

# THE STATE AND MARRIAGE: CUT THE CONNECTION<sup>1</sup>

## Abstract

I argue that the connection between the state and the institution of marriage should be cut. More precisely, I argue that the state should not (i) solemnize or purport to solemnize any marriages, (ii) register any marriages, and (iii) make any laws, civil or criminal, respecting marriage. I advance several arguments for this thesis, and then respond to many possible objections. I do not argue for any change in any of the typical Western laws respecting sexual intercourse; in particular, I do not argue for any change in the laws regarding rape, the age of consent to intercourse, or intercourse with a minor.

## 1. What is Marriage?

### 1.1. The Scriptural View

The nature of marriage and marital status are hotly debated today. The fundamental disagreement seems to be between those, on the one hand, that think that marriage is purely an institution of the state or society, and those, on the other hand, that think that marriage is of divine institution.<sup>2</sup>

The Christian Scriptures hold out marriage as an institution of divine origin. The first marriage-related word to occur in most English translations of the Scriptures is the word 'wife', and its first

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<sup>1</sup> This paper is based on a much shorter paper, 'Cut the Connection: Marriage and the State', on-line at <http://epsociety.org/library/articles.asp?pid=289>, accessed 22 July 2016, written as part of the Web project 'Philosophical Discussions on Marriage and Family Topics'. I am grateful to the Evangelical Philosophical Society for allowing me to develop the material in that paper into the present article. My thanks go first and foremost to Dr Peter J Williams, Prof. Julian Rivers, Dr Jonathan Chaplin, and Dr Thomas Simpson, who have given unstinting criticism, some positive and some negative, all of which has helped me in very great measure. I'd also like to thank Lorraine Cavanagh, Dr Colin Hamer, Dr James Heather, Dr John McClean, Stephen Rees, and three anonymous reviewers for *Tyndale Bulletin*. Finally, I'd like to thank the audience at the 2016 Tyndale conference for helpful comments, particularly a correction on a matter not in this paper.

<sup>2</sup> An intermediate view, that marriage is partly a state institution and partly a divine one, is also possible. An example would be the view that marriage is a divine institution that has been left to humans to codify—perhaps within certain divinely appointed limits. There are also those that think that marriage is whatever the individual wants it to be, but I think the tension underlying the contemporary debate in the West seems to be over whether it is the state or God that determines the nature of the institution of marriage.

occurrence in most English translations is in Genesis 2,<sup>3</sup> where it occurs twice.<sup>4</sup> The first occurrence is in a sentence traditionally held to be describing the institution of marriage, ‘therefore a man shall leave his father and mother and hold fast to his wife, and they shall become one flesh’,<sup>5</sup> while the second occurrence describes Eve in particular.<sup>6</sup> In the New Testament Jesus is recorded in Matthew 19:6 as referring back to Genesis 2 when he says:

‘Have you not read that he who created them from the beginning made them male and female, and said, “Therefore a man shall leave his father and his mother and hold fast to his wife, and the two shall become one flesh”? So they are no longer two but one flesh. What therefore God has joined together, let not man separate.’<sup>7</sup>

Here Jesus says that it is God that unites two people in marriage, and he links (‘therefore’) this teaching to Genesis 2. This seems to make it plain that marriage, together with its consequent status, is an institution of divine origin. Against this view is the view that marriage is a purely social or state institution.

## **1.2 What does the law think marriage is?**

Before the coming into force of Lord Hardwicke’s Act in 1754,<sup>8</sup> the law of marriage in England and Wales was the canon law of the church—before the Reformation, the canon law of Rome, and after the Reformation, the canon law of the Church of England. Before 1754 there was no requirement that a marriage be registered with the state, though the House of Lords controversially held in 1844

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<sup>3</sup> The Hebrew word ‘iššah’ translated ‘wife’ in Gen. 2:24 and Gen. 2:25 also occurs in Gen. 2:22 and Gen. 2:23, where it is usually translated ‘woman’.

<sup>4</sup> The word ‘husband’ does not occur until Gen. 3 in most translations.

<sup>5</sup> Gen. 2:24 (ESV).

<sup>6</sup> Gen. 2:25.

<sup>7</sup> Matt. 19:4–6 (ESV).

<sup>8</sup> <http://statutes.org.uk/site/the-statutes/eighteenth-century/1753-26-geo-2-c-33-prevention-of-clandestine-marriages/> (‘An Act for the Better Preventing of Clandestine Marriage’, 26 Geo II c 33), accessed 29 March 2017. It should be noted that the Act does not make the registration of the marriage essential for validity. Rather, it states that the registration is designed ‘to preserve the Evidence of Marriages, and to make the Proof thereof more certain and easy’ (s 15).

in *R v Millis* that there had been a requirement for solemnization by an episcopally ordained cleric.<sup>9</sup>

Perhaps the best expression of the concept of marriage in the law of England and Wales was that given by Sir William Scott in 1811:

Marriage in its origin is a contract of natural law; it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind; it is the parent, not the child, of civil society. [...] In civil society it becomes a civil contract regulated and prescribed by law and endowed with civil consequences. In most civilized countries acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded: it then becomes a religious as well a natural and civil contract; for it is a great mistake to suppose that because it is the one therefore it may not likewise be the other. Heaven itself is made a party to the contract and the consent of the individuals pledged to each other is ratified and consecrated by a vow to God. [...] At the Reformation this country disclaimed, amongst other opinions of the Romish Church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin[.]<sup>10</sup>

The law of England and Wales also bears witness to a single antecedent institution of marriage in the fact that no statute ever defines marriage, and in its general recognition of marriages contracted in foreign jurisdictions, in many cases even when they would not have been valid had they been celebrated in England and Wales, and in some cases even when they were not valid according to the jurisdiction in which they were celebrated.<sup>11</sup> It is also clear that in the law of England and Wales it is the parties that create the marriage, which officials then witness and register. In the Australian case

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<sup>9</sup> *R v Millis* (1844) X Clark & Fennelly 534, 8 ER 844. In fact, this requirement was stated to be only 'in order to constitute a regular marriage—a perfect marriage—a marriage with all the consequences belonging to a marriage in its complete and perfect state' 844–845 (the Lord Chancellor).

<sup>10</sup> *Dalrymple v Dalrymple* (1811) 2 Hag Con 63, 63, 77 (Sir William Scott). The case also involved Scots law; Sir William thought it not substantially different from the law of England and Wales on this point.

<sup>11</sup> See *Taczanowska v Taczanowska* [1957] P 301 CA, which concerned then-Polish nationals in Rome, and *Kochanski v Kochanska* [1958] P 147 and *Preston v Preston* [1963] P 411 CA, both of which concerned then-Polish nationals in Germany. In each case the marriage was invalid according to the law of the place of celebration, but was adjudged valid by the court.

of *Quick v Quick*,<sup>12</sup> the marriage was held valid even though one party had had a change of mind before the minister had pronounced them husband and wife.

The law of Scotland before 1854 also preserved the old canon law,<sup>13</sup> and even after then, until 1940, it was possible to contract a marriage without any legal recognition by declaration of present consent or by promise followed by sexual intercourse.<sup>14</sup> In fact, even up until 2006 it was possible to constitute a marriage in Scotland without any legal recognition by 'cohabitation with habit and repute'.<sup>15</sup> Perhaps the best expression of how marriage is regarded in Scots law was given by Lord Deas in 1860:

The leading principle is, that consent makes marriage. No form or ceremony, civil or religious, no notice before nor publication after, no consummation or cohabitation, no writing, no witnesses even, are essential to the constitution of this, the most important contract which two private parties can enter into [...]. Matrimonial consent may be verbally and effectually interchanged when no third party is present; and if it can be proved, even at the distance of years [...] that such consent had been seriously and deliberately given, the parties will be held to have been married from that time forward.<sup>16</sup>

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<sup>12</sup> *Quick v Quick* [1953] VLR 224. The case concerns the common law of marriage, not any statutes. See also G V Tolhurst 'Marriage—Incomplete Ceremony—Validity' 6 *Res Judicatae* [1953] 546.

<sup>13</sup> The passing of the Registration of Births, Deaths, and Marriages (Scotland) Act 1854, aka "An Act to provide for the better Registration of Births, Deaths and Marriages in Scotland", 17 & 18 Vict c 80, made civil registration of all marriages in Scotland mandatory.

<sup>14</sup> These forms ('declaration *de praesenti*' and 'promise *subsequente copula*') were invalidated from 1 July 1940 by The Marriage (Scotland) Act 1939, 2 & 3 Geo 6 c 34.

<sup>15</sup> <http://www.legislation.gov.uk/asp/2006/2/section/3> (Family Law (Scotland) Act 2006, s 3), accessed 29 March 2017. This section provides that those marriages constituted by habit and repute before 2006 are still valid today. NB although the Act uses the word 'constitute', it seems to me that Francis Lyall is correct in stating that 'Marriage was not truly constituted by habit and repute. Rather the civil authorities presumed a marriage to have occurred, and therefore consequentially applied its civil effects upon proof of a factual situation. An actual exchange of consent to marriage was proven, but was presumed to have occurred at some former time [...] there always had to have been matrimonial intent. Concubinage *simpliciter* did not result in marriage.' (Francis Lyall, *Church and State in Scotland: Developing Law* (London: Routledge, 2016): 173).

<sup>16</sup> *Leslie v Leslie* (1860) 22 D 993, 1011–2 (Lord Deas).

Scots law also, of course, in general recognizes marriages celebrated abroad,<sup>17</sup> and, like England and Wales, expects other jurisdictions to recognize marriages contracted under its jurisdiction.

All this evidence strongly suggests that the legal system of England and Wales, and that of Scotland, takes the view that there is but one institution of marriage, entry into which, and exit from which, is subject to the regulation of the different laws of various jurisdictions, and the authoritative assessment of the different courts of the various jurisdictions, although effected by the couples themselves.

### **1.3 The problem of differing jurisdictions**

One question that immediately presents itself when one considers the differing laws concerning marriage across different jurisdictions<sup>18</sup> throughout space and time is which jurisdiction, if any, gets the institution right. It might be replied that there is no reason why one and the same institution should not have different entry and exit conditions in different countries, meaning that there is no single right answer. But the point is that, although, in general, jurisdictions accept those marriages accepted by the jurisdiction of the parties or the place of solemnization, there are exceptions. For example, the law of England and Wales does not recognize certain polygamous marriages contracted overseas,<sup>19</sup> and many overseas jurisdictions do not recognize same-sex marriages contracted in England and Wales.<sup>20</sup> It cannot be the case that both jurisdictions are right here about a single institution, that in that single institution certain individuals both do and do not have a certain valid marriage. Of course, it could be replied that, with respect to these precise examples, one of the jurisdictions is right and the other one wrong, but the problem generalizes, and it is hard to believe

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<sup>17</sup> <https://www.scotlawcom.gov.uk/files/1813/1419/9156/cm64.pdf> (The Law Commission Working Paper No. 89 and the Scottish Law Commission Consultative Memorandum No. 64, 'Private International Law: Choice of Law Rules in Marriage' London: HMSO, 1985), ss 2.29 and 2.30, accessed 29 March 2017.

<sup>18</sup> By 'jurisdictions' and 'jurisdiction' here and hereafter I mean to refer just to secular legal systems. I do not mean to include religious or ecclesiastical legal systems. (The Fundamental Law of the Vatican City State counts as secular for this purpose, but the Canon Law of the Catholic Church counts as ecclesiastical.)

<sup>19</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/268020/marriage.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/268020/marriage.pdf), Government Notes on Marriage, para 8.3.1, accessed 21 September 2016.

<sup>20</sup> <http://www.gmanetwork.com/news/story/512018/news/nation/phl-will-not-recognize-same-sex-marriages-done-in-other-countries-palace>, accessed 20 January 2017, gives the example of the Philippines.

that one jurisdiction gets it exactly right on every single disputed point. It is hard even to believe that one jurisdiction is clearly better than the rest at correctly representing the single institution of marriage.

One reason why it is hard to suppose that one secular jurisdiction gets the single institution of marriage right all or most of the time is that almost every jurisdiction has itself changed its own answers over time. Some of the changes that have occurred to the law in England and Wales over the years have already been mentioned, but the problem is not merely that the law changes over time, but that some of the laws of England and Wales have in fact contradicted each other about one and the same thing. A famous historical example is the Act of Succession 1533, which declared void the purported marriage between Henry VIII and Katherine of Aragon, later retrospectively validated by Queen Mary,<sup>21</sup> and valid the purported marriage between Henry VIII and Anne Boleyn,<sup>22</sup> later retrospectively voided by the Second Succession Act 1536.<sup>23</sup> A more recent example can be found in the Succession to the Crown Act 2013, which provides that the marriages thitherto declared void under the Royal Marriages Act 1772 are retrospectively 'to be treated as never having been void', subject to certain provisos.<sup>24</sup> As before, the problem generalizes: it is not convincing to say that now, or at some single prior point, the law of England and Wales gets, or had got, the institution of marriage exactly right, or even mostly right.

The point I am trying to make here is not the perfectionist one that unless a state's law of marriage gets every detail right it counts for nothing. Rather, I am merely trying to show that it is not plausible to think that there is a unique antecedent institution of marriage that a jurisdiction succeeds in getting exactly right.

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<sup>21</sup> An act declaring the Queen's highness to have been born in a most just and lawful matrimony 1533 (1 Mary 2 c 1), s 8, reprinted in Danby Pickering, ed., *The Statutes at Large from the First Year of Queen Mary to the Thirty-fifth Year of Queen Elizabeth, inclusive* Vol. 6 (Cambridge: Bentham, 1763), 3, 6.

<sup>22</sup> <http://www.luminarium.org/encyclopedia/firstactofsuccession.htm> (Act of Succession 1533 (25 Henry VIII c 22)), accessed 21 September 2016.

<sup>23</sup> Succession to the Crown: Marriage Act 1536 (28 Henry VIII c 7), reprinted in Pickering, *Statutes at Large*, Vol. 4, 416. Section 10 of this Act (422) voided the marriage between Henry VIII and Anne Boleyn.

<sup>24</sup> <http://www.legislation.gov.uk/ukpga/2013/20/section/3> (Succession to the Crown Act 2013, s 3(5)), accessed 31 October 2016.

I stated in a footnote above that the word 'jurisdiction' was to be interpreted, unless otherwise stated, as short for 'secular jurisdiction'. This might lead someone to suggest that a jurisdiction can simply adopt the marriage law of a religious institution or hand over the administration of marriage matters to a religious institution. And, indeed, a few jurisdictions have taken this step: marriage was dealt with by the church courts in England and Wales until 1858,<sup>25</sup> in Israel today marriage matters are adjudicated by the faith community to which the parties belong,<sup>26</sup> and in some Islamic countries, such as Saudi Arabia,<sup>27</sup> marriage matters are adjudicated by sharia courts. It seems to me, however, that this privilege of administering marriages is not the state's to give, and, further, that it is outside the state's role even to judge which religious institution is the correct one, or even the best one, to administer marriages. It is worthy of note that even within the Christian church there is disagreement on when marriages start (consent<sup>28</sup> or consummation<sup>29</sup>), when they end (divorce<sup>30</sup> or death<sup>31</sup>), and what the conditions are for their starting and finishing, so even if a state went beyond its appropriate role to select the Christian revelation as its guide to marriage, the state would then have still further to exceed its mandate by making theological decisions concerning the correct way to interpret the Scriptures.

At this point the reader may be tempted to drop the idea that there is a single social institution of marriage in favour of the idea that there are instead multiple different institutions of marriage in our societies and states. These institutions cannot be totally unrelated to each other, however: it does

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<sup>25</sup> <http://freepages.genealogy.rootsweb.ancestry.com/~framland/acts/divorce1857.htm> (Matrimonial Causes Act 1857, aka 'An Act to amend the Law relating to Divorce and Matrimonial Causes in England', 20 & 21 Vict, c 85), accessed 20 January 2017.

<sup>26</sup> [https://en.wikipedia.org/wiki/Marriage\\_in\\_Israel](https://en.wikipedia.org/wiki/Marriage_in_Israel), accessed 20 January 2017.

<sup>27</sup> [https://en.wikipedia.org/wiki/Legal\\_system\\_of\\_Saudi\\_Arabia#Family\\_law](https://en.wikipedia.org/wiki/Legal_system_of_Saudi_Arabia#Family_law), accessed 20 January 2017.

<sup>28</sup> 'The consent of the parties, legitimately manifested between parties qualified by law, makes marriage', Roman-Catholic Code of Canon Law c. 1057§1, [http://www.vatican.va/archive/ENG1104/\\_P3V.HTM](http://www.vatican.va/archive/ENG1104/_P3V.HTM), accessed 14 July 2016.

<sup>29</sup> Hincmar of Reims, *Epistolae* 22, PL 126: 137–8, quoted and translated in James A Brundage, *Law, sex, and Christian society in medieval Europe* (Chicago: University of Chicago Press, 1990), 136, fn 43.

<sup>30</sup> 'In the case of adultery after marriage, it is lawful for the innocent party to sue out a divorce and, after the divorce, to marry another, as if the offending party were dead', *The Westminster Confession of Faith*, XXIV.5, [http://www.reformed.org/documents/wcf\\_with\\_proofs/ch\\_XXIV.html](http://www.reformed.org/documents/wcf_with_proofs/ch_XXIV.html), accessed 14 July 2016.

<sup>31</sup> 'A marriage that is ratum et consummatum can be dissolved by no human power and by no cause, except death', Roman-Catholic Code of Canon Law c. 1141, [http://www.vatican.va/archive/ENG1104/\\_P44.HTM](http://www.vatican.va/archive/ENG1104/_P44.HTM), accessed 14 July 2016.

not seem plausible that the word 'marriage' means something different in different states of the USA and something different again in England and Wales and something different still in Scotland. Further, when one says something like 'there are more marriages in France than in England' one is saying something meaningful, rather than something equivocal along the lines of 'there are more cranes on the building site than in the bird sanctuary' or 'there are more banks by the side of rivers than in the City of London'.

In the light of the above, if the reader is not convinced by the Scriptural account as I have presented it, he or she will probably take the best way forward to be to maintain that there are many different institutions of marriage bearing a family resemblance to each other.<sup>32</sup> In other words: different jurisdictions have different laws concerning marriage, all forming a family resemblance, without its being the case that just one of the jurisdictions gets it exactly (or even mostly) right. It is this view with which I shall be contrasting the divine-origin view of marriage in what follows.

## **2. My arguments in favour of cutting the connection**

### **2.1 The argument from first principles**

I want to suggest that the state should not legislate concerning the institution of marriage. I suggest this because it seems to me outside the state's role to legislate concerning marriage, and I do not think that the state should engage in any course of action outside its role.

The proposition that the state should not act outside its role is less controversial than my other premiss, that it is outside the state's role to legislate concerning marriage. This latter premiss could be defended in many ways, and I shall outline a few to let the reader judge which is the most plausible.

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<sup>32</sup> The notion of family resemblance is taken from Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell Publishing, 1953).



Some readers may think that the state's role does not extend to controversial matters, and there is no doubt that there are many controversies surrounding marriage, as detailed above. While this argument will yield my conclusion, I do not put much store by it: almost everything the state does, including warfare, health care, and the police force is controversial, yet the state can surely do *something*. Further, I am inclined to the view that even if there were total unanimity on marriage, which perhaps there nearly was in England and Wales before the Reformation, legislating concerning marriage would *still* be outside the state's role.

A second, similar way of arguing for the premiss that legislating concerning marriage is not within the state's role would be to appeal to the concept of public reason. The idea would be that the state should not perform any action that cannot be defended at the bar of public reason, and that marriage cannot be so defended. As Lawrence Torcello puts it:

To define marriage is always to define it comprehensively. This implies a public advocacy of certain values against alternative values. Simply put, legal marriage is intrinsically linked to comprehensive doctrines and is therefore by definition, outside the realm of public reason.<sup>33</sup>

Again, while this argument also yields my conclusion, the notion of public reason is notoriously slippery,<sup>34</sup> and it seems to me better to avoid it for something clearer.

A third way is to argue that it is outside the state's role to legislate in a way that embodies a moral or religious judgement, and that legislating concerning marriage embodies a moral, if not also a religious, judgement.<sup>35</sup> At first it might be objected that legislating concerning other institutions normally thought unproblematic, such as the institution of property, also embodies a moral

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<sup>33</sup> Lawrence Torcello, 'Is the State Endorsement of Any Marriage Justifiable? Same-Sex Marriage, Civil Unions, and the Marriage Privatization Model', *Public Affairs Quarterly* 22.1 (2008): 43, 52.

<sup>34</sup> <https://plato.stanford.edu/entries/public-reason/> (Jonathan Quong, 'Public Reason', *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition), Edward N. Zalta, ed.), accessed 31 January 2017, outlines various different ways of fleshing out the concept of public reason.

<sup>35</sup> Tamara Metz states that marriage achieves its value 'through the formal recognition and regulation of an ethical authority' and adds that this 'makes clear why the state should not be in the business of recognizing and regulating marriage as such': Tamara Metz, *Untying the Knot* (Princeton: Princeton University Press, 2010), 107.

judgement, but I think it can be responded that the institution of property and similar institutions can be legislated for not on moral grounds but on the grounds of their utility. Can, then, marriage be also legislated for on the grounds of its utility? It seems to me that all the utility in marriage of which the state is entitled to take account is also to be found in other non-marital relationships, such as those enjoyed by couples cohabiting without being legally married. Some will respond that marriage has a special, perhaps sacramental significance, not to be found in non-marital relationships, but the point is that the state should not take account of this, since to recognize a sacramental significance would precisely be to embody a moral or religious judgement.

A fourth argument would be that it is outside the state's role to legislate concerning non-necessities, and that it is not necessary to legislate concerning marriage.<sup>36</sup> The use of the word 'necessary' here should not be understood to apply to the exact specifics of any proposed legislation. It may be, for example, that the state wishes to pay its soldiers £14,783 as a starting salary.<sup>37</sup> The question here would be whether it is necessary for the state to employ soldiers at all, not whether it is necessary for it to pay them £14,783 rather than £14,782 or £14,784. I am not asking here whether it is necessary for the state to establish every word of, say, the Matrimonial Causes Act 1973, but the more general question whether it is necessary for the state to legislate concerning marriage in any way at all. Judgements concerning necessity are somewhat subjective, and there will no doubt be differences of view on whether it is really necessary for a state to maintain a welfare system, for example. If it could be shown that it were indeed necessary for a state to legislate concerning marriage that would refute the contention of this paper, and in the section on objections I shall try to rebut some attempts to do just that.

The oddness of maintaining it to be necessary for the state to legislate concerning marriage can be seen if we imagine that there were a law prescribing that in order to have sexual intercourse both

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<sup>36</sup> This resembles the argument deployed in Gary Chartier, *Public Practice, Private Law: An Essay on Love, Marriage, and the State* (Cambridge: Cambridge University Press, 2016).

<sup>37</sup> <https://www.army.mod.uk/documents/general/Ratesofpay-Regular.pdf>, accessed 25 January 2017.

(or all) parties had to register with the state to that effect, and that that registration, even if not permanent, had to be officially revoked in order for one of the parties to have sexual intercourse with another party. A modern liberal democracy would not tolerate this,<sup>38</sup> even though this is in fact the position in many states now,<sup>39</sup> and was the position in many states in the past<sup>40</sup>—the act of registration, of course, being marriage. It seems to me right of the modern liberal state not to tolerate this; I think it is not within the role of the state to register acts done in this way in private between consenting adults, as there is no necessity for it to do so. The point I wish to make, however, is that, given the intimate connection between sexual intercourse and marriage, if it is outside the role of the state to require registration for sexual intercourse, then it is outside the role of the state to require registration for marriage: in neither case is it necessary for the state to legislate.

It is important to stress that my argument here is not absolutely tied to any one of the preceding four arguments. The reader may select whichever seems most plausible. All that matters is that each argument yields the conclusion that legislating concerning marriage is outside the state's role. This leads me to present what I call 'the argument from first principles' for cutting the connection between the state and the institution of marriage.

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<sup>38</sup> <http://www.cbc.ca/archives/entry/omnibus-bill-theres-no-place-for-the-state-in-the-bedrooms-of-the-nation>, accessed 26 January 2016, shows Pierre Trudeau, then Justice Minister of Canada, saying on CBC Television News on 21 December 1967 'there's no place for the state in the bedrooms of the nation'. Compare also the public bafflement when a Yorkshire man was ordered in 2015 to give police 24 hours' notice before having sexual intercourse: <http://www.bbc.co.uk/news/uk-england-york-north-yorkshire-36481127>, accessed 20 January 2017.

<sup>39</sup> [http://www.pakistani.org/pakistan/legislation/zia\\_po\\_1979/ord7\\_1979.html](http://www.pakistani.org/pakistan/legislation/zia_po_1979/ord7_1979.html) (Offence of Zina (Enforcement Of Hudood) Ordinance, 1979), accessed 20 January 2017, provides one example. NB that in Pakistan marriages and divorces have to be officially registered with some apparatus of the state; see the Muslim Family Laws Ordinance Act 1961 (<http://punjablaws.gov.pk/laws/777a.html>, accessed 20 January 2017), though this does not invalidate marriages or divorces not so registered. <http://www.futurescopes.com/love-and-sex/10167/countries-where-sex-outside-marriage-crime>, accessed 20 January 2017, lists other jurisdictions that outlaw sexual intercourse outside marriage.

<sup>40</sup> [https://en.wikipedia.org/wiki/Martin\\_v.\\_Ziherl#cite\\_note-1](https://en.wikipedia.org/wiki/Martin_v._Ziherl#cite_note-1), accessed 20 January 2017, records that s 18.2-344 of the Code of Virginia stated 'Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication, punishable as a Class 4 misdemeanor'. ([https://en.wikipedia.org/wiki/Common-law\\_marriage\\_in\\_the\\_United\\_States#State\\_law\\_issues](https://en.wikipedia.org/wiki/Common-law_marriage_in_the_United_States#State_law_issues), accessed 20 January 2017, states that Virginia never recognized common-law marriage.)

- (1) If some course of action is outside the state's role, then the state should not engage in that course of action.
- (2) Legislating concerning marriage is outside the state's role.
- (3) Therefore, the state should not legislate concerning marriage.

I have given this argument first because it is a principled philosophical argument rather than one that depends on any contingent features of actual societies.

## **2.2 The argument from liberal democracy**

A second argument for cutting the connection between marriage and the state is an argument from liberal democracy: suppose several consenting adults were to ask to be joined together in marriage, on what principled grounds could the state refuse? Scriptural grounds are not available to the liberal democracy, since such a state is not supposed to favour one religion or belief system over another. So, it seems that the state could not refuse to join three persons, say, in marriage while agreeing to join two persons, because it is hard to see that there are good reasons for the state to discriminate in this way while allowing three persons to be involved in a three-way sexual relationship. The only principled responses here are (i) for the state to offer to join any number of consenting adults together,<sup>41</sup> and (ii) for the state not to offer to join any persons at all in marriage, which is my suggestion in this paper. (I do not mean to base this argument on the contingent fact that England or the UK happens to be a liberal democracy. Rather, I believe that every state ought to be a liberal democracy. Of course, this argument would not have impressed many in medieval England, but it is widely accepted today, so I shall not pause to defend it here.)

## **2.3 The argument from non-discrimination**

A third argument for cutting the connection is from the principle of non-discrimination more generally. It does not seem acceptable for a state to discriminate against married people—which is

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<sup>41</sup> Compare the line defended in Elizabeth Brake's *Minimizing Marriage: Marriage, Morality, and the Law* (Oxford: OUP, 2012).

forbidden in the UK to employers, in any case<sup>42</sup>—or in favour of them. On what ground could a state legitimately treat unmarried people worse than it treated married people? Not on any ground to do with children, since many unmarried people have children, and many married people do not have children. Not on any ground to do with having a partner, since many an unmarried person has a partner. Not on ground of love and commitment, since there are married people that no longer love or display commitment to their spouses, and there are unmarried people that do display love and commitment to their partners. There seems no obvious ground that could justify preferential treatment, for example in tax breaks,<sup>43</sup> of the married over the unmarried, since the law's recognition of someone as married neither confers nor depends upon any substantive feature of the person. Of course, this argument does not yield the conclusion that the state should not solemnize or register marriages, but it does cast doubt on whether the state could have a legitimate reason for wanting to.

#### **2.4 The argument from conscience**

A fourth argument for cutting the connection relates to the conscience of the state employee. We know that there are state employees tasked with legally solemnizing or registering marriages to whose legal solemnization or registration they have a conscientious objection.<sup>44</sup> There may well also be state employees tasked with implementing legislation that discriminates against the unmarried (for example by giving tax breaks) that goes against their consciences. Finally, ministers of the Church of England are registrars for the state in virtue of the establishment of their church, and they cannot discriminate in their calling of banns of marriage, or in the provision of Holy Communion to a

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<sup>42</sup> <http://www.legislation.gov.uk/ukpga/2010/15/section/8> (Equality Act 2010, s 8), accessed 31 March 2017.

<sup>43</sup> <https://www.gov.uk/married-couples-allowance/overview>, accessed 1 February 2017, provides an example of a state giving a tax break to married couples.

<sup>44</sup> An example from the United States would be Kim Davis, county clerk of Rowan County, Kentucky, who, after same-sex marriage had been legalized in the US in 2015, refused to issue any marriage certificates at all. An example from the UK would be Lillian Ladele, who refused to register civil partnerships after they were introduced for same-sex couples in the Civil Partnership Act 2004.

couple, on the basis that they do not recognize as a valid marriage what the state deems valid.<sup>45</sup>

Now, it is true that the state cannot afford to extend unlimited tolerance to conscientious objections of its employees, but it is, in general, better for the state to afford more tolerance than less, and this is one area in which the state can afford more tolerance, by simply removing marriage laws from the statute books and thereby removing the dilemmas for those of its employees with conscientious objections to certain forms of marriage-at-law. It might be suggested that this outcome could be achieved by statutory exemptions or some such means,<sup>46</sup> but these are inherently discriminatory, and likely to create other problems, such as resentment of colleagues not eligible for the statutory exemptions.

### **2.5 The pragmatic argument**

The final argument that I wish to put forward for cutting the connection is a pragmatic one. It may be that some people are prepared to tolerate some difference between what the law says of marriage and how they conceive marriage really to be. Nevertheless, it may yet be that there is a breaking point, a level of difference at which the law will, in their view, no longer be faultily tracking real marriage, but tracking something else, perhaps something of its own (witting or unwitting) invention, just as there is a breaking point between a bad poem and an attempt at poetry so bad that it fails even to be a poem. It may be that some will think that the law in England and Wales has already reached that breaking point, or will reach it soon. It may be that others will think that it has not yet reached it, but is certain to reach it in a decade or two. It may be that others yet will think that it is not certain that it will reach it, but the chance that it will reach it is sufficiently high to warrant the taking of action now.

### **3. Other arguments in favour of cutting the connection**

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<sup>45</sup> *Thompson v Dibdin* [1912] AC 533 is the leading judgment on the distribution of Holy Communion. As for the calling of banns, there is no provision for conscientious objection in Canon B35.2 of the Canons of the Church of England (<https://www.churchofengland.org/about-us/structure/churchlawlegis/canons/section-b.aspx>, accessed 16 July 2016) or in the rubric prefixed to the office of Solemnization of Matrimony in *The Book of Common Prayer*.

<sup>46</sup>This was suggested to me by Jonathan Chaplin, to whom I am grateful.

I do not say that the above arguments are the only ones that can be deployed against the state's regulation of marriage. Indeed, there are many long-standing arguments from feminists and homosexual activists against it;<sup>47</sup> I have not deployed any of these above because they tend to be arguments against marriage itself as an institution rather than specifically against state regulation of it. As an example of an activist argument, consider these words of Claudia Card:

Let us not be eager to have the State regulate our unions. Let us work to remove the barriers to our enjoying some of the privileges presently available only to heterosexual married couples. But in doing so, we should also be careful not to support discrimination against those who choose not to marry and not to support continued state definition of the legitimacy of intimate relationships. I would rather see the state *deregulate* heterosexual marriage than see it begin to regulate same-sex marriage.<sup>48</sup>

I agree with Card's conclusion, but her starting point is rather different from mine, so I shall not discuss her argument or similar ones any further.

More recently, there have been economic arguments against the idea that the state should regulate marriage. Thus, for instance, Richard Posner, Judge on the United States Court of Appeals for the Seventh Circuit in Chicago:

The more fundamental economic question is why marriage is a legal status. One can imagine an approach whereby marriage would be a purely religious or ceremonial status having no legal consequences at all, so that couples, married or not, who wanted their relationship legally defined would make contracts on whatever terms they preferred. There could be five-year marriages, 'open' marriages, marriages that could be dissolved at will (like employment at will), marriages that couldn't be dissolved at all, and so forth, and alimony and property

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<sup>47</sup> These arguments are excellently discussed in Brake, *Minimizing Marriage*, Elizabeth Brake (ed.), *After Marriage: Rethinking Marital Relationship* (Oxford: OUP, 2016), and Clare Chambers, *Against Marriage: An Egalitarian Defence of the Marriage-Free State* (Oxford: OUP, 2017, forthcoming).

<sup>48</sup> Claudia Card, 'Against Marriage and Motherhood', *Hypatia* 11.3 (1996), 1, 6, quoted in Chambers, *Against Marriage*.

settlement would be freely negotiable as well. The analogy would be to partnership law, which allows the partners to define the terms of their relationship, including the terms of dissolution. As with all contracts, the law would impose limits to protect third-party interests, notably those of children. If outrage costs are set to one side, a purely contractual approach to (or replacement for) marriage makes sense from an economic standpoint because it would permit people to define their legal relationships in accordance with their particular preferences and needs.<sup>49</sup>

Similar arguments are deployed by Richard Thaler and Cass Sunstein in their 2008 book *Nudge*.<sup>50</sup>

Again, although I agree with their conclusion I do not agree with their arguments for it, and so I shall say no more about them.

The proposal has also been made in political contexts. In the USA then-candidate for the US Presidency Rand Paul stated in 2015:

The government should not prevent people from making contracts but that does not mean that the government must confer a special imprimatur upon a new definition of marriage.

Perhaps the time has come to examine whether or not governmental recognition of marriage is a good idea, for either party.<sup>51</sup>

Within individual US states, bills to remove the state from the administration of marriage have been filed in Michigan,<sup>52</sup> Oklahoma,<sup>53</sup> Alabama,<sup>54</sup> New Hampshire,<sup>55</sup> Missouri,<sup>56</sup> and Indiana.<sup>57</sup> As yet none

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<sup>49</sup> <http://www.becker-posner-blog.com/2005/07/the-law-and-economics-of-gay-marriage%C3%A4%C3%AEposner.html> (Richard Posner, 'The Law and Economics of Gay Marriage', The Becker-Posner Blog, posted 17 July 2005), accessed 1 February 2017.

<sup>50</sup> Richard H. Thaler and Cass R. Sunstein, *Nudge* (London: Penguin, 2008), Chapter 13.

<sup>51</sup> <http://time.com/3939374/rand-paul-gay-marriage-supreme-court/> (Rand Paul, 'Government Should Get Out of the Marriage Business Altogether', *Time* 29 June, 2015), accessed 26 January 2017.

<sup>52</sup> <https://legiscan.com/MI/bill/HB4733/2015> (Michigan House Bill 4733 (2015)), accessed 26 January 2017.

<sup>53</sup> [http://webserver1.lsb.state.ok.us/cf\\_pdf/2015-16%20INT/hB/HB1125%20INT.PDF](http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20INT/hB/HB1125%20INT.PDF) (Oklahoma House Bill 1125 (2015)), accessed 26 January 2017.

<sup>54</sup> <https://legiscan.com/AL/bill/SB143/2016> (Alabama Senate Bill 143 (2016)), accessed 26 January 2017.

<sup>55</sup> <https://legiscan.com/NH/text/HB1596/id/1287882> (New Hampshire House Bill 1596 (2016)), accessed 26 January 2017.

<sup>56</sup> <https://www.billtrack50.com/BillDetail/756448> (Missouri House Bill 62 (2017)), accessed 26 January 2017.



has been enacted. In Canada the idea was first aired by a politician back in 2003, when the then leader of the Conservative Party Peter MacKay suggested it.<sup>58</sup>

Finally, while judges in their judgments have, naturally, not argued much for political changes, Associate Justice of the Supreme Court of the United States Clarence Thomas in his dissenting judgment in *Obergefell v Hodges* suggested that the framers of the US Constitution did not think that the state was obliged to recognize marriages:

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits.<sup>59</sup>

My arguments here, of course, do not concern the thoughts of any framers of any constitution.

#### **4. How would things look if my proposal were implemented?**

How would things look if the proposal made here were implemented? They would look very much as they look now. For example, religious and humanist weddings would be the same, except that there would be no registrar present. A certificate would, no doubt, still be issued, but this certificate would not then be copied to any state official. Those that are now employed as registrars could continue to perform just the same ceremony as they currently do, but in their capacity as private citizens, without any legal effect. No doubt their experience at celebrating weddings would mean that they

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<sup>57</sup> <https://iga.in.gov/legislative/2017/bills/house/1163> (Indiana House Bill 1163 (2017)), accessed 26 January 2017.

<sup>58</sup> <http://www.theglobeandmail.com/news/national/tory-leader-wants-ottawa-to-get-out-of-marriage/article1020540/> (Campbell Clark, 'Tory Leader wants Ottawa to get out of marriage', *Globe and Mail* 14 August 2003), accessed 26 January 2017. The proposal is discussed in a 2002 discussion paper from the Canadian Department of Justice 'Marriage and Legal Recognition of Same-sex Unions', on-line at [http://web.archive.org/web/20030916020611/http://canada.justice.gc.ca/en/dept/pub/mar/mar\\_e.pdf](http://web.archive.org/web/20030916020611/http://canada.justice.gc.ca/en/dept/pub/mar/mar_e.pdf), 26–27, accessed 26 January 2017.

<sup>59</sup> [https://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf) (Thomas J, dissenting, *Obergefell v Hodges* 576 US \_\_ (2015), 10–11), accessed 26 January 2017.

were still much in demand. Since there would be no restriction as to place, time, or witnesses, there would probably be more people getting married on desert islands and the like.<sup>60</sup>

## **5. Objections to my proposal**

I now proceed to consider several objections, many of which go by way of suggesting positive reasons for the state to legislate concerning marriage, which goes against one of my earlier suggestions, that it is not necessary for the state to legislate. Space limitations mean that my replies are more suggestive than complete.

### **5.1 The Objection from the Common Good**

Objection: The Christian Scriptures teach that those in authority are God's servants for our good (Romans 13:4), which implies that the state's role is to promote the common good, i.e. the overall good for its citizens. Marriage is part of the common good, so the state should promote marriage.

Response: I certainly agree that marriage is a good thing, but I do not admit that it follows that the state should promote it. To take the Scriptural text, Romans 13:4 does not mean that the state should promote everything that is good for us. It doesn't seem appropriate for the state to promote patience, kindness, self-restraint, generosity, magnanimity, and forgiveness, at least in the abstract, rather than in concrete situations with a definable social advantage, even though they are arguably part of the common good. There are many different competing visions of the good life in the market-place of ideas, and the state's role does not extend to judging between different visions of the good, or to choosing someone else to judge.

It may be that the objector will concede that not every good thing ought to be promoted by the state, but insist that a certain class of good thing ought to be promoted by the state. Responses to

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<sup>60</sup> <https://www.theguardian.com/theobserver/2000/oct/29/features.magazine37>, accessed 21 July 2016, describes how British comedian Paul Merton went through a form of marriage with Sarah Parkinson alone on a desert island in the Maldives.

this suggestion depend on which class is being put forward, but some replies will be offered in the course of dealing with the next few objections.

## 5.2 The Objection from the Family

Objection: Marriage is the foundation of the family, and, since the state should promote the family, the state should promote marriage. So Robert P George:

Family is built on marriage, and government—the state—has a profound interest in the integrity and well-being of marriage, and to write it off as if it were purely a religiously significant action and not an institution and action that has a profound public significance, would be a terrible mistake.<sup>61</sup>

Response: There are different competing notions of what a family is in modern society, and any choice by the state of one of the competing notions to be promoted would be highly controversial. I suggest that it is simply not within the state's role to choose the right notion of the family from all the ones available in today's marketplace of ideas, nor is it within its role to choose someone else to choose; it is simply not the function of the state—or, at any rate, a state styling itself a 'liberal democracy'—to be attempting to decide these deep value-laden questions.<sup>62</sup>

Secondly, promoting the family is not the same as promoting marriage: there are married couples that do not think of themselves as families since they lack children, and there are families in which there is no marriage, e.g. a widow and her young children. So the state could promote the family directly, rather than through the intermediary of marriage.

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<sup>61</sup> [http://www.catholicnewsagency.com/news/kmiec\\_proposes\\_end\\_of\\_legally\\_recognized\\_marriage/](http://www.catholicnewsagency.com/news/kmiec_proposes_end_of_legally_recognized_marriage/) ('Kmiec proposes end of legally recognized marriage', Catholic News Agency, 28 May 2009, quoting Robert P George), accessed 26 January 2017.

<sup>62</sup> The state of Israel in the Old Testament is obviously a special case, since it is a theocracy receiving specific divine guidance on its laws and practices.

### 5.3 The Objection from Statistics

Objection: Some statistics seem to show that children of married parents do better under certain measures, or that adults do better when married. Since the state should want everyone to do better under these measures, the state should promote marriage.

Response: This objection differs from the one about marriage's being a common good in maintaining that marriage is good in a specific measurable way of which the state can justly take cognizance.

Nevertheless, it is still the case that it isn't the duty of the state to promote everything that promotes measurable improvement. It may well be that people with access to the latest high-tech assistance (super-fast broadband, top computers, robotic servants) do better under some measures, but it isn't the case that the state has to promote (still less provide) the latest high-tech assistance to everyone. People may rationally prefer to live their lives in a certain way (for example, without computers or robots) even if they know that that way will disadvantage them in certain other respects.

Secondly, the statistics themselves are by no means uncontroversial. For one thing, it is not at all certain that these statistics will be tracking real marriage, rather than the state's, perhaps faulty, view of marriage.<sup>63</sup> But, in any case, the surveys do not uniformly all point in the same direction.<sup>64</sup>

### 5.4 The Objection from Divorce

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<sup>63</sup> The title of one defence of marriage seems to me unwittingly to reveal the problem here: Glenn T Stanton, *The ring makes all the difference: the hidden consequences of cohabitation—and the strong benefits of marriage* (Chicago, IL: Moody, 2011). It is plainly not the ring that makes any difference there is between marriage and cohabitation—for one thing, not every marriage features a ring. Of course, the title is just a figure of speech, but the point still holds: outward signs of marriage, be they rings or certificates from the state, are fallible guides to whether their owners really are married.

<sup>64</sup> <http://www.medicaldaily.com/married-vs-single-what-science-says-better-your-health-327878>, accessed 17 September 2016, provides a brief taste of some of the differences in the way surveys point.

Objection: Divorce is a bad thing,<sup>65</sup> and making marriage and divorce legal matters would help discourage people from divorcing, so the state should make marriage and divorce legal matters.

Response: In a way, this is the negative version of the positive argument from the common good, and my reply is similar. It doesn't follow from the proposition that divorce is a bad thing that the state should help discourage people from divorcing. There are many things from which people should be discouraged (for example, thinking idle, uncharitable, or hateful thoughts) that it is no business of the (modern, liberal) state's to discourage. Murder and theft are bad things that the state should outlaw, but in their case we do not need to appeal to moral considerations: these things restrict people's ability to implement their own visions of the good life. Divorce, at least where all parties consent, is not in the same category.

Secondly, it may be doubted whether the state's making marriage and divorce legal matters has in fact discouraged people in England and Wales from divorcing: divorce is easy and common.<sup>66</sup> In any case, many people don't bother with divorce and simply co-habit with the new partner, so the law is no deterrent to the behaviour, even if it is a deterrent to changing one's marital status in the eyes of the state.

### **5.5 The Objection from Children**

Objection: Marriage helps us know which children belong to which parents, and the safeguarding of the relationship between children and parents is an important and legitimate function of the state's. So the state should register marriages to provide it with the knowledge needed to safeguard the relationship between children and parents.<sup>67</sup>

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<sup>65</sup> For confirmation of this from the Christian Scriptures, see Mal. 2:16.

<sup>66</sup> The statistics are visible at [https://en.wikipedia.org/wiki/Divorce\\_demography](https://en.wikipedia.org/wiki/Divorce_demography), accessed 21 July 2016.

<sup>67</sup> <http://www.thepublicdiscourse.com/2012/04/5073/> (Jennifer Roback Morse, 'Privatizing Marriage Is Unjust to Children', *Public Discourse* (The Witherspoon Institute) 4 April 2012), accessed 26 January 2017, argues thus.

Response: It is perfectly possible, and not uncommon, for the parents of a child not to be married to each other, and for a couple to be married without being parents. In England and Wales now the parents of a child are both usually registered to the child at birth, irrespective of marital status,<sup>68</sup> and it is not part of the present proposal that the registration of children to parents be abolished. In the event of a break-up of a family the marital status of the natural parents of the children makes no difference at the law of England and Wales to the obligation to pay maintenance to the children.<sup>69</sup> On my proposal this would continue; I do not think that legal registration of marriage adds any extra safeguard for children.

### **5.6 The Objection from the Security of Women**

Objection: Marriage provides security to women, so your proposal would deprive them of much-needed security.

Response: My proposal would not deny anyone the security of marriage. It would deny only the legal registration of marriage. It does not seem to me that the legal registration of marriage affords significant extra protection to wives (or to husbands): battered and exploited wives (and husbands) exist just as do battered and exploited unmarried partners, and the law is not prejudiced for (or against) the married in its prosecution of domestic violence. It might be said in reply that the legal registration of marriage provides extra financial security, so that each party is protected in the event of the spouses' splitting up. My response is, first, that financial security can be effected by a private cohabitation agreement,<sup>70</sup> and, secondly, there is in principle no reason why the law could not enforce a fair settlement in the break-down of a relationship of any kind. The law has lately started to treat unmarried partners similarly to married partners. This seems to me a trend that will grow,

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<sup>68</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/222510/dg\\_176228.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/222510/dg_176228.pdf) (Statutory Declaration of Acknowledgement of Parentage), and <https://www.gov.uk/register-birth> (Government's Guide to Registering a Birth), each accessed 20 July 2016.

<sup>69</sup> <http://www.childsupportlaws.co.uk/who-has-pay-child-support.html>, accessed 21 July 2016.

<sup>70</sup> <https://www.theguardian.com/money/2013/mar/09/cohabitation-agreement-essential-non-married-couples>, accessed 20 July 2016, provides brief discussion and recommendation of cohabitation agreements.

and, of course, I entirely agree that the state should not be discriminating between the married and the unmarried in the way it has been doing hitherto.<sup>71</sup>

### **5.7 The Objection from Incest, Child Marriage, and Polygamy**

Objection: Your proposal opens the door to incest, child marriage, and polygamy. These innovations should be resisted, and, therefore, so should your proposal.

Response: My proposal concerns marriage only, not sexual relations. My proposal does not affect any laws concerning sexual relations with a minor or with a close relative. Nor would there be any practical difference with respect to polygamy: in England and Wales it is legal to have more than one sexual partner at once, so it is possible in practical terms, just not legal terms, to be a polygamist. My proposal does not change the status quo here.

### **5.8 The Objection from Discrimination**

Objection: Your proposal would allow rampant discrimination against people because of their marital status. For example, it would allow employers to sack married women. This consequence should be guarded against at all costs, so your proposal should be resisted.

Response: My proposal is independent of, and does not concern, anti-discrimination law. The laws forbidding discrimination on grounds of marital status could be kept unaltered on my proposal. This is because, at least at the law of England and Wales,<sup>72</sup> it is illegal for someone to discriminate in the relevant circumstances against someone because that person is married, whether that person is

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<sup>71</sup> [http://www.legalsecretaryjournal.com/?q=Surprising\\_Cohabitee\\_Case\\_in\\_Probate\\_Law](http://www.legalsecretaryjournal.com/?q=Surprising_Cohabitee_Case_in_Probate_Law), accessed 20 July 2016, describes the case heard at the Central-London County Court by Judge Nigel Gerald concerning a dispute between Joy Williams, partner of the deceased Norman Martin, and Maureen Martin, widow of the deceased. Another case is *McLaughlin's (Siobhan) Application* [2016] NIQB 11, in which it was held that unmarried partners of the deceased should not be discriminated against in the provision of certain state benefits on grounds of their being unmarried.

<sup>72</sup> <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/2/1> (Explanatory Notes to the Equality Act 2010 Part 2, Chapter 2, Section 13, para 59), accessed 21 July 2016.

legally married or not. In other words, the legally important thing is not the victim's actual marital status at law, but what the discriminator *thinks* is the victim's marital status. Similarly, many jurisdictions, such as England and Wales, do not have state registration of religious beliefs or of sexual orientation, yet it is still an offence in many such jurisdictions to discriminate against someone because of perceived religious beliefs or perceived sexual orientation.<sup>73</sup>

### **5.9 The Objection from Common Wisdom**

Objection: Almost every state in the history of the world has had marriage legislation. If almost every state in the history of the world has taken a certain course of action, then there must have been good reason for taking that course of action. So, there must have been good reason for marriage legislation, and we neglect it at our peril.

Response: It is true that every state currently has marriage legislation, though there are some people groups that appear to lack the institution of marriage.<sup>74</sup> Nevertheless, despite this, I do admit that there is no present jurisdiction that has no marriage law at all.<sup>75</sup> Unpopularity does not imply falsity, however. It may be true that if almost every state backs a certain policy that policy has the *presumption* of truth, but I hope to have overturned that presumption with my arguments above to the contrary.

### **5.10 The objection from uncertainty**

Objection: If the state did not register marriages nobody could be sure which people were married, and to whom, which would be intolerable.

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<sup>73</sup> <http://www.legislation.gov.uk/ukpga/2010/15> (Equality Act 2010), accessed 21 July 2016; see sections 10 and 12.

<sup>74</sup> [https://en.wikipedia.org/wiki/Mosuo#Walking\\_marriages](https://en.wikipedia.org/wiki/Mosuo#Walking_marriages), accessed 16 July 2016, gives the example of the Mosuo people, though it is unclear whether they have no concept of marriage or a very non-standard concept of marriage.

<sup>75</sup> Of course, the first few chapters of the Christian Scriptures contain references to marriages with no hint of any marital law.



Response: It is already impossible to have a high degree of certainty about who is married to whom.<sup>76</sup> The state is not infallible; in fact, the state itself admits that it makes mistakes. Most annulments are cases in point. In most annulments, a marriage is pronounced good at one time, usually immediately after it is solemnized, and then, at a later point pronounced null and void. In some cases the delay can be a long one, in others very short. Further, many people hold that the state is systematically in error in some of its marital laws. For example, some hold that no-fault divorce does not dissolve the marriage bond. The problem is that when one is told that someone is divorced one is not usually told the grounds for the decree, and so one does not usually know whether it is a no-fault divorce or not, which means that those people that do think that a no-fault divorce does not dissolve the bond do not know whether the person is in fact married. In normal life, we usually just take people's word for it that they are married. In sum, my proposal here would make no difference.

### **5. 11 The Objection from Democracy**

Objection: Your proposal is un-democratic. Most people do not want the state to cease registering marriages, so we should not implement it.

Response: It is not being suggested that this proposal should be foisted on an unwilling electorate. The proposal should be campaigned for and subjected to the ballots of the public or their elected representatives in the usual way. The fact that a proposal does not yet command 50% of the popular vote does not show that it is wrong.

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<sup>76</sup> This is even agreed by some state officials: 'there are, at all times, in Scotland a large number of individuals who cannot tell whether they are married or unmarried' (*Leslie v Leslie* (1860) 22 D. 993, 1012 (Lord Deas)). The law of Scotland concerning marriage has, of course, changed since Lord Deas made his remarks; I quote them here only because they make the point that even states can be modest about the degree of certainty that their laws afford.

## 5.12 The Pragmatic Objection

Objection: Marriage is too deeply embedded in the law to be removed. For example, there are more than 8000 references to marriage in the law of England and Wales,<sup>77</sup> and the situation is similar in the United States:

Marriage now triggers over 1100 'benefits, rights, and privileges' in US federal law. According to legal scholar Mary Anne Case, its 'principal legal function' is to designate spouses for third-party benefit claims. Spouses have rights 'to be on each others' health, disability, life insurance, and pension plans', to special tax and immigration status, and to survivor, Social Security, and veterans' benefits, and they are designated next-of-kin 'in case of death, medical emergency, or mental incapacity'.<sup>78</sup>

It would be totally impractical to eliminate all these references, hence the proposal under consideration is also totally impractical.

Response: In the law of England and Wales, the Marriage (Same Sex Couples) Act did not make changes to these 8000 different references, or the just under 2000 references to 'husband' and approximately 1800 to 'wife'.<sup>79</sup> Rather, the Act provided a schedule of interpretation, which dealt at one sweep with any relevant passage in any earlier statute.<sup>80</sup> It would not, therefore, be necessary to go piecemeal through every law and pass a new specific piece of legislation to deal with it.

## 5.13 The Objection from Romance

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<sup>77</sup> <http://www.publications.parliament.uk/pa/cm201213/cmpublic/marriage/130307/pm/130307s01.htm> (Marriage (Same Sex Couples) Bill Deb 7 March 2013, col 430), accessed 17 October 2015, records the answer of the then Minister of State, Department for Culture, Media and Sport (Sir Hugh Robertson).

<sup>78</sup> Brake, *Minimizing Marriage*, p. 12.

<sup>79</sup> <http://www.publications.parliament.uk/pa/cm201213/cmpublic/marriage/130307/pm/130307s01.htm> (Marriage (Same Sex Couples) Bill Deb 7 March 2013, col 426), accessed 17 October 2015, records the statement of the MP for Enfield, Southgate (Mr David Burrowes).

<sup>80</sup> <http://www.legislation.gov.uk/ukpga/2013/30/schedule/3/enacted>, (Marriage (Same Sex Couples) Act 2013 Schedule 3), accessed 17 October 2015.

Objection: You are trying to abolish marriage, or, at least, the romance of it, which would be a crying shame.

Response: I am not proposing the abolition of marriage, merely the wresting of it back from state control. The involvement of the state in marriage seems to me to detract from, rather than add to, the romance, as is also seen in many of the 19<sup>th</sup>-century romances of English lovers' eloping to be married before the blacksmith at Gretna Green.<sup>81</sup>

## **6 Conclusion**

It seems to me that both as a matter of principle and as a pragmatic response to the current deep disagreements in society over marriage, the connection between the state and marriage should be cut: the state should take no cognizance of the marital status of anyone; there should be no laws mentioning the marital status of anyone, and, in particular, there should be no legal registration of marriages, still less insistence on state agents' solemnizing or witnessing them.

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<sup>81</sup> For a case pronouncing valid a run-away marriage to Scotland see *Crompton v Bearcroft* (1769) 2 Hag Con 444n, Bull NP 113.