts. For an example from after 1857 of a judge's affirming that society and, by implication, the state were built on marriage, rather than marriage being created by the state, see the comments of the Judge Ordinary in *Mordaunt v Mordaunt* (1870):

Marriage is an institution. [. . .] Though entered into by individuals, it has a public character. It is the basis upon which the framework of civilized society is built.<sup>9</sup>

A response to this may be that, while this could have been the state's view once, nowadays the state has no concept of marriage outside its own marriage law. However, this objection has little force when one considers that the Anti-social Behaviour, Crime and Policing Act 2014 criminalises, *inter alia*, any use of 'violence, threats or any other form of coercion for the purpose of causing

<sup>7</sup> Sheed (note 2).

<sup>8</sup> *Dalrymple v Dalrymple* (1811) 2 Hag Con 63 at 77, 161 ER 665 at 669. *Dalrymple* also involved Scots law; Sir William thought it not substantially different from the law of England and Wales on this point. Sir William makes similar remarks in the earlier case of *Lindo v Belisario* (1795) 1 Hag Con 215 at 230–231, 161 ER 530 at 535. (I am grateful to Rebecca Probert for bringing these points to my attention.) Not all jurisdictions have agreed that the exchange of mutual consent constitutes the marriage: in Japan it is (or used to be) the case that the registration constitutes the marriage, according to expert testimony in *Brinkley v Attorney General* (1890) 15 PD 76 at 79.

<sup>9</sup> *Mordaunt v Mordaunt* (1870) LR 2 P & M 109 at 126.

another person to enter into a marriage',<sup>10</sup> and the use of the word 'marriage' here is defined in the same section as 'any religious or civil ceremony of marriage (whether or not legally binding)'. So, the state itself is in fact prepared to use the word 'marriage' of a ceremony that it does not recognise as a marriage under its own marriage law.<sup>11</sup>

The law of England and Wales also holds that it is the consent of the parties, rather than any pronouncement or action by any official, religious or secular,<sup>12</sup> that makes the marriage.<sup>13</sup> In fact, even if the clergy of the Church of England are regarded in this context as state officials, it should be noted that in the marriages of Quakers and the marriages of Jewish people, there need be no state official or representative present.<sup>14</sup>

As the institution of marriage neither was, nor is, constituted by the civil laws concerning marriage, which in any case really came in in England and Wales only with Lord Hardwicke's Act in 1753,<sup>15</sup> the question of whether the state could cease to legislate concerning marriage is not unthinkable in the way it might seem to some.

None of this is to say, of course, that only Christians, or only believers in God, can get married. Although marriage is, according to Christianity, a divine institution, it is not necessary to believe that it is a divine institution in order to get married. Indeed, even positively believing marriage to be a merely human institution would not preclude someone from getting married.<sup>16</sup>

10 Anti-Social Behaviour, Crime and Policing Act 2014, s 121; cf also Family Law Act 1996, s 63S. (I am grateful to Benjamin Harrison for this reference.)

11 It is slightly unfortunate that the Act defines 'marriage' here as a ceremony, rather than as a status or relationship or contract.

12 The pronouncement by the officiant that the couple are married is sometimes wrongly taken to be performative rather than merely declaratory (see, eg, A Sesonke, 'Performatives' (1965) 62 *Journal of Philosophy* 459, p 465). But Willes J, citing in support Coke on Littleton 39, says that it is declaratory: *Beamish v Beamish* (1859–1861) 9 HLC 274 at 330. Willes J was responding on behalf of himself and Byles and Hill JJ to a question put to him by the Lord Chancellor on behalf of the House of Lords. Although Willes's answer was not strictly part of the judgment, it should be observed that it is endorsed by Lord Cranworth (at 346) and by Lord Wensleydale (at 349). It must be conceded that it is still *obiter*, but the point was the crux of the judgment in *Quick v Quick* [1953] Victorian LR 224 at 238A (Martin J) and 238D–241 (Smith J).

13 *A v B* (1868) 1 P & D 559, 562 (Sir J P Wilde). See also *Collett v Collett* (1968) P 482 where Ormrod J referred to 'the traditional concept both of the common law and of the canon law that the essence of marriage is the formal exchange of voluntary consents to take one another' at 492G–493A.

14 Marriage Act 1949, s 53C(4).

15 An Act for the Better Preventing of Clandestine Marriage, 26 Geo II c 33. There were some civil laws regulating marriage before then, eg the Bigamy Act 1604, 1 Jac 1 c 11, but these laws were really just adding the muscle of the state (the death penalty in the case of the Bigamy Act 1604) to support the church's sanctions. In fact, it could be argued that Lord Hardwicke's Act also mainly supplies muscle to the church, as the law of marriage remained within the domain of the ecclesiastical courts until the Matrimonial Causes Act 1857, 20 & 21 Vict c 85.

16 Compare Canons 1099 and 1100 of the Roman-Catholic 1983 Code of Canon Law:

Canon 1099: Error concerning the unity or indissolubility or sacramental dignity of marriage does not vitiate matrimonial consent provided that it does not determine the will.

Canon 1100: The knowledge or opinion of the nullity of a marriage does not necessarily exclude matrimonial consent.

Nor, by the same token, is it to say that only Christians, or only believers in God, can tell who is married. This is because God does not unite humans capriciously, but, as stated above, on the exchange of marital consent. Of course, marriage, according to both the church and secular law, requires a certain intention in the human parties,<sup>17</sup> and it is impossible for outsiders to be absolutely certain whether that intention is present. Nevertheless, in practice, the state and the general public take people's word for it that they are married in most contexts.

## THE PROPOSAL

The state is at present involved in the institution of marriage in three main ways in England and Wales:

- i. It purports to define marriage, and its entry and exit conditions;<sup>18</sup>
- ii. It passes laws affording or denying certain legal benefits or penalties on the basis of marital status or lack of it;
- iii. It registers marriages, and in practice imposes the benefits or penalties just mentioned on the basis of registration, or lack of it, of marriage.<sup>19</sup>

The proposal is that the state should cease to be involved in any of these ways. I now advance some arguments for this proposal before describing in detail what the legal landscape would look like without any law of marriage.

## WHY THE STATE SHOULD GET OUT OF MARRIAGE

I now intend to argue that as marriage involves a supernatural action on God's part it does not fall within the remit allotted to the state. Pope Pius XI puts it thus near the beginning of *Casti Connubii*, his encyclical on Christian marriage:

17 In *A-M v A-M* [2001] 2 FLR 6, Hughes J gives the example of 'a staged dramatic marriage "ceremony" conducted in a play or in the course of a television soap opera' and also of "'alternative marriage" rites consciously and deliberately conducted altogether outside the Marriage Acts and never intended or believed to create any recognisable marriage' at para 55. Neither of these could count as a marriage under the law of England and Wales. The same approach was taken in *Hudson v Leigh* [2009] EWHC 1306 (Fam), [2013] Fam 77, where Bodey J found that 'the positive intention of all three key participants not to perform or effect a marriage' meant that the ceremony did not constitute a void marriage, never mind a valid one, at 92C.

18 See, eg Marriage Act 1949 and Matrimonial Causes Act 1973.

19 Scotland still allows by statute for the recognition of some historic unregistered marriages 'by habit and repute': Family Law (Scotland) Act 2006, s 3(2)–(4). England and Wales has also, historically, recognised some unregistered marriages contracted abroad, see, for example, *Isaac Penhas v Tan Soo Eng* [1953] UKPC 7, [1953] AC 304. Occasionally it will recognise unregistered marriages contracted in England and Wales if the parties intended to contract a registered marriage: *A v A* [2012] EWHC 2219 (Fam), [2013] Fam 51, also sub nom *MA v JA*: 'There is no statutory provision which results in a marriage being void because it was solemnised without notice or certificate, but is otherwise within the scope of the 1949 Act, unless the parties knowingly and wilfully married without having complied with these requirements' (at 75G, Moylan J).

Christ Our Lord [...] ordained it in an especial manner as the principle and foundation of domestic society and therefore of all human intercourse, but also raised it to the rank of a truly and great sacrament of the New Law, restored it to the original purity of its divine institution, and accordingly entrusted all its discipline and care to His spouse the Church.<sup>20</sup>

Let me next admit that under the old covenant there was no distinction for ancient Israel between religious law and civil law: all law came from the same source (God) in the same way (via Moses). However, under the new covenant, I assert, things are very different. Jesus tells us to render unto Caesar the things that are Caesar's, and unto God the things that are God's.<sup>21</sup> This command presupposes a basic distinction between the secular authority and the spiritual authority. The question then arises: which areas has God entrusted to the secular authority for its arbitration?

Let us start answering this question by considering the parallel argument regarding another instance of supernatural action by God: God's regeneration of the human soul in conversion.<sup>22</sup> Surely it would be out of the question for any modern state to purport to define when people are converted to Christ,<sup>23</sup> to register such changes in spiritual state, and to pass laws affording privileges or denying benefits on the basis of whether someone had been spiritually regenerated by God.

20 Para 1 at <[https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf\\_p-xi\\_enc\\_19301231\\_casti-connubii.html](https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19301231_casti-connubii.html)>, accessed 6 January 2022. (The phrase 'truly and great' is as displayed on the website.) It is true that the Church of England (Article XXV, 'Of the Sacraments'), and the churches of the Reformation more generally, do not agree that marriage is a sacrament, but it does not seem to me that this is an essential part of the encyclical's reasoning here.

21 Matthew 22:21.

22 To quote the words of Jesus recorded in John 3:3–6: 'unless one is born again he cannot see the kingdom of God [...] unless one is born of water and the Spirit, he cannot enter the kingdom of God. That which is born of the flesh is flesh, and that which is born of the Spirit is spirit'.

23 The state has legislated in this area in the past. Chapters X and XI of the Westminster Confession of Faith give what the Westminster Assembly of Divines took to be the conditions under which God regenerates the soul. This Confession was approved by the English Parliament during the interregnum under the title 'Articles of Christian Religion' on 20 June 1648, available at <<https://www.british-history.ac.uk/commons-jrnl/vol5/pp606-608>>, accessed 20 December 2021, and confirmed by the Long Parliament's Act declaring the Public Confession of Faith of the Church of England 1659/1660. It was confirmed in Scotland by the Confession of Faith Ratification Act 1690 (c 7), which remains in force and was itself confirmed by the English Parliament in the Union with Scotland Act 1706 (6 Ann c 11), Article XXV, s 2, which also remains in force. The *Book of Common Prayer* gives a slightly different set of conditions; the book was declared by the Act of Uniformity 1662 (14 Car 2 c 4), s 1, to be 'agreeable to the Word of God and usage of the Primitive Church' and 'very comfortable to all good people desirous to live in Christian conversation and most profitable to the Estate of this Realme upon the which the Mercy Favour and Blessing of Almighty God is in no wise so readily and plentifully poured as by Co[m]mon Prayers due using of the Sacraments and often preaching of the Gospell with Devotion of the Hearers', although these words are not in any part of the Act still in force.

The Supreme Court of the UK has also stated that courts should not attempt to pronounce concerning the truth of religious assertions themselves:

courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment. The court addresses questions of religious belief and practice where its jurisdiction is invoked either to enforce the contractual rights of members of a community against other members or its governing body or to ensure that property held on trust is used for the purposes of the trust.<sup>24</sup>

While I concede that the state is competent to rule on whether a particular religious doctrine is compatible with (or entailed by) a particular set of agreed propositions, as the Judicial Committee of the Privy Council did in connection with baptism and the doctrine of the Church of England in *Gorham v The Bishop of Exeter*,<sup>25</sup> this is obviously quite different from ruling on whether a particular religious doctrine, such as Gorham's doctrine of baptism, is true.<sup>26</sup>

It might be replied that even if the state is not competent to do these things itself, it is at least competent to delegate its regulation of these things to a third party.<sup>27</sup> However, nowadays most would agree that it is highly implausible that the state could discern, out of all the churches and denominations, which would be the correct one to which to defer judgment about God's action in regeneration of the human soul in conversion. In saying this I am not forgetting that in England the Church of England is established by law. The point is that the state (rightly) no longer thinks that it can issue civil legislation to endorse or enforce the doctrine or practice of the Church of England,<sup>28</sup> except perhaps in certain specific contexts such as the position of the Monarch.

24 *Shergill v Khaira* [2014] UKSC 33, [2015] AC 359 at 379C–D.

25 *Gorham v Bishop of Exeter* (Privy Council, 1850) (1865) 1 Brodrick & Fremantle 64.

26 The difference is, in fact, clear in the *Gorham* judgment itself: 'This Court [...] has no jurisdiction or authority to settle matters of faith, or to determine what ought in any particular to be the doctrine of the Church of England. [...] The case not requiring it, we have abstained from expressing any opinion of our own upon the theological correctness or error of the doctrine held by Mr Gorham. [...] [T]he judgment of their Lordships is, that the doctrine held by Mr Gorham is not contrary, or repugnant to the declared doctrine of the Church of England as by law established' *Gorham* (note 25) at 102, 105.

27 This is, in effect, the position of states with an established church. It should be noted that, in contrast, the Westminster Assembly of Divines was created by Parliament, and its individual members summoned by name: Ordinance for Calling the Assembly of Divines (1643).

28 The Writ De Excommunicato Capiendo Act 1562 (5 Eliz 1 c 23) was repealed by the Ecclesiastical Jurisdiction Measure 1963. It is remarkable that it was officially on the statute book until then. It is true that Measures of the Church of England have to be confirmed by Act of Parliament (House of Commons Information Office, 'Church of England Measures' (London, 2010), Factsheet L10, Legislation Series, available at <<https://www.parliament.uk/documents/commons-information-office/l10.pdf>>, accessed 30 December 2021), but it is clear that this is a case of the

To return to marriage, American theologian Charles Hodge writing in 1872 seems to me to apply pretty well to marriage the principle underlying the discussion just concluded of God's supernatural action in conversion:

It is a violation of the principles of civil and religious liberty for the state to make its will paramount to the will of God. Plain as this principle seems to be, it is nevertheless constantly disregarded in almost all Christian nations, whether Catholic or Protestant. In England, for example, it is still the law, that no member of the royal family can marry without the consent of the reigning sovereign. [. . .] This is to bring the law of man and the law of God into direct collision, and make the human supersede the divine.<sup>29</sup>

Hodge had in mind the Royal Marriages Act 1772,<sup>30</sup> and, indeed, it does sound blasphemous to say that God is forbidden from joining together any 'descendant of the body of his late majesty King George the Second' without the sovereign's permission.<sup>31</sup> (Compare the satirical placard put up in Paris in 1732 saying 'By order of the king it is forbidden to the Divinity to perform any more miracles in this vicinity'.<sup>32</sup>) Hodge's point is not, of course, confined to this Act, but, rather, extends to every purported human limitation of God's action in uniting people in marriage. He also mentions the then-current legislation restricting the hours during which a marriage may be validly solemnised.<sup>33</sup>

It may be responded that the state can at least *register* marriage, even if it cannot *regulate* it; but it sounds eccentric and arrogant for the state to say that it knows that, as a matter of fact, God will refrain, or even has refrained, from joining together any descendant of the body of his late majesty King George the Second without the sovereign's permission, and, in consequence, such purported marriages should not be registered. As Hodge makes plain, if a descendant of King George's disregarded the Royal Marriages Act 1772 and purported to marry without permission, then, although such a purported

state's legislating just for the church, rather than the state's legislating for the nation in the light of the church's teaching. The Canons of the Church of England do not, 'by their own force and authority', bind the laity: *Middleton v Crofts* (1736) 26 ER 788 at 790, 2 Atk 650 at 653 (Lord Hardwicke).

29 Charles Hodge, *Systematic Theology*, vol 3 (Grand Rapids, MI, 1940), p 138. I should add that Hodge does not go the full length of my position.

30 12 Geo 3 c 11. Now repealed by the Succession to the Crown Act 2013.

31 Royal Marriages Act 1772, s 1. The Act provides an exception for 'the issue of princesses who have married, or may hereafter marry, into foreign families'. It also provided (s 2) that if the descendant in question gave notice to the Privy Council and then waited a year they could get married without the sovereign's consent.

32 D Van Kley, *The Religious Origins of the French Revolution* (New Haven, CT, 1996), p 130.

33 Hodge has in mind the Act for amending the Laws respecting the Solemnization of Marriages in England 1823 (4 Geo 4 c 76). He takes the restrictions on hours to be mandatory; it seems to me that the Act makes them merely directory. The restrictions on hours were finally abolished only by the Protection of Freedoms Act 2012.



marriage would be ‘null and void, to all intents and purposes whatsoever’<sup>34</sup> in the eyes of the law of England and Wales, there would be no reason to think that God would have felt obliged to follow the Act of Parliament and to refrain from uniting the couple.<sup>35</sup> Of course, this is not to say that the state can never correctly tell whether God has joined a couple in marriage; for all I have said, it might be that the Royal Marriages Act 1772 was an uncharacteristic error. However, it still seems implausible and chauvinistic to think that, out of all the legal systems in the world, the only one to get God nearly right is the law of England and Wales. Moreover, when one considers all the case law around impediments and void and voidable marriages, it seems hard to believe that this somewhat ramshackle collection of precedents happens exactly to coincide with the action of the Almighty. Also, of course, the law of England and Wales, like that of most jurisdictions, has changed over the past centuries, even though there is no reason to think that God has changed his *modus operandi* during this period.

Just as it would be highly implausible, it seems to me, to suggest that the state could reliably tell, out of all the churches and denominations there are, to which it should defer judgment on the question of God’s supernatural action in regeneration of the soul, so too it is highly implausible, it seems to me, to think that the state could tell, out of all the different approaches to marriage adopted by all the different religions and denominations, and by people of all different faiths and of no faith, to which approach it would be right to defer in the matter of marriage. Before 1857 the state in England and Wales deferred all questions concerning the validity of domestic marriages, even marriages between Jewish people contracted according to the rites of Judaism,<sup>36</sup> to the ecclesiastical courts of the Church of England,<sup>37</sup> but it seems to me that to revert to this system now would be foolish. (Also, as it happens, the current civil laws regulating marriage in England and Wales are no longer consistent with the Church of England’s official definition of marriage.<sup>38</sup>)

One response to the above could be that, while it is indeed beyond the state’s competence to pick one religion to which to defer judgment, it is possible for the state simply to defer judgment to the *individual’s* own community and enforce

34 Royal Marriages Act 1772, s 1.

35 Hodge has similar things to say in relation to the permitted hours of solemnisation of matrimony, but, as mentioned above (note 33), it seems to me that he is mistaken in taking this provision to be mandatory rather than merely directory.

36 For an example of a case in which the ecclesiastical courts of the Church of England pronounced on a marriage contracted according to Jewish forms see *Lindo v Belisario* (1795) 161 ER 530, 1 Hag Con 216.

37 The law was changed by the Matrimonial Causes Act 1857, 20 & 21 Vict c 85.

38 Canon B 30.1 of the Church of England states: ‘The Church of England affirms, according to our Lord’s teaching, that marriage is in its nature a union permanent and lifelong, for better for worse, till death them do part, of one man with one woman, to the exclusion of all others on either side’. It is unclear whether ‘permanent and lifelong’ can be reconciled with civil legislation (now accommodated by the Church of England) permitting divorce, but it seems clear that the definition is inconsistent with civil legislation permitting same-sex marriage, and that is certainly the majority understanding within the Church of England of the current official definition.

*their* judgment. Israel comes close to this model: although in Israel there are civil laws concerning marriage,<sup>39</sup> the Israeli state, further to the Palestine Order-in-Council 1922,<sup>40</sup> defers judgment concerning which marriages are valid to other sources, for example to the Chief Rabbinate of Israel concerning marriages between Jewish parties.<sup>41</sup> However, Israel makes no provision for the non-religious,<sup>42</sup> and does not recognise for this purpose every religion, or every Christian denomination.<sup>43</sup> The obvious contemporary solution is for the state to defer to the judgment of the authority accepted by the parties, but even if we leave aside the difficulty this approach throws up concerning those professing not to accept *any* authority, most states today would not accept this scheme without limits, as they would not want to be thought to be giving approval to a body whose actions might be radically contrary to public policy.<sup>44</sup>

It might be maintained in response to all this that there is a crucial difference between my supposed parallel of the supernatural action of God in regenerating the soul on the one hand, and marriage on the other: the state has no interest in any physical acts connected with the first, but it does have an interest in regulating and promoting the exchange of marital consent that underlies marriage. What I hope to show in what follows, however, is that the state's interest is not specifically in the exchange of marital consent, but, rather, in committed intimate relationships more generally.

A second objection would take as its starting point the position of Frank Sheed quoted above<sup>45</sup> that the state is working with its own concept of marriage, quite different from the Christian conception of marriage (despite Lord Penzance's famous mention in 1866 of 'Christendom'<sup>46</sup>), and that, therefore, the state is not exceeding the bounds of its competence.

I consider these objections in the following sections.

39 For example, income tax credit points are available to some spouses, but not for those cohabiting: <[https://www.kolzhut.org.il/en/Income\\_Tax\\_Credit\\_Points\\_for\\_a\\_Non-Working\\_Spouse](https://www.kolzhut.org.il/en/Income_Tax_Credit_Points_for_a_Non-Working_Spouse)>, accessed 3 December 2021.

40 <<https://unispal.un.org/UNISPAL.NSF/o/C7AAE196F41AA055052565F50054E656>>, accessed 3 December 2021.

41 E Freedman, 'Family Law in Israel: Overview' (Practical Law Country Q&A, Thompson Reuters, 2020).

42 *Ibid* at para 13.

43 'The Palestine Order in Council recognized eleven religious communities: Jewish, Muslim, and nine Christian denominations. The Israeli government added the Presbyterian Evangelical Church and the Ba'hai to this list. The Knesset also enacted a law vesting jurisdiction in the Druze religious courts.' Israel Ministry of Foreign Affairs, 'The Judiciary: The Court System' (2013), available at <<https://www.mfa.gov.il/mfa/aboutisrael/state/democracy/pages/the%20judiciary-%20the%20court%20system.aspx>>, accessed 4 December 2021.

44 For example, Israel requires all religious courts to implement certain fundamental rights, eg those protected by the Equal Protection of Women Law: Freedman (note 41).

45 See text annexed to note 6 above.

46 '[M]arriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others' *Hyde v Hyde and Woodmansee* [1866] 1 LR P&D 130 at 133 (Lord Penzance).

## THE POSITION IN DETAIL

My position has four components:

- i. The state may track and legislate concerning the close relationships of its citizens;
- ii. The state should not attempt to single out real marriage (God's supernatural act of uniting the couple) to track and legislate about, as so doing is outside the competence of the (modern) state;<sup>47</sup>
- iii. The state should track and legislate concerning the exchange of marital consent only insofar as this is necessary to establish the broader category of the close relationship mentioned in point (i);<sup>48</sup>
- iv. The state should not call 'legal marriage' the network of close relationships among its citizens that it permissibly attempts to track and about which it permissibly legislates.

I deal with point (i) in detail below. The argument for point (iii) is that there is never any need or rational basis for the state to single out the exchange of marital consent from every other form of consent, and, as the state should not treat some people differently from others without a rational basis, the state should not track or legislate concerning the exchange of marital consent except to establish it as part of a broader category. The argument for this is presented in detail below.

The argument for point (iv) is that it is confusing to call what the state tracks as 'legal marriage' when the name 'marriage' has already been taken by another institution.<sup>49</sup> Indeed, the confusion is evident in the fact that many people think that there is no other sort of marriage than legal marriage. Historically, as we have seen,<sup>50</sup> the word 'marriage' was used in the law because the law was thought to track real marriage, the divine institution. It might be thought that my suggestion embodies a lot of effort to which to go to dispel confusion, but it is also the case that the word 'marriage', rightly or wrongly, puts off some people.<sup>51</sup>

47 It should be recalled that point (ii) is not intended to apply to the theocratic state of ancient Israel.

48 One possible exception could be if there were an accusation of particular discrimination in favour of (or against) those that had exchanged marital consent. In that case it would be permissible for the state to investigate the allegation by tracking who had exchanged marital consent, or, to be more strictly accurate, who said that they had exchanged marital consent. The key point here, though, is that this would not be the state acting as legislator; it would be no different in principle from how a state-employed detective might need to track things of many different kinds in the course of an investigation.

49 Compare the comment of Sheed, quoted above: text annexed to note 6.

50 Compare the quotation from Sir William Scott above: text annexed to note 8.

51 For example, Virginia Braun says: 'My current position on marriage is that I am against it. [...] Politically, I am against it because it has been oppressive for women, and through privileging heterosexuality, oppressive for lesbians and gay men' (V Braun, 'Thanks to my Mother ... A Personal Commentary on Heterosexual Marriage' (2003) 13 *Feminism & Psychology* 421. It is noteworthy that Braun says 'has', not 'is'; Braun's complaint seems to be that the institution has historically had these defects rather than that it had it at the time of her writing. It may be that

### *De facto* relationships

To turn to point (i), I shall take my cue from Australian law, which, both at the federal and state levels, recognises what it calls ‘*de facto* relationships’. These are defined as existing between two parties when they are not legally married or closely related but ‘have a relationship as a couple living together on a genuine domestic basis’.<sup>52</sup> Note that it is possible to be married in the eyes of God and in a *de facto* relationship in the eyes of the state if one is not legally married.<sup>53</sup>

The key aspect of *de facto* relationships is that the state does not create them in the way that civil partnerships in England and Wales are a creation of the state;<sup>54</sup> the state is simply recognising the antecedent domestic reality. But what is the state to count as a ‘genuine domestic basis’? The federal Family Law Act 1975 (Commonwealth) states that the circumstances to which regard may be had in attempting to discern the presence or absence of a *de facto* relationship may include any or all of the following:

- (a) The duration of the relationship;
- (b) The nature and extent of their common residence;
- (c) Whether a sexual relationship exists;
- (d) The degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- (e) The ownership, use and acquisition of their property;
- (f) The degree of mutual commitment to a shared life;
- (g) Whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship;
- (h) The care and support of children;
- (i) The reputation and public aspects of the relationship.<sup>55</sup>

The Act goes on to add in sub-sections 3 and 4 that:

- (3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether the persons have a *de facto* relationship.

people like Braun would not be similarly opposed to state regulation of close relationships if the label made it clear that this was not the same institution. Of course, people oppose marriage laws for other reasons too, and my point is not that Braun is right, but that the proposal might help remove her objection. (I owe the reference to Clare Chambers, *Against Marriage* (Oxford, 2017), p 13.)

<sup>52</sup> Family Law Act 1975 (Cth), s 4AA.

<sup>53</sup> This point is missed in the submission of the Brethren to the Australian Parliament’s Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, which stated, *inter alia*, that ‘The whole concept of living in *de facto* relationships is to dispense with marriage—with its commitments, responsibilities to each other, relative security, and the importance of the family being the basic unit of our society’. This is quoted in *The Parliament of the Commonwealth of Australia, ‘The Family Law Act 1975: Aspects of the Operation and Interpretation’* (Australian Government Publishing Service, 1992) at para 10.56. There are no italics in the original.

<sup>54</sup> Civil Partnership Act 2004, s 1.

<sup>55</sup> Family Law Act 1975 (Cth), s 4AA(2).

- (4) A court determining whether a *de facto* relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.<sup>56</sup>

It may be objected that the Act here is somewhat vague. In reality, relationships of equal commitment can vary enormously in how they manifest that commitment. The Act allows the courts to take individual cases on their merits. Nevertheless, it may be that some hard-and-fast rules need to be given so that people can have security, and to prevent the courts from the administrative burden of having to decide every case from first principles. To take the example of relationship breakdown, the Family Law Act 1975 prescribes, in connection with maintenance, declarations of property interests and alterations of property interests, that the *de facto* relationship must meet one of these conditions in order to be treated in the same way in which a legal marriage is treated:

- (a) That the period, or the total of the periods, of the *de facto* relationship is at least 2 years; or  
 (b) That there is a child of the *de facto* relationship; or  
 (c) That:  
     (i) the party to the *de facto* relationship who applies for the order or declaration made substantial contributions [. . .]; and  
     (ii) a failure to make the order or declaration would result in serious injustice to the applicant; or  
 (d) That the relationship is or was registered under a prescribed law of a State or Territory.<sup>57</sup>

The last clause (d) is important. Many couples rejoice at the moment of becoming legally married because (among other things) their legal status changes at that point without any further waiting period. One can easily imagine that couples would not be pleased if, under my proposal, they lost the opportunity they currently have to get their relationship legally recognised without having to wait for the expiration of a certain period of time.

I suggest, then, that in common with most states and territories of Australia,<sup>58</sup> there should be a legal facility to register *de facto* relationships.<sup>59</sup> Furthermore,

<sup>56</sup> Family Law Act 1975 (Cth), s 4AA(3) and (4). The Act does not here italicise 'de facto'.

<sup>57</sup> Family Law Act 1975 (Cth), s 90SB.

<sup>58</sup> 'Western Australia and the Northern Territory are the only jurisdictions where relationship registration is not yet recognised for the purposes of family law proceedings': S Emerson and L Carter, *Family law in Australia: overview* (Sydney, 2020), p 42.

<sup>59</sup> It might sound contradictory to talk about registering a *de facto* relationship—surely this should be called 'a *de jure* relationship' if registered?; but it is important to stress that the registration records the antecedent existence of the relationship; it should not be regarded as replacing that with a new relationship. Similarly, when the court finds the existence of an unregistered *de facto*

if a state did follow my suggestion and repeal all its marriage law then it should replace all registered marriages with registered *de facto* relationships, so that nobody would be legally disadvantaged by the change. If this were not to happen then someone having been married without having been in a relationship for a long period of time could find themselves losing legal rights, or, at least, being unsure whether they continued to possess the same legal rights.

Note that one cannot register just anyone as one's *de facto* partner in Australia. Each party has to make a signed and witnessed statutory declaration that they are in a relationship with the other, and the states have various statutory limits on who can register to be in a relationship. For example, in New South Wales the minimum age to register a relationship is 18.<sup>60</sup> There are also provisions about the parties not being blood relations of each other.<sup>61</sup>

*De facto* relationships, being normal natural human relationships rather than artificial creations of the law, start and end in the way in which normal natural human relationships begin and end. *De facto* relationships almost always start before they are registered, and usually end before their registration is revoked, although it is possible for one of the parties unilaterally to revoke the registration, provided notice is given.<sup>62</sup> In addition, they need not be registered, and if they are not registered, that fact does not affect their legal status. Furthermore, a registered *de facto* relationship can stop existing, and stop existing in the eyes of the state, even if its registration has not been revoked.<sup>63</sup> It would also seem in theory that the parties could decide to revoke registration of the relationship without wishing the relationship itself to be terminated, or even terminated in the eyes of the state for all purposes.<sup>64</sup>

The first component of my position, then, is that the state should track close relationships by taking into account *de facto* relationships in the way in which Australia currently does, and then extend this to replace legal marriages, so that what had formerly been treated as a legal marriage will instead be accounted a *de facto* relationship. This will then constitute a fair regime under which the state treats committed relationships similarly, whether or not the couple are married.

relationship, that discovery does not transform it into a *de jure* relationship, as it is not the case that the relationship exists in virtue of the law.

60 Relationships Register Act 2010 (NSW). Note that the federal Family Law Act 1975 (Cth) prescribes no minimum age to be in a *de facto* relationship.

61 Family Law Act 1975 (Cth), s 4AA(1)(b).

62 Relationships Register Act 2010 (NSW), s 11. A cooling-off period of 90 days is prescribed in s 12.

63 cf L Young, A Sifris, R Carroll and G Monahan, *Family Law in Australia* (9th edn, Melbourne, 2016), para 5.96, and Australian Government, 'Social Security Guide', available at <<https://guides.dss.gov.au/guide-social-security-law/2/2/5/13>>, accessed 9 December 2021.

64 cf L Young et al, *Family Law in Australia* (ibid), para 6.125.

## Is marriage essential in the law of England and Wales?

I return to the second and third components of my position outlined above, that it is not permissible for the (modern) state to track or legislate in connection either with marriage, conceived as the supernatural act of God in uniting the couple, or with the exchange of marital consent.

I argued at length for this component in an article in 2017.<sup>65</sup> Professor Julian Rivers has responded to this article with a detailed and helpful critique,<sup>66</sup> in which he painstakingly isolates a large number of areas in which the concept of marriage (or something very like it, which he calls ‘quasi-marriage’<sup>67</sup>) is, he argues, essential or at least important to the law of England and Wales. I now turn to look at each instance, and argue that there is no justification for the appeal to the concept of marriage or marital consent in any of them. There is no space here to consider examples from other jurisdictions, but if they correspond to examples from England and Wales then they should be covered below, and if they do not correspond to examples from England and Wales, then it would seem already possible for a legal system to do without them. If I can show that no need has been demonstrated in the law for the state to attempt to track marriage or marital consent, as there is no just purpose (not even a statistical one) to which it could be put, then I think we may say that the state should not attempt to track marriage or marital consent, just *de facto* relationships.

For what purposes, then, might the concept of marriage or marital consent be thought to be necessary at law? The key response in what follows is that not every committed relationship is one in which the parties have entered a legally binding agreement or exchanged specifically marital consent, and the state should not be choosing only one form of committed relationship to promote.

- i. *Tax*: in the UK some couples married at law have special treatment when it comes to taxation.<sup>68</sup> In my view this is unjust: there should be no discrimination in favour of the legally married against those equally committed (demonstrated by, say, two years of cohabitation) but not legally married. My preference would be that the special treatment be entirely abolished.

65 D Hill, ‘The state and marriage: cut the connection’, (2017) 68 *Tyndale Bulletin* 95. I also argued for this position in D Hill, ‘Marriages and civil partnerships are regulated by the government—here’s why that’s a problem’ (8 January 2020), available at <<https://theconversation.com/marriages-and-civil-partnerships-are-regulated-by-the-government-heres-why-thats-a-problem-127303>>, accessed 21 December 2021.

66 J Rivers, ‘Could marriage be disestablished?’, (2017) 68 *Tyndale Bulletin* 121.

67 Rivers (ibid), p 127.

68 Income Tax Act 2007, ss 45 and 46. This, and subsequent references, are all taken from Rivers, note 66.

- ii. *Immigration*: in the UK, immigration law has, rightly it seems to me, changed over the past few years so as not to discriminate between those married at law and those that 'have been living together in a relationship akin to marriage or civil partnership which has subsisted for two years or more'.<sup>69</sup> It might be alleged here that it is still essential that the law make reference to marriage, or everyone would have to wait two years to immigrate, but my proposal would be that those with registered *de facto* relationships should be allowed to immigrate on the basis currently afforded to those legally married.<sup>70</sup> In other words, it would not be essential for the law to work with a concept of legal marriage here.
- iii. *Inheritance*: in England and Wales if a legally married person dies intestate then their estate devolves to their legal spouse,<sup>71</sup> while if someone not legally married but in a long-term cohabiting relationship dies, their estate does not automatically devolve to the surviving cohabitant. This discriminatory treatment appears on the face of it to be easily avoidable by simply making a will. The problem is, however, that many people do not make a will before they die. Provision must be made for what happens to their estate. It would be unjust for it all, in the event of there being no surviving relatives, to be taken as *bona vacantia*, rather than given to a surviving cohabitant, and in many cases unjust for it to be given to aunts and uncles before the surviving cohabitant.<sup>72</sup> I should note that the courts have discretion to make awards for reasonable provision to surviving cohabitants if an application is made under the Inheritance (Provision for Family and Dependents) 1975 Act, but it is apparent that this does not treat committed partners that were not married at law equally with those that were married at law. This seems to me unjust. In Australia, in every state, the *de facto* partner is treated for inheritance purposes in exactly the same way as that in which the legal spouse is treated,<sup>73</sup> and on my proposal *de facto* partners would be treated as legal spouses are now.

A further point is that a new marriage at law, but not a new relationship short of legal marriage, invalidates an existing will.<sup>74</sup> It seems that different states in Australia take different approaches on this issue: in Tasmania

69 Immigration Rules, r 295A(i)(a)(i).

70 Indeed, the law at the moment explicitly acknowledges registered relationships as the equivalent of civil partnerships: see s 212(1)(b) and Schedules 20 and 21.

71 Administration of Estates Act 1925, s 46.

72 Administration of Estates Act 1925, s 46(1).

73 N Armstrong, *De Facto Inheritance Laws in Australia* (Armstrong Legal, 2020), available at <<https://www.armstronglegal.com.au/family-law/de-facto-relationship/de-facto-inheritance-laws-in-australia/>>, accessed 4 December 2021. For a specific example, consider s 5AA(1)(b) of Queensland's Succession Act 1981.

74 Wills Act 1837, s 18.



the law has been since 2008 that registering a relationship revokes a will,<sup>75</sup> while in New South Wales the Succession Act 2006 does not provide that registering a relationship revokes a will (although it does provide that a marriage revokes a will<sup>76</sup>). In South Australia the law was changed in 2017 so that registering a *de facto* relationship now revokes an existing will.<sup>77</sup> I take no stand here on this difficult question, except to say that it is clear that there is no need for the law to invoke the concept of marriage.

- iv. *Relationship breakdown*: a mechanism is needed for solving disputes over how to divide what was previously jointly owned, and for making sure that division of assets is not unjust. At the moment, under the law of England and Wales it can make a big difference whether the parties were legally married. If they were, then, on divorce, the court can make orders under the Matrimonial Causes Act 1973. This does not apply if the parties were not married at law, no matter the length of time for which they had been in a committed relationship. It is widely agreed that the financially weaker party to the relationship is treated better under the Matrimonial Causes Act 1973 than if legally unmarried. It seems to me that, once again, if a committed cohabitant has, for whatever reason, not got married at law they should not be treated differently for that reason alone from the legally married. In Australia those in a *de facto* relationship that meets the threshold for commitment<sup>78</sup> are treated equally with those legally married when it comes to relationship breakdown.<sup>79</sup>
- v. *Criminal law*: with respect to the criminal law, it seems once more unjust that legal spouses cannot be compelled to give evidence against each other in cases in which the committed cohabitant can,<sup>80</sup> and it seems to me unjust that legal spouses cannot be prosecuted for conspiracy with each other while committed cohabitants can,<sup>81</sup> and that special consent is required from the Director of Public Prosecutions for prosecution for theft from one's legal spouse, but not from one's committed cohabiting partner.<sup>82</sup> In Australia the High Court has ruled

75 Wills Act 2008 (Tas), s 16.

76 Succession Act 2006 (NSW), s 12. cf B Davies, *Do Marriage and Divorce Revoke your Will?* (Legal Consolidated, 2021), available at <<https://www.legalconsolidated.com.au/does-marriage-revoke-your-will/>>, accessed 22 December 2021.

77 Wills Act 1936 (Sth Aus), s 20(1), as amended by Relationships Register Act 2016 (Sth Aus).

78 See Family Law Act 1975 (Cth), s 90SB.

79 Federal Circuit and Family Court of Australia, 'Finances and property: Overview' (Commonwealth Courts Portal 2021), available at <<https://www.fcfoa.gov.au/fl/fp/overview>>, accessed 22 December 2021.

80 Police and Criminal Evidence Act 1984, s 80(3).

81 Criminal Law Act 1977, s 2(2)(1).

82 Theft Act 1968, s 30(4).

that there is no generally accepted principle at common law of spousal privilege.<sup>83</sup> I take no stance on this difficult question, except to say that in my view there should be no discrimination here.

- vi. *Bigamy*: the law currently allows one to cohabit with, and have sexual relations with, as many people as will consent, but attempting to marry while already married to another is a criminal offence.<sup>84</sup> It should be noted that neither fraud nor deceit is a necessary element specified in the statute: someone unaware that bigamy was an offence would still be guilty if they attempted to marry while already married. It might indeed be that all three parties, the bigamist, the existing spouse, and the desired second spouse, were all perfectly happy with the proposed arrangement. This would not prevent the action from being an offence. It should also be noted that in England and Wales there is no equivalent offence to bigamy relating to civil partnerships.<sup>85</sup>

It seems to me that there is no need for the criminal offence of bigamy, and, under my proposal, there would be no such offence, as there would be no legal concept of marriage. The question whether a jurisdiction should allow people to be in more than one *de facto* relationship at one time is a different one: in Australia it is possible and permitted to be in more than one *de facto* relationship at any given time,<sup>86</sup> but it is not possible or permitted to register more than one *de facto* relationship.<sup>87</sup> Furthermore, as one has to make a statutory declaration that one is not already in a *de facto* relationship with someone else when applying to register a *de facto* relationship,<sup>88</sup> one would be guilty of an offence if one made a statutory declaration that one knew to be false. In fact, it is a particular offence already in England and Wales if someone ‘for the purpose of procuring a marriage, or a certificate or licence for marriage, or a marriage document or a marriage schedule, knowingly and wilfully makes a false oath, or makes or signs a false declaration, notice or certificate’<sup>89</sup> or ‘knowingly and wilfully makes, or knowingly and wilfully causes to be made, for the purpose of being inserted in any register of marriage [...] a false statement as to any particular required by law to be known and registered relating to any marriage [...]’,<sup>90</sup> and it is also an offence

83 *Australian Crime Commission v Stoddart* [2011] HCA 47.

84 Offences Against the Person Act 1861, s 57.

85 *Halsbury's Laws of England*, vol 26, Criminal Law (London, 2020), s 987.

86 Family Law Act 1975 (Cth), s 4AA(5)(b).

87 Compare, eg, Relationships Register Act 2010 (NSW), s 5(3)(b).

88 Relationships Register Act 2010 (NSW), s 6(a)(4).

89 Perjury Act 1911, s 3(1)(a).

90 Perjury Act 1911, s 3(1)(b).

to make a false declaration in connection with registration for a civil partnership.<sup>91</sup> It seems, then, that anyone intentionally committing bigamy would already be committing perjury.<sup>92</sup> Without taking a stance on the detailed questions here, I assert that there should not be one rule for marriage and another rule for registered *de facto* partnerships.

vii. *Sham marriages*: a sham marriage is defined as a marriage entered into for one or more of these purposes:

- a. Avoiding the effect of one or more provisions of United Kingdom immigration law or the immigration rules;
- b. Enabling a party to the marriage to obtain a right conferred by that law or those rules to reside in the United Kingdom.<sup>93</sup>

Similar rules apply to sham civil partnerships.<sup>94</sup> If marriage were no longer a legal concept then there would be no sham marriages, but, there would, of course, almost certainly be sham *de facto* relationships, and these could incur the same penalty as sham marriages and civil partnerships currently do.

viii. *Forced marriages*: in England and Wales it is an offence if one ‘uses violence, threats or any other form of coercion for the purpose of causing another person to enter into a marriage’.<sup>95</sup> There is no comparable offence of a ‘forced civil partnership’ in England and Wales,<sup>96</sup> although there is in Scotland.<sup>97</sup> Under my proposal this discrepancy would be removed because it would be an offence to coerce anyone into any *de facto* relationship, registered or not.

ix. *Tort law*: the courts have the power to stay actions in tort between spouses, but not between committed cohabitants.<sup>98</sup> This difference of treatment

91 Civil Partnership Act 2004, s 80.

92 It is a defence to a charge of bigamy that one is making an honest and reasonable mistake: *R v Gould* [1968] EWCA Crim 1, [1968] 2 QB 65. If one’s mistake is honest but unreasonable, however, one may still be guilty: *R v King* [1964] 1 QB 285 at 293.

93 Immigration and Asylum Act 1999, s 24(5)(c).

94 Immigration and Asylum Act 1999, s 24A.

95 Anti-Social Behaviour, Crime and Policing Act 2014, s 121.

96 The Government states ‘The legislation surrounding forced marriage, and the change to it which will be made by this bill, does not extend to civil partnerships. This is not considered likely to be disadvantageous to people whose sexual orientation is other than heterosexual, as it is more likely that a person who is not heterosexual would be forced into a marriage, despite, and perhaps because of, their sexual orientation, than that they would be made to enter a civil partnership. The Government is not aware of any cases of forced civil partnership’: ‘Equality Statement for Marriage and Civil Partnership (Minimum Age) Bill Policy Equality Statement’, para 6.8 (Parliament Publications, 2021), available at <<https://publications.parliament.uk/pa/bills/cbill/58-02/0018/AgeofMarriageBillEqualitiesStatement.pdf>>, accessed 2 December 2021.

97 Civil Partnership (Scotland) Act 2020, s 13.

98 Law Reform (Husband and Wife) Act 1962, s 1(2).

seems unjust and unnecessary to me. In Australia the courts have no power to stay actions in tort between spouses,<sup>99</sup> and in my view that regime should be implemented here too.

- x. *Tenancy*: legal spouses automatically have home rights, but an occupation order under the UK Family Law Act 1996 for a cohabitant without an interest in the home is capped at six months, renewable once.<sup>100</sup> Once more, this difference of treatment seems unjust and unnecessary to me. In Australia there is no such limit on *de facto* partners.<sup>101</sup>
- xi. *Peerages*: children not born in a legal marriage, unlike those born in one, are not able to succeed to peerages<sup>102</sup> or to the monarchy.<sup>103</sup> In my view, this is unjust, and they should be able to succeed.<sup>104</sup>
- xii. *Discrimination*: the Equality Act 2010 outlaws discrimination in employment on the basis of ‘marriage and civil partnership’.<sup>105</sup> It is a curiosity that the Act does not outlaw discrimination on the basis of being not in a marriage or civil partnership. It seems to me unjust that one can, under the Act, discriminate against someone because they are cohabiting but not because they are married.<sup>106</sup>
- xiii. *Statistics*: the UK government uses its registers of marriages for statistical purposes.<sup>107</sup> This use is widespread internationally: even Israel keeps a marriage register for statistical purposes, and, apparently, for this purpose only.<sup>108</sup> It seems to me, however, that there is no need for statistical monitoring of marriage, as opposed to of cohabitation or being in a *de facto* relationship.<sup>109</sup>

99 Family Law Act 1975 (Cth), s 119.

100 Family Law Act 1996, ss 36(10) and 38(6).

101 Family Law Act 1975 (Cth), s 114.

102 This affects adopted children as well as illegitimate children: Adoption and Children Act 2002, s 71.

103 The phrase ‘heirs of the body’ in s 1 of the Act of Settlement (1701) (12 & 13 Will 3 c 2) denotes those born within marriage.

104 This change probably should not be retrospective.

105 Equality Act 2010, s 8. Note that the Act provides for a single protected characteristic of ‘marriage and civil partnership’. It does not provide for two protected characteristics, marriage and civil partnership. There are exceptions to the ban on discrimination: see Schedule 9.

106 It may be that discriminating against someone because they are not in a marriage or civil partnership would still be unlawful under Article 8 of the European Convention on Human Rights, as incorporated by the Human Rights Act 1998. I am grateful to Frank Cranmer for pointing this out to me.

107 Kanak Ghosh, *User guide to marriage statistics* (Office for National Statistics, 2021), available at <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/methodologies/userguidetomariagestatistics>>, accessed 22 December 2021.

108 *Funk Schlesinger v Minister of the Interior* (1963) HCL 143/62 paras 6 and 9 (Sussman J).

109 See the possible exception mentioned in note 48.

### Where the law would not change

- i. *Sexual offences*: it should be stressed that my proposal is just about marriage law. It is not intended to affect any law regarding sexual offences. In particular, the laws against rape,<sup>110</sup> unlawful sexual intercourse<sup>111</sup> and incest,<sup>112</sup> together with the other specific sexual offences outlined in statute,<sup>113</sup> would be unaffected by the proposal. Similarly, the age of consent could be simply transferred from entering a marriage to being in a *de facto* relationship.
- ii. *Children*: my proposal does not affect the legal status of children in any meaningful way. It is already the case that legal decisions concerning children are made with their welfare as the paramount concern rather than on the basis of the marital status of their parents.<sup>114</sup> It is true that, as Julian Rivers points out, '[p]arental responsibility is acquired automatically by the husband of a child's mother, but it is not automatically acquired by a cohabiting partner'.<sup>115</sup> However, the father of the child, even if not legally married to the mother, can nevertheless still acquire parental responsibility on registration.<sup>116</sup> It seems to me that it would not be impractical for it to be normally obligatory for both parents, married or not, to register the birth. This is the procedure currently followed in, for example, South Australia.<sup>117</sup>

### OBJECTIONS

The main objection against the thesis has been that it is impractical, but I hope that I have demonstrated in this article that it would not in principle be impractical to adopt the Australian model of *de facto* relationships, convert all marriages to registered *de facto* relationships, and then proceed solely with the latter.

#### No jurisdiction wants to move first

One objection might be that no jurisdiction would be prepared to move first with my proposal, out of fear that their citizens might be deprived of certain rights when they moved to other jurisdictions that did recognise marriage.<sup>118</sup> In my view, there is no cause to fear: there are jurisdictions, for example New

110 Sexual Offences Act 2003, s 1.

111 Sexual Offences Act 1956, ss 1–9.

112 Sexual Offences Act 1956, ss 10 and 11.

113 Principally in the Sexual Offences Act 2003.

114 Children Act 1989, s 1(1).

115 Rivers (note 66), p 130. Rivers cites the Act in question: Children Act 1989, s 3.

116 Children Act 1989, s 4.

117 Births, Deaths and Marriages Registration Act 1996 (Sth Aus), ss 15 and 16.

118 Thanks to Rebecca Probert for this objection.

Hampshire<sup>119</sup> and Connecticut,<sup>120</sup> that are prepared to treat as marriages unions solemnised in other states that are not technically marriages in those states. What is more, the UK treats as civil partnerships registered *de facto* partnerships from some of the states of Australia, even though the former are a legal creation and the latter a legal record of a pre-existing relationship.<sup>121</sup> Finally, the Grand Chamber of the Court of Justice of the European Union (CJEU) recently confirmed<sup>122</sup> that Romania, which has no provision for civil unions or civil partnerships, had to recognise for the purposes of immigration law a marriage recognised in the EU state in which it had been contracted. So, in response to the worry that, were the UK to implement my suggestion, UK citizens would be disadvantaged abroad, my hope and expectation would be that the CJEU, or the European Court of Human Rights, would mandate states party to recognise *de facto* relationships between UK citizens even if the states party did not themselves have such relationships in their own domestic law.<sup>123</sup>

### The European Convention on Human Rights

The European Convention on Human Rights (ECHR) provides in its Article 12 ‘Right to Marry’ that:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

It has been objected that for the UK, or any other country signatory to the ECHR, to repeal its marriage law would be to violate the right to marry as detailed in this Article.<sup>124</sup> At this point it is important for me to remind the reader that the proposal is not to abolish the institution of marriage, but, rather, to allow marriage to flourish outside the present legal framework. Accordingly, if a state did repeal its marriage law it would not thereby remove the right to

119 ‘A civil union legally contracted outside of New Hampshire shall be recognized as a marriage in this state’: HB 436 (2009), NH Rev Stat § 457:45 (1996 through Reg Sess).

120 ‘A marriage, or a relationship that provides substantially the same rights, benefits and responsibilities as a marriage, between two persons entered into in another state or jurisdiction and recognized as valid by such other state or jurisdiction shall be recognized as a valid marriage in this state’, 2011 Connecticut Code Title 46b ‘Family Law’ Chapter 815e ‘Marriage’ Sec. 46b-28a ‘Recognition of marriages and other relationships entered into in another state or jurisdiction’.

121 Schedule 20 to the Civil Partnership Act 2004.

122 *Coman & Ors v Inspectoratul General* [2018] EUECJ C-673/16\_O, EU:C:2018:2.

123 This would be more likely if the state following my proposal was actually a member of the CJEU, of course.

124 This objection is made by John Allman at D Hill, ‘The State and Marriage II: How would things look after the Cutting of the Connection?’ (*Law & Religion UK*, 5 July 2018), available at <<https://lawandreligionuk.com/2018/07/05/the-state-and-marriage-ii-how-would-things-look-after-the-cutting-of-the-connection/>>, accessed 22 December 2021. Frank Cranmer also made this objection in correspondence.

marry. In my view, it is impossible for a state to remove the right to marry as the right is one given by God, and the state lacks power to abrogate it, but, equally to the point, under my proposal nobody would lose legal rights, as all legal marriages would be converted into registered *de facto* relationships, and these would have all the legal rights (or all the legal rights worth keeping) of marriages under the current regime. Of course, people would have the same right to call their own relationship 'a marriage' even though that would no longer be a legal title.

This understanding of Article 12 does not make it toothless. Imagine that a state purported to prevent its citizens, or, with more historical plausibility, a subset of its citizens, from marrying anybody. The law here might punish anyone that got married, even if in a non-legal ceremony. This would surely fall foul of Article 12, and the difference between it and my proposal is obvious.

### **Cohabitants might not want legal recognition**

Another objection to the proposed extension of cohabitation law in the form of *de facto* relationships is that put forward by Baroness Ruth Deech in a series of papers.<sup>125</sup> Her key points, it seems to me, are that those cohabiting or in *de facto* relationships may be cohabiting or in them precisely because they do not want to get married at law, and that it would be unfair for the law then to saddle them with the legal incidents of marriage. This point is well taken, and under my proposal they would not be regarded by the law as married. Nevertheless, they would still be saddled with some legal incidents that they might have preferred to forgo. This is a disadvantage of my proposal, but it seems to me to be outweighed by the need for the law to make some provision in cases of intestacy. It is possible that the deceased intestate cohabitant did not want any of their estate to pass to the surviving cohabitant on death, but it is equally possible that the deceased cohabitant did want this, but never got round to making a will.<sup>126</sup> It seems to me that it is more important to avoid the risk of leaving the surviving cohabitant unjustly penniless than it is to avoid the risk of leaving the surviving cohabitant unjustly rich. In either case, the cohabitants are able to avoid the situation (at least in theory) by simply making a will. This consideration applies to other areas as well: if an unwilling cohabitant seems to be unfairly saddled with a legal incident then it is usually possible for the cohabitant to 'contract out' of that incident. That said, it must be admitted that many jurisdictions have limits on how far people may be permitted to contract out

125 For example, R Deech, 'The Case Against Legal Recognition of Cohabitation' in J Eekelaar and S Katz (eds), *Marriage and Cohabitation in Contemporary Societies* (Oxford, 1980), p 300.

126 It is said that 64% of adults have not made a will, and of those that have, 32% are out of date: C Rist, 'Put your will in order to avoid inheritance disputes', *Bdaily News* (12 January 2015), available at <<https://bdaily.co.uk/articles/2015/01/12/put-your-will-in-order-to-avoid-inheritance-disputes>>, accessed 8 December 2021. Rist cites research by Investec Wealth & Investment.

of what are thought to be their moral responsibilities. For example, the court has the power to over-ride the terms of a will if it is thought not to make reasonable financial provision for surviving family and dependents.<sup>127</sup> It is worth noting that Baroness Deech herself says:

Cohabitation could only be assimilated to marriage if the legal incidents of marriage itself were reduced (which would be no bad thing). The case will be made later for the application of ordinary laws to cohabitants—contract rather than status—and this too would be desirable in marriage. In other words, marriage should become more like cohabitation and not the other way around.<sup>128</sup>

It seems to me that my proposal should escape the brunt of her criticisms.

### **Marriage is a good that the state should promote**

A prominent objection to my view takes issue right at the start. It says that marriage, or legal marriage,<sup>129</sup> is a good thing, and can be shown statistically to be beneficial to society: it is argued to promote mental health<sup>130</sup> and even physical health too.<sup>131</sup> The conclusion is that if it is a good thing that statisticians can track, then it should be promoted by the state.

Statistician George Ploubidis responds to one of these surveys with words that seem to me to apply to most of them: ‘Generally speaking, people who are in stable marriages have better health compared to those who have never been married, but it’s not so much about being legally married as the benefits of being in a stable, long-term relationship.’<sup>132</sup> In consequence, if any state of life is to be promoted by the state it seems to me that it should be the more general one of being in a stable, long-term relationship. This would include legal marriage but other committed relationships too. Not everyone in such a relationship, not even everyone married in the eyes of God, is also married in the eyes of the civil law.

127 Inheritance (Provision for Family and Dependents) Act 1975.

128 Deech (note 125), p 303.

129 The surveys invariably track those legally married or those that say that they are legally married.

130 See, eg, S Grover and J Helliwell, ‘How’s Life at Home? New Evidence on Marriage and the Set Point for Happiness’, NBER Working Paper No. 20794 (National Bureau of Economic Research, December 2014), available at <<https://www.nber.org/papers/w20794>>, accessed 17 December 2021.

131 N Davis, ‘Marriage boosts survival chances of cancer patients, say scientists’ *The Guardian* (11 April 2016), available at <<https://www.theguardian.com/science/2016/apr/11/marriage-boosts-survival-chances-of-cancer-patients-say-scientists>>, accessed 17 December 2021.

132 Quoted in L Geddes, ‘Couples are healthier, wealthier... and less trim’, *The Guardian* (17 April 2016), available at <<https://www.theguardian.com/lifeandstyle/2016/apr/17/couples-healthier-wealthier-marriage-good-health-single-survey-research>>, accessed 17 December 2021.



## CONCLUSION

There are many other arguments for the position put forward that I have not discussed here.<sup>133</sup> I do not disavow these other arguments, but my own argument, resting on a principled denial of the state's competence to regulate or even track a supernatural action on God's part, and lack of rational basis for tracking the exchange of specifically matrimonial consent, is perhaps more fundamental.

It may be thought that my proposal here is of purely academic interest; it could never actually happen. Perhaps. But the state of change of the law of marriage over the past few decades has been rapid and increasing. In particular, accommodation of the rise in cohabitation outside legal marriage has led to vast changes in many areas of the law. My proposal is really just to bring this trajectory to its natural endpoint of the removal of all discrimination against committed cohabitants, and then to remove the concept of marriage from the law as unnecessary. It would seem to me foolish to say, when one thinks of the changes in society and the law over the past century alone, that this could *never* happen.<sup>134</sup>

133 See, in addition to my own arguments in D Hill, 'The State and Marriage: Cut the Connection' 68 *Tyndale Bulletin* 95, and 'Marriages and civil partnerships are regulated by the government—here's why that's a problem' (*The Conversation*, 8 January 2020), available at <<https://theconversation.com/marriages-and-civil-partnerships-are-regulated-by-the-government-heres-why-thats-a-problem-127303>>, accessed 22 December 2021, eg, E Clive, 'Marriage: an Unnecessary Legal Concept?' in J Bekelaar and S Katz (eds), *Marriage and Cohabitation in Contemporary Societies* (Oxford, 1980), C Sunstein and R Thaler, *Nudge* (London, 2009) chapter 15, E Zelinsky, 'Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage' (2006) 27 *Cardozo Law Review* 1161, E Brake, *Minimizing Marriage* (Oxford, 2012), E Brake (ed), *After Marriage* (Oxford, 2015), G Chartier, *Public Practice, Private Law* (Cambridge, 2016), and C Chambers, *Against Marriage* (Oxford, 2017).

134 There are many that I'd like to thank for their help over the years as I have been pondering these issues. Julian Rivers' reply to my essay in *Tyndale Bulletin* has radically reoriented my thinking on the subject. Rebecca Probert has been a mine of helpful information in answer to a very large number of queries relating to the law of marriage. I am grateful to Frank Cranmer and David Pocklington for discussion and for publishing three blog pieces of mine on the question. Dominic Foo has also been very helpful in pushing me in discussion. I am grateful to the *Ecclesiastical Law Journal* for inviting me to submit this essay, and for affording me some extra time in which to do it, and for Benjamin Harrison for detailed comments leading to 1,251 revisions. Of course, none of those just mentioned should be thought to agree with what I have written.