Let's talk about a divorce:
Religious and legal wedding

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INTRODUCTION

The extension of marriage to same sex couples is an important policy concern in a number of jurisdictions across the world. This is not necessarily framed as a religious rights issue, at least in the constitutional discourse. In *US v Windsor*,[2] for instance, the US Supreme Court managed to discuss the constitutional position of same sex marriage without any consideration of religion; the High Court of Australia has managed much the same in *Commonwealth of Australia v The Australian Capital Terrority*.[3] In this chapter, however, rather than seeking to engage with marriage as part of the canon of family law (Hasday 2004), I will be putting same sex marriage very much in a religious frame, that is, as an issue which raises religious interests.

Following Wintemute (Wintemute 2002), I consider love rights as going beyond recognising the right to share sexual activity, to enabling and recognising the development of a partnership. I argue that the contested areas in England have become the symbolic and ceremonial side of the creation of marriages – love rites rather than love rights. This emphasis on the symbolic and the ceremonial should not be misinterpreted as an emphasis on the trivial or the easily resolvable. Rather, it has generated a considerable public debate. I argue that the current debate may usefully be understood as a debate over coproduction of legal marriage by the state and religious organisations, which has become more problematic as the conceptions of marriage increasingly diverge. I argue that the time has come for a divorce between legal and religious production of marriage, with religious weddings having purely religious consequences for all religious communities. A consequent question is where the term marriage should then reside. One possibility is for marriage to remain a technical term in English law, albeit one which coexists with other usages of the same word in social and religious discourse. Another, more radical, way forward is for the state to cease to have any role in the production of marriage whatsoever, and instead to reinvent both legal marriage and legal civil partnerships as a single category of legal civil partnerships, with marriage ceasing to be a legal

[1] Thanks to participants at the Cambridge Workshop, and to Brigitte Clark of Oxford Brookes, for their comments on an earlier draft of this chapter.
[2] *United States v Windsor* 570 US 12 (2013) (US Supreme Court).
[3] *Commonwealth of Australia v The Australian Capital Territory* [2013] HCA 55 No. C13 of 2013 (High Court of Australia). On the Australian context more broadly see Grossi (2012).

construction in England. Adopting the latter, I ultimately argue for civil partnerships for all as the best way to address both equality and religious liberty.

THE DEVELOPMENT OF CIVIL PARTNERSHIPS IN ENGLISH LAW

English law in relation to marriage developed from local Anglo-Saxon custom but came to be increasingly regulated by Christian religious law, which was relatively stable by 1300 (Helmholtz 2004: 522-556). For a considerable period, 'the regulation of marriage was largely a matter for the Church' (Masson, Bailey-Harris and Probert 2008: 1-002). After marriage law ceased to be a matter for ecclesiastical courts from 1836-1860,[4] religious organisations and communities contributed to marriage particularly through the process by which marriage came to exist, which I will refer to throughout as wedding (Edge and Corrywright 2011). Focussing on the end of the twentieth century, there were two primary types of wedding – civil and religious.

Civil weddings could occur in the office of a Superintendent Registrar.[5] As the statute states baldly, 'No religious service shall be used at any marriage solemnized in the office of a superintendent registrar'.[6] This key passage has not been interpreted by the courts, with the only appellate decision on the section exploring a different issue.[7] There is, perhaps, tangential guidance elsewhere in the Act. In a section dealing with weddings by the housebound and detained, provision is made for use of the 'relevant form, rite or ceremony' where the wedding is being conducted as if in a registered place of worship.[8] This is defined in the statute as 'a form, rite, or ceremony of a body of persons who meet for religious worship in any registered building being a form, rite or ceremony in accordance with which members of that body are married in any such registered building'.[9] Even this section, however, has not been the subject of judicial consideration. Civil weddings could also occur in 'approved premises', where the wedding took place in a venue registered for weddings 'according to such form and ceremony as the persons to be married see fit to adopt'.[10] This is not as broad as it sounds, however, as '[no] religious service shall be used at a marriage on approved premises'.[11]

Four routes provided for explicitly religious solemnisations of marriages. Three of them were specific to particular religious communities, allowing marriages to be created by the usages of the Society of Friends,[12] Jews,[13] and the Church of England.[14] An important point to note here is that

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[4] Marriage Act 1836, Ecclesiastical Courts Act 1855, Matrimonial Causes Act 1857, Ecclesiastical Courts Jurisdiction Act 1860.
[5] Marriage Act 1949 s 45(2).
[6] Marriage Act 1949 s 45(2).
[7] *Miles v Wakefield* [1987] AC 539, HL.
[8] Marriage Act 1949 s 45A(2), cf s 45(A)(4).
[9] Marriage Act 1949 s 45A(5).
[10] Marriage Act 1949 s 26(1)(a).
[11] Marriage Act 1949 s 46B(4).
[12] Marriage Act 1949 s 26(1)(c), s 47.

these were not marriages within the context of these three religious groups – for instance by occurring in a place of worship dedicated to the religion – but by the usages of each. The canon law of the Church of England is part of English law, and so its usages may be determined legally.[15] For the other two communities, explicit statutory mechanisms existed to determine the question of whether the marriage was according to their usages.[16] The last, and most general, route emphasised not the way in which the wedding was carried out, but the premises on which it occurred. Marriages may occur at certified places of worship,[17] whose governing body may authorize a person to be present at the solemnization of marriages without the presence of a registrar.[18] Such ceremonies must include a brief, statutory form of words,[19] and must be with the consent of the governing body,[20] but otherwise may be 'according to such form and ceremony as [the couple] see fit'.[21] Interestingly, this does not necessarily require that the ceremony takes place in accordance with the particular religion practiced at the place of worship.

Entering the 21st century, then, marriage was seen as a legal institution which could be created either purely by state activity, or, less commonly, by a partnership between the state and certain religious communities (Haskey 2015). The structure of the relationship was determined by the state, as were the rules concerning the ending of the relationship, that is, the rules for divorce. It was an institution that was limited to opposite sex couples only.[22]

The Civil Partnership Act 2004 created new 'civil partnerships' which had many similarities to marriage. The legislation has been criticised for seeking to replicate marriage (Stychin 2006; Bendall 2013), but also failing to do so closely enough to eliminate sexual-orientation discrimination in this area (Wright 2006). To portray civil partnerships as 'gay marriage' was often seen as over-simplistic (see Barker 2006; Kitzinger and Wilkinson 2004), although a concept with tremendous cultural traction (see also Farrimond 2015; Peel 2015). That it is a close analogy was less contested. Like marriage, civil partnership creates far-reaching legal incidents (Wright 2006), acts as a relationship ritual (Harding and Peel 2004), is legally incompatible with a subsisting marriage,[23] and is not open to individuals within prohibited degrees of relationship.[24] In a recent Supreme Court

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[13] Marriage Act 1949 s 26(1)(d).
[14] Marriage Act 1949 Part II.
[15] Marriage Act 1949 Part II.
[16] Marriage Act 1949 s 55(1).
[17] Marriage Act 1949 s 41. See further *R (Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77.
[18] Marriage Act 1949 s 43.
[19] Marriage Act 1949 s 44(3), (3a).
[20] Marriage Act 1949 s 44(1).
[21] Marriage Act 1949 s 44(1).
[22] *Hyde v Hyde and Woodmansee* (1866) LR 1 P and D 130; Matrimonial Causes Act 1973 s 11(c).
[23] Civil Partnership Act 2004 s 3(1)(b).
[24] Civil Partnership Act 2004 s 3(1)(d).

decision, Lady Hale found that 'Civil partnership is not called marriage but in almost every other respect it is indistinguishable from the status of marriage in United Kingdom law'.[25]

Unlike marriage weddings, however, civil partnership weddings were initially constructed as purely civil. The standard procedure for creation of a civil partnership required the signing of a civil partnership document in the presence, inter alia, of a civil partnership registrar.[26] As with the routes to civil marriage outlined above, '[n]o religious service is to be used while the civil partnership registrar is officiating at the signing of a civil partnership document'.[27] The wedding could, with an important exception discussed below, happen in a place approved by the registration authority, which could also provide a place in its area for the registration of civil partnerships.[28]

It is significant to note that there was no religious route for the creation of a civil partnership, a position which survived the prohibition of sexual orientation discrimination in relation to the provision of goods and services.[29] The provisions allowing marriage by the usages of the Church of England, Society of Friends, and Jews, were not extended to civil partnerships. Strikingly, the more general provisions concerning the certified place of worship were expressly excluded from the legislation. Registration of a civil partnership is formally separate from any ceremony,[30] but the separation between civil partnership registration and religious ceremony was reinforced by a separate rule that registration may not take place in religious premises.[31]

Civil partnerships, then, were constructed as a form of especially secularised civil ceremony. Specifically religious ceremonies were excluded from the process, as with civil marriage, but without the possibility of religious routes. This exclusion of religion was deliberate:

> [O]pposite-sex couples can opt for a religious or civil marriage ceremony as they choose, whereas civil partnership is an exclusively civil procedure. The government has been very clear throughout the process that it has no plans to bring in same sex marriage. Marriage is an institution for opposite couples with its own historical traditions. Civil partnership provides a separate and distinct relationship, which is secular in nature and only open to same sex couples. (Falconer of Thoroton 2007: 5-6)

The exclusion of religion from the creation of civil partnerships began to be queried by couples who wished to form a civil partnership through a religious ceremony, and by religious communities who

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[25] *Bull and Another v Hall and another* [2013] UKSC 73, [26]. This is not a view shared by the applicants in *Wilkinson*, discussed below.
[26] Civil Partnership Act 2004 s 2(1)-(4).
[27] Civil Partnership Act 2004 s 2(6).
[28] Civil Partnership Act 2004 s 6(5).
[29] See Department for Communities and Local Government 2007.
[30] Civil Partnership Act 2004 s 2(1).
[31] Civil Partnership Act 2004 s 6(1)(b).

wished to create such partnerships as a religious act.[32] As a result, a 2011 change in the law allowed religious premises to be used for those communities which wished to do so, but the ceremony remained a civil one, which could not 'be religious in nature'. The first religious community to take advantage of this was the Cross Street Unitarian Chapel in Manchester, but the first civil partnership ceremony in a place of worship appears to have been carried out by the Quakers at Friends House in London. Some religious communities may be willing to extend their services to civil partnerships, but may have been deterred by the additional process and fee,[33] but obviously many communities who did not accept same sex unions within their religious thinking deliberately choose not to register.

SAME SEX MARRIAGE IN ENGLISH LAW

It will be recalled that the fundamental distinctions between civil partnerships and marriage were the gender polarity of the couple, and the exclusion of religious possibilities from civil partnerships. Both may have been less stable than anticipated. Opposite sex couples sought access to civil partnerships, [34] and same sex couples sought access to marriage.[35] The 2011 amendment to the law had itself begun to recognise that the complete exclusion of religion from civil partnerships should not be maintained.

In 2012 the Home Office consulted on extending marriage to same sex couples. It received over 228,000 responses. The concept was rejected by bodies such as the Coalition for Marriage, the Catholic Bishops' Conference, the Church of England, the Muslim Council of Britain, and the Evangelical Alliance as misunderstanding the nature of marriage, which was exclusively heterosexual. The Government proposed to enable same sex couples to have a civil marriage, and to permit religious organisations that wished to conduct same sex marriages to do so, but with explicit protection for religious organisations and clergy that did not wish to do so;[36] and to retain civil partnerships for same sex couples only, but allow existing civil partnerships to be converted to marriage. In response, more than one thousand Roman Catholic clerics signed an open letter arguing

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[32] Notably by the Quakers in 2009, whose Yearly Meeting, resolved 'to enable same sex marriages in a meeting for worship under the care of a meeting as we currently do for opposite sex marriages' (see Yearly Meeting, 'Epistle from Britain Yearly Meeting Gathering 25 July to 1 August 2009', http://www.ymg.org.uk/ (accessed 6 October 2009).; see also FLGBTQC (Friends for Lesbian, Gay, Bisexual, Transgender and Queer Concerns), 'Collection of Marriage Minutes', http://flgbtqc.quaker.org/marriageminutes.html (accessed 29 October 2008)).

[33] As discussed in General Register Office, *Civil partnerships on religious premises: Some Frequently Asked Questions*, GRO, November 2013.

[34] For instance Stephanie Munro and Andrew O'Neill, who have petitioned the European Court of Human Rights as part of the Equal Love case – see further equallove.org.uk/the-legal-case (accessed 26 February 2014).

[35] For instance Sharon Ferguson and Franka Strietzel, who also form part of the Equal Love case, referred to above.

[36] This responded to a long-standing concern, significant in the passage of the Human Rights Act 1998, that allowing same sex partnerships would lead to religious organisations being compelled to religiously sanctify them – see Cumper 2000.

that same sex marriage would return them to persecution, rendering them unable to teach 'the truth about marriage in their schools, charitable institutions or places of worship'.[37]

The Government proceeded with the Marriage (Same Sex Couples) Bill 2012-2013. The Bill included specific protection for religious organisations and individuals who did not wish to solemnise same sex marriage. The Church of England, by virtue of its constitutional position, was not entitled under the Bill to decide for itself on same sex marriage, but instead was prohibited from carrying out such marriages without further legislation. Controllers of places of worship, as well as Quakers and Jews, could 'opt in' to religious marriage of same sex couples, but no organisation could be compelled to opt in, and no one could be compelled to carry out a same sex marriage. The Bill passed its key second reading in the House of Commons in February 2013, with a very significant majority of MPs voting for the Bill.

The Marriage (Same Sex Couples) Act 2013 extends marriage to same sex couples,[38] and provides routes for conversion of existing civil partnerships to marriages.[39] The Church of England does not thereby become required to, or entitled to marry same sex couples,[40] nor do any clergy otherwise required to solemnise marriages become required to solemnise the marriage of a same sex couple.[41] Other religious organisations are protected by the detailed provisions of section 2. This protects organisations from any compulsion, including enforcement of a legal requirement, concerning an opt-in activity.[42] Further, a similar protection from compulsion exists where a person refuses to conduct, participate in, or consent to a marriage because a same sex couple is getting married.[43] The same section amends the Equality Act 2010, the principal equality legislation in UK law, to exclude the provision of religious marriage of same sex couples.[44] The principal purpose of Section 2 is to protect religious organisations from being compelled to exercise the opt-in powers later in the Act. Sections 4 and 5 amend the Marriage Act 1949 to allow a same sex couple to be married in a registered place of worship 'according to such form and ceremony as the persons to be married see fit to adopt', but only where the governing authority has given written consent to marriages of same sex couples.[45] The governing authority is an internal one – 'the persons or persons recognised by the members of the relevant religious organisation as competent for the purpose of giving consent for the purposes of this section'.[46] Similar provisions continue the practice of treating religious marriages by the Society and Friends and by Jews specifically, but mirror the requirement of a positive decision in

[37] See Scottish Catholic Observer, 'A vow to protect freedom' (2013) January 18.
[38] Marriage (Same Sex Couples) Act 2013 s 1.
[39] Ibid, s 9.
[40] The Church in Wales, with a different constitutional position, has an opt-in power under Marriage (Same Sex Couples) Act 2013 s 8.
[41] Ibid, s 1(3)-(5).
[42] Ibid, s 2(1).
[43] Ibid, s 2(2).
[44] Ibid, s 2(5), 2(6).
[45] Marriage Act 1949 s 26A, as amended.
[46] Marriage Act 1949 s 26(A)(4) as amended.

writing by the 'relevant governing authority'.[47] Belief organisations, that is organisations 'whose principle or sole purpose is the advancement of a system of non-religious beliefs which relate to morality or ethics' remain unable to carry out religious weddings of any type, because of their inability to register a place of worship.[48] The statute requires that their position must be reviewed by the Secretary of State before January 2015.[49]

RELIGIOUS AND LEGAL MARRIAGE: TIME FOR A DIVORCE[50]

The flashpoint for the recent debate in the UK was not open disagreement between the substantive incidents which should follow from a legal partnership between a same sex couple as opposed to an opposite sex couple, or disagreement about the morality of same sex relationships (Jowett 2014). Although no doubt some of the opposition to same sex marriage was from those who considered the Civil Partnership Act a poor piece of legislation, this was not the battleground upon which the debate took place. Nor were specific concerns about the position of religious communities which did not wish to carry out same sex religious marriages central to the debate. Religious communities were discussed primarily in relation to protecting the autonomy of religious communities to 'opt in', or not, as they choose. The Catholic Church, for instance, is no more compelled to create a same sex pathway to religious marriage than it has been compelled to create an opposite sex pathway for divorcees. Instead, the recent debate has focussed on symbol, ceremony, and language. As discussed below, the decision of the state to define 'marriage' in a new way was resisted in Parliament. Strikingly, we can see parallels in similar debates outside the UK. In the case before the High Court of Australia for instance, the Commonwealth of Australia phrased its opposition to the ACT legislation singularly narrowly:

> Of course, the ACT Marriage Act could have validly extended rights under ACT law to same sex couples as *if* they were in a marriage - thereby accepting and acting upon the demarcation of status effected by the Commonwealth Acts. But what it purports to do instead is to authorise and clothe in legality as a *marriage or equal form of marriage* that which under Australian law cannot be such.[51]

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[47] Marriage Act 1949 s 26B, as amended.
[48] This restriction has recently been reaffirmed by the Supreme Court – see *R (Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77, per Lord Toulson at [57]-[59].
[49] Marriage (Same Sex Couples) Act 2013 s.14.
[50] See also Presser 2012.
[51] Federal argument, para 37 (submitted 13 November 2013).

It should not be thought that this reduces the importance of the debate. Symbol, ceremony, and language matter (see further Barker 2011; Bamforth 2007; Auchmuty 2008). Indeed, this moving of the debate to a relatively high level of abstraction and principle may reduce the scope for pragmatic compromise between different groups. The emphasis on principle increases the difficulty of developing a 'family law [which] would decide this important question without unduly denigrating or devaluing any particular social front' (Huntington 2013: 646). The 2013 Act, for instance, was welcomed by Ben Summerskill of Stonewall as 'the last piece of the legislative jigsaw providing equality for gay people',[52] but criticised by Sir Roger Gale MP as 'Orwellian almost, for any government … to seek to come along and rewrite the political lexicon'.[53] Let me state an abstract version of the two positions – it should be stressed that I am not seeking to précis either Ben Summerskill or Sir Roger Gale.

From the perspective of a supporter of same sex marriage, a distinction between civil partnership and marriage was a violation of equality norms because it treated similarly placed persons differently. Love rights are love rights regardless of the gender of the loving, and former distinctions between opposite sex and same sex unions needed to be recognised as arbitrary discrimination and removed. Even if civil partnership and marriage were identical in every way except nomenclature and sexual polarity, this would still constitute discrimination. By excluding same sex couples from marriage the law carried the message that the relationship was less authentic - in the words of pivotal former law, a 'pretended family relationship'.[54] It sought to police a separation between the modern era and the past, severing same sex couples from their family traditions of marriage, which would typically emerge from an opposite sex couple. [55] While it was acceptable to allow religious organisations and people some space to set their values against equality norms here, by not requiring them to provide religious marriage services to same sex couples, religious organisations could not exercise a monopoly over the definition of marriage. As one commentator has put it, '[t]he law cannot, and probably should not attempt to, change the doctrinal understandings of such religious bodies - but nor may it reflect such understandings in its own rules' (Norrie 2011: 98-9).

From the perspective of an opponent of same sex marriage, a distinction between civil partnership and marriage respected equality norms because it treated differently placed persons differently. While it was important to ensure that people of all sexual orientations were treated decently, for instance by according the incidents of civil partnerships to those who enter into them, same sex and opposite sex relationships were not the same.[56] In particular, marriage was intrinsically

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[52] Stonewall, 'Same Sex Marriage Bill Storms through House of Commons', (Press Release, 5 February 2013) at http://www.stonewall.org.uk/media/current_releases/8461.asp (accessed 26 February 2014).
[53] Roger Gale MP, Hansard HC vol ** col 152 (5 February 2013).
[54] Local Government Act 1988 s 28; repealed by Local Government Act 2003 s 122.
[55] This is an area the importance of which I consistently underplay in my writing. I am grateful to Michael Holdsworth, formerly of Oxford Brookes University, for his insights on this point.
[56] This is the view of government policy taken in *Kitzinger and Wilkinson* [2006] HRLR 36.

limited to opposite sex couples. The distinction may arise from the relative ease of reproduction for the stereotypical opposite sex couple; essentialist constructions of the different sexes in partnership; tradition and culture; or religion, particularly a long theological tradition which sees the family as prior to the state. Whatever its source, this distinction was a given that the state needed to recognise – it could not simply change the definition of marriage.

The key to draw from these abstractions is that both poles neglect the history of marriage in English law, as a history of coproduction of marriage between the state and religious organisations and communities.[57] In England, marriage is both a religious and a national legal concept in a sense that say nissuin[58] and nikah[59] are not. The controversy over the definition of 'marriage', particularly by those seeking change, has not given sufficient weight to this co-production. Both the state, and religious organisations who use the term, have a stake in 'marriage' which is not easily replicated elsewhere across the law/religion scene.

This co-production should not be caricatured as a unified front between the state and significant religions. As the Church in Wales has recently noted:

> It is true that church and state have already disagreed profoundly. The first dispute was in 1835 (until 1907) on the Table of Kindred and Affinity (can a man marry his deceased wife's sister?), and again in 1937 on the liberalization of divorce by the state. Archbishop Lang felt that this was a watershed. It was only in 2002 that the Church of England allowed divorced people to marry in church under certain circumstances, and so came into line with civil law (the Church in Wales always had some discretion from the 1990s). Now the introduction of same sex marriage causes further tensions. That leaves a major challenge for how the church will relate to the state on their doctrine of marriage.[60]

Neither is the new understanding of marriage contained in the legislation incompatible with all religious stances. As noted in relation to the development of religious routes to civil partnership, some religious organisations and individuals take exactly the positive view of same sex marriage I have sketched above. It is fair to say, however, that the understandings of the state and demographically significant religious communities about marriage have now diverged to an unusual degree – and the extent of this divergence is what has given the debate about symbol, ceremony, and language such heat.

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[57] For a broader reflection on similar ideas, see Nichols 2012.
[58] The Jewish religious term normally translated as marriage.
[59] The Muslim religious term normally translated as marriage.
[60] Standing Doctrinal Commission of the Church in Wales, 'The Church in Wales and Same sex Partnerships' (March 2014), para. 29.

One way of understanding the 2004 Act is as an attempt to address the discrimination faced by same sex couples without requiring the cooperation of religious groups in the co-production of marriage. In the passage quoted earlier, Lord Falconer said that civil partnership differed from marriage in being for same sex couples, and exclusively civil. Let me recast the last ground in terms of co-production – civil partnerships were *not* co-produced with religious communities and organisations. Not only did they not depend upon religious communities for their implementation, but in the first iterations of the law, religious communities were positively, and strongly, excluded from the production of civil partnerships. The justifiable scepticism about 'separate but equal' or even 'separate but same' strategies when dealing with a historically persecuted minority (see further Barker 2011; Baker and Elizabeth 2012), as well as the call for change by religious communities who found their powers over religiously wedding couples divided by the state in a way they found arbitrary, rendered this resolution to the problem of coproduction of marriage unstable. At the time of writing the state has chosen to redefine marriage in line with state values of non-discrimination on the grounds of sexual orientation, rather than in line with the values of the demographically significant religious communities who opposed this definition in the consultation process.

There was a pressing need to reform the law to recognise that 'lesbian, gay, bisexual and transgendered individuals are generally entitled to equal treatment with heterosexual individuals' (Wintemute and Andenaes 2001: 4). From my perspective, the new legal position is much better than the previous distinction between civil partnership and marriage. But there is another way of resolving the problem which gives better weight to both equality and religious freedom; that is the removal of religious marriage from the legal sphere entirely, and the universalising of a creature purely of state law, which for the moment I will refer to as civil partnership.[61] Coproduction would be ended by recognising that civil partnerships are an exclusively legal concept which the state is exclusively entitled to shape according to its own values, which will of course involve how it constructs religious liberty; and that religious marriage (as nissuin, zawadj and other religious partnerships) is an exclusively religious concept which different religious communities are exclusively entitled to shape according to their own values.[62] This would lead, as the religious think tank Ecclesia has put it, to 'a mutually beneficial disentangling of the roles, interests, and practices of church and state' (Barrow 2006).

As to the argument from equality, the current regime means that some religious weddings create legal incidents, and some do not – as Chatterjee observed of the post-1837 marriage landscape, '"choice" has indeed been extended in the realm of marriage laws, but different kinds of *religious* choices still result in different status in law' (Chatterjee 2010: 535). With the recent, overdue,

[61] My conclusion, although not my argument, can also be found in Norrie 2011.
[62] For a detailed argument against this separation of law and religion in the specific context of the family, see further Shachar 2010.

liberalisation of the law concerning registration of places of worship in *Hodkin*, religious communities sufficiently well-resourced to be able to operate a place of worship are largely able, if they choose, to access a route to marry. Religious communities which are not so placed cannot. Additionally, there is some evidence that the distinction between purely religious marriage, and legal marriage, is not recognised with equal clarity across different communities (see Douglas 2011). The removal of legal effect from all religious weddings, regardless of the access of a community to a registered place of worship which carries out legal marriages, would simplify and equalise the legal consequences of religious wedding.

In relation to the argument from religious freedom, the state has a strong interest in determining the content of its partnership law, and inevitably this will be in accord with its fundamental values. Within a religiously plural state, the issue then arises of how it is to deal with communities whose values conflict. Within a coproduction model, there is a distinction between religious communities whose values are sufficiently aligned to allow coproduction, and those who are not. The potential for entanglement between religion and state is high. Removing legal effect from religious weddings removes this potential, and allows religious communities to shape marriage without the influence of legal recognition for particular shapings. It may be argued, however, that removing legal effect actually reduces religious liberty in two ways – the liberty of religious organisations who want their religious ceremonies to have legal effect in state law, and the liberty of a marrying couple who want their religious ceremony to have this effect. I have already suggested that a state demand to confer a religious ceremony is unlikely to succeed on religious liberty grounds; the same approach suggests that a religious demand for conferment of particular state benefits through a religious ceremony is also unlikely to succeed.

One issue arising from this 'civil partnerships for all' approach is how to articulate religious wedding, which will create in the religious law or understandings of the community a marriage, nissuin, zawadj and the like; with the civil partnership ceremony which will create a legal civil partnership. This concern with articulation is not particularly novel. In Australia, the Commonwealth's current Marriage Act includes provision for allowing a legal marriage to be followed by a second 'religious ceremony of marriage', which is predicated upon the proving of the legal marriage.[63] There are a number of possible forms of articulation, the simplest being none whatsoever – couples are free to carry out whatever religious ceremonies they wish, which are completely immaterial to the legal creation of a civil partnership. Another is to allow some degree of articulation, as we saw in the 2011 reforms to civil partnerships and religious places of worship. This opens up the possibility of distinguishing between different religions by different degrees of articulation.

[63] Marriage Act 1961 s 113(5) (Commonwealth of Australia).

One concern by those who did not see same sex partnerships as religiously identical to opposite sex partnerships was that allowing religious routes to such partnerships would pressure them to change their stance. At its most blunt, there are arguments that once marriage is defined in a way which does not depend upon sexual polarity, equality law can be used to compel religious sanctification of same sex marriage. Although an abiding concern for religious communities which would fear such an outcome, this already weak argument has been dealt with explicitly in the new legislation. More subtly, and more accurately, it may also be that once religious communities *can* carry out same sex marriages, a debate will take place within the communities as to whether they *should* carry out such marriages. So by opening up the possibility of same sex religious weddings, the state nudges communities which do not currently endorse these views on a journey towards compliance with state values. Articulation could be used to take this nudge further, to allow religious communities whose vision of marriage is compatible with that of the state to articulate more smoothly into the creation of legal civil partnerships. Allowing this to operate at the level of the individual couple may be too complex, and in any case would not be a particularly effective nudge. The organisation would need to be assessed for its congruence with the legal definition of civil partnership generally to secure this preferential status.

I have argued elsewhere that using state power deliberately to encourage theological change within a community in order to bring it into line with state values and aims should always be a cause for concern (Edge 2010; cf for instance Jackson 2009). As may be expected, therefore, I do not advocate the adoption of this mechanism to distinguish between state-compliant religions and others, and seek to reward transition into state-compliance with legal incentives. If, however, this approach is not seen as objectionable it should at least be applied consistently – which of course is not the case in the current regime, with its explicit protections for religious autonomy in relation to sexual polarity, but not other conflicts between religious and state values. So not only would this articulation need to be withheld from communities who distinguish on sexual polarity when the state does not, but also from communities which refuse to marry people of different religions or races, people with particular disabilities except where the state also refuses marital status, and of course divorcees. Religious communities with different views of marriage in terms of ending of the commitment, or the compatibility of the commitment with multiple partners, would also be excluded. A strikingly small number of communities may, ultimately, qualify for this preferential treatment.

BUT WHO GETS THE HOUSE? ABANDONING MARRIAGE AS A LEGAL TERM

The Act includes provision for turning civil partnerships into marriages, which will come into force in December 2014. In this final section I argue for the opposite. It is perhaps worth my being frank that the remaining differences between civil partnerships and opposite sex marriage seem to me to favour

civil partnerships as a structure. Marriage, but not civil partnership, keeps an emphasis on consummation. A similar emphasis can be found in adultery, one of the routes to leave it (although technically this opposite sex activity will also justify divorce in a same sex marriage). Along with Herring, I find this emphasis on a very particular kind of sexual activity unnecessary (Herring 2015). My preference for civil partnership over marriage seems, it is also worth noting, a minority view for heterosexuals in Britain.[64]

If there is to be a distinction between religious marriage, etc, and intimate partnerships recognised by law, one possibility is to leave the terms as they are. There will be legal ideas of what a marriage is, religious ideas, and social ideas, and they may bear very little relationship to one another. This leaves open the possibility of confusion. It also suggests a degree of continuity with former ideas of intimate partnerships which may hamper the development of this area of law. It would also mean that the legal system was using a term shared with a particular subset of religions in the jurisdiction, but not others. It may be better for a purely legal institution to have a distinct linguistic identity, and to leave 'marriage' to the religious communities with which it has been shared.

It may be argued that by moving the state out of marriage, I am giving insufficient weight to the social goods that marriage provides. If I were to argue not only for the abolition of legal marriage, but also civil partnerships, this would be a strong criticism. By retaining state involvement in civil partnerships, however, the state role in supporting 'the social bases of caring relationships' (Brake 2010: 173) is maintained. Additionally, crafting civil partnerships as a purely legal institution opens up the possibility for more radical changes in this institution – for instance to move away from Brake's amatonormativity to support other forms of caring relationship (see further Herring 2015); or to move towards Ristroph and Murray's 'disestablished family' (Ristroph and Murray 2010). The remaining force of this criticism, however, concerns the cultural significance of marriage, and the 'intangible benefit' of 'access to a deeply meaningful institution – it is about equal participation in the activity, expression, security and integrity of marriage'.[65] While the abolition of legal marriage for opposite sex couples would address the issue of equal participation, it would not meet the needs of couples – both same sex and opposite sex – who see legal marriage as more significant, or more binding, than a civil partnership (see Merin 2002: 274-277).

It may also be argued that the term 'marriage' should remain a state possession, and that the state giving up this property is not a neutral way of resolving the (religious) disputes as to definition of marriage which have characterised the current debate. There is some strength in this. Advocating a removal of a legal position is not the same as advocating that such a legal position should not be

[64] See the 2013 yougov poll at http://yougov.co.uk/news/2013/05/19/public-supports-civil-partnerships-all/ (accessed 26 February 2014).
[65] *Halpern v Canada (AG)* (2002) CanLII 427949.

adopted. Marriage at the moment clearly is a legal institution, and changing that will not satisfy those who wish to use state power to resolve the definitional arguments.

More concretely, it may also be argued that there is a legal right to marriage,[66] as opposed to civil partnership. In practice, arguments which engage with this frequently move between a right to marriage per se, and the discrimination inherent in some couples being able to marry and others not, with the emphasis on the latter. A good example is the witness statement of Susan Wilkinson, who sought to have her Canadian marriage to another woman recognised as a marriage, rather than a civil partnership.[67] She argued that she did not wish her relationship to be recognised as a civil partnership:

> it is simply not acceptable to be asked to pretend that this marriage is a civil partnership. While marriage remains open to heterosexual couples only, offering the 'consolation prize' of a civil partnership to lesbians and gay men is offensive and demeaning. Marriage is our society's fundamental social institution for recognising the couple relationship and access to this institution is an equal rights issue … to have our relationship denied that symbolic status devalues it relative to the relationships of heterosexual couples.[68]

Discrimination aside, is there a right to marry? The European Convention on Human Rights provides, under Article 12, that 'Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right'. Is this a fatal obstacle? The ECHR has been reluctant to intervene too closely in national marriage law, as we see in *B&L v UK* for instance, where the Court states that :

> Article 12 expressly provides for regulation of marriage by national law and given the sensitive moral choices concerned and the importance attached to the protection of children and the fostering of secure family environments, this court must not rush to substitute its own judgment in place of the authorities that are best place to assess and respond to the needs of society.[69]

Nonetheless, Article 12 has some effect, and would prevent a state imposing some bans on marriage. In *Goodwin*,[70] for instance, the court found 'no justification for barring the transsexual from enjoying the right to marry under any circumstances'.[71] It is probably not open, therefore, for the state to

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[66] Article 12 of the ECHR.
[67] See *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam).
[68] Ibid, at [5].
[69] *B & L v UK* [2005] (App. 36536/02), at [36].
[70] *Goodwin v UK* (1996) 22 EHRR 123 (ECtHRts).
[71] *Goodwin*, at [103].

remove the legal framework allowing for recognition of a legal couple.[72] The specific question here is whether it requires that the legal relationship between a couple who are covered by Article 12 be called 'marriage'.

The official languages of the ECHR are English and French, although other languages are used by the Court. As may be anticipated, the word 'marry' is not used in both the, equally definitive, versions of the Convention. The English language version of Article 12 uses 'marry', the French 'marier' – English and French for the same concept in the respective languages , but obviously not the same word. Beyond the official text itself, there is much diversity in Member States practice. In Germany, for instance, the Basic Law of 1949, under article 6(1) states 'Ehe und Familie stehen unter dem besonderen Schutze der staatlichen Ordnung', normally translated as 'Marriage and the family shall enjoy the special protection of the state' (Sanders 2012). So a right to have a relationship entitled 'marriage' would not seem to be contained in the ECHR.

This may fairly be rejected as an excessively lawyerly form of pedantry. Might Article 12 guarantee the right to form a 'marriage' recognised as such in the official language of the State party in question? Even this is not to me a rejection of abolitionism. If marriage ceases to be a legal term in England, and is replaced throughout with the term 'civil partnership', it may then be argued that that term becomes the term which parties have a right to have their relationship recognised as.

The case law is, similarly, not supportive of an insistence on a right to a particular term. In *Schalk and Kopf v Austria*,[73] it is true, the Court rejected an argument by Austria that the case be struck out because of the availability of registered partnerships for a same sex couple who sought the right to marry. The differential treatment inherent in the existence of opposite sex marriage was, however, clearly relevant to this decision: 'the said Act allows same sex couples to obtain only a status similar or comparable to marriage, but does not grant them access to marriage, which remains reserved for different-sex couples'.[74]

The abolition of marriage would not, of course, be without its practical problems. Most significant of these is the issue of recognition of legal relationships internationally (see further Curry-Sumner 2005; Frimston 2006; Curry-Sumner 2007; Curry-Sumner 2008). These were not seen as insurmountable when civil partnerships were the only forms of love rights available to same sex couples, however, and it is not clear to me that they are more insurmountable when they are the only form of love rights available to *anyone*.

CONCLUSIONS

[72] See also *Van Oosterwijck v Belgium* (1981) 3 EHRR 557, Com Rep.
[73] *Schalk and Kopf v Austria* (2011) 53 EHRR 20, ECtHRts.
[74] Ibid, at [37].

As a final word, during the passage of the Civil Partnership Act through Parliament, the responsible minister, Jacquie Smith, was pressed on whether the government supported same sex marriage. She replied:

> I recognise that many hon. Members on both sides of the House understand and feel very strongly about specific religious connotations of marriage. The Government are taking a secular approach to resolve the specific problems of same sex couples. As others have said, that is the appropriate and modern way for the 21st century.[75]

If I can remove 'same sex' from her words, and look to treat both same sex and opposite sex couples the same in law, then we are in agreement.

[75] Hansard HC vol 425(35), col 177 (12 October 2004).

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