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Seeking Secularism: Resisting Religiosity in Marriage and Divorce. A Comparative Study of England and America

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Summary
This article explores some of the legal and religious aspects of marriage and divorce in England and Wales and America. It argues that legal marriage and divorce (if it is to continue to exist as a legal concept), should be purely secular and civil. In other words, there should be no religious involvement of any kind at the formation or demise of a legally regulated relationship such as marriage. This article further suggests that the state and the law should not facilitate or promote religiosity in marriage or divorce, nor should religious marriages should have any legal force. Instead of continuing to encourage religiosity in marriage and divorce, Law should instead look to ways of strengthening the secularisation of marriage and divorce.

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Introduction

This article advocates the possibility of secular marriage and divorce without religion and suggests that the role of the state should be to discourage religiosity in these spheres and resist the relatively recent rise in religiosity and fundamentalism in the United Kingdom, America and indeed worldwide. In this context, my use of the term 'religiosity' takes its meaning from that formulated by Allport who postulated that religiosity takes the form of two types of religious commitment - extrinsic and intrinsic. Intrinsic religion 'floods the whole life with motivation and meaning', whereas extrinsic religiosity refers to a religiosity that 'serves and rationalizes assorted forms of self-interest' (Allport 1960, p 264). To put it another way, extrinsic religiosity can refer to a person who attends church or synagogue as a means to an end - for what they can get out of it or an 'immature faith that serves as a means of convenience for self-serving goals' (Tiliopoulos et al 2007, p 1610). Intrinsic religiosity refers to a guide for one's way of life or an organizational principle, a central and personal experience. I would suggest that it would be impossible to produce undisputable evidence proving either a rise or decline in religiosity, I would nevertheless argue that there is sufficient evidence upon which to base an argument suggesting that levels of religiosity in both England and Wales and America are high or continuing to rise. In America there has been a 'rise of evangelical political action groups' (Martin 2005); a rise in 'Christian fundamentalism' (Almond, Appleby and Sivan 2003) and a 'rapid rise in the number of Churches and Synagogues' (Allitt 2005). The UK has also witnessed similar rises in religiosity. Research published by the charity 'Christian Research' in December 2010, showed that Roman Catholic Church is continuing to enjoy a rise in attendance at Mass; that the number of Pentecostal worshippers is increasing rapidly and that numbers attending Baptist churches is also on the increase (reported in *The Telegraph* 19 Dec 2010). Additionally, the numbers converting to Islam in the UK have nearly doubled between 2001 and 2010 (Brice 2011). The field of education is another example of this. In recent years UK governments have presided over a dramatic increase in the number of faith schools, now estimated to be a third of all schools (Department for Education 2011, at http://www.education.gov.uk/schools/leadership/typesofschools/b0066996/faith-schools). Religious education in schools has been compulsory since 1944 (The Religious Education Act 1944). Worldwide, there has been the 'reinvention and resurgence of traditional religions alongside the rise of new forms of religion and spirituality' (Davie, Woodhead and Heelas 2003, p 1).

This suggested rise in religiosity has extended to many areas of law making, especially in the areas of marriage and divorce. There are similarities of approach by both the United Kingdom and the United States to marriage and divorce which sets them apart from their closest neighbors in Europe and North America. Indeed the responses of Britain and the United States differ significantly from that of other jurisdictions in terms of family policy (Barlow and Probert 2004, p 1-11). This article therefore begins with an exploration of some of the main developments of religious marriage and divorce within America,

England and Wales, and then proceeds to explore secular marriage, offering an exploration of some major objections to religion and religiosity in marriage and divorce law. It questions the argument that divorce is a 'problem' which can be solved by higher degrees of religiosity being enshrined in law.

Religiosity in Both Marriage and Divorce

The issue of religiosity in the legal construction of both marriage and divorce law is a perennial one. It crosses borders of nationhood, culture and time. The Church of England and the Church in Wales are permitted to conduct marriage ceremonies which, as well as being religious, also have legal standing. Other denominations, (such as Baptists, Brethren, Congregationalists, Free Presbyterians, Methodists and the Salvation Army), must obtain a registrar's certificate or license, as church officials belonging to these organizations are not authorized by the state to issue certificates or licenses (Marriage Act 1949). Regardless of where a marriage ceremony takes place, once married, the 'terms' of the marriage, (such as consummation requirements, financial support and a cohabitation requirement), are determined by the secular law of the state. In other words, no particular religious organization can impose different 'terms' upon the marriage than would secular law.

Covenant Marriages

A 'covenant marriage' is a type of marriage that has recently found favour with some couples particularly in America. The term usually refers to a marriage in which there are heightened requirements for entering and leaving the marriage imposed. In other words, it is a 'legally cognizable premarital contract in which couples make marital commitments beyond those required by law' (Nichols 1998, p 944). Covenant marriages were introduced in response to the perceived threat of divorce. In a covenant marriage, in order to obtain a divorce, couples must prove fault and commonly must demonstrate two years separation. Civil or secular notions of 'irreconcilable differences, general incompatibility, or irretrievable breakdown of the marriage are not acceptable grounds for divorce' (Sanchez 2002, p 95). The so called 'traditional' secular marriage contract continues to be available to couples with the usual formalities relating to formation and divorce. Covenant marriages were first introduced into America in 1997 with the specific goal of converting a 'culture of divorce' to a 'culture of marriage', (Nichols 1998, p 929) and to combat what was perceived by the 'Christian right' as the 'problems' of unilateral no-fault divorce and the concern that marriage (defined exclusively as heterosexual marriage), needed saving (Stewart 1999, p 515). Louisiana was the first American state to legislate for covenant marriage and it is currently available in two other American states; Arkansas and Arizona (Baker 2009, p 147).

Central to the Christian Right's identity is its modern day crusade to restore the heterosexual nuclear family and marriage as the only approved social unit worthy of the name 'family'. One example of this was the furore surrounding 'Proposition 8' (the California Marriage Protection Act), which amended California's constitution in order to 'protect marriage' and re-define it as being only between one man and one woman. Proposition 8 was supported by numerous religious organisations (Gedicks 2009, p 151).

One of the key planks of the Christian Right's campaign to promote the traditional nuclear family formation has been covenant marriage. Covenant marriage is one of the ways used by the Christian Right to re-enforce of the religious aspects of marriage. Covenant marriage is seen not only by couples as a symbol that their marriage is religious, it is also seen as a vehicle to 'encourage mainstream society to uphold the traditional religious meaning of marriage' (Baker 2009, p 165).

As Guth points out, traditional Christian values in America often focus around single moral issues such as abortion, gay rights and the banning of school prayers (Guth 1983, p 45). This also includes demands for schools to teach creationism and a ban on same-sex marriages. Whilst there are many religious individuals who are not homophobic, much of the rhetoric coming from the American Christian Right is hypocritical homophobic theology (Lewis 1927). Indeed, for members of the American Christian Right, 'opposition to same-sex marriage is tied to their vision of the role that Christian morality should play in national identity and citizenship' (Josephson 2005, p 272). With the rise in the number of faith schools in England and Wales, there are also concerns that religious homophobia and homophobic bullying are 'endemic' in them (*The Independent* 26 April 2011).

Before embarking upon an exploration of covenant marriages as they are currently constituted in America, it would be helpful to begin with a brief explanation of the development of marriage law in England and Wales.

Marriage Law in England and Wales

As noted by Bradney, prior to 1753 in England and Wales, there was no formal state involvement in marriages (Bradney 2009, p 98). Although there was a predominance of clandestine and 'illegal' marriages (Leneman 1999, p 161), these relationships often attained the status of legal marriage (Kiernan 2004, p 34). Due to the essentially private nature of ceremonies and the wide variations of practice, problems would arise when one party claimed to be married and the other denied this. The passing of Lord Hardwicke's 1753 Marriage Act was intended to address this problem. The Act required that records should be kept of both banns and marriages laying down more severe penalties for noncompliance with the requisite formalities than had previously applied (Probert 2009, p 210). Further, Probert has demonstrated that Hardwicke's Act based itself on the existing cannon law and did not (as is commonly mistakenly thought), mark a radical departure from what had gone before (Probert 2009, p 211).

Perhaps more pertinent to this article, the 1753 Act also stipulated that a couples' marriage would only be recognised after a ceremony had been performed in an Anglican church (Leneman 1999), effectively overturning the 'common law' status of marriage (although there were exemptions for Quaker and Jewish marriages). Thus so called clandestine and informal marriages were no longer considered legally valid.

The passing of the 1753 Act effectively introduced a Church of England virtual monopoly on the legitimization of marriage ceremonies – a monopoly that had not

existed before. Marriages which were legal and free from church and religion were not recognised in England and Wales again until the Marriage and Registration Acts 1836 (except briefly under Cromwellian rule (Lucas 1990, p 121)).

After 1836 a marriage could be conducted in any licensed building provided that a registrar was present. The Church of England's virtual monopoly on the conducting of legal marriages had already been loosened by the repeal of the Test and Corporation Acts, by Catholic Emancipation in 1829 and by the 1832 Reform Act. Following these reforms, the House of Commons set up a Select Committee in 1833 'to consider and report on the general state of parochial registers, and the laws relating to them; and on a general registration of births, baptisms, marriages, deaths, and burials, in England and Wales.' (Session 1833, (69) vol 14 p 5). Its recommendations included local parochial systems being replaced by a national system of registration of births, deaths and marriages. More importantly, it recommended that this new national system be administered through a General Register Office by civil rather than church officers. These recommendations subsequently became the Registration Act 1836 and the Marriage Act 1836. The 1994 Marriage Act and the Marriage (Approved Premises) Regulations of 1995, further loosened the Church's grip on presiding over legally recognised marriages by allowing couples to marry in 'approved premises' other than register offices. Indeed, this is set out in Schedule 1of the regulations accompanying the 1994 Act which state that the premises 'must have no recent or continuing connection with any religion, religious practice or religious persuasion which would be incompatible with the use of the premises for the solemnisation of marriages'. The regulations further state that readings, words, music or performances, which form any part of a civil marriage ceremony, must be secular. One of the effects of the Marriage (Approved Premises) Regulations 1995 has been that '[s]ince 1993 civil ceremonies have outnumbered religious ones, and by 1998 three in five weddings in Great Britain were conducted with civil ceremonies' (Office for National Statistics 2001). In 2008, civil ceremonies accounted for 67 per cent of all ceremonies, an increase from 61 per cent in 1998 (Office for National Statistics 2010). The figures for Scotland are even starker. Figures quoted in *The Scotsman* point to a similar trend with non-religious unions carried out by the Humanist Society of Scotland (HSS) rising by 35 per cent in 2010 since 2005. In contrast, the number of ceremonies carried out by the Church of Scotland, the Catholic Church and the Episcopal Church has either fallen steadily or remained static over the same period. However, this may be specific to Scotland as Scotland is the only country in the UK, and one of only six in the world, where Humanist weddings are legal (http://www.humanism-scotland.org.uk/ceremonies/weddings-partnership-ceremonies.html).

Marriage Law in the USA

The development of marriage law in America has taken a different direction, although we can point to some common points of origin. English and canon laws relating to marriage were transported with the first American colonists (Oliphant and Steegh 2007) and this was reflected in the idea that 'for the most part, when one married in Colonial America, the marriage was intended to last forever, and the law reflected this view by making it difficult for married couples to divorce or separate' (Oliphant and Steegh 2007).

Although marriage laws do differ slightly from American state to American state, (a marriage created in one state is respected by all others), the definition of a valid legal marriage is similar to that found in England and Wales. Although the English case of *Hyde v Hyde* (1866) LR 1 P&D 130 is not specifically cited in American case law, the 1996 Defense of Marriage Act passed Congress defines marriage under federal law to refer only to a legal union between one man and one woman. Whilst the 'for life' requirement has always been in doubt (divorce by Act of Parliament for example was always possible if expensive, before the introduction of divorce through the courts), there is still a presumption that the parties must *intend* the marriage to be for life. The road to the reform of marriage laws to facilitate 'easier' divorce has been a rocky one and indeed it is the presence of divorce which is seen by many as one of the most fundamental threats to the institution of marriage. The presence of covenant marriages is arguably in response to what have been perceived of as 'threats' to the so called traditional forms of marriage. One such response was the Defense of Marriage Act 1996, (DOMA) passed by Congress under the presidency of Bill Clinton which bans any federal recognition of same sex marriages. More recently, The American Law Institute (ALI) published an influential report in 2002 entitled 'Principles of the Law of Family Dissolution: Analysis and Recommendations (Philadelphia: American Law Institute, 2002). One of the Report's strongest recommendations was that what it identified as 'traditional marriage' should be reduced in importance so that it sits alongside what it terms as equally valid family forms, such as cohabiting couples and gay and lesbian families (American Law Institute, 2002). The report argues that full legal marriage rights should be accorded to same-sex couples and those same-sex couples, cohabitees, and married people should all receive the same legal treatment at the point of relationship breakdown. Further, the ALI argues for a 'new understanding of marriage' which 'seeks to replace "conjugality" with "relationship" or "couple-hood" as the central organizing principle of family law' (American Law Institute, 2002).

Secular Marriage

As stated above, this paper argues that marriage and divorce should be secular. It might be useful to briefly set out my terms of reference for the word secular. Berger, in his oft quoted definition of secularisation, puts it thus; 'the process by which sectors of society and culture are removed from the domination of religious institutions and symbols' (Berger 1973, p 113). However, Berger did in fact draw a distinction between two main types of secularity; 'structural secularisation' (removal of religion from society's institutions) and 'subjective secularisation' (removal of the religious from the consciousness of the person).

Secularism means, amongst other things, that there should be a separation of Church and State. Some authors have argued that this separation should be for the benefit of secular individuals whilst others have argued that, although the effect of 'separation of church and state' remains arguably obscure, nevertheless separation will protect religious freedom (Hamburger 2002, p 3). This is similar to the process of secularisation which is the process whereby 'religious thinking, practice and institutions lose social significance' (Wilson 1966, p 14). As pointed out by Keyman, '[S]ecularization would not automatically and necessarily lead to the secularization of consciousness and the eventual

decline of the social and symbolic significance of religious beliefs, commitments and institutions' (Keyman 2007, p 14).

As I explore in more detail later in this article, I would suggest that a decrease in both societal and individual religiosity is a desirable objective and having secular marriage and divorce would be part of this objective. It is unfortunately however, an objective that is unlikely to be achieved in England and Wales even if there were a strict division between church and state. Notwithstanding the fact that secularisation is an increasingly accepted feature of life in England and Wales, the hold that the Church of England and the Church in Wales have on solemnization of marriages is a hold they are unlikely to release voluntarily and is one that a government is unlikely to wrest from them. A formal separation of church and state does not necessarily lead to lower levels of religiosity. For example, the system as found in America which, although formally a secular state, has high levels of religiosity. This point is succinctly pointed out by Asad. '[I]n Britain the state is linked to the Established Church and its inhabitants are largely nonreligious, and in America the population is largely religious but the federal state is secular' (Asad 2003, p 5).

The phrase 'separation of church and state' has of course been the subject of much scholarly debate. John Locke is commonly credited with introducing the concept, arguing that the state did not have authority to determine matters of individual conscience (Locke 1689, cited in Horton and Mendus 1991, p 9). Whilst Locke did not argue specifically for a separation of church and state as the phrase later came to be interpreted, he did advocate the idea that the state should exert tolerance in matters of individual religion. His work was written in direct response to the particular circumstances of his day and thus reflected a response to state intolerance (Horton and Mendus 1991, p 2). However, some authors credit the actual phrase to Thomas Jefferson who in a letter written to the Danbury Baptists in 1802, argued that there should be a 'Wall of Separation between Church and State' (Horton and Mendus 1991, p 2). Although as Hamburger has usefully suggested, this was an interpretative assumption on Jefferson's part (Hamberger 2002, p 2).

I should of course, make mention of Montesquieu who in his seminal work *The Spirit of the Laws*, argued that the three branches of government, the judicial, legislative, and executive should be kept separate (Claus 2005, p 421). In very broad terms therefore, what these writers are promulgating is the idea that the State should absent itself from matters relating to the Church and people's religiosity. This is itself reminiscent of Elizabeth's I's promise that in matters of religion, she would not make 'windows on to men's souls' (Neale 1934, p 174). I wish to turn this around and argue that the Church and religiosity should absent itself from those matters which are the proper remit of the State. With covenant marriage, this line becomes even more blurred 'the great thing about America is the separation of church and state, and the covenant marriage, if it doesn't cross that line, jumps up and down on it.' (Quoted in Sanchez et al 2001, p 218).

Some religious groups have called for a greater legal ability to regulate their own religious affairs as they see fit, and as we have seen, marriage is one such area. For example, whilst many would agree that there is increased debate and interest surrounding

the role of religion and Law, there appears to be no clear lead as to whether or not religious communities themselves want increased involvement from their respective religious organisations. Malik argues that her research evidences an increased appetite within the Muslim community for the use of Islamic Courts (Malik, cited in Sandberg 2009, p 211). However, Bano, writing in the same journal argues that 'Muslim women remain extremely cautious of initiatives to accommodate sharia into English Law' (Bano 2008, p 27). The reasons for this Bano suggests can be summed up in the words of one her interviewees;

> They [sharia councils] serve a useful purpose but really when people ask for these councils to be formally recognised, alarm bells go off in my head. When you start bringing in special things I think there's two things that can happen. One, I think you can have ghettoisation – you have a community within a community that is ostracised and marginalised and you then become a target for many other things. Secondly, I think why? Why would you need it? (Bano 2008, p 27)

It is not only the Christian Right in the USA which views marriage and divorce as sites of religious contestation. Similar debates are occurring in some Muslim groups. Under Islamic law, marriage serves the dual purpose of fulfilling the 'moral imperative to marry as an essential part of leading a good Muslim life, and it is a binding legal contract that must meet certain conditions in form and context' (Tucker 2008, p 41). One of the criticisms levelled at Muslim marriages is that there is no written proof under Islamic law that the parties are indeed married and that Muslim women facing Muslim divorce are left without financial redress. In order to try and address this criticism, in August 2008, The Muslim Institute in the UK, drafted and introduced a new 'model marriage contract' for Muslims stating that it will give Muslim women equal rights. The contract was drafted by Dr Ghayasuddin Siddiqui and found support from several Muslim groups including the Islamic Sharia Council and the Muslim Women's Network UK (Imams and Mosques Council (UK)).

Nikah is the Islamic word which describes the 'contract of marriage or the contract between a man and a woman with the specific purpose of legalizing sexual intercourse' (Tucker 2008, p 91) and establishing 'the limits of financial obligations' (Mirza 2000). The term nikah can also be used to describe the marriage ceremony (Pearl 1987). A Muslim divorce is known as the talaq and the right to divorce by talaq is the prerogative of the husband (Hussain 2003). A Muslim woman does not have a reciprocal right of unilateral divorce' (Tucker 2008, p 91). Thus there is not any equality, formal or otherwise, within Muslim divorce law.

> Islamic law gives the husband the unilateral right to divorce his wife for any reason (or for no reason) simply by declaring his repudiation of her three times (talaq) and his maintenance obligations after divorce are then extremely minimal. The wife, on the other hand, is generally entitled to divorce her husband only in a court of law and only upon proof of the particular grounds specified by statute. (Freedman 1991, p 20)

A nikah ceremony which does not comply with the provisions of the Marriage Act 1949 will not be recognised by British courts. The result will be that English and Welsh law will continue to treat the couple as cohabitants and as legal strangers, not as spouses. The same applies to the situation regarding the talaq. There is however some, limited recognition of a couple's religious beliefs in settling familial disputes. For example, in *A v T (Ancillary Relief: Cultural Factors)* [2004] 1 FLR 927, the court took into account factors relevant to the couples 'primary culture' (as Iranian Muslims) on the basis that the couple had a 'secondary attachment' to English jurisdiction. What weighed heavily with the court was the judgment by Thorpe LJ in *Otobo* v *Otobo* [2003] 1 FLR 192, where it was stated that 'an English judge should give due weight to the primary cultural factors, and not ignore the differential between what the wife might anticipate from a determination in England as opposed to a determination in the alternative jurisdiction' (per Thorpe LJ Paragraph 57). This reasoning was followed in *C* v *C* [2004] EWHC 742 (Fam) where it was stated that English law is beginning to belatedly 'recognise the need, in a case with foreign connections, for a sideways look at foreign law as part of the discretionary analysis required by substantive law' (per Wilson J at para 36). Such an approach gives greater recognition to the fact that parallel legal systems exists in the UK.

That the UK has parallel legal systems is not new, nor is the existence of them disputed. For example sharia courts (http://www.islamic-sharia.org/) and Beth Dins hear divorce cases. Decisions of the Beth Din and the Muslim Arbitration Tribunal are, in some instances, are enforceable in the county and high courts by virtue of the Arbitration Act 1996. (There is no centralised Beth Din in the UK, but the largest and oldest is the London Beth Din, Office of the Chief Rabbi http://www.chiefrabbi.org/). Needless to say, all these religious courts' decisions are decided according to religious doctrine which in the context of sharia law has been described as 'arbitrary and discriminatory' by the House of Lords in the case of *M(Lebanon)* v *Home Secretary* [2008] UKHL 64. What is in question here whether the state *should* give any legal recognition to them? I would suggest that this question should be answered in the negative. Any recognition of religious doctrine in alternative dispute resolution should be robustly resisted. It is, I would argue, a route down which UK law should not progress any further and indeed should retreat from. Others disagree. Bradney for example, argues that 'personal law systems' whilst having the potential to create significant problems both at the technical and conceptual level, never the less can offer significant advantages to those who find the values of state law deficient and that Muslims should be afforded an opportunity to opt into personal law systems that recognise values unique to the Muslim faith and culture. (Bradney 2009, p 51). Although I concede that recognising the decisions of religious courts is not the same thing as recognising a personal law system, there are never the less parallels between personal law systems and recognising the decisions of religious courts.

Bradney has elsewhere explored the issue of how law in a secular society should treat religion and religious belief, pointing out that a legal system can only respect the believer's rights to their views (and in many instances their practices) not the views themselves (Bradney 2008).

The proposed new Muslim marriage contract would not produce a legally recognised marriage under English and Welsh law. The proposed contract would be been religious

in nature and would not address the concerns explored in this paper relating to resisting religiosity. On the contrary, it encourages religiosity within legal marriage. One way to accommodate both the religious beliefs of those who wish to marry and the state's interests would be to ensure that there is a clear distinction between a religious marriage which has no legal status and a legal marriage (or civil marriage), which does. In other words, the state could allow religious individuals to undergo whatever religious ceremony they wish, but insist that the only marriages which would have legal status would be civil marriages (as currently happens in countries such as The Netherlands and Belgium). Such civil marriages could take place in a registry office or any secular registered building. Arguably, a better alternative to the proposed Muslim marriage contract would have been for the Muslim Institute and similar organisations to encourage couples to undergo a civil marriage which would then provide the same secular legal protection to Muslim women as is provided to non-Muslim women; indeed this is what the Muslim Parliament encourages couples to do. However, although praised by some Muslim groups, the marriage contract was heavily criticised by the Muslim Council of Britain who have said that they will produce their own documentation (statement posted on the MCB website (http://www.mcb.org.uk/) on 15 August 2008, lasted visited 10th march 2011). These issues have a direct bearing of course on the controversy surrounding the comments made by the Archbishop of Canterbury in a speech given at the Royal Courts of Justice in London in February 2008 (Williams 2008). Rowan Williams' comments caused widespread discussion and reaction, both positive and negative. Williams suggested that there was a role for religiosity in the formation and practice of law and legal policy, asking whether it is possible for law to recognise some of the Muslim traditions as they relate to relationships. However, Williams also appeared to emphasize that this should only happen if vulnerable individuals (for example, women), have their human rights recognised and protected. At the time, his comments were widely misinterpreted, especially by the media who reported his comments as being a call for Sharia law to be introduced as a parallel jurisdiction to the English civil law.

There are, I suggest several major objections to religion and religiosity in marriage and divorce law, and I present them below in six points:

1. Covenant marriages ask too much of law. One of the central tenets of covenant marriage is that it is 'more difficult' to leave than secular or civil marriage. The covenanted marriages are made more difficult to leave by the operation of secular law. Presumably this is needed because the covenant between believer and their god is insufficient and more easily broken than secular law. In effect, supporters of covenant marriage are asking law to do for them what their faith, their church and their god cannot. Presumably, religious individuals have always had this expectation of divorce law. This is a near impossible objective.

2. Religious marriages deprive people of the rights and freedoms they should have under the law. Marriages generally and religious marriage in particular, disadvantage women and so women should be cautious about entering into the heterosexualised institution of marriage. Smart argues that marriage and its attendant laws reproduce an existing patriarchal order which minimizes social change and that

> [a]lthough legislation does not create patriarchal relations … it does in a complex and often contradictory fashion reproduce the material and ideological conditions under which these relations may survive (Smart 2002, p 22).

This version of the family, sometimes portrayed as men 'taking responsibility' forms a large plank of the Christian Right's message, but in reality, 'the resurrection of responsible manhood is really the Second Coming of Patriarchy' (Kimmel 1999, p 116). I have argued elsewhere (Beresford and Falkus 2009, p 1), that heterosexual marriage is so imbued with a history of inequality and thus so fundamentally flawed, that it cannot be 'fixed' by law reform and should therefore be abolished. Despite so-called reforms, marriage remains a deeply flawed patriarchal institution which is often 'harmful to women's status as citizens … the flaws of the institution are deeply embedded in its reinforcing of inequality, gender roles, gender hierarchy and male power' (Josephon 2005, p 270). For example, getting married prompts a 50 per cent increase in housework for women (Couprie 2007, p 289). Simone de Beaviour recognised this in her seminal work, *The Second Sex* where she argued that women's subjection to social roles that men invented in their own interest is epitomised in marriage and motherhood. As succinctly put by Bergoffen

> [w]e have long known that marriage is the place where women's bodies are on the line. The bodies of battered women confront us with dramatic examples of the ways in which marriage legitimates the abuse of women. (Bergoffen 1999, p 96).

In addition to this, '[f]rom the 1970s onwards, for example, studies have consistently demonstrated that men receive enhanced physical and mental health benefits from their relationships with women' (Seymour-Smith and Wetherell 2006, p 105). Similar things cannot be said of married women however. For women, marriage endows 'men with a better lifestyle, greater freedom and more power, while it has the opposite effect on women, limiting, impoverishing and rendering them vulnerable to abuses of power by their husbands' (Bernard 1973, 105).' In addition, 'women are more likely than men to be murdered by a member of the other sex and by a spouse' (Graham, Rawlings and Rigsby 1995, p 71). 'For women the shift from being single to being married increases the likelihood of being murdered, while for men the shift decreases their chances' (Gove 1973, p 51).

3. Religious marriages compound the structural inequalities found in civil marriage. I have already mentioned above the formal inequality between men and women in obtaining a talaq meaning that it is easier for men to end a Muslim marriage. Whilst there may not exist the formal inequality in a covenanted marriage, inequalities nevertheless exist and the structural inequalities in law and society compound this inequality. Both civil and religious marriage 'provide a limited means of recourse when ending unwanted marriages, and both have provisions which treat women unequally and unfairly-subordinate to men' (Silberbogen 1998, p 242). For example, in a covenanted marriage, the couple must undergo mandatory counselling both before marriage and before divorce which can be costly both in terms of personal safety and finances. Mandatory counselling before a divorce petition can be filed is covenant marriages most serious drawback and will potentially endanger battered spouses (Carriere (1997-1998) p

1741). American States that have passed covenant marriage laws have done little to provide low-cost or free counsellors for those who cannot afford them (Carriere (1997-1998) p 1741). There are of course, further considerations to be made in relation to long standing religious and/or cultural practices. These can be strongly entrenched and are a complex system of norms and values. Where couples undertake a religious as well as a civil marriage, they are constrained by the strictures of their religion. There were plans in England and Wales to provide uniformity for all secular and religious marriages, but these have so far failed to find their way onto the statute books (Barton 2002). In relation to Jewish divorces in England and Wales for example, it is women who are disadvantaged again. Indeed, this view is supported by Freeman who argues forcibly that '[t]he *Get* is a deeply flawed institution; it discriminates against women; it has become a vehicle for blackmail and other despicable practices' (Freeman 2001, p 380). A Jewish couple can obtain a civil (secular) divorce, but unless the man provides the woman with a 'get', she cannot re-marry under Jewish law and any children she may have in the future will be illegitimate (see *Brett* v *Brett* [1969] 1 All ER 1007). Under Jewish Law, the 'get' must be provided voluntarily. This approach gives precedence to a male-orientated version of the ending of a relationship.

> There seems to be a wilful resistance by the religious authorities in Jewish communities of all countries to resolve the issue. It is for men to make the decision. If men were the sufferers, they would have found a solution. It is only because the problem does not affect men that they rely on numerous religious objections to resolve the issue. I know that Jewish religious leaders will strongly resist this explanation, but I find their explanations for being unable to do anything simply pathetic. (Lord Jacobs, HL Deb, 10 May 2002, c1405.)

The Divorce (Religious Marriages) Act 2002 was introduced to try and address this problem. The Act enables a court to require the dissolution of a religious marriage before granting a civil divorce. However, the legislation is arguably seriously flawed and does little to improve the situation. Firstly, it assumes that the man will care about obtaining a civil divorce. It has limited value only in situations where the husband does want a civil divorce, in which case, the requirement may help to protect the wife's financial position. Secondly, it does not help a wife in a situation where she wants a divorce but the husband does not. Thirdly, it will not help in situations where the couple has already divorced and finally, the refusal to grant a *get* is sometimes used as a means to pressurize the other party into agreeing to less favourable arrangements concerning, for example, financial aspects (Freeman 2001, p 380). Despite these flaws, it was nevertheless supported by the Chief Rabbi, the Board of Deputies of British Jews and the Jewish Marriage Council. If legal recognition of religious marriages were to be abolished, it is unarguable that religious marriages would continue to exist. There does not need to be legal recognition in order for the state to engage with the parties and provide them with alternatives moving between the religious and secular systems so as to accommodate their needs.

4. In covenant marriages, there are often no legal grounds to end the marriage based on coercion or duress. There is, I would suggest, little difference between forcing someone to *get* married and forcing someone to *stay* married. By virtue of section 12 (c) of the Matrimonial Causes Act 1973, English and Welsh law states that a marriage shall

be voidable if 'either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise.'. Further, there is now specific provision to deal with forced marriages in England and Wales with the passing of the Forced Marriage (Civil Protection) Act 2007. There is no justification for stating that duress or coercion in marriage is acceptable. According to the Crown Prosecution Service 'forced marriage is an abuse of human rights and cannot be justified on any religious or cultural basis' (CPS website accessed 22nd March 2011). Indeed, article 16 of the Universal Declaration of Human Rights states that 'marriage shall be entered into only with the free and full consent of the intending spouses'. Whilst covenant marriages do allow for divorce, such a divorce is much harder to obtain and making divorce much harder than a 'normal' marriage is central to the notion of a covenant marriage.

5. With additional requirements, come inevitable additional costs. One of the stated aims of the Family Law act 1996, s 1(1)(c)(iii) is that the divorce process in England and Wales should not involve unnecessary expenditure for the state or the parties. Although divorce exacts a heavy toll on all parties, it is particularly heavy on women and whilst fault-based divorce increases these financial costs, no-fault divorce does not exacerbate the financial costs (Stewart 1999, p 521). If a divorce is more difficult to obtain, the process of obtaining it is necessarily longer. It is not sufficient for the state to engineer increased costs and then argue that these increased financial burdens are ones that people choose to enter into. Similarly, it is misguided to argue that if couples wanted to avoid the higher costs of divorce in a convent marriage, they could choose 'normal' marriage instead. This argument about 'choice' is neither here nor there. Couples already have 'choices' about the level of commitment they wish to make to their partner in the same way as they make choices about whether to have children or buy a home (Stewart 1999, p 517).

6. With regard to divorce, marriages and covenant marriages in particular, require proof of fault. The stated aim of divorce law in England and Wales is that when a marriage has irretrievably broken down, divorce law should seek to 'enable the empty legal shell to be destroyed with the minimum of bitterness, distress and humiliation' (Law Commission, 1966, para. 15).

If a party to a covenanted marriage wants a divorce, the grounds for legal separation are adultery by the other spouse; conviction in a criminal court or death; abandonment by the other spouse for one year; physical or sexual abuse of the spouse or of a child of either spouse; the spouses have lived separate and apart for two years; or habitual intemperance (for example, alcohol or drug abuse), cruel treatment, or severe ill treatment by the other spouse. The reasons for divorce exclude this last ground but include the other four. There are significant problems with continuing to retain the concept of fault in divorce which is essentially, what covenant marriages do in bringing back the concept of a matrimonial offence. Fault-based divorces actually promote acrimonious break-ups as they encourage the parties to make allegations about each other's behavior. Indeed, the 1990 Law Commission recognised that requiring fault is not realistic as 'the law cannot accurately allocate moral blameworthiness, for there are always two sides to every marital history (Law Commission 1990, para. 3.26). Obtaining a divorce from a covenanted marriage

requires proof of fault. Having to 'prove' fault in divorce results in increased costs both emotionally and financially. Retaining fault in divorce, particularly the standard demanded by covenant marriage, will likely result in increased litigation. It is also more likely to keep women in abusive relationships than not, and is 'risking lives to save marriages' (Carriere 1997-1998). It also prolongs children's exposure to parental conflict. A fact recognised by the 1989 Children Act which defines 'harm' as including impairment suffered from seeing or hearing the ill treatment of another'. Further, as shown by Mahoney, the compulsory counselling of covenanted spouses prior to divorce poses a threat to a woman's safety because 'the marriage counselor defines success as reconciling the partners in the relationship rather than as stopping the abuse' (Mahoney 1991, cited in Carriere 1997-1998).

One of the commonly asserted reasons for the promotion of covenant marriage a 'freedom of will' argument; that as no one is forcing individuals to choose covenant marriages, they should therefore be facilitated (Spaht 2005, p 253). To put it another way, 'if the couple say they want covenant marriage, the state should provide it *because the couple want it'*. One logical corollary to this argument is that if 'a person wants a divorce, then the state should give it to them *because they want it*.' It leaves Spaht and other supporters of this argument open to the suggestion that as no one forces people to get divorced, divorces should therefore be facilitated. This is probably not a consequence envisaged by the advocates of covenanted marriage. As I have suggested above, if individuals wish to enter into a religious marriage then the state should not prevent them from doing so, but the state should not give it legal recognition.

There appears to be a widespread assumption that religiosity and religion in both private and public life is desirable and that religious values should influence secular law making. Sphat, for example, argues that one of the benefits of covenant marriages is that they will invite 'religion back into public life' (Spaht 2005, 253). Part of this line of thought is formulated on the premise that society's morals and values can only stem from religiosity and faith. However, far from being one of those fundamental truths universally acknowledged, such assumptions are not made on grounds of evidence, but rather upon grounds of faith. Scientific theories on moral complexity in humans, for example, has suggested various themes. Boehm suggests that hominid moral complexity is due to an increasing need to avoid disputes (Boehm 1982, p 136). Human morality does not stem from religiosity therefore, but instead stems from human biological evolutionary history (Dawkins 2006, p 238). As argued by Paul, '[a]greement with the hypothesis that belief in a creator is beneficial to societies is largely based on assumption, anecdotal accounts, and on studies of limited scope and quality' (Paul 2005, p 1). The approach taken by those who favour high levels of religiosity in law-making, endorses a religious view of marriage which is sanctified by law. Such an approach is not desirable in a country such as America which has a constitutionally defined separation of church and state. Although the Church of England is not separate from the state, such an approach is not appropriate for England and Wales. There is already disestablishment in Wales; by virtue of the Welsh Church Act 1914, the Church of England was disestablished and provision was made for the creation of the Church in Wales. Even if there could be a formal separation between Church and State in England this would not be enough in and of itself;

religiosity and religion should be actively discouraged from influencing law and law reform. It would appear that;

> Only the more secular, pro-evolution democracies feature low rates of lethal crime, juvenile-adult mortality, sex-related dysfunction, and even abortion … the non-religious, pro-evolution democracies contradict the dictum that a society cannot enjoy good conditions unless most citizens ardently believe in a moral creator. (Paul 2005, p 8)

Indeed, there is convincing evidence that religiosity is not inherently good for society and is not necessary in order to provide the moral and ethical foundations of a healthy society. In other words, high levels of religiosity can exacerbate societal problems; 'In general, higher rates of belief in and worship of a creator correlate with higher rates of homicide, juvenile and early adult mortality, STD infection rates, teen pregnancy and abortion in the prosperous democracies' (Paul 2005, p 7).

Whilst covenant marriage itself still only represents a small minority of marriages in the United States and none in England and Wales, this should not be held representative of the strength of feeling for religion per se in marriage. For example, by the end of 2001, '[f]ewer than 3 per cent of couples who marry in Louisiana and Arizona take on the extra restrictions of marriage by covenant' (National Center for Policy Analysis 2001). If America, England and Wales are liberal states, should the liberal state not allow people to enter into a religious marriage on the basis of religious liberty? Unless a 'harm' can be identified, liberal societies are reluctant to restrict the liberty of individuals to act as they see fit. I would suggest that the definition of 'harm' does not apply to religious convictions and 'the Salvation of Souls' (Locke 1983: 26), but applies the secular. There is a clearly identifiable harm in giving legal recognition to religious marriages. Religious liberty involves more than allowing individuals to satisfy their internal moral laws. Religious liberty is also external to the individual – it impacts upon other individuals and extends to (amongst other things), property rights, education, speech and of course marriage. Religious liberty is therefore more than a matter of individual religious liberty; it is a matter of government. Abolishing legally sanctioned marriage therefore contributes towards the reduction of religiosity in society generally which serves the greater good and notions such as freedom, equality and diversity. Regardless of numbers therefore it is perfectly acceptable and reasonable that a liberal state should refuse to give legal recognition to the 'value choice' of legally enforceable religious marriage on the grounds that the legal existence of religious marriage constitutes a harm.

Whilst I would reject the concept of a legally sanctioned religious marriage, I have no objection to the current secular law on marriage being reformed to include what may be thought of as religious ideas of morality by recognising polyandry or polygamy for example. Ideas such as monogamy and polygamy should not be thought of as religious, but as secular.

In England and Wales there is no official or clear divide between church and state when it comes to marriage for example. A marriage that takes place under the auspices of the Church of England or Church in Wales must be registered by the vicar, with no need to

involve the local register office (Jackson 2009, p 152). Compare this with America where all marriages in America are civil marriages because all marriages require a civil license. Some people have a religious ceremony, but this ceremony has no legal standing (Aguilar 2006, p 315).

'Divorce is a Problem'

One of the main arguments used by those in favour of religious marriages is that divorce is a problem and that religiosity will 'fix' this problem, commonly through making divorce more difficult to obtain (Stewart 1999 p 509). This is a spurious argument. It is not divorce per se that the problem, rather, it is the manner in which law makes people divorce which is the problem. Relationship breakdown is undeniably upsetting and potentially traumatic for the parties and children concerned. However, divorce and separation is de facto relationship re-arrangement. Families still continue to exist after divorce and separation, they are just constituted differently. Making divorce 'harder' will not result in a lowering of the distress caused by relationship breakdown, nor in a lowering the current divorce rate. In the United Kingdom, there has been an increased use of what has been termed 'collaborative law', a process promoted by Resolution. Collaborative law attempts to promote non-aggressive conciliatory settlements, without going to court. Any agreement reached still takes the form of a Consent Order. Such agreements are reached amicably and as such the parties are more likely to embrace the arrangements and less likely to return to court. There is much literature to suggest that it is not divorce per se which harms children, rather, it is the accompanying acrimony, bitterness, and fighting which can result in significant emotional and psychological harm to the child/children (Smart 2003, p 125). Indeed, what is problematic is the 'way in which it is handled by adults in their interactions with their children.' (Smart 2003, p 125). In cases where there is a high level of parental conflict, the risks of children suffering harm rise even higher (Buchanan et al 1996, p 258). As is convincingly pointed out by Smart, the focus of divorce is now less focused on rights and obligations arising from the status of marriage, and more focused upon the impact of divorce (or separation) on parenting and the future welfare of children (Smart 2004, p 402).

The 2008 annual survey of British Social Attitudes revealed that most people think divorce is a normal part of life; with two thirds saying that it can be 'a positive step towards a new life'. Even when children are involved, divorce is no longer seen as a disaster, with 78 per cent of the public saying the end of a marriage in itself does not harm children, although conflict between parents does.

Some Conclusions

I have sought to demonstrate that religiosity is not only unnecessary in civil marriage and divorce. Further, not only is religiosity in marriage and divorce at best undesirable it is potentially dangerous to particularly women and children. Given this, the state and the law should not endorse this approach and should instead, be proactive in resisting this. Instead of capitulating to, or worse, encouraging religiosity in these areas, law and policy makers should instead look to ways of strengthening the secularisation of marriage and divorce. If secular courts give effect to decisions made by religious courts or bodies then

there is the very real danger that there develops a parallel system of law. If religious individuals wish to undergo a religious marriage, covenanted or not, or get divorced according to the tenants of their religion, this should be a private matter for them and be done without legal sanction. Ekkelsia, a Christian think-tank, has recommended that 'legal marriages should be scrapped and replaced with a range of civil partnerships' (Cited in Jackson 2009, p 152). Ekkelsia argues for a separation of church and state in weddings as the present situation was confusing as it attempts to mix Christian and civil concepts of marriage onto a 'one size fits all' arrangement. Changing this they argue, would make a clearer distinction between religious marriage and those defined in law. The Director of the think-tank Jonathan Bartley stated that the current arrangements did not 'reflect Christian ideas of marriage, which are based on a covenant before God, rather than a legal contract and agreement between individuals' (cited in Jackson 2009, p 152) I would agree with Bartley's statement, but I would also add that religious organisations should not have any power to formulate the law surrounding marriage or divorce.

The law relating to the entering and leaving of marriage should be governed by secular considerations and the law should neither facilitate religiosity in marriage or divorce, nor should it promote legally enforceable religious marriages. Civil marriage should be a secular right without religious rites. Religious marriage should be a religious rite not a legal right.

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