This is a draft chapter/article. The final version will be available in *Research Handbook on Marriage, Cohabitation and the Law* edited by Rebecca Probert and Sharon Thompson, forthcoming 2024, Edward Elgar Publishing Ltd.

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Complex Relationships: Marriage and Relationship Status, Procreation and Criminal Law

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# INTRODUCTION

At first sight, it may seem outdated to speak of a relationship between the law on marital and relationship status and criminal law.[[1]](#footnote-1) Contemporary marital law no longer relies on criminal law to communicate the setting for legitimate sexual activity, as Witte has highlighted:

Historically, Western family law promoted the integration of marriage, sex, procreation, and child-rearing within an enduring and exclusive marital household; criminal law, in turn, prohibited sexual conduct that threatened or undermined this integrative domestic ideal. Today, family law embraces a far wider range of sexual activities and domestic relationships … This new family law regime has far less room and need for many traditional sex crimes.[[2]](#footnote-2)

Despite increased diversity of relationship recognition, including the extension of marriage to same-sex couples in jurisdictions including the UK, I argue that a relationship between family and criminal law persists. Family law may no longer depend upon criminal law as a regulatory mechanism. However, many aspects of criminal law continue to rely upon models and ideals of family life and relationships, even where these are no longer perceived as immutable within family law itself.

In particular, criminal law continues to draw upon models of family life to shape and limit criminal liability, particularly in relation to offences linked to sexual conduct. Writing on this prior to the introduction of the Sexual Offences Act 2003, Lacey suggested that ‘criminal law produces, both explicitly and implicitly, a norm of adult heterosexual activity, and of penetrative heterosexual intercourse as the paradigm of normal sexual behaviour.’[[3]](#footnote-3) This chapter uses English law as a case study to argue that, even after the 2003 Act, criminal law continues to frame heterosexual sex, with the procreative consequences it potentially entails, as the norm.

These issues are, of course, not unique to England and Wales. Issues concerning the relationship between sexual consent, marital status, procreation and the relationship between family and criminal law can also be seen in other jurisdictions. This chapter builds on the work of Murray, whose analysis of criminal and family law in the USA demonstrates the benefits of an analysis combining both perspectives.[[4]](#footnote-4) Murray points to sodomy offences and other uses of criminal law to highlight where ‘criminal law has reflected and furthered family law’s stated interest in protecting and promoting the family as a cornerstone of society’.[[5]](#footnote-5) This, Murray suggests, is demonstrative of the value communication seen in aspects of both criminal and family law:

On one level, criminalizing [sodomy] conduct reiterate[d] the understanding of marriage as a heterosexual undertaking; however, these laws also were intended to denounce the non-procreative character of same-sex sex. In this way, anti-sodomy laws were not solely about defining marriage as a heterosexual enterprise; they also were intended to clarify marriage’s procreative purpose.[[6]](#footnote-6)

Similarly, I argue that in England and Wales, criminal law continues to reproduce hierarchies of sex and sexuality. This has significance not only to the critical analysis of criminal law; but also offers an underexplored perspective on ongoing debates in family law, most notably those concerning the availability of same-sex marriage.

The position as it currently stands in England and Wales is particularly complex due to three factors: first, developments in English criminal law, particularly in cases such as *Dica,*[[7]](#footnote-7) *McNally,*[[8]](#footnote-8)and *Lawrance*;[[9]](#footnote-9) second, the position of the Church of England as the established church; and third, the restrictions on same-sex marriage set out in the Marriage (Same Sex) Couples Act 2013.

Restrictions on the extension of marriage to same-sex couples, particularly the prohibition on clergy in the Church of England solemnizing same-sex marriages,[[10]](#footnote-10) have been subject to critique both during and since the passage of the 2013 Act – including through The Campaign for Marriage Equality in the Church of England.[[11]](#footnote-11) Recently, further scrutiny of this position has been prompted by calls from among Anglican clergy to extend some provision to same-sex couples.[[12]](#footnote-12)

The current position of the Church of England is complex and precarious. Resolution I.10 of the 1998 Lambeth Conference condemned ‘homosexual practice’ and rejected the possibility of ‘the legitimising or blessing of same sex unions’.[[13]](#footnote-13) As recently as 2022 this position was reiterated,[[14]](#footnote-14) however, the February 2023 General Synod acknowledged the intention to replace Resolution I.10, although not without contention.[[15]](#footnote-15) The dual emphasis on marriage and sexual activity seen in Lambeth I.10 highlights the connections that can exist between judgments about the value of sexual activity and positions on same-sex marriage recognition which, I suggest, can be critically evaluated through comparison using the dual lenses of criminal and family law.

The heteronormative and procreative foundations of marital law have been extensively discussed elsewhere.[[16]](#footnote-16) I argue that, by examining how procreation influences both criminal and family law,[[17]](#footnote-17) further important reflection on future reform in England is possible.[[18]](#footnote-18) Beginning by first reviewing the role of procreation within religious ideals of marriage, before then addressing the deployment of procreation within *Dica* and *Lawrance*,[[19]](#footnote-19) this chapter explores the role of procreation, privacy and “common sense”attitudes towards sexual activity. It then discusses how these themes emerge in debates about same-sex marriage before concluding with the observation that the continued positioning of procreative sex as the norm in criminal law reinforces/is reinforced by hierarchies of marriage and relationship status.

# PROCREATION, MARRIAGE, AND SEXUAL HIERARCHIES

When determining the validity of a marriage between a cisgender man and a transgender woman, prior to the Civil Partnership Act 2004,[[20]](#footnote-20) the then House of Lords stated:

Marriage is an institution, or relationship, deeply embedded in the religious and social culture of this country. It is deeply embedded as a relationship between two persons of the opposite sex. *There was a time when the reproductive functions of male and female were regarded as the primary raison d'être of marriage*. The Church of England Book of Common Prayer of 1662 declared that the first cause for which matrimony was ordained was the ‘procreation of children’. For centuries this was proclaimed at innumerable marriage services. *For a long time now the emphasis has been different*. Variously expressed, there is much more emphasis now on the “mutual society, help and comfort that the one ought to have of the other”.[[21]](#footnote-21)

Bainham highlights that this acknowledgement – although doing little to distinguish the domination of ‘questions of sex and gender [… and being] really more concerned with *sexuality* and the capacity for its expression in sexual relationships’ – was built on established principles in English law.[[22]](#footnote-22) As Bainham discusses,[[23]](#footnote-23) neither insistence on condom use (thereby intending to eliminate the potential for conception),[[24]](#footnote-24) nor an agreement that the marriage will not involve sexual activity,[[25]](#footnote-25) will necessarily be a bar to a valid marriage.

Even in a religious context, the relationship between procreation and marriage is complex. Contemporary religious communities frequently recognise and celebrate marriages which will (or are likely to) be child-free – even where these communities consider procreation a core function of marriage.[[26]](#footnote-26) Whilst, in some communities, same-sex marriage and marriages involving ‘voluntary child free couples’ are distinguished from couples unlikely to have children,[[27]](#footnote-27) other denominations have explicitly moved away from a pro-procreative ideal of marriage. For instance, the Religious Society of Friends, in *Quaker Faith and Practice* acknowledge that:

At the beginning of the 21st century marriage has become a contract between individuals and is no longer seen as the way in which communities renew themselves through the creation of new life and new energy for life. In contrast we need to have faith that the synergy created within marriage will flow out into the world and that in God we have the power to make right relationships.[[28]](#footnote-28)

Thus, it can be suggested that whilst seeking marriage to have a publicly visible output, procreation is not intrinsic to the modern Quaker meaning of marriage. This is perhaps unsurprising given the British Quaker involvement in marriage equality campaigning.[[29]](#footnote-29) However, positions also appear dynamic among some other Christian denominations. Farley notes how the shifting attitudes of the Catholic Church saw procreation’s prominence wain over the 20th Century, with procreation becoming ‘relativised for heterosexual relationships … but… absolutized once again where homosexual relationships are an issue.’[[30]](#footnote-30) Similarly, Simpkins and O’Donovan suggest that the Church of England no longer places procreation centrally, instead positioning it as ‘not *necessary* for a valid marriage, … [but] honoured in the sense that marriage provides the only proper context for’ it.[[31]](#footnote-31)

In a legal context, although the High Court in *NB* v *MI* clearly stated that ‘sexual relations, and *a fortiori* procreation are not essential features of the marital contract’,[[32]](#footnote-32) these two concepts continue to shape aspects of our understanding of marriage.[[33]](#footnote-33) The potential for procreation appears central to the law’s approach to consummation, which has ‘been interpreted in a heterosexual manner’[[34]](#footnote-34) focused on sexual activity as a ‘generative act’,[[35]](#footnote-35) and thus on penile-vaginal penetration,[[36]](#footnote-36) with ejaculation.[[37]](#footnote-37) Given the persistence of non-consummation as a ground for marriage nullification,[[38]](#footnote-38) although legal marriage need not necessitate sexual relationships, consummation remains, in Maine’s words, ‘a symbolic recognition of the ideated nature of marriage, distinguishing it from non-sexual, platonic relationships’.[[39]](#footnote-39)

The persistence of penile-vaginal intercourse as the idealised form of sexual activity and, consequently, presumptions about the procreative potential of sexual activity can also be seen in analysis of sexual offences. Looking at two key cases – *Dica* and ­*Lawrance* – I suggest that English criminal law’s approach to the potential consequences of sexual activity contributes to a hierarchy in which heterosexual, procreative, sex dominates.

# PROSECUTING THE RECKLESS TRANSMISSION OF HIV

*Dica* was the first successful prosecution of reckless HIV transmission in England and Wales.[[40]](#footnote-40) The defendant, Dica, was initially convicted of grievous bodily harm, successfully appealed and was subsequently convicted at re-trial.[[41]](#footnote-41) Both complainants had been in long-term relationships with Dica,[[42]](#footnote-42) although the exact length of these relationships is unclear.[[43]](#footnote-43) The nature and duration of these relationships appears to have been a significant factor in the Court of Appeal’s analysis of the issue of the complaints’ awareness of HIV transmission risk:

Given the long-term nature of the relationships, if the appellant concealed the truth about his condition from then, and therefore kept them in ignorance of it, there was no reason for them to think that they were running any risk of infection, and they were not consenting to it.[[44]](#footnote-44)

Whilst Dica was not married to either complainant, marriage nevertheless played a major role in the court’s analysis of the extent to which a complainant could consent to injury – with hypothetical married couples used as exemplars of where consent defences may arise. English law enables individuals to consent to injuries which constitute lower levels of harm, but not to more serious injuries.[[45]](#footnote-45) In *Dica,* at first instance it was held that this principle effectively precented sexual partners from consenting to the risk of HIV transmission.[[46]](#footnote-46) The Court of Appeal, however, approached this issue by distinguishing between consent to the risk of HIV transmission and consent to transmission itself.[[47]](#footnote-47) As Ryan highlights, ‘[i]n neither *Dica* nor [the subsequent case of] *Konzani* was the nature of the risk taken or whether it was reasonable or not to take that risk discussed’.[[48]](#footnote-48) However, *why* sexual partners may be willing to take such risks was addressed by the Court of Appeal in *Dica* through two primary examples: the *Roman Catholic* partnersand the *young couple* partners.

In the first example, the non-usage of condoms and, consequently, consent to the risk of transmission by the couple was justified on religious grounds:

The parties are Roman Catholics. They are conscientiously unable to use artificial contraception. They both know of the risk that the healthy partner may become infected with HIV.[[49]](#footnote-49)

In the second example, the desire for a child was used not only as justification for the non-usage of condoms, but also as part of a broader justification of hypothetical serious risks to the wife’s health:

a young couple, desperate for a family, who are advised that if the wife were to become pregnant and give birth, her long-term health, indeed her life itself, would be at risk. Together the couple decide to run that risk, and she becomes pregnant. She may be advised that the foetus should be aborted, on the grounds of her health, yet, nevertheless, decide to bring her baby to term.[[50]](#footnote-50)

Given subsequent advancements in HIV treatment, both of these justifications arguably carry less weight today.[[51]](#footnote-51) Non-usage of condoms and conception can now be achieved without HIV transmission risk.[[52]](#footnote-52) However, that consent is capable of providing a defence at all in these circumstances it in itself worthy of note. As Davies points out, consent to the risk of injury of such perceived severity is not typically available, irrespective of the motivations behind that consent.[[53]](#footnote-53)

Procreation is central to these examples and to the archetypes they represent. In the case of the *young couple*, the procreative ideal is direct and explicit, the sexual activity is justified by the desire to conceive. In the case of the *Roman Catholic* couple, procreation is addressed indirectly – through reference to the inability of the couple to use contraception – but is no less powerful. Longstanding debate about the nature of condom use for HIV prevention exists among Catholic commentators, often centring on whether condoms act contrary to the ‘generative function of sex’.[[54]](#footnote-54)

Both these archetypes appear to involve different-sex couples,[[55]](#footnote-55) although their sexual orientation and gender identity is not explicitly discussed. Notably, both couples appear to be married. In the *Roman Catholic* couple example, this is implied through their conscientious religious beliefs; whereas, in the *young couple* example this is explicit through the use of the term ‘wife’.[[56]](#footnote-56) This explicit construction of the *young couple* as a young *married* couple is also significant because of the growing proportion of children born outside of marriage.[[57]](#footnote-57) Whilst their marital status is not essential to their procreative motivations, it is key to the idealised form of sexual activity they represent. The boundaries that these archetypes place on criminalisation arguably rely on the perceived normality of the heteronormative couples and the nuclear families that procreation would make them a part of.[[58]](#footnote-58)

# SEXUAL CONSENT AND “COMMON SENSE”

*Dica* and subsequent cases have emphasised that non-disclosure of HIV transmission risk does not negate sexual consent and does not amount to a sexual offence.[[59]](#footnote-59) Other deceptions, however, may give rise to sexual offences. In *F v DPP,* the High Court examined a situation where consent was negated due to a deception about the intent to withdraw prior to ejaculation. The Court concluded that whilst ejaculation and subsequent pregnancy were not central to the definition of rape,[[60]](#footnote-60) ‘evidence relating to “choice” and the “freedom” to make any particular choice must be approached in a broad commonsense way’ including in relation to ejaculation.[[61]](#footnote-61)

In *Lawrance,* the defendant was charged with rape, on the basis that he deceived the complainant into thinking he had undergone a vasectomy. Lawrance successfully appealed, on the basis that deceptions relating to fertility could not vitiate consent to sexual activity.[[62]](#footnote-62) *Lawrance* emphasises that a range of deceptions, such as ‘lies concerning marital status or being in a committed relationship; lies about political or religious views; lies about status, employment or wealth’ would not vitiate consent to sexual activity.[[63]](#footnote-63)

*Lawrance* reiterates that consent is not affected by subsequent pregnancy. The judgment distinguishes the case from *F* on the basis that in *Lawrance* ‘[t]he deception was one which related not to the physical performance of the sexual act but to risks or consequences associated with it’.[[64]](#footnote-64) In this section, I suggest that the idea of pregnancy as a normal consequence of sex is central to the Court of Appeal’s analysis - in a manner which sustains hierarchies of sexual activity, seen in criminal law, in which procreation is nevertheless privileged.

Comparatively little is said in *Lawrance* about the nature of the relationship between the parties. It is noted that they met and initially communicated via a dating website, where the defendant made statements indicating he had undergone a vasectomy.[[65]](#footnote-65) These facts are, in a sense, unsurprising, given the proportion of relationships which now begin through digital technologies.[[66]](#footnote-66) It is significant, however, that little was said about the context of the relationship, given how this context might interact with the concept of ‘common-sense’ - which arose during discussion of earlier case law*.*[[67]](#footnote-67)

In those cases, the courts examined other situations where allegations of deception and non-disclosure of information might potentially vitiate consent to sexual activity. In *Monica,* the complainant had unknowingly been in a (sexual) relationship with an undercover police office for a period of approximately seven months in 1997, not discovering the officer’s profession until 2011.[[68]](#footnote-68) In *McNally*, the defendant had digitally and orally penetrated the complainant on more than one occasion,[[69]](#footnote-69) following a period of three years where the defendant had presented as male.[[70]](#footnote-70) The Court of Appeal in *McNally* held that ‘the sexual nature of the acts [making up the charge] is, on *any common sense view*, different where the complainant is deliberately deceived by a defendant into believing the latter is a male’.[[71]](#footnote-71) This principle was also discussed in *Monica* where it was emphasised that whilst juries might rightly be expected to draw on ‘their common sense and experience of life’, this had to be within the limits of the legal (and, in the case of the jury, factual) questions being posited.[[72]](#footnote-72)

“Common sense”thinking may perpetuate broader myths and misapprehensions surrounding sexual offending.[[73]](#footnote-73) In *McNally,* itappears to be imbued with normative expectations of penile-vaginal intercourse, which serve to distinguish different forms of sexual activity.[[74]](#footnote-74) However, the concept is ambiguous, particularly when considering the impact of *Lawrance.*[[75]](#footnote-75) Murray and Beattie argue that the discussion of “common sense”in *McNally* has been misinterpreted as establishing a new legal principle, rather than acknowledging judicial and jury practices, and consequently cases such as *Lawrance* have over-relied on a purported '“common sense”’ test rather than the established concepts of freedom and capacity to choose set out in the 2003 Act.[[76]](#footnote-76)

Weait and Gerry similarly argue that the use of “common sense” in *Lawrance* does nothing to develop the analysis of factors which have the potential to vitiate consent and instead attempts to address such factors ‘on a case by case basis’.[[77]](#footnote-77) A case-by-case analysis is likely to depend heavily on the nature of the alleged deception and its significance to/in the context of the relationship between the parties. The significance of various deceptions is a problematic issue when considering the limits of criminalisation, given potential ‘deal breakers’ vary significantly between individuals and sexual partnerships.[[78]](#footnote-78) It is here that deployment of “common sense”rationales regarding sexual deal breakers are likely to play a critical role in the development of criminal law, although it remains unclear what the source of “common sense” reasoning is to be.[[79]](#footnote-79) On this point Laird suggests that the deployment of ‘common sense’ within *Lawrance* and *McNally* is predominantly a judicial conceptualisation of the concept, which may not reflect – or even harmonise with – the “common sense” interpretations of juries.[[80]](#footnote-80)

The deployment of “common sense” within these judgments therefore has the potential to disguise the impact of broader influences, including residual heteronormativity. Discussing *Konzani* and other early HIV transmission cases, including *Dica,* Ryan argues that ignoring the broader context of HIV transmission carries the risk that:

a very narrow, cold and unrealistic approach to criminal liability for HIV transmission will be adopted in which a *common sense* pragmatic view of what constitutes ‘proper’ conduct in sexual relations, that is largely at odds with the reality of sexual behaviour and sexual encounters, will prevail.[[81]](#footnote-81)

Indeed, Travis argues that *McNally* is demonstrative of a judicial conservativism regarding sexual activity:

The McNally decision plays into this conservatism, highlighting that while “appropriate” same-sex relationships are accepted (i.e. relationships that mirror the traditional reproductive family) other same-sex relationships will not be tolerated. As a result, a whole host of experimental, fleeting and tentative encounters are institutionally signified as dangerous. This construction of sex outside the confines of marriage (or marriage-like relationships) as unsafe is not particularly new but rather, depressingly persistent.[[82]](#footnote-82)

Whilst *Lawrance* moves away from the use of “common sense” exemplified in *McNally* and appears to reiterate a narrower interpretation closer to that seen in *Monica*,it does so whilst arguably retaining the conservativism Travis highlights. This is most notable in the court’s discussion of deception and deceit. The *Lawrance* judgment presumes the jury’s “common sense” was influenced by the judge’s summing up, which instructed them to consider whether the complainant would have consented had she known the truth,[[83]](#footnote-83) an approach it considered flawed.[[84]](#footnote-84)

Instead, the appellate court’s analysis centred on section 74 of the Sexual Offences Act 2003 as well as on the complainant’s decision not to impose ‘any physical restrictions’ and agreement ‘both to penetration of her vagina and to ejaculation without the protection of a condom’.[[85]](#footnote-85) This analysis, which continues to employ the physical performance/consequences distinction to penile-vaginal sex seen in *F,* suggests the binary of condom usage/non-usage continues to shape a “common sense” understanding of “safe” and “dangerous” sexual practices.[[86]](#footnote-86)

As with the conservativism highlighted by Travis, which upholds the model of the procreative family unit,[[87]](#footnote-87) the paradigms of safe barriered sexual activity and dangerous condomless sex reinforce a phallocentric view of sexual activity.[[88]](#footnote-88) As such, the “common sense” view of sexual activity in *Lawrance* speaks to a ‘coital hierarchy’,[[89]](#footnote-89) with penetration and ejaculation at its apex. These aspects of criminal law therefore echo the heteronormative and phallocentric idealisation of sexual activity.[[90]](#footnote-90)

# PRIVACY, CRIMINALISATION AND MARRIAGE

The “common sense”perspective seen in the prosecutions discussed above, and other similar perspectives on the nature of sexual and romantic relationships discussed here, demonstrate the idealisation of certain forms of relationship. In this section, I discuss how the privacy arguments which contributed to the decriminalisation of homosexuality are interconnected with the continued role of procreation, and the extent to which this sustains hierarchies surrounding sexuality and marriage.

## Privacy, Relationships and Criminal Law

Rubin argues that, within the multifaceted hierarchies sexuality is subjected to, the ‘notion of a single ideal sexuality characterizes most systems of thought about sex. For religion, the ideal is procreative marriage.’[[91]](#footnote-91) Although the law does not explicitly adopt this ideal, notable examples, including those discussed above, demonstrate idealised forms of relationships appearing within legal judgments. The positioning of some sexual activity outside Rubin’s ‘charmed circle’[[92]](#footnote-92) and the extent to which this activity is legally scrutinised and delegitimised has been used to discuss the regulation of public sexual activity,[[93]](#footnote-93) as well as the criminalisation of disease transmission.[[94]](#footnote-94) Murray, writing in the context of the US Supreme Court judgment in *Lawrence v Texas,* which deemed Texas anti-sodomy laws unconstitutional, argues that the Court went ‘to great lengths to paint the plaintiffs… with the brush of marital domesticity.’[[95]](#footnote-95)

Decriminalisation of homosexual sex in England can potentially be distinguished from Murray’s analysis, in that English reforms employed the concept of privacy rather than domesticity. The relationship between privacy and criminal law, particularly the extent to which privacy may mask domestic violence, has been widely discussed.[[96]](#footnote-96) The reforms prompted by the 1957 Wolfenden Report,[[97]](#footnote-97) incorporated into the Sexual Offences Act 1967, only decriminalised consensual sexual activity taking place in private.[[98]](#footnote-98) Gleeson suggests that the deployment of privacy in this context has often been framed ‘in terms of social utilitarianism, “getting the balance right” between individual rights and public offence and so on.’[[99]](#footnote-99)

Arguably, embedded within this privacy are domestic and procreative ideals, which imprint onto the law. As Waites suggests, despite the Wolfenden Report’s emphasis on privacy, the privacy of subsequent reforms was distinct from that granted to heterosexuals, where it ‘was seen to contribute to the flourishing of the family, society and good citizenship.’[[100]](#footnote-100) Privacy in the context of homosexual activity was ‘markedly spatialised’,[[101]](#footnote-101) in a similar manner to the US where, as Raj emphasises, ‘a spatialisation of privacy that showcased romanticised intimacy rather than making space for disturbing acts of sodomy’ was employed.[[102]](#footnote-102)

Raj goes on to highlight that the conceptualisation of privacy in the US in the case of *Lawrence* and in the UK in cases such as *Brown* enable the management and containment of attitudes of disgust.[[103]](#footnote-103) The judgments in *Lawrance* and *Dica* are further notable examples of the tailored deployment of privacy in legal reasoning, which closely associates privacy with procreative sexual activity. The privacy afforded to the hypothetical different-sex couples in *Dica* relies on the procreative idea to transform what would otherwise be a criminally culpable act into a romanticised commitment to the procreative ideal. This reasoning implicitly, if not explicitly, seeks to avoid engaging with surrounding motivations for sexual activity – including sexual gratification – in order to avoid undermining the reasoning of *Brown*.[[104]](#footnote-104)

In practice, it has been suggested that the nature of the parties’ relationship has a direct impact on the limits of HIV transmission criminalisation. Even if one rejects arguments such as those by Spencer, that criminalisation may be more appropriate where the relationship has a degree of permanency (and therefore, Spencer argues, trust),[[105]](#footnote-105) Weait highlights that juries are likely to interpret non-disclosure through the lens of a relationship in which there is an ‘assumption of fidelity and honesty’.[[106]](#footnote-106) Consequently, this exposure of a private relationship to public scrutiny means that appeals to the concept of personal autonomy, like those seen in *Dica* and, subsequently, *Konzani,* only provide a defence where the relationship confirms with normative standards:

[the] claim to the right to respect for private life, whether that be used to frame a defence to a criminal charge, or appeal against conviction, on facts similar to those set out [in cases such as *Dica*] is likely to fail unless the court is satisfied that the conduct, and its context, is in some sense socially and sexually conformist.[[107]](#footnote-107)

Equally, in *Lawrance*, arguably the normative nature of the relationship contributed to the decision not to categorise the deception by the defendant as capable of undermining consent. Although *Lawrance* and *Dica* address consent in slightly different contexts – the former concerning consent to sexual activity and the latter consent to harm – this is itself notable, in that the potential consequences of Lawrance’s deception, namely the complainant’s pregnancy, are not constructed as a harm with which the criminal law has an interest.

Weait and Gerry suggest that the decision not to interpret the risk of pregnancy as a potential harm in *Lawrance* likely rests on policy grounds.[[108]](#footnote-108) This appears correct. But, I suggest, it is also indicative of a broader approach to procreation within criminal case law. On the one hand, the perceived need to facilitate procreation has contributed to the availability of a defence, in *Dica,* particularly if associated with (conscientiously religious) marriage. On the other hand, procreation is not given prioritisation over other motivations for sexual activity in *Lawrance*, to the extent that the procreative nature of certain acts is distinguished from their nature or purpose and has limited impact in the context of sections 74 and 76 of the Sexual Offences Act 2003.

One might welcome the acceptance that motivations for sexual activity are broader than the procreative acts prioritised in *Dica* and the general recognition that ‘deceit and deception are very slippery concepts’ in *Lawrance*.[[109]](#footnote-109) Yet, *Lawrance* seemingly accepts the rationale put forward in *McNally* that complainant’s sexual preferences are relevant to assessing consent; whilst also finding that complainant’s decisions regarding non-barrier-based contraception are not. Travis argues that the judgment in *McNally* ‘shows us that non-heterosexual encounters taking place outside of the confines of marriage are still subject to a heightened level of institutional scrutiny’.[[110]](#footnote-110) What the judgment in *Lawrance* highlights is that, even within heterosexual encounters, the naturalness or normalcy of behaviour appears to determine the extent to which it is scrutinised.

## Procreation, Privacy and Marital Law

So far in this section, I have highlighted how the criminal cases discussed in this chapter demonstrate implicit and explicit hierarchies surrounding procreative sexual activity. In this part, I will argue that critical appraisal of the procreative ideal in criminal law should be used as part of a broader critique of the association of procreation and marriage.

As highlighted above, contemporary legal and religious perspectives on marriage demonstrate a shift away from procreation as an explicit central aim. The introduction of civil partnerships and, later, same-sex marriages might be seen as one extension of this trend, even if critiques of same-sex marriage as inhibiting more ‘radical approaches to sex and relationships’[[111]](#footnote-111) are accepted. However, as Thatcher observes:

sexual moralities, at least for straight people, are not so easily separated from the having of children and connections are made between pure relationships and their unintended consequences (abortions and babies). Children *happen*.[[112]](#footnote-112)

Moreover, that this does *happen*, or has the potential to happen, in different-sex relationships but not in same-sex relationships (in the absence of medical intervention) is not insignificant. As Harding observes, during debates over what became the Marriage (Same-Sex Couples) Act 2013 in the House of Lords, children and procreation were mentioned 152 and 29 times respectively.[[113]](#footnote-113) This is all the more notable given children were only mentioned 35 times, and procreation not mentioned at all, during similar debates on the Civil Partnership Act.[[114]](#footnote-114)

Similar points were raised by Edward Leigh MP during debate on the Marriage (Same Sex Couples) Act in the House of Commons:

I realise that not every married couple is able to have the gift of children, and that some married couples may not want it, yet that does not change the fact that the concept of marriage has always been bestowed with a vision of procreation.

Every marriage has procreating potential in that marriage brings together biologically the two elements needed to generate a child. The very reason that marriage is underpinned with laws and customs is that children often result from it. They need protecting from the tendency of adults to want to break their ties and cast off their responsibilities.[[115]](#footnote-115)

This argument appears similar to that used against same-sex marriage in the US,[[116]](#footnote-116) in that it positions marriage as a catalyst which takes the risk of accidental pregnancy and transforms it into ‘“responsible procreation”’.[[117]](#footnote-117) Whilst such arguments did not prevent the 2013 Act, they are significant when evaluating the position of the Church of England. In the same debate, Stephen Timms MP stated:

The 1662 version of the Church of England service, which has been in use for the past 350 years, sets out three reasons for marriage. The first is that it was

“ordained for the procreation of children, to be brought up in the fear and nurture of the Lord”.

The central problem with the Bill is that it introduces a definition of marriage that includes the second and third reasons but drops that first one. The result is something that is a good deal weaker than the original.[[118]](#footnote-118)

Whilst Timms is correct that the 1662 wording continues to be used in the Church of England, this choice of wording is not the only option in modern times.[[119]](#footnote-119) Moreover, as noted above, *Bellinger* rejected the proposition that this remained a primary rationale for marriage.[[120]](#footnote-120) Although the other options also incorporate references to children, these are notable for not placing children as the first point of emphasis in the couple’s vows.[[121]](#footnote-121) The change in emphasis offers a potential vision of marriage no longer dominated by children and procreation.[[122]](#footnote-122)

Of course, children are an important factor in some decisions to have sex and to marry. But recognising this is not the same as embracing the traditionalist view, described by Herring, that ‘there is something special about heterosexual intercourse that marks marriage as separate from all other relationships and provides a justification for its special status.’[[123]](#footnote-123) Broadening our collective understanding of the sex-marriage connection challenges “coital hierarchies” seen in both criminal and family law.[[124]](#footnote-124) As Maine highlights, one example of this may be the introduction of no-fault divorce in England and Wales; where, in these reforms, the removal of any reference to adultery – which English law limited to heterosexual sexual activity – could prompt legal acknowledgement of non-monogamous marital relationships.[[125]](#footnote-125) To move beyond the traditional hierarchies of sex and sexuality means embracing the idea that there are multiple contradictory rationales for sex and marriage.

# CONCLUSIONS

Marital and criminal law each have their own particular scope, eccentricities and lineage. However, using one to interpret and analyse the other has its advantages and insights. Looking at the procreative-marital ideal in *Dica* and the developments since, including *Lawrance,* demonstrates how heteronormative sexual activities may still be framed as normal. This speaks to a residual sexual hierarchy where procreation within marriage may no longer hold a monopoly but is still given value by law.

This offers a new perspective with which to consider ongoing developments in the field of marital law. Despite a shift in the role of procreation in denominations such as the Quakers - who acknowledge that the procreation of a new generation is no longer central to marriage - and the Church of England – whose wedding vows no longer necessarily place children pre-eminently – the hierarchies these criminal cases offer enable a more critical reflection on procreation and same-sex relationship recognition.

As Alsgaard discusses in a US context, prior to same-sex marriage bans being deemed unconstitutional, ‘there are still important areas of law and society where marriage and procreation are fundamentally linked’.[[126]](#footnote-126) The connection between marriage, procreation and sex seen in English criminal law frames procreative sex as natural and therefore subject to less scrutiny. This contributes to a hierarchy of both sexual acts and sexual relationships.[[127]](#footnote-127)

Although the issue of same-sex marriage within the Church of England is – in part – a matter of theological debate; the Church retains ‘certain privileges and responsibilities at a local level’.[[128]](#footnote-128) This privileged position means that the availability of marriage within the Church is also a matter of public debate. Even were it not, such debate is already ongoing within the Church[[129]](#footnote-129) and Parliament.[[130]](#footnote-130) The Church’s move away from the Lambeth I.10 position on relationship recognition has seen significant internal debate,[[131]](#footnote-131) which appears – in part – to be a result of a continued scrutiny of same-sex sexual activity. Similarly, procreative heterosexual sex continues to hold a normative position in criminal law, which appears to subject certain forms of sexual activity to greater or lesser legal scrutiny.

The relationship between criminal law, sexual morality, and marital law is complicated by the ideal forms of relationship which continue to shape liability, personal decision making, and political debate on relationship recognition. Recognising and valuing a greater diversity of relationships, sex and sexuality in criminal, as well as family, law might weaken the link between heteronormative relationship ideals and the law more broadly.[[132]](#footnote-132)

**Acknowledgements:** I am grateful to the Editors, colleagues at LSBU, Matthew Weait, and Alexander Maine for discussion and comments on drafts of this Chapter. Any mistakes remain my own.

1. That is except in the context of the complexities of offences related to marriage, for instance, forced marriages: on which, see, Kaye Quek, ‘A Civil Rather Than Criminal Offence? Forced Marriage, Harm and the Politics of Multiculturalism in the UK’ (2013) 15 British Journal of Politics and International Relations 626. [↑](#footnote-ref-1)
2. John Witte, ‘Church, State, and Sex Crimes: What Place for Traditional Sexual Morality in Modern Liberal Societies?’ (2019) 68 Emory LJ 837, 842. [↑](#footnote-ref-2)
3. Nicola Lacey, *Unspeakable Subjects : Feminist Essays in Legal and Social Theory* (Hart Publishing 1998) 102–103. [↑](#footnote-ref-3)
4. Melissa Murray, ‘Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life’ (2009) 94 Iowa L Rev 1253; Melissa Murray, ‘The Space between: The Cooperative Regulation of Criminal Law and Family Law’ (2010) 44 Fam LQ 227. [↑](#footnote-ref-4)
5. Murray, ‘Strange Bedfellows’ (n 4) 1270. [↑](#footnote-ref-5)
6. ibid 1270. [↑](#footnote-ref-6)
7. *R v Dica* [2004] EWCA Crim 1103. [↑](#footnote-ref-7)
8. *R v McNally* [2013] EWCA Crim 1051. [↑](#footnote-ref-8)
9. *R v Jason Lawrance* [2020] EWCA Crim 971. [↑](#footnote-ref-9)
10. Marriage (Same Sex Couples) Act 2013 ss1(3)-(5). Similar provisions apply to clergy in the disestablished Church in Wales. [↑](#footnote-ref-10)
11. On which, see, ‘About the Campaign – The Campaign For Equal Marriage in the Church of England’ <https://cofe-equal-marriage.org.uk/about/> accessed 14 August 2023. [↑](#footnote-ref-11)
12. ‘We Will Conduct Same-Sex Marriages Say More than 1000 Clergy’ (*Church Times*, 24 October 2022) <https://www.churchtimes.co.uk/articles/2022/28-october/news/uk/we-will-conduct-same-sex-marriages-say-more-than-1000-clergy> accessed 14 August 2023. [↑](#footnote-ref-12)
13. ‘The Lambeth Conference Resolution Archive from 1998’ (Anglican Communion Office, 2005) I.10(d) and I.10(e) <https://www.anglicancommunion.org/media/76650/1998.pdf> accessed 14 August 2023. [↑](#footnote-ref-13)
14. ‘Lambeth 2022: Resolution 1.10 Is Still Valid, Archbishop of Canterbury Tells Bishops’ (*Church Times*, 2 August 2022) <https://www.churchtimes.co.uk/articles/2022/5-august/news/world/lambeth-2022-resolution-110-is-still-valid-archbishop-of-canterbury-tells-bishops> accessed 14 August 2023. [↑](#footnote-ref-14)
15. See, generally, General Synod, ‘Report of Proceedings 2023’ <https://www.churchofengland.org/sites/default/files/2023-06/updated-report-of-proceedings-feb-2023.pdf> accessed 14 August 2023. [↑](#footnote-ref-15)
16. Sarah Beresford, ‘We’re All Same (Sex) Now?: Lesbian (Same) Sex; Consummation; Adultery and Marriage’ (2016) 12 Journal of GLBT Family Studies 468; Fergus Ryan, ‘Repackaged Goods?: Interrogating the Heteronormative Underpinnings of Marriage’ in Frances Hamilton and Guido Noto La Diega (eds), *Same-Sex Relationships, Law and Social Change* (Routledge 2020); Alexander Maine, ‘Queering Marriage: The Homoradical and Anti-Normativity’ (2022) 11 Laws. [↑](#footnote-ref-16)
17. For further discussion on criminal law and religion-driven sexual ethics, in the context of abortion regulation, see, Ngaire Naffine, *Criminal Law and the Man Problem* (Bloomsbury Publishing 2019) 79–80. [↑](#footnote-ref-17)
18. As well as, potentially, other jurisdictions, such as the US, which has seen recent developments including the Respect for Marriage Act of 2022, Pub. L. No 117-228. [↑](#footnote-ref-18)
19. *Dica* (n 7); *Lawrance* (n 9). [↑](#footnote-ref-19)
20. Today, such a case would see a markedly different approach: see, generally, *P v P (Transgender Applicant for Declaration of Valid Marriage)* [2019] EWHC 05 (Fam). [↑](#footnote-ref-20)
21. *Bellinger v Bellinger* [2003] UKHL 21 (HL) [46] (emphasis added). [↑](#footnote-ref-21)
22. Andrew Bainham, ‘Does Sex Matter?’ (2002) 61 CLJ 1, 46 (emphasis added). [↑](#footnote-ref-22)
23. Ibid. [↑](#footnote-ref-23)
24. Ibid, citing *Baxter v Baxter* [1948] AC 4 (HL). [↑](#footnote-ref-24)
25. Ibid, citing *Morgan v Morgan (otherwise Ransom)* [1959] P 92 (PDA Div). Note ‘extraordinary circumstances’ led the court to reject Mr Morgan’s petition for nullity on the basis of his own impotence. [↑](#footnote-ref-25)
26. Jacqueline Humphreys, ‘The Civil Partnership Act 2004, Same-Sex Marriage and the Church of England’ (2006) 8 Ecc LJ 289, 289; Cristina Richie, ‘Disrupting the Meaning of Marriage?’ (2013) 19 Theology & Sexuality 123, 139. [↑](#footnote-ref-26)
27. Richie (n 26) 139. [↑](#footnote-ref-27)
28. ‘Quaker Marriage Procedure | Quaker Faith & Practice’ para 16.02 <https://qfp.quaker.org.uk/chapter/16/> accessed 14 August 2023. [↑](#footnote-ref-28)
29. David Blamires, *Pushing at the Frontiers of Change: A Memoir of Quaker Involvement with Homosexuality* (Quaker Books 2012) ch 7. [↑](#footnote-ref-29)
30. Margaret A Farley, *Just Love: A Framework for Christian Sexual Ethics* (Reprinted, Continuum 2008) 279. [↑](#footnote-ref-30)
31. Matthew Simpkins and Oliver O’Donovan, ‘The Church of England’s Exclusion of Same-Sex Couples from Marriage: Some Problems with Oliver O’Donovan’s Influence and Arguments’ (2016) 119 Theology 172, 173. [↑](#footnote-ref-31)
32. *NB v MI (Capacity to Contract Marriage)* [2021] EWHC 224 (Fam) [24]. [↑](#footnote-ref-32)
33. Ruth Lamont, ‘Family Life and the Law’ in Ruth Lamont (ed), *Family Law* (1st edn, OUP 2018) 24. [↑](#footnote-ref-33)
34. Andrew Hayward, ‘Relations between Adults: Marriage, Civil Partnerships, and Cohabitation’ in Lamont (n 33) 39. [↑](#footnote-ref-34)
35. Katherine O’Donovan, *Family Law Matters* (Pluto Press 1993) 47. [↑](#footnote-ref-35)
36. Gillian Black, ‘Adult Relationships and the Ongoing Significance of Sexual Intimacy’ in Jens M Scherpe and Stephen Gilmore (eds), *Family Matters: Essays in Honor of John Eekelaar* (Intersentia 2022) 314. [↑](#footnote-ref-36)
37. See discussion of *Grimes* by Maine in Ch x of this volume. [↑](#footnote-ref-37)
38. Jonathan Herring, ‘Why Marriage Needs to Be Less Sexy’ in Joanna Miles, Perveez Mody and Rebecca Probert (eds), *Marriage Rites and Rights* (Hart Publishing 2015) 276; Alexander Maine, ‘Queer(y)Ing Consummation: An Empirical Reflection on the Marriage (Same Sex Couples) Act 2013 and the Role of Consummation’ (2021) 33 CFLQ 143, 145. [↑](#footnote-ref-38)
39. Maine (n 38) 145. [↑](#footnote-ref-39)
40. In respect of Scotland, see *HMA v Kelly* [2001] Unreported. [↑](#footnote-ref-40)
41. *Dica* (n 7); Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge-Cavendish 2007) 28. [↑](#footnote-ref-41)
42. Vanessa E Munro, ‘On Responsible Relationships and Irresponsible Sex - Criminalising the Reckless Transmission of HIV R v Dica and R v Konzani’ (2007) 19 CFLQ 112, 113. [↑](#footnote-ref-42)
43. *Dica* (n 7) [7]-[9]. [↑](#footnote-ref-43)
44. ibid [39]. [↑](#footnote-ref-44)
45. *R v Brown* (1994) 1 AC 212. [↑](#footnote-ref-45)
46. Munro (n 42) 144. [↑](#footnote-ref-46)
47. *Dica* (n 7) [47]; ibid 144. [↑](#footnote-ref-47)
48. Samantha Ryan, ‘Risk-Taking, Recklessness and HIV Transmission: Accommodating the Reality of Sexual Transmission of HIV within a Justifiable Approach to Criminal Liability’ (2007) 28 Liverpool LR 215. [↑](#footnote-ref-48)
49. *Dica* (n 7) [49]. [↑](#footnote-ref-49)
50. ibid [49]. [↑](#footnote-ref-50)
51. I note this, briefly, in Cameron Giles, ‘Deception and Disclosure: A Socio-Legal Analysis of HIV Transmission Offences and Mobile Dating Applications’ (PhD Thesis, Northumbria University 2021) 56–61. [↑](#footnote-ref-51)
52. See, on HIV treatment as prevention and law, generally, Bridget Haire and John Kaldor, ‘HIV Transmission Law in the Age of Treatment-as-Prevention’ (2015) 41 J Med Ethics 982; Chris Ashford, Max Morris and Alex Powell, ‘Bareback Sex in the Age of Preventative Medication: Rethinking the “Harms” of HIV Transmission’ (2020) 84 Jo Crim Law 596. I address this point in Giles (n 49) 58–61. [↑](#footnote-ref-52)
53. Mitchell Davies, ‘R v Dica: Lessons in Practising Unsafe Sex’ (2004) 68 Jo Crim Law 498, 501. Although it may be argued that HIV transmission no longer constitutes the level of harm identified at the time of Dica, on which see Ashford, Morris and Powell (n 52). [↑](#footnote-ref-53)
54. Luc Bovens, ‘Can the Catholic Church Agree to Condom Use by HIV-Discordant Couples?’ (2009) 35 J Med Ethics 743, 743; see, also, Luke Gormally, ‘Marriage and the Prophylactic Use of Condoms’ (2005) 5 National Catholic Bioethics Quarterly 735. [↑](#footnote-ref-54)
55. Giles (n 51) 49. [↑](#footnote-ref-55)
56. *Dica* (n 7) [49]. [↑](#footnote-ref-56)
57. Data from between 1975 and 1997 in Britain suggests that the proportion of children born outside of marriage more than tripled during this period: Kathleen Kiernan, ‘The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe’ (2001) 15 IJLPF 1, 14. [↑](#footnote-ref-57)
58. On the ‘naturalness’ of the nuclear family and heterosexual sex, see, Martha Albertson Fineman, ‘The Sexual Family’ in Martha Albertson Fineman, Jack E Jackson and Adam P Romero (eds), *Feminist and queer legal theory: intimate encounters, uncomfortable conversations* (Ashgate 2009) in particular at 50. [↑](#footnote-ref-58)
59. *Dica* (n 7); *R v Konzani (Feston)* [2005] EWCA Crim 706; *R v EB* [2006] EWCA Crim 2945; *Assange v Swedish Prosecution Authority* [2011] EWHC 2849. [↑](#footnote-ref-59)
60. *R (on the Application of F) v DPP* [2013] EWHC 945 (Admin) (*F v DPP*) [21]. [↑](#footnote-ref-60)
61. Ibid [26]. [↑](#footnote-ref-61)
62. Karl Laird, ‘Sexual Consent: R. v Lawrance (Jason) Court of Appeal (Criminal Division): Lord Burnett CJ , Cutts and Tipples JJ : 23 July 2020 ; [2020] EWCA Crim 971’ [2021] Crim LR 610. [↑](#footnote-ref-62)
63. *Lawrance* (n 9) [34]. [↑](#footnote-ref-63)
64. Ibid [37]. [↑](#footnote-ref-64)
65. Ibid [3]-[5]. [↑](#footnote-ref-65)
66. Joanne Lloyd, Alison Attrill-Smith and Chris Fullwood, ‘Online Romantic Relationships’ in Alison Attrill-Smith and others (eds), *The Oxford Handbook of Cyberpsychology* (OUP 2019). [↑](#footnote-ref-66)
67. *Lawrance* (n 9) particularly at [33]: discussing *R (on the application of Monica) v DPP* [2018] EWHC 3509 (Divisional Court) (*Monica)* and *McNally* (n 8). [↑](#footnote-ref-67)
68. *Monica* (n 67) [2]. [↑](#footnote-ref-68)
69. An additional charge relating to penetration with a dildo was not perused. [↑](#footnote-ref-69)
70. *McNally* (n 8); Alex Sharpe, ‘Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent’ [2014] Crim LR 207. [↑](#footnote-ref-70)
71. *McNally* (n 8) [26] (emphasis added). [↑](#footnote-ref-71)
72. *Monica* (n 67) [80]. [↑](#footnote-ref-72)
73. On which, see, for example, Clare McGlynn, ‘Rape Trials and Sexual History Evidence’ (2017) 81 Jo Crim Law 367. [↑](#footnote-ref-73)
74. For discussion of penile-vaginal intercourse and a ‘coital hierarchy’, see, Joseph A Diorio, ‘Changing Discourse, Learning Sex, and Non-Coital Heterosexuality’ (2016) 20 Sexuality & Culture 841, in particular at 853. [↑](#footnote-ref-74)
75. Cameron Giles, ‘From Clarence to Lawrance: A Criminal Law Perspective on Marriage and Relationship Status and the Law on “Deceptive Sex”’ (A Sacred Covenant? Historical, Legal and Cultural Perspectives on the Development of Marital Law Conference, Online, May 2021) <https://www.youtube.com/watch?v=H4oC-32SNt4> accessed 14 August 2023. [↑](#footnote-ref-75)
76. Kyle L Murray and Tata Beattie, ‘Conditional Consent and Sexual Offences: Revisiting the Sexual Offences Act 2003 after Lawrance’ [2021] Crim LR 556, 567–568. [↑](#footnote-ref-76)
77. Matthew Weait and Felicity Gerry, ‘Virus Transmission, Deception and the Criminal Law’ (Libertas Chambers, 21 June 2021) <https://www.libertaschambers.com/media-hub/virus-transmission-deception-and-the-criminal-law/> accessed 14 August 2023. [↑](#footnote-ref-77)
78. See, generally, Matthew Gibson, ‘Deceptive Sexual Relations: A Theory of Criminal Liability’ (2020) 40 OJLS 82. [↑](#footnote-ref-78)
79. On common sense and the development of the law, see, Mariana Valverde, *Law’s Dream of a Common Knowledge* (Princeton University Press 2003) ch 7. [↑](#footnote-ref-79)
80. Laird (n 62) 612–613. [↑](#footnote-ref-80)
81. Ryan (n 48) 222–223 (emphasis added). [↑](#footnote-ref-81)
82. Mitchell Travis, ‘The Vulnerability of Heterosexuality: Consent, Gender Deception and Embodiment’ (2019) 28 S&LS 303, 320. [↑](#footnote-ref-82)
83. *Lawrance* (n 9) [17]. [↑](#footnote-ref-83)
84. Ibid [33]-[36]; For further discussion of the implications of the approach to the nature of sexual acts taken in Lawrance, see, Isabella Glendinning, ‘Should Mistaken Consent Still Be Consent? In Defence of an Incremental Understanding of Consent in the Sexual Offences Act 2003’ (2021) 85 Jo Crim Law 223 in particular at 227-228. [↑](#footnote-ref-84)
85. *Lawrance* (n 9) [37]. [↑](#footnote-ref-85)
86. For further discussion of safer sex, see, Haire and Kaldor (n 52); Ashford, Morris and Powell (n 52). [↑](#footnote-ref-86)
87. Travis (n 82) 320. [↑](#footnote-ref-87)
88. I’m grateful to Matthew Weait, whose comments on a draft helped me develop this point. [↑](#footnote-ref-88)
89. For discussion of a ‘coital hierarchy’ and debate on same-sex marriage, see Diorio (n 74) in particular at 853. [↑](#footnote-ref-89)
90. Black (n 36) 314–319; Maine (n 38) 145. [↑](#footnote-ref-90)
91. Gayle S Rubin, ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’ in Richard Parker and Peter Aggleton (eds), *Culture, Society and Sexuality: A Reader* (2nd edn, Routledge 2007) 162. [↑](#footnote-ref-91)
92. ibid 160. [↑](#footnote-ref-92)
93. Chris Ashford, ‘(Homo)Normative Legal Discourse’ [2011] Durham Law Rev 77. [↑](#footnote-ref-93)
94. Senthorun Sunil Raj, *Feeling Queer Jurisprudence: Injury, Intimacy, Identity* (1st edn, Routledge 2020) ch 2. [↑](#footnote-ref-94)
95. Murray, ‘The Space between’ (n 4) 246. [↑](#footnote-ref-95)
96. Sharon Cowan and Jacqueline Hodgson, ‘Violence in a Family Context: The Criminal Law’s Response to Domestic Violence’ in Rebecca Probert (ed), *Family Life and the Law: Under One Room* (Ashgate 2007) 47–48. [↑](#footnote-ref-96)
97. Home Department; Scottish Home Department, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 354 1957). [↑](#footnote-ref-97)
98. Ashford (n 93); Jeffrey Weeks, *Making Sexual History* (Polity Press 2000) ch 8, in particular at 172; Kate Gleeson, ‘Freudian Slips and Coteries of Vice: The Sexual Offences Act of 1967’ (2008) 27 Parliamentary History 393. [↑](#footnote-ref-98)
99. Gleeson (n 98) 405. [↑](#footnote-ref-99)
100. Matthew Waites, *The Age of Consent: Young People, Sexuality, and Citizenship* (Palgrave Macmillan 2005) 111–112. [↑](#footnote-ref-100)
101. Lacey (n 3) 104. [↑](#footnote-ref-101)
102. Raj (n 94) 28. [↑](#footnote-ref-102)
103. ibid 45. [↑](#footnote-ref-103)
104. Munro (n 42) 114; Weait (n 41) 172–174. [↑](#footnote-ref-104)
105. JR Spencer, ‘Liability for Reckless Infection - Part 1’ (2004) 154 NLJ 384; JR Spencer, ‘Liability for Reckless Infection - Part 2’ (2004) 154 NLJ 448. [↑](#footnote-ref-105)
106. Matthew Weait, ‘Harm, Consent and the Limits of Privacy’ (2005) 13 Fem LS 97, 116. [↑](#footnote-ref-106)
107. ibid 118. [↑](#footnote-ref-107)
108. Weait and Gerry (n 77). [↑](#footnote-ref-108)
109. *Lawrance* (n 9) [40]. [↑](#footnote-ref-109)
110. Travis (n 82) 319–320. [↑](#footnote-ref-110)
111. Brian Heaphy, Carol Smart and Anna Einarsdottir, *Same Sex Marriages: New Generations, New Relationships* (Palgrave Macmillan 2013) 132. [↑](#footnote-ref-111)
112. Adrian Thatcher, *Marriage after Modernity: Christian Marriage in Postmodern Times* (Sheffield Acad Press 1999) 53 (emphasis in original). [↑](#footnote-ref-112)
113. Rosie Harding, ‘Playing “House of Lords Bingo”: A Critical Discourse Analysis of Hansard Debates on Civil Partnership and Same Sex Marriage’ in Miles, Mody and Probert (n 38) 236. [↑](#footnote-ref-113)
114. Ibid. [↑](#footnote-ref-114)
115. HC Deb 5 February 2013, vol 558, col 161. [↑](#footnote-ref-115)
116. For discussion of privacy, procreation, and same-sex relationship recognition in the US, see, Vivian Hamilton, ‘Mistaking Marriage for Social Policy’ (2004) 11 Va J Soc Pol'y & L 307 in particular at 321-333, 346-349. [↑](#footnote-ref-116)
117. Hannah Alsgaardt, ‘Recent Developments Decoupling Marriage & Procreation’: (2012) 27 Berkeley Journal of Gender, Law & Justice 307, 332–334. [↑](#footnote-ref-117)
118. HC Deb 5 February 2013, Vol 558, Col 172 [↑](#footnote-ref-118)
119. Sarah Farrimond, ‘Church of England Weddings and Ritual Symbolism’ in Miles, Mody and Probert (n 38) 216–218. [↑](#footnote-ref-119)
120. See, Page 4, above. [↑](#footnote-ref-120)
121. Farrimond (n 119). [↑](#footnote-ref-121)
122. Cf the view of Thatcher (n 112) 229 that children remain ‘central, and not secondary, to marriage’ in a Christian context. [↑](#footnote-ref-122)
123. Herring (n 38) 278. [↑](#footnote-ref-123)
124. See Diorio (n 74). [↑](#footnote-ref-124)
125. Maine (n 16). [↑](#footnote-ref-125)
126. Alsgaardt (n 117) 337–338. [↑](#footnote-ref-126)
127. Black (n 36) 319; Maine (n 16) 10. [↑](#footnote-ref-127)
128. Farrimond (n 119) 213. [↑](#footnote-ref-128)
129. See, General Synod (n 15); and, also, Francis Martin, Tim Wyatt and Hattie Williams, ‘Bishops’ Proposals to Bless Same-Sex Couples Carried by Synod, despite Sustained Opposition’ (*Church Times*, 9 February 2023) <https://www.churchtimes.co.uk/articles/2023/10-february/news/uk/bishops-proposals-to-bless-same-sex-couples-carried-by-synod-despite-sustained-opposition> accessed 14 August 2023. [↑](#footnote-ref-129)
130. See, Same Sex Marriage (Church of England) HC Bill (2022-23) 274; HC Deb 21 March 2023, Vol 730, Col 18. [↑](#footnote-ref-130)
131. Muvija M, ‘Church of England to Draft Pastoral Guidance on Same-Sex Couple Blessings’ (*Reuters*, 9 July 2023) <https://www.reuters.com/world/uk/church-england-draft-pastoral-guidance-same-sex-couple-blessings-2023-07-08/> accessed 14 August 2023. [↑](#footnote-ref-131)
132. Heaphy, Smart and Einarsdottir (n 111) 132; Elizabeth Peel, ‘Civil Partnership Ceremonies: (Hetero)Normativity, Ritual and Gender’ in Miles, Mody and Probert (n 38) 113; Maine (n 16). [↑](#footnote-ref-132)