

COULD MARRIAGE BE DISESTABLISHED?¹

Julian Rivers
(julian.rivers@bristol.ac.uk)

Summary

In this paper, I respond to Dr Daniel Hill's argument that English law should cease to recognise marriage. Rather than focusing on general arguments of political theory for and against such a proposal I consider practical arguments based on the development of the law in response to injustice in family relations. A law of marriage of some sort seems inevitable. This conclusion is reinforced by the arguments of libertarian and feminist writers who seek to 'abolish' marriage. Looked at more closely, they do nothing of the sort; they redefine it. Finally, I discuss the problem of unregistered marriages among British Muslims as an already existing example of marriage without the state. I conclude that law has to respond to existing social forms according to an idea of justice in domestic relations, and for that reason marriage cannot simply be 'disestablished'.

1. Introduction

Commentators on the recent development of English family law have noted two trends that stand in a paradoxical relationship. On the one hand, there has been a steady rise in cohabitation, such that it has become overwhelmingly normal for young people to spend some time living together before getting married; around 80% of couples now do this, rising from around 30% in the early 1980s.² The proportion of

¹ University of Bristol Law School. I am grateful to Dr Daniel Hill, Dr Emma Hitchings, and Professor Patrick Parkinson for commenting on an earlier draft; the views expressed remain solely my own.

² Éva Beaujouan and Máire Ní Bhrolcháin, 'Cohabitation and marriage in Britain since the 1970s', Office for National Statistics, *Population Trends 145* (Autumn 2011), Table 2. ONS data for 2016 show that 17% of all families (i.e. at groupings of least

cohabitants eventually getting married has also dropped from about two-thirds in the 1980s to about half today.³ An increasing proportion are separating instead. About 10% remain simply as cohabitants. On the other hand, this increasing indifference to the status of marriage is complemented by the attempt on the part of sexual minorities to capture marriage as a high-value symbol in campaigns for social legitimisation. There is no reason to suppose that either trend has levelled off. The normalisation of cohabitation is still relatively new and has yet to work through an entire generation's lifetime; the logic of 'equality' applied consistently to an increasingly wide range of intimate relationships points to an ever-widening legal definition of marriage. And even if the remaining minorities here are too small to achieve legislative success, in time judiciaries operating under the rationalising imperative of equality and human rights law may well draw their own conclusions.⁴

In this context of social change and moral controversy, calls for the radical reform of marriage law have been mounted from a widening range of perspectives. What was once the preserve of radical feminist writers wishing to undermine an institution irredeemably associated with entrenched patriarchy is now shared with some libertarian and Christian thinkers.⁵ Daniel Hill's argument draws on both these strands, although the arguments from liberal political theory predominate. The combination of liberal and Christian critique of excessive entanglement by the state in religious institutions has a long history, and it is what warrants the extension of the label 'disestablishment' from its initial application in church–state relations to family–state relations.⁶ If

two adult/persons) involve cohabiting couples: statistical bulletin 'Families and Households in the UK', 2016. .

³ Beaujouan and Bhrolcháin, 'Cohabitation', n.1, Table 3.

⁴ In *Steinfeld v Secretary of State for Education* (2017) EWCA Civ 81, the Court of Appeal found the refusal to extend civil partnership to other-sex couples in principle discriminatory, but by a majority justified until the impact of same-sex marriage became clear. A parallel argument for polygamous or polyamorous groups could easily be made.

⁵ See, e.g., Edward A. Zelinsky, 'Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage', *Cardozo Law Review* 27 (2006), 1161-220; Daniel A. Crane, 'A "Judeo-Christian" Argument for Privatizing Marriage', *Cardozo Law Review* 27 (2006), 1221-59.

⁶ Alice Ristroph and Melissa Murray, 'Disestablishing the Family', *Yale Law Journal* 119 (2010), 1236-79.

marriage is still intertwined with its religious history, could it now be disestablished?⁷

The suggestion that the English law of marriage is still ‘Christian’ is a rather hard one to evaluate.⁸ In a case involving the recognition of a potentially polygamous Mormon marriage, Lord Penzance famously defined it as the voluntary and exclusive union of a man and a woman for life.⁹ He thought that this legal definition of marriage reflected the Christian character of the country. Yet there is nothing inherently Christian about this definition. As Ormrod J. later stated, the essence of marriage in both the common law and canon law is simply the formal exchange of voluntary consents to take one another for husband and wife.¹⁰ English law has been able to recognise as ‘marriage’ a wide range of similar arrangements from across the world, even showing tolerance for departures from the norm it would not countenance at home.¹¹ Christian theology is more likely to treat marriage as a matter of ‘natural law’, ‘creation ordinance’, or ‘common grace’ found more or less recognisably in every human society. Indeed, the question of same-sex marriage is theologically difficult for Christians precisely because the heterosexual dimension of marriage is not seen as merely a question of personal religious commitment or cultural contingency but a matter of general ethics.¹²

Where the Christian element of English law is much more obvious is in the state’s regulation of the formalities of marriage. In the medieval and early modern period, although the common law could recognise that a valid marriage was contracted simply by voluntary consent before witnesses, it was an ecclesiastical offence not to contract the marriage before a priest.¹³ Irregular marriage was not

⁷ The title of Hill’s paper recalls a 1994 book by Bishop Colin Buchanan arguing for the disestablishment of the Church of England.

⁸ For example, Patrick Parkinson has recently argued that modern marriage law has become ethically incoherent because it has already abandoned its religious foundations: ‘Can Marriage Survive Secularization?’, *University of Illinois Law Review* (2016), 1749-70.

⁹ *Hyde v Hyde* (1865–1869) LR 1 P&D 130.

¹⁰ *Collett v Collett* (1968) P 482 at 492-93.

¹¹ See Ian Edge, ‘Islamic Law in English Courts: Recognition of Foreign Marriages’, *Family Law* 46 (2016), 102-104.

¹² See, e.g., John Witte, Jr, ‘The Goods and Goals of Marriage’, *Notre Dame Law Review* 76 (2001), 1019-71; John Finnis, ‘Marriage: A Basic and Exigent Good’ in John Finnis, *Human Rights and Common Good: Collected Essays Vol. III* (Oxford: OUP, 2011).

¹³ Peter Lucas, ‘Common Law Marriage’, *Cambridge Law Journal* 48 (1990), 117-34.

simply a sin; it also had proprietary implications, for example in the enforceability of dower.¹⁴ The requirement of priestly involvement for validity was confirmed by the Council of Trent in 1563, and although not technically extending to the recently reformed Church of England was certainly the norm even here. It was therefore natural for Lord Hardwicke LC to seek to use church forms to bring clandestine marriage under state control in 1753.¹⁵ Quakers and Jews were allowed considerable latitude to manage their own affairs, but the failure to accommodate other Protestant groups that were already tolerated in law was a cause of considerable grievance.¹⁶ When marriage by civil and other religious ceremony was finally introduced in 1836 it mimicked the form of Anglican marriages. Non-established religious denominations could now conduct marriages, but had to register their buildings (as if they were churches) and their ministers (as if they were Anglican priests). This is still the basis of the current law.¹⁷ As far as other aspects of the law are concerned, the jurisdiction of ecclesiastical courts over marriage and divorce was ended in 1857, but the assumption that the Church of England had a key stake in family law was still reflected in the debates around the last major divorce law reform in the second half of the 1960s.¹⁸ The compromise thrashed out then still applies.¹⁹

It is therefore tempting enough to see a parallel with legal developments surrounding the state establishment of religion.²⁰ The process of religious diversification issued first in the tolerance of once unlawful religions seen as close alternatives to socially dominant Anglicanism (i.e. Trinitarian protestant Christianity). But toleration

¹⁴ Lucas, 'Common Law', 120.

¹⁵ R. B. Outhwaite, *Clandestine Marriage in England 1500–1850* (London: The Hambleden Press, 1995).

¹⁶ Timothy Larsen, *Friends of Religious Equality: Non-Conformist Politics in Mid-Victorian England* (Bury St Edmunds: The Boydell Press, 1999), ch. 2.

¹⁷ See Marriage Act 1949, ss 41 and 43.

¹⁸ See *Putting Asunder: Report of a Group Appointed By the Archbishop of Canterbury* (1966) and Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* (1966).

¹⁹ Under the Divorce Reform Act 1969 there was (and still is) one ground for divorce: 'irretrievable breakdown of the marriage'. This can only be evidenced by one of five facts: the old ecclesiastical grounds of adultery, cruelty (turned into 'unreasonable behaviour'), and desertion, and the new facts of two years' separation with consent, five years without consent. 'Wretched unhappiness' by itself is not a ground. See *Owens v Owens* (2017) EWCA 182.

²⁰ Julian Rivers, *The Law of Organized Religions* (Oxford: OUP, 2010), ch. 1.

was never enough, and the nineteenth-century campaign for liberal equality sought to create a neutral legal space for religion by extending the advantages of establishment to all. Eventually, even this pluralist mode of interaction was overtaken by an ever more marked disentanglement of religions from the state, until from a legal perspective religions became purely private phenomena existing in parallel and largely disconnected normative worlds of their own.²¹ The same story of decriminalisation leading eventually to equal recognition can be told in relation to sexual minorities as well. All that is missing is the final chapter cutting the connection entirely.

Towards the end of his paper, Hill makes a rather important observation, which is that there appears to be no jurisdiction in the world that has no marriage law at all. As we think through the legal implications of removing marriage as a legal status, we will find that the removal of marriage law is only superficially possible. The law would still need to respond to potential injustice in domestic relations in ways that make questions of definition and status unavoidable. In turn, this would make the question of access to some form of 'domestic partnership status' urgent, and the pressure to formalise access to the status irresistible. In short, the outcome of our thought-experiment will be that if marriage were abolished in law it would have to be reinvented. And this fact tells us something rather important about the relationship between family, law, and society. Or so I will argue.

It is important at the outset to be clear that I am not defending the necessary involvement of *government* in marriage. For much of history, human beings have done without much government, and it is perfectly possible to imagine a society in which marriage is not state regulated in that sense. But we human beings have not managed without the institution of *law*, nor have we managed without a law of marriage. As we shall see, those who propose radically to reform marriage are not actually proposing the abolition of marriage *law* at all. But Hill wants to defend the more ambitious thesis, that 'the state should not ... make any laws, civil or criminal, respecting marriage'. For him, marriage should become a legally irrelevant category. This, I think, is practically impossible. Getting the state out of marriage is possible, but getting the law out of marriage is not. Quite how one

²¹ Julian Rivers, 'The Secularisation of the British Constitution', *Ecclesiastical Law Journal* 25 (2012), 371-99.

defines the relationship between ‘state’ and ‘law’ is itself rather problematic – we cannot imagine law without courts, and courts are (in some sense) state institutions. So there is a second question, which is about the extent of the state’s involvement in marriage, and what exactly we mean by that. Even here I am not convinced that getting the state out of marriage is desirable.

Being married carries with it a wide range of legal consequences. Compared with many other jurisdictions, and certainly in comparison with the historic position of English law, removing marriage might now appear relatively easy. Two central doctrines of historic marriage law have fallen away. The doctrine of spousal unity, in which the wife’s legal position was subsumed within that of her husband, has long been abandoned, although, as we shall see, echoes remain. The doctrine of consortium, in which spouses could enforce the mutual sharing of bed and board, has also been completely hollowed out.²² For many purposes, spouses are already treated as separate individuals, as if they were merely friends – but not for all purposes, and this is what we need to focus on.

For the purposes of this article, the main legal incidents of marriage can be divided into three groups. First, there are a number that could indeed be removed without obvious difficulty; they are historic residues of abandoned legal doctrines. Second, there are legal consequences that marriage already shares with that other functionally equivalent relationship, cohabitation. These would presumably have to remain, since it is not the formal legal status of marriage as such that triggers the legal consequence, but the fact that the parties are (socially) in a marriage-like relationship. Third, there are some legal consequences currently attaching only to marriage, which arguably ought to be extended to cohabitation as well. If marriage were removed as a legal category, that pressure would become overwhelming. The practical need for a law of cohabitation tells us something significant about the nature of law in general, and its relationship to social conventions and to requirements of justice.

I will conclude that if marriage law were repealed, some definition(s) of cohabitation would remain and simply become the new

²² There are echoes of this doctrine in the survival of the remedies of judicial separation (which negates the obligation to live together) and desertion as a fact evidencing irretrievable breakdown. But it no longer operates to nullify a post-nuptial separation agreement: see *Macleod v Macleod* (2008) UKPC 64.

legal definition of marriage. The formal label may have changed, but the substantive institution would have remained. Furthermore, it would be very difficult to prevent people who wished deliberately to enter this quasi-marriage status. This conclusion is confirmed by considering a number of recent arguments for the ‘abolition’ of marriage, which do not abolish it all, but still treat it as a distinctively regulated branch of law. Finally, I consider a current example of practical injustice, the phenomenon of unregistered marriages among British Muslims, to see what this tells us about the need for a law of marriage and the desirability – or otherwise – of state involvement. In conclusion, I will suggest some important differences between religion and marriage that make arguments for ‘disestablishment’ inappropriate.

I should note that I restrict my argument to the law of England and Wales, since that is the jurisdiction I know best. Legal ‘marriage’ as discussed here also includes civil partnership and same-sex marriage, since they are treated virtually identically in law.²³ The consequences of marriage and cohabitation are only discussed in outline; the detail is neither necessary for the purposes of my argument nor possible in the space available.

2. Dispensable Consequences of Marriage

It would be easy enough to remove the state’s involvement in the formalities of marriage: one simply removes the various routes to marriage contained in the Marriage Act 1949, and takes away the competence of the Registrar General to oversee the formation and registration of marriage. The registers could all be closed and shipped off to the Public Records Office for the amusement of future generations of historians.

Hill suggests that one could also enact a general rule stating that marital status ceases to have any legal significance as such. This is not as simple as he suggests. There are tricky questions of social policy in which legal marital status is still used as a proxy for underlying social forms. For example, we might want marital status to remain in the list of protected characteristics in the Equality Act 2010 as a

²³ See Civil Partnership Act 2004 and Marriage (Same Sex Couples) Act 2013. The most significant difference is the absence of non-consummation as a ground for annulment and adultery as a fact evidencing breakdown.

religious/social categorisation that in principle remains irrelevant to employment, the provision of goods and services, and those other areas covered by the Act.²⁴ On the other hand, its origins in the view that a married woman poses a (greater) risk of pregnancy than an unmarried woman are increasingly outdated, and perhaps it could also be abandoned. Pregnancy and maternity now have their own separate protection.²⁵ The point is that this debate is independent of the removal of marital status as a legal category. More generally, it is not obvious that all the incidents of marriage must fall away, as opposed to being extended to a wider range of relationships. Simply removing all the legal consequences of marriage at a stroke is not a realistic option. We have to consider them one by one.

Historically, spouses were not competent to give evidence in criminal trials involving the other party to the marriage. This proved inconvenient in some cases and risked causing substantial injustice in cases of serious domestic crime, where the principal witness might well be the spouse. As a first stage, the incapacity was removed so that spouses were permitted to give evidence if they wished; however, they can still only be compelled to give evidence against each other in limited cases – those involving crimes of violence and sexual offences against spouses and children under 16.²⁶ The steady reduction of this particular consequence of marriage over time suggests that it could ultimately be entirely removed and the position of married couples assimilated to cohabitants, who have no such incapacity. Staying with criminal law for a moment, it is still technically possible for a spouse to offer a defence that he or she was coerced by his or her spouse into committing a crime (typically, the wife by the husband).²⁷ But marital coercion has not been successfully used in modern times and could be abolished. Spouses also cannot be prosecuted for conspiracy only with each other,²⁸ and the Director of Public Prosecutions has to give consent before they can be prosecuted for theft from each other.²⁹

²⁴ Equality Act 2010, s. 8.

²⁵ Equality Act 2010, ss. 17-18.

²⁶ Police and Criminal Evidence Act 1984, s. 80.

²⁷ Criminal Justice Act 1925, s. 47.

²⁸ Criminal Law Act 1977, s. 2(2)(a); this does not extend to cohabitants: *Darius v Suski* (2016) EWCA Crim 24.

²⁹ Theft Act 1968, s. 30(4).

These are all residues of the old doctrine of spousal unity in the criminal law, and they could be removed.

Historically, the doctrine of spousal unity also had a major impact on the law of tort: tortious actions could not be brought by spouses against each other, and the husband had to be joined in any action brought by or against the wife. This was gradually removed, but it was only under the Law Reform (Husband and Wife) Act 1962 that spouses were given the right to sue each other as if they were not married. Even here there is a judicial discretion to stay the action if the marriage is subsisting.³⁰ The point is that there are circumstances in which a tort action between existing spouses might be very useful (e.g. if the wrongdoing spouse is insured, effectively to claim on the policy) and there are other circumstances in which legal action might be used inappropriately to put pressure in the context of a matrimonial dispute ('I'll stop suing you if you divorce me'). But this judicial discretion does not extend to cohabitants and could perhaps be removed without excessive difficulty, although one could equally well imagine a case for extending the judicial discretion in tort actions to cohabitants as well.

Entry into marriage automatically invalidates any pre-existing will, on the assumption that the testator would now want to dispose of his or her property differently.³¹ At least, it is more likely that the testator would approve of the distribution under the rules of intestate succession (which favour the surviving current spouse) than under the old will. This would no longer happen. Abolishing this rule might be rather problematic, in that one can imagine property being distributed to a former cohabitant in preference to a current cohabitant according to the terms of an original will that has not been updated. But the interaction of succession law with marriage raises many other problems that would require separate regulation if there were no law of marriage. Some of these will be touched on later.

Many countries operate systems of joint taxation for spouses, but in British tax law married couples are already treated as separate. There are two minor exceptions. If one of the parties was born before 6 April 1935, the couple qualifies for an allowance,³² and the Conservative government has recently reintroduced a nod to joint taxation in the

³⁰ S. 1(2).

³¹ Wills Act 1837, s. 18.

³² Income Tax Act 2007, ss. 42-55.

form of a limited ability to transfer up to £1000 of personal allowance from one spouse to the other to make use of a lower-rate tax band. One could easily countenance the abolition of both of these allowances.

Parental responsibility is acquired automatically by the husband of a child's mother, but it is not acquired automatically by a cohabiting partner.³³ Instead, it can be acquired by an unmarried father on registration, by agreement between the parents, or by subsequent court order.³⁴ In practice, in most cases of cohabiting parents, the father gains parental responsibility by registration at birth. Refusals of registration are rare, but it is an assumed condition that the applicant is the child's genetic father.³⁵ If challenged, this genetic relationship has to be proved. As always, the overriding condition is the best interests of the child, and this can lead to refusals of parental responsibility orders, even to a genetic father. For example, in one recent case, a child was born to one of a same-sex couple, and the known genetic father, who was also in a same-sex relationship of his own, made a claim for parental responsibility.³⁶ This was refused. There are also arrangements under the Human Fertilisation and Embryology Act 2008 whereby an unmarried man can become the father of a child brought into being by sperm that is not his own, thus breaking the genetic link.³⁷ The Act extends these rules to same-sex couples, so that the female partner of a woman conceiving by donor insemination can also be parent of the child.³⁸

If marriage ceased to have legal significance, the position would presumably be assimilated to that of cohabitants currently. There will always be some cases in which the father is dead, unknown, or the mother refuses to indicate who he is. Parental responsibility could only ever be acquired by men on registration, by agreement in a prescribed form, or through some other act of state recognition. Hill argues that he wishes to leave the law regarding parental responsibility untouched, but we must notice that the effect of getting the state out of marriage has to

³³ Children Act 1989, s. 2.

³⁴ Children Act 1989, s. 4.

³⁵ *R v Secretary of State for Social Security, ex parte W* (1999) 2 FLR 604.

³⁶ *R v E and F (Female Parents: Known Father)* (2010) EWHC 417 (Fam).

³⁷ Human Fertilisation and Embryology Act 2008, ss. 36-37.

³⁸ Human Fertilisation and Embryology Act 2008, ss. 42-47. The Marriage (Same-Sex Couples) Act 2013 calls a married female same-sex partner a 'wife'. Yet English law stops short of saying that the child has two mothers, although embryos can now be developed using genetic material from two different women.

be the increase of state involvement in the recognition of legal paternity. Beyond that, the law has made a consistent effort to assimilate the legal position of illegitimate and legitimate children, and apart from very minor exceptions, such as the right to inherit certain peerages,³⁹ we can ignore the issue of marriage as it relates to child law. We would also need to amend the rules of succession to the British monarchy,⁴⁰ but that is a consequence a principled liberal democrat is presumably unlikely to shed few tears over.

3. Functional Equivalents to Marriage

In many contexts, the law has already extended its reach beyond marriage strictly defined to the functionally equivalent relationship of cohabitation. The main elements of this development are as follows.

For rather obvious fiscal reasons, the law has long taken account of the presence of cohabitants in calculating eligibility for welfare payments. The Social Security Contributions and Benefits Act 1992 now uses the concept of a 'couple' for some benefits, which it defines as two people who are married, or civil partners, and are members of the same household, or as two people who are not married or in a civil partnership, but who are living together as a married couple.⁴¹

Since 1938 the law has given courts a discretionary power to make reasonable provision for the surviving spouse and children of a marriage if a testator fails to do so in his or her will.⁴² In 1952 this was extended to situations of intestacy, and from 1958 provision could also be made for a former spouse who had not remarried. The whole law was reformed and extended in the Inheritance (Provision for Family and Dependants) Act 1975, which for the first time allowed cohabitants to claim as 'dependants', a term not limited to children, but extending, for example, to partners at the time of death.⁴³ In 1989 the Law Commission recommended that cohabitants should expressly be given

³⁹ Family Law Reform Act 1987, s. 19(4).

⁴⁰ Act of Settlement 1700, s. 1; Succession to the Crown Act 2013, s. 3.

⁴¹ Social Security Contributions and Benefits Act 1992, s. 137.

⁴² Inheritance (Family Provision) Act 1938.

⁴³ Rebecca Probert has shown that it was around this time that the term 'common law wife' started to gain traction: 'The Evolution of the Common-Law Marriage Myth', *Family Law* 41 (2011), 283-88.

the right to claim reasonable provision,⁴⁴ and this was enacted in the Law Reform (Succession) Act 1996. The Civil Partnership Act 2004 and equalities legislation extended this law to same-sex partners. ‘A person who, during the whole of the period of two years immediately before the death of the deceased, was living in the same household as the deceased as his or her husband or wife, or civil partner’ is entitled to request reasonable provision from the estate, regardless of the terms of the will, if there is one.⁴⁵

In 1982, the Fatal Accidents Act 1976 was amended to allow cohabitants to claim compensation on the wrongful death of a former partner. The definition here is essentially the same as under the Inheritance Act.⁴⁶ Note, however, that separate damages for bereavement (currently £12,980) can still only be claimed by the husband, wife, or civil partner.⁴⁷ We can treat this as another dispensable ‘extra’ belonging in the first group of consequences of marriage.

The Housing Act 1985 includes among those who can claim the transfer of a tenancy on the death of the spouse or partner persons living together as if they were husband, wife, or civil partner of the original tenant. Section 86A even makes provision for multiple relationships.⁴⁸ If, as a result of the extension to *de facto* relationships, there is more than one potential successors to the tenancy, they may agree among themselves which one is to be the successor. In the absence of agreement, the landlord is to select one as the successor.⁴⁹ Here we see an interesting recognition, but not accommodation, of the fact of polygamy.

The Family Law Act 1996 reformed the law on the grant of non-molestation and occupation orders as well as giving the court the power to transfer tenancies. Since they are designed to deal with situations of domestic violence, these powers apply to cohabitants and former cohabitants, although there are still some differences with marriage. Imagine, for example, the situation in which an abusive male partner is the tenant of the family home, and the court wants to protect the

⁴⁴ Law Com No. 187, *Distribution on Intestacy* (1989).

⁴⁵ Inheritance (Provision for Family and Dependents) Act 1975, ss. 1 (1A) and (1B).

⁴⁶ Fatal Accidents Act 1976, ss. 1(3)(b).

⁴⁷ Fatal Accidents Act 1976, s. 1A.

⁴⁸ Added by the Localism Act 2011.

⁴⁹ Housing Act 1985, s. 86A(7).

woman and her children by excluding him, but also wants to ensure that they are not required to change accommodation. As well as making a non-molestation order, the court could issue a temporary occupation order giving her exclusive access to the home, and can even order the transfer of the tenancy to the woman. In the case of occupation orders, a spouse automatically has 'home rights'. However, a cohabitant without a contractual or a proprietary interest in the family home can only get an occupation order for up to six months, renewable once. Like the Housing Act, this Act defines cohabitants as 'two persons who ... are living together as husband and wife or as if they were civil partners'.⁵⁰ In considering whether to grant a temporary occupation order or transfer a tenancy, the court is required to have regard to a number of factors, such as the nature of the parties' relationship and their level of commitment, the length of time they have cohabited, whether they have had children together, and the length of time (if any) since they ceased to cohabit.⁵¹ This is a much more fluid and discretionary test for 'cohabitant'.

Immigration law has also assimilated cohabitants to the position of spouses and civil partners by reference to a two-year test. A person seeking leave to enter or remain in the United Kingdom as the unmarried or same-sex partner of a person present and settled must have been 'living together in a relationship akin to marriage or civil partnership' for at least two years.⁵² Thereafter the conditions as to basic English language proficiency and adequate accommodation and financial resources track those for spouses and civil partners. The only difference is that with unmarried partners any previous marriage or civil partnership must have permanently broken down, and the partners may not be in a consanguineous relationship.⁵³ In the case of marriage and civil partnership there are similar tests to exclude polygamous relationships.

As regards contracts between spouses or partners, it is not clear how much the law differs between those who are married and those who cohabit. The law presumes that agreements between a husband and wife are not contractually binding, since there is generally no intention

⁵⁰ Family Law Act 1996, s. 62(1).

⁵¹ Family Law Act 1996, s. 36 (occupation orders).

⁵² Immigration Rules, rl. 295A(1)(a)(i).

⁵³ Immigration Rules, rls 295A (ii) and (iii).

to create legal relations.⁵⁴ The same reasoning has also prevented a former mistress from establishing a contractual licence to occupy the home her lover provided for her,⁵⁵ although in that case there was no consideration either. In other cases, the courts have upheld contractual agreements to provide for a cohabitant.⁵⁶ There is the added complication that, historically, courts have found that contracts to live together outside of marriage are unenforceable as a matter of public policy, since they tend to promote an immoral purpose. It is probably still the case that contracts that are primarily for sexual relations are unlawful, but that contracts dealing with the financial and proprietary incidents of a relationship and its potential breakdown are now lawful and enforceable.⁵⁷

In *Granatino v Radmacher* the Supreme Court decided that in principle a pre-nuptial agreement should be given effect on breakdown of the marriage unless it would be unfair to do so.⁵⁸ They also expressed the view that such agreements could constitute binding contracts. On this basis, the difference between pre-nuptial agreements between spouses and contracts between cohabitants is really rather small. It should be noted that Baroness Hale dissented vigorously from this move to enable the parties to redesign the incidents of marriage. For her, it was still important that marriage conferred a distinct protected status, since the majority's emphasis on party autonomy was likely to further worsen the position of the weaker party, typically the woman.

Obviously, the various tests as to cohabitation contained in legislation create boundary difficulties. To pick just one example, in *Kotke v Saffarini* the male cohabitant had died, and his female partner wanted to make a claim under the legislation making provision for dependants.⁵⁹ They had each had their own home; he worked away from home all week, but spent most weekends at his partner's house, where he kept some clothes. When their child was born, he used his own address to register the birth, but then started increasingly to use his partner's address as his own. The Court of Appeal found that the centre

⁵⁴ *Balfour v Balfour* (1919) 2 KB 571.

⁵⁵ *Horrocks v Forray* (1976) 1 WLR 230.

⁵⁶ *Tanner v Tanner* (1975) 1 WLR 1346.

⁵⁷ *Sutton v Mishcon de Reya* (2003) EWHC (Ch).

⁵⁸ (2010) UKSC 42.

⁵⁹ (2005) EWCA Civ 221.

of gravity had only shifted towards a common household after his partner's pregnancy and less than two years before his death. She therefore did not qualify for financial provision. The increasing phenomenon of 'living together apart' creates many problems in this respect.

The tension between form and substance continues to trouble the courts. A recent case from Northern Ireland concerned the pension rights of a surviving cohabitee under a local authority pension scheme.⁶⁰ From 2009, the scheme had allowed cohabitees to claim under the policy of their deceased partner, so long as that partner had nominated them as a beneficiary. Denise Brewster had lived together with policy holder for ten years, but he had died shortly after they became engaged. She wanted to claim a pension under his policy. The Court of Appeal held that the element of formality required by the nomination process was justified, and that his failure to nominate Denise was fatal to her claim. The Supreme Court overturned this ruling. Denise satisfied the substantive definition of a cohabitant (able to marry; living together as if husband and wife; neither party living with a third person as if husband or wife; financial dependency or mutual interdependency). Any further formal requirement was without justification and amounted to unlawful discrimination on grounds of marital status in the enjoyment of property rights. It was important that this was a public pension scheme governed by human rights law. If marriage law were removed, there would (in principle) be nothing to stop private pension schemes continuing to define 'quasi-marriage' for their own purposes.⁶¹

In short, in a variety of ways, English law has moved beyond marriage to extend legal consequences to other relationships like marriage. In doing so, it cannot avoid the question of definition and boundaries. The wide spectrum of domestic possibilities has to be ordered into a set of alternative tests for legal application. Anyone wishing to remove the law of marriage completely would have to abolish the growing law of cohabitation as well.

⁶⁰ *Re Brewster's Application for Judicial Review* (2017) UKSC 8.

⁶¹ This is because equality law only prevents occupational pension schemes from treating people less favourably on the grounds that they are married or in a civil partnership, not on grounds of marital status generally. See ss. 8 and 13(4).

4. Distinctive Incidents of Marriage

Three major gaps in the law would open up if marriage ceased to be a legal category. These are (1) the ownership of matrimonial property, (2) the redistribution of property on nullity, judicial separation or divorce, and (3) the rules of intestate succession.

The doctrine of spousal unity was replaced in the nineteenth century Married Women's Property Acts by an assumption of strict separation of property. This was carried through even into the matrimonial home, such that if the husband bought the home, or paid the mortgage instalments, the home remained his. This could cause considerable hardship to the wife, who for example may have made non-financial contributions to the household economy, damaging her future earning capacity in the process. The law addressed this problem in two ways. First, from the early 1970s, courts were given new discretionary powers to redistribute all assets on nullity, judicial separation, or divorce.⁶² This dealt with the most outstanding injustices, but of course did not apply to cohabitants.

Second, the rules of family property were adjusted by the courts to allow for greater recognition of the domestic economic unit, whether based on a marriage or not. These rules apply in cases of death and bankruptcy among married couples as well as in all cases of cohabitation. For example, the law has come to presume that a house conveyed into joint names and used as a home (as opposed to a mere investment) is beneficially owned by both parties in equal parts, unless there is evidence to the contrary.⁶³ Likewise, any property commonly used (e.g. furniture) and deriving from money paid into a joint bank account and used as a common purse is also jointly and equally owned.⁶⁴ The point about these examples is that they represent a move away from a strict focus on the extent of the financial contribution to the purchase price or mortgage payment, as well as technical questions of gift. However, the courts have never felt able to develop the law of matrimonial property to such an extent that it completely abandons its basis in financial contribution to the domestic economic unit.⁶⁵ It is certainly not as flexible as taking account of the contributions to family

⁶² Matrimonial Causes Act 1973, part II.

⁶³ *Stack v Dowden* (2007) 2 AC 432.

⁶⁴ *Jones v Maynard* (1951) Ch 572.

⁶⁵ See, e.g., *Le Foe v Le Foe and Woolwich plc* (2001) 2 FLR 970.

welfare or past conduct under the Matrimonial Causes Act 1973 when the court distributes property after nullity, separation, or divorce.⁶⁶

In both respects, the Law Commission has made proposals to change the law. In 1978, it proposed that there should be a statutory (i.e. automatic) joint tenancy of the family home regardless of the names in the property register.⁶⁷ This would ensure that both parties benefited in equal shares if, say, the husband but not the wife went bankrupt. In 1985 the Commission also proposed that the beneficial interest of any property acquired wholly or mainly for the use of both would vest jointly, thus a car bought by one party for the use of both would belong to both.⁶⁸ Neither of these proposals has been adopted. Again, in 2007, the Law Commission made extensive proposals regarding the regulation of cohabitation, which the Government has had little interest in pursuing, not wishing to be seen to 'undermine marriage'.

If the legal category of marriage were removed, one or both of these elements of the law would come under enormous pressure. Either the law would have to recognise a greater degree of community of property among cohabitants, or there would have to be new discretionary powers to redistribute property on relationship breakdown. One might suspect that the second route would be the more likely, not least because the Children Act 1989 already contains a limited power to make financial provision where a cohabiting couple have children.⁶⁹ Whichever route is adopted, there would need to be a legal definition of the type of relationship qualifying for such reallocation of property rights. It could not simply be applied to all cases of friendship.

A related point can be made about 'home rights'. If only one of a cohabiting couple is the owner or tenant of the family home, the other is vulnerable to exclusion. Section 30 of the Family Law Act 1996 gives the vulnerable spouse or civil partner an automatic right to occupy the home, but this is only extended to cohabitants on a short-term basis by court order.⁷⁰ Either everyone would have to get the automatic right, or in every case there would need to be a discretionary court order. Since one could not give the right to all who share

⁶⁶ See s. 25(2).

⁶⁷ Law Com no. 86 (*Third Report on Family Property*).

⁶⁸ Law Com no. 175 (*Matrimonial Property*).

⁶⁹ Children Act 1989, s. 15 and Schedule 1.

⁷⁰ Family Law Act 1996, ss. 36 and 38.

accommodation, a threshold definition of ‘cohabitation’ that confers the right or triggers the discretion is unavoidable.

And the same point can be made about the law of intestate succession. A majority of people in this country die without making a will. The law of intestate succession is designed to track the normal expectations of parties. If a spouse is joint tenant of the matrimonial home, he or she ‘inherits’ that automatically by operation of survivorship, but there is also a statutory legacy worth £250,000 designed to ensure that the widowed spouse has enough money to own the matrimonial home if he or she is not a joint tenant.⁷¹ Since 2014, widows and widowers without issue have inherited the whole estate. Cohabitants, by contrast, do not inherit under an intestacy. The Law Commission has proposed that cohabitants should inherit on an intestacy if certain tests of commitment are fulfilled, but this has been resisted for two main reasons: if the parties really care about the distribution of property on death, they can get married, and if they do not want to, or cannot, marry, they can make a will. In any case, as we have already seen, even if they do neither of these things, minimum provision for cohabitants is already secured under legislation amended in 1995.

If marriage no longer existed as a legal category, the pressure to change the rules of intestate succession to secure the inheritance of at least some ‘cohabitants’ would be irresistible. Take the case of a couple who have always been together and were once married in law (before the law of marriage was abolished), or even after all such couples have died out, those who underwent a religious ceremony of marriage and remained faithful to each other thereafter. Any rules that, for the sake of argument, left all property to children or to the state in the absence of a will would completely fail to track the expectations of the parties. And if the law leaves property to certain categories of cohabitant, boundaries will have to be set, and the qualifying quasi-marital relationship defined in law.

⁷¹ Administration of Estates Act 1925, s. 46, as amended by the Inheritance and Trustees’ Powers Act 2014.

5. Reinventing Marriage

One of the main reasons for resisting calls to extend the legal rights of cohabitants has been the relative ease with which one can get married. In recent years, the state has been trying to make it even easier to get married, and the government is currently consulting on whether it can be made easier still.⁷² We have already seen that although there are some minor and residual incidents of marriage that could easily be dispensed with, the law has already moved beyond marriage to attach legal consequences to a wider range of marriage-like relationships. If marriage were removed in law, further legal changes would be needed to deal with, at least, (1) the beneficial ownership of property shared between domestic partners; (2) the redistribution of property on dissolution of long-standing intimate relationships; and (3) the rules of intestate succession.

In this context, it is worth recalling Lord Penzance's argument in his classic judgment in *Hyde v Hyde* (1865). In refusing to recognise a potentially polygamous marriage contracted in the Mormon state of Utah, Lord Penzance was not simply enforcing arbitrarily what he took to be the definition of marriage common to all Christian nations. His point was that this definition was deeply implicated in the law, for example in its understanding of adultery, divorce, and alimony. It would require considerable readjustment to function effectively in the context of polygamous marriages. In the same way, one can argue that even today the concept of marriage and of marriage-like relationships is implicit within several aspects of English law. Disentangling it would prove rather difficult.

But supposing we try. One can imagine a legal system that operates different conditions of access for the different incidents of cohabitation. So, the legal test to apply to see if the court has a discretion to redistribute property after separation could be different from the test for inheriting property on an intestacy. But there would, I think, be considerable advantages and considerable pressure to harmonise many of these tests. The question is whether one is to have a single or multiple definitions for the purposes of the law. Attempts have already been made to adopt such a harmonised approach. For example, and simplifying somewhat, the Cohabitation Bill currently before

⁷² Law Commission, *Getting Married: A Scoping Paper* (17 December 2015).

Parliament defines cohabitants for a range of purposes as any two people who live together as a couple, who are either parents of the same minor child, or who have lived together continuously for at least three years, and who are not already married or civil partners, and not within prohibited degrees of relationship.⁷³ The Bill makes financial and proprietary provision for cohabiting couples on death or separation similar to those applying to married couples – and like many such Bills in recent years it is unlikely to succeed.

What is going on here is better characterised not as the removal of marriage as a legal concept but as its redefinition from a formal to a functional status.⁷⁴ Instead of accessing marriage by declaration of intent and state registration, one would access ‘quasi-marriage’ by behaviour over time. The law would come to treat people as married if, and only if, they had behaved as if they were married for a period of time. One can see some advantages to this. It seems as if some people, at least, refuse to get married because they prefer the freedom of cohabitation. It could be argued that such a choice is unjust, since it fails to accept responsibility for others directly affected by one’s actions. Perhaps the law ought to treat functional marriages more like formal marriages.

But the law could never become purely functional. Two examples show this. Consider, first, the prohibited degrees of relationship.⁷⁵ One cannot marry if one is related to one’s intended spouse by certain close relationships of blood, or by certain relationships of affinity (i.e. on account of prior marriage to another). Under modern law, the reason for these restrictions are both eugenic and to avoid potential sexual abuse and family dysfunction. In the case of relationships of affinity, only the latter considerations apply. That is why parties related by affinity can marry if they are both over 21 and if neither has at any time been a child of the family in relation to the other. The same reasoning applies equally well in the case of cohabitation, so even if a man is now in an intimate domestic relationship with his former female partner’s adult daughter, it might not be recognised as ‘cohabitation’ for the purposes of the law, regardless of its functionality as such. The law

⁷³ Cohabitation Rights Bill 2016–2017, cl. 2.

⁷⁴ See, e.g., Lisa Glennon, ‘Obligations Between Adult Partners: Moving From Form to Function?’, *International Journal of Law, Policy and the Family* 22 (2008), 22-60.

⁷⁵ Marriage Act 1949, s. 1 and Schedule 1.

seeks to preserve an interest in regulating sexual relations within families that overrides the wishes of the parties.

It is important to observe that this example of opposition to sexual relations between close family members could not easily be regulated by the criminal law.⁷⁶ As Hill rightly observes, the criminal law struggles when it seeks to punish consensual sexual relations between adults. A man who lives and has sexual relations with a woman who was once a child of his family commits no crime, but he cannot legally 'cohabit' with her, still less get married. Family law still reflects an ethic that preserves a strong penumbra of non-sexual relations around the core sexual relationship.

The other example is quite different. If the legal status of marriage were removed, the legal status of quasi-marriage (that is, the new functional replacement for marriage) would be denied to parties who intend to enter such a state and who are willing to declare publicly and with as much solemnity as they can muster that they intend to do so. One can easily imagine hard cases in which a surviving cohabitant went through a religious ceremony of marriage before cohabiting, but is denied any interest in the matrimonial home because he or she had only lived together for, say, a year afterwards. Given the evidence that only in very rare exceptions are formal acts of marriage a sham or result in relationships that collapse before any plausible functionally qualifying test is satisfied, on what grounds could one deny the parties' immediate access to this status, if that is what they desire? Could the law realistically refuse to recognise such people as married?

There is a human rights dimension to this point. Art. 16 UDHR and related instruments include the right to marry and found a family. As the European Court has often stated in the context of art. 12 ECHR, 'the exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.' States party to the various human rights treaties enjoy a considerable discretion in how they regulate family law, but one of the constraints they operate under is the duty to ensure access to the status of marriage without undue delay. For example, in *F v*

⁷⁶ See now Sexual Offences Act 2003, ss. 25-29, which deal with child family members only.

Switzerland, a violation was found when a party who had been at fault in causing the breakdown of a previous marriage was prohibited from remarrying after divorce for three years.⁷⁷ The judgment implies that delay in permitting remarriage after divorce serves no legitimate purpose. A case in which the law refused anyone the right to access the status of marriage by formal act of declaration, as opposed to qualifying after a period of cohabitation, would be unprecedented. Given the uniform and historic practice of states, it is hard to imagine a human rights tribunal not finding a violation if otherwise qualified parties could not access the legal status of marriage after a relatively short registration period.⁷⁸

A further complication concerns the criminal law penalising bigamy.⁷⁹ This can only realistically attach to a formal definition of marriage. Criminalising cohabitation with partner B while cohabitation A is in some sense continuing (e.g. the man who keeps a mistress) might be tempting to those who take fidelity seriously, but is likely to be substantially ignored and unenforceable.

One could respond to this by proposing the removal of both marriage and cohabitation law, treating people entirely as unrelated individuals. But then one has to be prepared to countenance all the social injustices that prompted the extension of law to cohabitants in the first place, above all the processes by which one person (typically a man) makes another (typically a woman) dependent on him, and then when 'love' wanes abandons her with limited resources and as often as not children to care for as well. If marriage is a patriarchal institution, how much more its abolition? In short, if 'marriage' were abandoned as a legal category, it would still need to continue to exist functionally as 'quasi-marriage', and indeed legislators would struggle to prevent it existing formally as well. If the law of marriage were abolished, it would have to be reinvented.

⁷⁷ Application 11329/, 18 Dec. 1987.

⁷⁸ In *R (Aguilar Quila) v Secretary of State for the Home Department* (2011) UKSC 45 the Supreme Court held that a policy restricting marriage visas to those at least 21 years old in an attempt to prevent forced marriages was contrary to the European Convention and unlawful.

⁷⁹ Offences against the Person Act 1861, s. 57.

6. Proposals for the ‘Abolition’ of Marriage

Radical feminist and other writers have long argued for the abandonment of marriage as an irredeemably patriarchal and oppressive institution.⁸⁰ In this they have more recently been joined by libertarians such as Hill. However, the difference in political theory tends to have an impact on the proposed alternatives.

All marriage laws can be plotted on a spectrum from status (the law determines the nature and implications of marriage) to contract (the parties design their own relationship). The legal anthropologist Sir Henry Maine famously said that the history of law, and indeed the history of family law in particular, was the history of development from status to contract.⁸¹ There has always been a contractual element to English marriage law – it is a voluntary union – and it is certainly true that marriage law has become more ‘contractual’ in recent years. This can be seen in the judicial acceptance of pre-nuptial agreements and the development of family arbitration services.⁸² After all, successful ongoing relationships require ongoing consent and cooperation.

Libertarian abolitionists tend to be attracted to the contract model since it best reflects their commitment to individual autonomy. As Hill shows in his quotation, Richard Posner, the doyen of free market ‘law and economics’, assimilates marriage to business partnership contracts with a wide range of possible contents.⁸³ Some proponents of this position draw an analogy with economic arguments for religious disestablishment; the American religious settlement shows that choice in a market of possible churches has stimulated the emergence and growth of the most attractive.⁸⁴ Religious institutions could make standard-form ‘marriage contracts’ available to their members, creating a market in this field too. Edward Zelinski suggests that such contracts could contain arbitration clauses, effectively allowing for the

⁸⁰ See, famously, Simone de Beauvoir, *The Second Sex* (Paris: Gallimard, 1949).

⁸¹ Sir Henry Maine, *Ancient Law* (1861), ch. 5.

⁸² The Institute of Family Law Arbitrators was founded in 2012 and in 2016 extended its work to children.

⁸³ Quoted at p.109 in Daniel Hill, ‘The State and Marriage: Cut the Connection’, *Tyndale Bulletin* 68 (2017), 95-119.

⁸⁴ See, e.g., Rodney Stark and Roger Finke, *Acts of Faith: Explaining the Human Side of Religion* (Oakland: University of California Press, 2000).

enforcement of ‘religious law’ in relation to the marriage contract.⁸⁵ So, churches believing in ‘covenant marriage’ could encourage their members to enter into them and adjudicate between the parties when they run into difficulties. On the other hand, there would be nothing to stop secular organisations and individuals from designing their own forms of marriage. The philosophical anarchist Gary Chartier has recently painted a highly optimistic view of the emergence of equitable marriage arrangements in such a deregulated world.⁸⁶

Even if one accepts a contract regime for marriage there would have to be default rules for those who have no contract. Cohabitation law would continue to exist, and there would have to be a line between the cohabiting couple and mere friends. Furthermore, the marriage contract would need a regulatory framework that protected minors, prevented coercion, decided how many parties could enter the relationship and their sex, set limits on property transfers, and so on. For example, it is hard to imagine the law finding a contract to transfer all your future property to the sole ownership of your spouse for the duration of an indissoluble marriage effective.⁸⁷ We cannot assume that no one would enter such a relationship. Finally, there would need to be a special regime for enforcement. This is particularly problematic. Presumably, a marriage contract could not be specifically enforced; the law does not literally force people to provide personal services. So the remedy would be compensation. Should the law enforce a clause setting a sum in liquidated damages for every extra-marital affair? What if the contract establishes a regime of community of property? And if the relationship breaks down one is left with the problem that led to the separation of alimony/maintenance from questions of ‘fault’ in the breakdown of a relationship. ‘Need’ and ‘innocence’ do not always align. And ultimately the state would have to bail out the indigent. In truth, the only incentive the law can offer to prevent a breach of a marriage contract is to terminate it.

Paradoxically, liberal promoters of contract-based marriage law are actually appealing to the increased coercive power of the state. In a free society couples should be able to enter into a ‘traditional’ religious

⁸⁵ Zelinsky, ‘Deregulating Marriage’, 1161.

⁸⁶ Gary Chartier, *Public Practice, Private Law: An Essay on Love, Marriage and the State* (Cambridge: CUP, 2016), ch. 6.

⁸⁷ Direct authority is hard to find; *Sutton v Mishcon de Reya* (2003) EWHC 3166 (Ch) is close.

marriage, perhaps with asymmetric gender roles, and a social expectation of religious mediation in the case of relationship failure, but should this be turned into a contract with state sanction and whatever legal enforcement it can muster? It is rather odd to find avowed liberals making common cause with the state to enforce religious obligations.

If contract-based alternatives are unattractive, one is left with status. Feminist writers typically worry that contract-based alternatives to marriage would simply perpetuate, and even exacerbate, existing gendered hierarchies in marriage. One strategy here is simply to continue the process of trimming the incidents of marriage back to their bare minimum. Cass Sunstein and Richard Thaler argue for a single status of egalitarian civil union formed by domestic partnership agreement between any two people, with a limited range of clear legal obligations and consequences on breakdown.⁸⁸ The valid points here are that, first, people rarely plan for their relationships to fail, and second, clear rules assist private dispute resolution; discretionary rules empower judges.

More radically, some feminist writers have argued for the disaggregation of marriage. Clare Chambers argues for piecemeal directives and only limited contractual deviation. In other words, each social situation would have its own legal rules to prevent injustice; for example, partners would get accommodation rights under one test of cohabitation and co-parenting obligations under another.⁸⁹ Elizabeth Brake moves slightly further back towards the contract model. In her conception of ‘minimal marriage’, parties can disaggregate the current bundle of expectations and chose which ones apply in which relationships, literally ticking the elements they wish to include from a standard form checklist.⁹⁰ A person might share accommodation and associated costs with one person, have a sexual relationship with another, agree to co-parenting of a child with a few others, give yet another a power of attorney, and leave her property elsewhere. Brake’s model is that of friendship, which can be equally complex and diffuse.

⁸⁸ Cass Sunstein and Richard Thaler, *Nudge: Improving Decisions About Health, Wealth and Happiness* (New York: Penguin, 2009), ch. 15.

⁸⁹ Clare Chambers, ‘The Limitations of Contract’ in Elizabeth Brake, ed., *After Marriage* (Oxford: OUP, 2015).

⁹⁰ Elizabeth Brake, ‘Equality and Non-Hierarchy in Marriage’ in Brake, *After Marriage*, n.80.

Yet another way of moderating the deficiencies of pure contract is represented by relational contract theory, which seeks to take account of the reality of renegotiation over time within a framework of agreed expectations and commitments.⁹¹

The point about all of these different proposals is that they all represent a law of marriage. As Ristroph and Murray point out, a rigorous legal policy of ‘family-blindness’ is very hard to imagine.⁹² One would have to develop a single uniform regime of ‘normal’ contract and property rules, such as applies between relative strangers or even good friends, which is also appropriate for intimate relationships involving long-term commitment, vulnerability, and dependency. Quite simply, it cannot be done.

7. Marriage Law and Practical Injustice: The Unregistered Islamic Marriage

We can test this conclusion against a current example of practical social injustice. Hill’s argument is almost entirely based on theoretical injustice – the injustice involved in state intervention in an area of life that it is ill-suited to regulate according to a more-or-less controversial conception of the good. Law undoubtedly reflects political theory to some extent, but more often it reflects the only semi-coherent deposit of centuries’ engagement with problems of practical injustice. We can test his proposal against the current problem of the unregistered Islamic marriage.

Although the exact numbers are unknown, it appears that a substantial proportion of British Muslims get married by way of religious ceremony (*nikah*) alone.⁹³ Typically, this is conducted by an official such as an imam on private property in the presence of family and friends. Such ceremonies are treated as ‘non-marriages’ in the eyes of English law, since for a religious marriage to be valid in civil law it must take place in a registered religious building and in the presence of

⁹¹ Elizabeth S. Scott and Robert E. Scott, ‘Marriage as a Relational Contract’, *Virginia Law Review* 84 (1998), 1225-334.

⁹² Ristroph and Murray, ‘Disestablishing the Family’, 1275.

⁹³ Aina Khan has been cited as suggesting the figure is as high as 80%. See Ralph Grillo, *Muslim Families, Politics and the Law* (Abingdon, UK; Routledge, 2015), 42. Another conference on the topic saw a consensus of 30–40%: David Hodgson, ‘The Islamic Marriage Conundrum’, *Family Law* 45 (2015), 992-97.

a registrar or authorised person.⁹⁴ Few mosques fulfil these requirements, and in any case Muslims traditionally do not marry in a mosque.⁹⁵ The presumption of marriage can only apply to cure formal defects in the registration process if the parties were unaware of the defect.⁹⁶ English law treats the parties as cohabitants. As we have seen, the main legal implications are that the husband will not have automatic parental responsibility for any children born of the relationship, there are likely to be reduced pension entitlements and entitlements on death, and – most problematically of all – there is very limited financial provision on breakdown of the relationship.

In some cases of unregistered Islamic marriage, one or both parties assume that they are entering into a valid English law marriage, and in a few cases it seems as if one party (typically the financially stronger man) deliberately uses the ignorance of his future wife as a relatively easy exit strategy.⁹⁷ It may also be adopted as a way to conduct a *de facto* polygamous marriage. In spite of public and political hostility, shari'a councils actually offer a partial remedy in this situation. Islamic law requires a divorcing husband to provide some financial support to his wife and children, not least through the *mahr* (dowry), which is promised to the wife on marriage. In theory it might be possible to enforce the promise of *mahr* through English contract law, and one might have thought that the legal environment is more open this than before.⁹⁸ However, it has also been suggested that Islamic marriages would not in general be *Radmacher* compliant.⁹⁹ The reality is that

⁹⁴ Marriage Act 1949, ss. 41-44. See, e.g., *El-Gamal v Al-Maktoum* (2011) EWHC 3763 (Fam); *Dukali v Lamrani* (2012) EWHC 1748 (Fam). Full discussion in Rebecca Probert, 'The Evolving Concept of Non-Marriage', *Child and Family Law Quarterly* (2013), 314-35.

⁹⁵ John Bowen reports an estimate of 80% of Muslim marriages taking place outside a mosque: *On British Islam* (Princeton, New Jersey: Princeton University Press, 2016), 213. ONS statistics also show a substantially lower proportion of mosques are registered than, e.g., Sikh gurdwaras.

⁹⁶ *A v A* [2012] EWHC 2219 (Fam) is an unusual case in which an unregistered marriage took place in a registrable mosque. This was held sufficient to save its validity.

⁹⁷ Samia Bano, *Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and Law* (Houndsmills, UK/New York: Palgrave Macmillan, 2012) charts the complexity of the relationship.

⁹⁸ See the discussion of *Uddin v Choudhury* (2009) in John Bowen, *On British Islam* (Princeton, New Jersey/Woodstock, UK: Princeton University Press, 2016), 184-93.

⁹⁹ *Radmacher v Granatino* (2010) UKSC 42. See David Hodson, 'The Islamic Marriage in the Context of the Practice of English Family Law', *Family Law* 46 (2016), 90-94.

unregistered Muslim marriages and English law have precious little to do with each other. To the extent that shari'a councils have some effect in ameliorating the problem of divorced Muslim women, they are valuable.¹⁰⁰

One solution would be to make renewed efforts to encourage the registration of mosques and officials to match the position in other religions and non-established Christian churches. This could be accompanied by penalties of conducting marriage ceremonies that are not valid in civil law. Neither of these is straightforward: requirements for the type of building that can be registered can cause practical obstacles, and it is not clear that the state should be prohibiting religious ceremonies that do not purport to be civilly binding. Should a couple who are perfectly content to cohabit under English law be prevented from going through a religious ceremony of marriage? A variation of this approach would be to insist on uniform civil preliminaries but place the emphasis on the role of the celebrant, regardless of the place of celebration.¹⁰¹ From a comparative perspective, the fixation of English marriage law on registered buildings is unusual and it is becoming increasingly problematic.¹⁰²

The more radical option is to revert to a 'common law' conception of marriage: in other words, parties are married if they express mutual consent to be married in each other's presence before witnesses. This would represent the abandonment of registration and official oversight, but even this is not as broad as the concept of marriage that English law already recognises in the case of couples married abroad. It is possible to be married by proxy if you are domiciled abroad and the law of the place of celebration allows it; it is even possible to marry under the age of 16.¹⁰³ English law need not go that far. If the concern is the abandonment of the principle of public registration, then one must take account of the fact that there are plenty of couples holding themselves

¹⁰⁰ It follows that Baroness Cox's well-intentioned attempts to outlaw them are misconceived. See Ralph Grillo, *Muslim Families*, n.84, Part II; Leyla Jackson and Kathryn O'Sullivan, 'Putting the Cart Before the Horse? The Arbitration and Media Services (Equality) Bill', *Family Law* 46 (2016), 82-85.

¹⁰¹ As proposed in the White Paper, *Civil Registration: Vital Change*, Cm 5355 (January 2002). See also Ian Edge, 'Islamic Finance, Alternative Dispute Resolution and Family Law: Developments Towards Legal Pluralism' in Robin Griffith-Jones, ed., *Islam and English Law* (Cambridge: CUP, 2013).

¹⁰² I am grateful to Patrick Parkinson for making this point to me.

¹⁰³ *Apt v Apt* [1948] P 83; *Alhaji Mohamed v Knot* (1969) 1 QB 1.

out as married who were married in another country, and there is no official register of the fact. We simply take their word for it. And of course lots of cohabiting couples think of themselves as married at common law. Such a change is unlikely to happen. In its recent Scoping Paper, the Law Commission rejected from the outset the removal of state oversight of the formalities of marriage, citing the need to check eligibility, prevent forced and sham marriages, as well as the need to keep proper records.¹⁰⁴

A less radical option is to develop the law of cohabitation. Vishal Vora has recently proposed the elaboration of cohabitation law to meet the concern of unregistered Islamic marriages.¹⁰⁵ He points out the crudeness of the strict distinction between being validly married or cohabiting and suggests a two-fold distinction: ‘cohabitation’ with limited legal consequences for short-term and new relationships, and ‘de facto marriage’ where the parties have been together for at least two years or have children, or where a ceremony of marriage has been carried out. In the case of ‘de facto’ marriage, legal remedies would be closely modelled on registered marriages. Even this proposal has some interesting consequences that need careful thought. For example, would a father unmarried at the time of the conception of his child acquire parental responsibility on the child’s birth? Would a married man who starts to cohabit with another woman become guilty of bigamy after two years? But the idea is a good one. A simple solution to the problem of unregistered Muslim marriages would be to add participation in a religious ceremony of marriage to the definition of ‘cohabitation’ for the purposes of a reformed cohabitation law. Combined with a celebrant-based model of civil registration one could both increase the proportion of British Muslim marriages that have civil effect and address the problems of the remainder that do not.

Whichever route one adopts, removing the concept of marriage (or quasi-marriage) entirely from the law is not the way forward. It would leave us exactly in the situation we currently find ourselves in, with a well-rooted social practice providing only limited and informal remedies for domestic injustice.

¹⁰⁴ Law Commission, *Getting Married: A Scoping Paper* (17 December 2015), para. 1.5.

¹⁰⁵ Vishal Vora, ‘The Problem of Unregistered Muslim Marriage: Questions and Solutions’, *Family Law* 46 (2016), 95-98.

8. Conclusion: Why Marriage Is Not Like Religion

The underlying problem with the proposal to get the state out of marriage is that it mistakes the nature of the relationship between law, justice, and society. We should not be misled by the apparent malleability of positive law in a modern state to suppose that it can actually have any content we please. The inherent rationale for law is the attempt to prevent and remedy injustice. In its attempts to 'do justice' it has to respond to the existing social forms it regulates. Positive law always inhabits the tension between what is socially given and what is morally required.¹⁰⁶

If most of us lived as economically and emotionally independent individuals, negotiating the terms of our relationships with each other but remaining fundamentally at arm's length, then a just legal order could respond by treating us accordingly. We could disestablish marriage, as we have already disestablished religion, by reference to the general laws of contract and property. We can imagine such a society of individuals, but it is not ours, and nor is it likely to become ours in the foreseeable future.¹⁰⁷ We human beings become deeply, and sometimes heedlessly, involved with each other. We come to rely on each other, and then sometimes are as strongly repelled by each other. We create obligations – not least by generating fellow-human beings – and then find those obligations onerous to fulfil. We commit and we abandon. Formal marriage is declining in popularity, but domestic and sexual partnership most certainly is not. Indeed, Hill's argument presupposes that marriage would flourish as a social and religious institution without the law. However, these informal partnerships are proving more fragile than marriage, imposing enormous physical, emotional, and financial costs on individuals and society.¹⁰⁸ These are patterns of behaviour the law must respond to.

¹⁰⁶ This position reflects an 'integrative' approach to legal theory. See Harold Berman, 'Toward an Integrative Jurisprudence: Politics, Morality, History', *California Law Review* (1988), 779-802.

¹⁰⁷ The latest ONS data show that the 27.1 million households in the UK can be divided as follows: couples (whether married, partnered or cohabiting) without dependent children 35.4%; couples with dependent children 21.8%; single adult households 28.4%; lone parents 10.0%, two or more unrelated adults 3.3%, multi-family households 1.1%. 'Families and Households in the UK 2016', Tables 1 and 2.

¹⁰⁸ The Relationships Foundation estimates the annual financial cost of family breakdown at £48 billion. See <http://relationshipsfoundation.org/the-cost-of-family-failure-2016-update/>, accessed 8 March 2017. The methodology cannot be anything other than contentious.

And we do not look on the messiness of intimate human relating – its joys and its sorrows – with indifference. We can feel wronged by the behaviour of our closest others, and at our best we see that we too are capable of acting wrongfully towards those we are closest to. The law cannot simply mimic what is given in social forms. To be normative, it has to act out of a sense of justice and injustice, out of an understanding of the conditions of human wellbeing. It has to be based on an exercise of moral judgement. Given the stakes involved, is it really such an imposition for the state to require us to register our closest relationship? We require the licensing of many other things far less valuable or dangerous.

In this sense, marriage is not like religion. We can have a fair crack at living without God, but only a few of us manage to live without each other. More to the point, the liberal state has shown itself able to suspend judgement on questions of religious belief and practice, confining it within relatively isolated normative enclaves, having minimal impact on other areas of life.¹⁰⁹ But it cannot avoid intervening in the dysfunctional family. That is why, for all our moral difficulties and ethical puzzles, marriage has to be seen as a matter of natural right, not of civil liberty. For dysfunctionality can only be identified and addressed in relation to some paradigm of functionality. Call it what one will, natural law or a theory of justice, the need for reasoned reflection on what the normative paradigm of marriage has to be as a matter of shared law is inescapable. And in that sense marriage cannot be disestablished.

¹⁰⁹ In fact, the law strains to treat religious property and contracts differently by rendering them peculiarly immune from judicial oversight. From recent case law, see *Moore v President of the Methodist Conference* (2013) UKSC 29; *Khaira v Shergill* (2014) UKSC 33.