Marriage to a Deceased Wife's Sister in Australia and England 1835-1907

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This thesis represents a major part of the prescribed program of study.

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ABSTRACT

Is marriage a natural institution? Is it a political institution? Does marriage have essential attributes? Is marriage adaptable? This thesis examines these questions, and the nature of marriage through the comparative case study of the law against marriage to a deceased wife's sister in nineteenth century England and the Australian colonies. The study reveals marriage to be a political, legal and social institution with no essential attributes; an institution entirely created by the state, capable of enforcing a wide variety of norms and fulfilling a wide variety of chosen purposes. A man's marriage to a sister-in-law after a wife's death may seem like an obscure subject of research, a legislative relic with narrow ramifications. The sister-in-law marriage debate has nothing to do with marriage or incest in their contemporary form, or the economic or social context of the twenty-first century in England or Australia. However, the marriage debate and other marriage reform debates in history, remind us that the most fundamental marriage rules – even the rules of incest – are not natural but social, revised by each culture to match its sense of justice and purpose.[1] This thesis is about the fluidity of the marriage institution and provides one example of how marriage evolved to reflect changing social mores. It illustrates how comparative religious culture shaped nineteenth century marriage law in England and the Australian colonies; how political prerogative reinforced or removed legal marriage prohibition; and how distinctive colonial social, economic and religious culture led to divergences from the marriage legislation inherited from England. This case study is ideal for answering the questions posed in this thesis because of the protracted nature of the debates, spanning seventy-five years of the nineteenth century; the wide ranging political, social, economic and religious issues that shaped marriage in the respective societies; and the colonial abolition of the prohibition almost thirty years prior to England. These characteristics enable an in-depth comparative analysis of the social and legal construction of marriage's parameters in the nineteenth century.

[1] E.J Graff, *What is marriage for: the strange social history of our most intimate institution* (Beacon Press, 2004) 166.

STATEMENT OF CANDIDATE

I certify that the work in this thesis entitled **"Marriage to a Deceased Wife's Sister in Australia and England 1835-1907"** has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree to any other university or institution other than Macquarie University.

I also certify that this thesis is an original piece of research and it has been written by me. Any help and assistance that I have received in my research work and the preparation of this thesis itself have been appropriately acknowledged.

In addition, I certify that all information sources and literature used are indicated in the thesis.

Charlotte Frew (30675995)

8 January 2012

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DEFINITIONS AND ABBREVIATIONS

Definitions

Incest: refers to the pre-twentieth century understanding of incest, that is, incest recognised in the Church courts as marriage within the prohibited degrees. The great majority of incestuous unions subjected to ecclesiastical authority were between affines not blood relatives. The contemporary definition of incest denoting sexual relations between closely related family members is only referred to in the post 1907 context because it was in 1908 that the contemporary meaning of incest was incorporated into the English criminal law.

Affinity: refers to a relationship which "arises from a valid marriage, even if not consummated, and exists between a man and the blood relatives of the woman and between the woman and the blood relatives of the man. Affinity is relationship by marriage, usually signified by the prefix in-law to the degree of kinship. Prohibited relationships of affinity included those with a step-mother, aunt by marriage, step-sister, sister-in-law, daughter-in-law or step-daughter.

Consanguinity: refers to a relationship arising from the sharing of descendants, or more colloquially, kinship by blood. Prohibited relationships of consanguinity included, among others, a man with his mother, sister, daughter, granddaughter and blood aunt. Such relationships were considered incestuous as a group with no delineation between affinity and consanguinity. [2]

Incestuous Adultery: adultery committed by a husband or wife with a woman or man with whom, if his/her spouse were dead he/she could not lawfully contract marriage, by reason of her being within the prohibited degrees of consanguinity or affinity. This was one of the few grounds by which a woman could divorce her husband under the *Matrimonial Causes Act*

[2] For discussion of the listed definitions of incest, affinity and consanguinity see, Polly Morris, 'Incest or Survival Strategy? Plebeian Marriage within the Prohibited Degrees in Somerset 1730-1835' (1991) 2 (1) *Journal of the History of Sexuality*, 235, 235-6.

1857. Unlawful marriages and incestuous intercourse continued united, appertaining to the relations of in-laws as well as blood relatives, into the twentieth century. [3]

Abbreviations

Marriage to a deceased wife's sister (MDWS)

Marriage to a deceased husband's brother (MDHB)

Mitchell Library (ML)

British library (BL)

State Library Victoria (SLV)

London National Archives (LNA)

[3] *Matrimonial Causes Act* 1857 20 & 21 Vic c 85, sec 27. The church courts retained jurisdiction over incest until 1908. See Victor Bailey and Sheila Blackburn, 'The Punishment of Incest Act 1908: A case study of law creation' (1979) (November) *Criminal Law Review*, 708, 708.

INTRODUCTION AND METHODOLOGY

Background and Aim

Is marriage a natural institution? Is it a political institution? Does marriage have essential attributes? Is marriage adaptable? The thesis examines these questions and the nature of marriage through the comparative case study of the law prohibiting marriage to a deceased wife's sister in nineteenth century England and the Australian colonies. By comparing how the legal and social debates shaped the institution of marriage in nineteenth century England and colonial Australia, the thesis reveals marriage as a political, legal and social institution constructed and reconstructed by legislatures. This is one snapshot of the on-going social and legal construction of the marriage institution across time.

The case study is an analysis of rhetorical argument found in nineteenth century newspapers, magazines, parliamentary debates and fictional narratives, for and against the reform of marriage to a deceased wife's sister legislation. The case study provides a window into the comparative aspects of nineteenth century colonial Australian and English culture and allows us to watch marriage shift in two societies as the nineteenth century progresses. Whilst men in the colonies were legitimately married to their dead wife's sister, like any other married pair, in England they were committing incest. And whilst affinity marriage was prohibited in the nineteenth century on the basis that it was incestuous, incest had developed a completely different meaning by the turn of the century. The story is one of many stories about the history of marriage which are reflective of the on-going transformation of marriage as an institution, a transformation that continues in the twenty-first century. The comparative case-study is ideal for a parallel analysis of how colonial Australian culture and nineteenth century English culture shaped the parameters of legal marriage. Examining marriage historically is important both in the pursuit of better understanding our historical past and for the purpose of locating current marriage debates within their historical context.

The case study is of interest because it is illustrative of the political nature of the marriage institution, its adaptability as a legal framework in new societies, and its continued transformation across time. It broadens our knowledge of the historical development of marriage law in Australia and it provides a window into the changing social mores of nineteenth century English and Australian society. Understanding colonial marriage practice

and regulation is central to an understanding of Australian colonial settler culture and the development of early colonial family law. The case study enables a comparative analysis of the relationship between culture and the marriage institution in two similar yet distinctive societies. The passing of the 1835 legislation outlawing marriage to a deceased wife's sister sparked the longest parliamentary debate in English history which has been largely ignored in historical scholarship. The nineteenth century literature about sister-in-law marriage is riddled with links to wider developments both culturally and legally in nineteenth century England and the colonies. From the shift in the power of the Established Church and ecclesiastical control of marriage law in England to the push for colonial legislative independence; and from the continued influence of 'traditional' notions of marriage and property on attitudes to the union, to growing liberalism in political argument about marriage choice. The debate pushed the boundaries of traditional eighteenth century notions of economic marriage purpose.

The significance of this subject for those living in colonial Australia or nineteenth century England is evidenced by the masses of literature produced on the subject in that period. The subject was of interest to lay people, clerics, bishops, politicians, lawyers, journalists, and persons entering such unions and moving around within the Empire. Whether deceased wife's sister marriage would be recognised and provide economic security to spouses and children was important to members of the union. Whether legalising the marriage threatened the 'family' or contravened biblical law was important to some politicians and defenders of religion. Affinity marriage, particularly sister-in-law marriage, was a very serious issue in the nineteenth century. Many arguments were made that are difficult to comprehend today with possession of scientific knowledge. For example, some defenders of the existing marriage institution's exclusion of affinity partners relied on the notion that the physical merging of the flesh of husband and wife on marriage gave rise to new blood relations that hitherto had not existed. Part of this project is to examine these beliefs within the nineteenth century context, unravelling how and why they held weight.

Furthermore marriage prohibition remains a relevant issue in the twenty-first century. The first Commonwealth *Marriage Equality Amendment (Same-Sex) Bill* was introduced and defeated in the Australian Federal Parliament in 2009. In late 2011 the Tasmanian Parliament passed a motion in support of a change to the federal marriage law to include same-sex partners; the Queensland Parliament passed the *Civil Partnerships Act* to legalise civil unions

for same-sex couples in that State; and the issue was given a conscience vote at the National Labour Conference on 4 December 2011, which resulted in a change to the Government's party platform, in favour of same-sex marriage. Marriage prohibition was historically significant and continues to be an issue of national and international concern, sparking controversy with every political and legal development. Highlighting the great significance of this forgotten debate for the social and legal development of marriage in the nineteenth century contextualises the current debate over same-sex marriage. It challenges the contemporary anti-reformers reliance on the essentialist nature of the meaning of marriage in the Judaeo-Christian world. The study reveals the contradiction that exists throughout the marriage debate which is characteristic of marriage reform debates; being the state's reliance on arguments for the maintenance of the essential attributes of marriage, in the midst of the very act of constructing marriage in new ways through legislation.

Marriage to a sister-in-law after a wife's death was common practice in nineteenth century England and colonial Australia however marriage between kin had long been a subject of legal and ecclesiastical regulation.[4] Deceased wife's sister marriage had been subject to voidable or illegal status in England for several centuries prior to the nineteenth century. Between the thirteenth and sixteenth century marriage prohibitions were extensive and from the sixteenth century the number and types of marriage prohibitions changed in association with political and religious change.[5] From the sixteenth century deceased wife's sister marriage had been voidable in the ecclesiastical courts and in 1835 an English statute, *Lord Lyndhurst's Act*, was passed making the union illegal in England under civil law. A debate inside and outside of Imperial parliament with regards to whether the prohibition should be overturned began in the 1840s and lasted for over seven decades. The thesis introduces the reasons for the prohibition's existence[6] and examines the rhetoric employed throughout the debate to reveal changing perceptions of the meaning of marriage, incest and family in England.[7]

[4] The 1851 English census revealed almost forty percent of the female population ages 21-44, to live with a married sister, and to take care of the children if the mother died. See J F C Harrison, *The Early Victorians 1832-51* (Fontana Press, 1971), 4.
[5] Charlotte Frew, *Marriage to a Deceased Wife's Sister in England and Australia 1835-1907* (PhD, Macquarie University, 2012), ch 2.
[6] Ibid.
[7] Ibid, ch 3, 4, 5, 8 & 9.

The English colonisation of Australia took the form of conquest by settlement giving rise to settler colonies. The Indigenous populations were displaced from the land and replaced with institutions of authority and government imposed by the Imperial power. In 1788 the British first fleet arrived in New South Wales and a penal colony was established for the convict population transported as punishment for crimes committed in England. Van Diemen's land (Tasmania) was colonised by the British in 1803 and the free colony of South Australia was settled by the British in 1836. In the same year the Port Phillip District (Victoria) was colonised and became a part of New South Wales until it separated as an independent colony in 1850.

Those Australian colonies settled prior to the passing of *Lord Lyndhurst's Act* inherited the English position regarding deceased wife's sister marriage at the time; that such unions were voidable in the ecclesiastical courts during the lifetime of the parties. In those colonies established afterwards, the 1835 statute applied and deceased wife's sister unions were illegal. The Imperial government retained political and legal control over the colonies until 1855 when colonial legislatures were established and control over local affairs was granted to New South Wales, Victoria, Tasmania and South Australia.[8] In the period between 1850 and 1870 the colonies underwent rapid development. The discovery of gold in the 1850s led to large numbers of immigrants from England, Ireland, Continental Europe, North America and China and the populations of New South Wales and Victoria grew rapidly.[9] Booming pastoral and mining economies resulted in prosperity which lasted throughout the latter half the nineteenth century until the economic depression of the 1890s. During this period of rapid expansion all of the colonies attempted to pass statutes legalising deceased wife's sister marriage.[10] Therefore, a parallel debate to that in England, over whether deceased wife's sister marriage should be legalised, occurred for a shorter period - between 1850 and 1870 - in the respective parliaments of the Australian colonies. All of the colonies passed legislation to legalise marriage with a deceased wife's sister prior to England in the 1870s.[11] The thesis introduces the reasons for the prohibition's removal in the colonies[12] and examines the rhetoric

[8] In 1850 the British Parliament passed the *Australian Colonies Government Act*, granting responsible government to the colonies, and permitting the creation of legislative councils in South Australia, Victoria and Tasmania. The existing legislative council in New South Wales (created in 1842) was considerably expanded.

[9] For example Victoria's population grew from 76,000 in 1850 to 530,000 in 1859. See C M H Clark, *Select Documents in Australian History 1851-1900* (Angus and Robertson, vol 2, 1971) 664-5.

[10] This occurred in colonies where the union was illegal and where it was only voidable.

[11] South Australia 1870; Victoria 1873; Tasmania 1873; New South Wales 1875; Queensland 1877; Western Australia 1878.

[12] Frew, above n 5, ch 3-7.

employed throughout the colonial debates to reveal changing perceptions of the meaning of marriage, incest and family in the colonies.

The distinctiveness of Australian colonial culture and the extent of legislative divergence from English law has been the subject of the Australian historian's preoccupation with establishing an Australian-centred history. However, scholars examining the regulation of marriage in nineteenth century England and colonial Australia have invariably focused on married women's property legislation, married women's legal disabilities, and divorce law.[13] The lack of attention given to this particular legislation and debate leaves a significant gap in our understanding of colonial continuities and divergences from English marriage law. In addition, it leaves unexamined an important site of comparative legal history, an analysis of which has the capacity to answer larger questions about the legally and politically constructed nature of marriage. In order to analyse the comparative development of marriage law, each chapter examines the comparative economic,[14] political[15] and religious[16] context of nineteenth century Australia and England, and explores how these cultural factors contributed to the legislative direction of deceased wife's sister legislation.

The historical study reveals that marriage is not a fixed and unchangeable state of being, nor is it a fixed and unchangeable legal institution.[17] Legally and socially marriage fulfils the selective purpose that the State assigns. Marriage participates in the public order and is significant for one's standing in a community. The structure of marriage organises community

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[13]Henry Finlay, *To Have But Not to Hold: a history of Attitudes to Marriage and Divorce in Australia* (Federation Press, 2005); Nancy E Wright "The Lady Vanishes": Women and Property Rights in Nineteenth Century New South Wales' in John McLaren et al (eds) *Despotic Dominions: Property Rights in British Settler Societies* (University British Columbia Press, 2005), Ch 9; Hilary Golder & Diane Kirkby, 'Land, Conveyancing Reform, and the Problem of the Married Woman in Colonial Australia' in Diane Kirkby and Catherine Colebourne (eds) *Law, History, Colonialism: the Reach of Empire* (Manchester University Press, 2001) Ch 13. More recently in the English context: Danaya Wright, "Coverture and Women's Agency: Lessons Learned from One Hundred Years of Marital Discord" (Paper presented at Married Women and the Law Conference, Halifax Canada 23-25 June 2011); Philip Girard, "Coverture Resurgent? Married Women's Nationality in Canada and the Empire 1880-1950" (Paper presented at Married Women and the Law Conference, Halifax Canada 23-25 June 2011); Mary Beth Combs "'Concealing Him from Creditors': The Success of the Married Women's Property Act, 1870" (Paper presented at Married Women and the Law Conference, Halifax Canada 23-25 June 2011).

[14] Frew, above n 5, ch 4.

[15] Ibid, ch 7.

[16] Ibid, ch 3.

[17] For a recent article in support of marriage as a fixed and unchanging social state of being see Sherif Girgis, Robert P George and Ryan T Anderson, 'What is Marriage?'(2011) 34 *Harvard Journal of Law and Public Policy,* 245.

life and facilitates the government's grasp on the populace.[18] The State's chosen purpose may be economic as shown in chapters two and four or practical as shown in the colonial context in chapter five. Marriage may be defined in a particular way for political reasons as shown in chapters two, six and seven. Marriage is a vehicle by which the state can enforce norms about what constitutes family; the role of women and men within the family; and the way in which family members by blood and in-law ought to relate to one another, including sisters to brothers and parents to children. It is through marriage that the state enforces notions of normal sexual relations through the exclusion of those whose sexual relationship is deemed deviant. Therefore, marriage is defined in accordance with the acceptable norms of the time. The fluidity of these norms and the variability in the purpose that marriage serves are highlighted by the comparative approach taken in this thesis. Each chapter highlights how marriage is shaped by the selective prescription of particular norms in each society and how marriage is used to fulfil specific purposes in each society. Changing norms are identified through the rhetorical arguments for and against deceased wife's sister marriage legislation. Rhetorical arguments are contained in the novels explored in chapter five and in newspaper editorials and parliamentary debate examined throughout the thesis. Marriage is also defined in accordance with the dominant knowledge discourse of the times and chapter eight illustrates how a shift in the dominant discourse from religious knowledge to scientific knowledge changed the shape of marriage in the nineteenth century.

The thesis tells several interconnected stories which each illuminate the others. The first is the history of the prohibition of a man marrying his sister-in-law after his wife's death, the rhetoric employed on either side of the argument and the dominant norms that came to be enforced by respective legislative outcomes. The second is the story of religious, economic, political and social culture in the respective societies and the significance of differing cultures for legal marriage. Finally, the story of marriage as a legal and political construct and continuously transforming institution is illuminated by the comparative nineteenth century debates.[19] The case-study illustrates that it is within societies' power to construct and reconstruct marriage. If it were possible to hold a mirror up to marriage in any given society, it might be filled with reflections of the society that it serves. This thesis attempts to hold a mirror to the nineteenth century marriage debate. The reflection reveals many insights into

[18] Nancy F Cott, *Public Vows: A History of Marriage and the Nation* (Harvard University Press, 2000) 1-3.
[19] Many other historical marriage debates are illustrative of the changing nature of the marriage institution such as the Australian divorce debates of the 1850s and no-fault divorce debates of the 1970s . However, for reasons expanded upon below, the deceased wife's sister marriage debates are ideal for this comparative study.

nineteenth century English and Australian culture whilst illustrating the images of marriage in each society and time are unique.

Scope

Although the thesis contextualises the case-study of marriage to a deceased wife's sister amongst other marriage and property law debates of the nineteenth century, such as married women's property and divorce law, the case-study is the focus as other areas have been adequately dealt with in existing historical scholarship.[20] Legal historians have illustrated the value of colonially comparative histories, but the central focus of this thesis is Imperial/colonial comparison and therefore colonially comparative analysis is limited. Despite this, a wide geographical picture is drawn and primary material from Victoria, New South Wales and South Australia is included. The Empire wide context of the marriage debates is discussed in chapters eight and nine.

Legal sources are largely legislative rather than judicial and an examination of English court records has been excluded. There were a number of English cases about affinity marriage particularly in the early part of the century. However, as there were no ecclesiastical or matrimonial courts in colonial Australia prior to legalisation of deceased wife's sister marriage, there is no case-law on the issue in the colonial context. Given that comparative analysis of case law was not possible, a comparison of the legislative development of marriage law is the central focus of the thesis. The narratives of parties before the courts would reveal more about individual experiences. However, the construction of the meaning of marriage by authorities is best revealed through the rhetorical argument and discourse expressed in legislation, parliamentary debate and the media. A number of historians have examined civil and ecclesiastical English case law in matters of affinity and consanguinity and these studies provide excellent background for the legislative treatment found here.[21]

The thesis provides some background information regarding the origins of the English deceased wife's sister prohibition prior to the nineteenth century, without which, the reader could not comprehend the extent of the religious and feudal roots of the law. In addition, the

[20] See Frew, above n 5, ch 1.

[21] For examples see, Ginger Frost, *Living in Sin: Cohabiting Husband and Wife in Nineteenth Century England* (Manchester University Press, 2008) Ch 3; Bruce Bennett, '*Banister v Thompson* and Afterwards: The Church of England and the Deceased Wife's Sister Marriage Act'(1998) 49 (4) *Journal of Ecclesiastical History*, 668.

relevance of the history to the twenty-first century debate over same-sex marriage is discussed in the epilogue. However, the thesis is essentially focused on the period from the introduction of the marriage prohibition in English law in 1835 to its abolition in 1907. A wider scope would diminish the depth of the analysis of how various cultural elements worked to shape the institution of marriage in this period, and limit the case studies' usefulness for the wider questions about the pre-existence or political creation of marriage.

Theoretical Methodology

The thesis examines the nature of marriage through comparative legal history. One approach to understanding marriage is to look at the historical emergence of new forms of marriage in response to cultural change.[22] A second approach is to compare forms of marriage that exist in one society with those existing in another society. A third is to examine the discourse that constructed social understandings of marriage in different periods or societies. All three are employed to some extent in this thesis. A comparative analysis of cultural change in England and the Australian colonies reveals the relationship between marriage and culture. An analysis of the discourse in social and parliamentary argument in the marriage debates reveals why deceased wife's sister marriage was legalised in the Australian colonies more than three decades before legalisation in England. An analysis of the discourse enables a deeper comparison of marriage than simply comparing the enacted law over time.[23] Examining legal history comparatively is necessary, particularly in the colonial context, because much of the marriage law was inherited from the mother country. If the marriage prohibition was studied in colonial Australia alone, it would be far more difficult to identify how colonial law was adapted from its original form and to identify the socio-legal factors which influenced the laws' development.[24] The comparative legal histories examined in this thesis demonstrate that the legal categories which develop in societies are historically and culturally specific. Although it is often perceived as a universal institution, marriage is no exception. This thesis examines the culturally specific socio-legal factors that moulded the marriage institution in

[22] Stuart Banner takes this methodological approach in examining the changing meaning of property in his book *American Property: A History of How, Why and What We Own* (Harvard University Press, 2011).
[23] James Gordley argues that legal history identifies how rules arise and prevents a comparatist from concluding that simple structural differences account for rule differences. James Gordley, 'Comparative Law and Legal History' in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Companion of Comparative Law*, (Oxford University Press, 2006) 769.
[24] Ibid, 772.

each society, demonstrating that marriage is created by the state, and highlighting the variable purpose of marriage and/or the norms that marriage regulation enforces.

- **Comparative Law**

Colonial Australia is a site where established marriage laws were inherited from England, many of which were unsuited to colonial conditions, and changed over time. English cultural, institutional and legal structures were transplanted from the mother country into the colonies, which were sites of rapid and significant economic, political and social change. Traditional history-writing represented Australia's past as an extension of a British past and since that time there has been much Australian-centred history written. The former ignored the distinctiveness of the colonial environment, whilst the latter resulted in a loss of comparative perspective.[25] This thesis contributes to comparative legal history which has sought to regain that perspective. The concurrent occurrence of the deceased wife's sister marriage debate in the colonies and the mother country and the diverging legislative outcomes makes it an ideal case study for a comparative approach. This approach acknowledges the relevance of the imperial/colonial relationship, whilst examining the distinctive cultural factors that influenced marriage regulation in each.

The thesis compares the Imperial legislature's response to the issue of marriage to a deceased wife's sister with that taken by colonial Australian legislatures. However, rather than simply comparing or evaluating the legislative outcomes[26] the thesis analyses legislative responses to the problem from within their historical and cultural context.[27] This allows for the reconstruction of the function of the law from within the individual legal system.[28] For example, chapter two introduces an interpretation of the Old Testament as the root of the marriage prohibition and chapter three shows that well into the nineteenth century in the English context one of the functions of the law remained the protection of religious authority on marital matters. This function was far less relevant in the colonial context, resulting in

[25] Anne Curthoys quoted by Diane Kirkby in 'Lawyer's History Conversationally Speaking' (2003) 7 *Australian Journal of Legal History,* 47, 50.
[26] The functional approach to comparative legal history compares how different societies respond to the same legal problems and offers answers as to the best response to legal problems.
[27] See Michele Graziadei, 'The Functionalist Heritage' in Pierre Legrand and Roderick Munday (eds) *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2003) 100
[28] Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 308.

different legislative outcomes. By comparing the development of marriage in the Empire the case-study highlights the functional and dynamic nature of marriage.

The thesis draws together a range of interconnected and often equally influential factors which affected the historical process of the legal development of marriage. It examines comparative culture as well as comparative legal rules,[29] enabling plausible explanations to be drawn for legal and social change.[30] Comparative marriage legislation is understood through an examination of comparative culture and its connection to the law being examined.[31] For example, a comparison of English and colonial religious and class culture makes sense of the colonial abolition of a legal rule which, in the English context, functioned to protect the authority of the Established Church and the class system. The thesis seeks to uncover the characteristics that made Australian colonial culture unique, distinguished it from English culture and in turn resulted in a different approach to the deceased wife's sister marriage question than that taken in England. The comparator societies chosen are particularly useful for demonstrating that marriage is adaptable because broad similarities in government and legal structure make the differences in marriage more pronounced.

- **Legal History**

Research about the historical development of marriage law broadens our contemporary understanding of how the legal category of marriage comes to be defined and of its capacity for change. In addition, research into the legislative and public debate over marriage law identifies the factors that influence marriage legislation, demonstrating the power of legal and cultural institutions, and the significance of economic and religious interest groups in the creation of nineteenth century marriage law. Finally, this case-study sheds light on the relevance of colonialism for legal development.

Divergences in deceased wife's sister marriage law in Britain and the colonies reflect deeper differences in historical experience, class structure, institutional power, and national outlook.

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[29] This approach contrasts with the functionalist or positivist comparative approach which focuses on comparing legal rules or their effect.

[30] Reimann and Zimmermann, above n 28, 334, 468. In the context of law inherited or transplanted from one society to another, ignoring cultural differences can lead to facile conclusions about similarities and differences in legal systems.

[31] Vivien Curren argues that the study of law can be undertaken realistically only by adopting the standpoint of someone 'inside' a culture, by a kind of 'immersion' Vivien Curran, 'Cultural Immersion, Difference and Categories in U.S Comparative Law' (1998) 46 *American Journal Comparative Law* 43, 66, 71.

The thesis examines how these deeper differences, in two culturally similar societies, changed marriage law.[32] It was because inherited colonial marriage laws had their roots in the English class system and English institutional structures such as the Established Church, that colonial legislatures were forced to adapt the law to increase its function or, in some cases as a point of resistance against imperial control.[33] Examining nineteenth century law in the colonies and in Britain reveals that colonialism was not a one-way imposition in that Imperial and colonial legal and social developments affected one another. [34] English parliamentarians referred to colonial developments with regard to the marriage question, either to distance the 'English' from the 'colonial' or to use the colonial as an example. Similarly, the colonial authorities embraced the mother countries' approach to tackling the marriage question or rejected it in favour of a distinctive colonial approach.

After marriage to a deceased wife's sister was legalised in some colonies, the inconsistency between colonial and imperial law, irritated the background certainties and institutional invisibilities which maintained the prohibition in England.[35] The English prohibition's grounding in nature became questionable and the culturally specific nature of English values, for example the purity of the in-law relationship within English families, was highlighted.[36] This is not to say that laws such as that prohibiting deceased wife's sister unions, or values celebrating the sibling bond were arbitrary or meaningless, just that they were the local and temporary outcomes of communications with 'other' laws, values and practices occurring or perceived to be occurring elsewhere.[37]

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[32] Roger Cotterell argues that it is easy to put legal rule differences down to superficial or structural differences in societies that are culturally similar. See 'Comparative Law and Legal Culture' in Reimann and Zimmermann, above n 28, 722-723.

[33] Pierre Legrand claims that law cannot move from one society to another without a change in content because every language and culture produces indigenous systems of meaning and world views. See Pierre Legrand 'What Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111. See also Michele Graziadei in Reimann and Zimmermann, above n 28, who argues that it is inevitable that inherited laws will be adapted, 465.

[34] John L Comaroff, 'Images of Empire, Contests of Conscience: Models of Colonial Domination in South Africa' in Frederick Cooper and Ann Laura Stoler (eds), *Tensions of Empire: Colonial Cultures in a Bourgeois World* (University of California Press, 1997), 165.

[35] This sociological theory about the role of colonialism in legal change is borrowed from Stephan Fuch's, *Against Essentialism: A Theory of Culture and Society* (Fellows of Harvard College, 2001) and applied to the Imperial project. See also Catherine Hall, who asserts that 'the Imperial project made Englishness back home'. Catherine Hall, *White, Male and Middle Class: Explorations in Feminism and History* (Routledge, 1992) 20.

[36] This 'comparison effect' is discussed by Pamela Tolbert and Lynne Zucker in 'Institutional Analyses of Organisations' (Paper presented at the American Association of Sociology Meeting, 1995) 17.

[37] Rosemary Hunter argues that the 'colonial is what makes the imperial, imperial and consequently that imperial law is as dependent upon the colonial as the reverse'. See Rosemary Hunter, 'Australian Legal Histories in Context' (2003) 21 (3) *Law and History Review*, at http://www.historycooperative.org/journals/lhr/21.3/comment_hunter.html#REF16, 7 accessed 8 March 2011.

Although colonial legislatures argue for independent legislative power on this matter and others - as seen in chapter seven – the remainder of the thesis demonstrates that wider socio-economic factors beyond imperial/colonial politics were at play. Marriage law was affected both by local circumstances and by the 'othering' of the imperial and colonial, respectively. Though colonial authorities attempted to replicate the prestigious English model of law in shaping legal ideals, institutions and rules, the laws transplanted were diffused and built upon in response to local circumstances.[38] Examining a marriage debate in the nineteenth century British Empire provides both historical and comparative perspective in answering questions about the nature of marriage, its essential elements, and its adaptability.

- **Social Constructionism and Discourse**

The guiding hypothesis of this thesis is that the institution of marriage is a social and legal construction, that is, it is not established by nature and there is nothing fixed or inevitable about it. It is this that enables colonial authorities to replace English marriage conventions and practices with new ones.[39] It is this also that enables a battle of discourse in which various formulations of the 'true' history, meaning, and purpose of marriage are formulated in opposition to one another; discourses that may or may not represent reality. The defining parameters of marriage, both legal and social, have been evolving for centuries. Obvious though this is, it does not hold the weight that it should in contemporary debate about marriage regulation. The theoretical starting point for marriage debates is very often essentialism.[40] There is no historical evidence to support an essentialist theory of marriage. Even essentialist conceptions premised on biblical or religious tradition have been shown historically to be flexible, open to interpretation and influenced by politics.

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[38] Reimann and Zimmermann, above n 28, 458-461.

[39] See Fiona J Hibberd, *Unfolding Social Constructionism* (Springer Science, 2005) 3-4.

[40] For example, opponents of deceased wife's sister marriage argued that a man's sexual relationship with his sister-in-law after his wife's death was psychologically and physically repugnant and unnatural because of the essential nature of the brother/sister relationship. See New South Wales, *Parliamentary Debate,* Legislative Council, 4 March, 1874, during which Mr C Campbell describes such unions as repugnant and a threat to the purity of society. Similarly in *Loving v Virginia* (388 U.S 1 1966) the principal American case establishing the due process right to marry, Virginia defended its statute prohibiting inter-racial marriage along essentialist lines, suggesting that race was a fundamental dividing characteristic created by God. It was suggested in this and similar cases that such marriages were unnatural and that marriage has always been defined this way since God separated the races and intended that they would not mix. See *Loving* 388 U.S at 3; *Naim v Naim* (1955) 87 S.E.2d 749, 756 (Va); *Scott v Georgia* 39 Ga. 321, 324 (1869).

How marriage is legally defined by the state depends on the society in which it operates and the cultural influences that have affected its development. This thesis examines how marriage is linked with other social and cultural institutions, showing that it is not naturally generated but develops differently in different societies.[41] Examining the social and cultural factors that shape marriage in order to understand how it is constituted can be described as a social constructionist approach. There is now a substantial literature grounded in philosophy, history, sociology, and anthropology that develops social constructionist theory as a way of thinking about culture and marriage specifically. This is a suitable theoretical approach for this thesis because the purpose of social constructionist research is to study the emergence of forms of the law and social life and the social discourses by which they are created.[42]

This thesis is therefore a study of historical discourse rather than historical reality. The research does not necessarily seek to uncover how the English and Australian colonials actually felt about the marriage controversy or their own family structure, but rather to examine the discourses that created meaning around the marriage controversy, even when such discourses were not an accurate mirror of reality. For example, much of the discourse communicated visions of the marriage relationship advocated by the state or idealised images of the bourgeois family, in no way reflective of the reality of the working classes or the bourgeois. However, such discourses moulded social expectation and constructed legislation that enforced selective norms about what constitutes family and how family members ought to relate to one another.[43] The sources were chosen for their capacity to reveal the role of discourse in enforcing ideology. This is particularly the case in relation to references to broad transitions such as feudal and patriarchal family ordering to affective or companionate family ordering. Such a transition occurred before the nineteenth century in which the marriage to a deceased wife's sister debate took place. However, the use of these ideological[44] discourses in the nineteenth century shaped marriage law, even as the experiences of specific social groups

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[41] William Eskridge Jn, takes this approach in 'A History of Same-Sex Marriage' (1993) 79 (7) *Virginia Law Review* 1419, 1433-4.

[42] Vivien Burr, *Social Constructionism* (Routledge, 2nd edn, 2003) 7.

[43] See Brian Connolly's use of this theoretical methodology with regards to the discourse of separate spheres. Brian Connolly, *Domestic Intercourse: Incest, Family and Sexuality in the United States 1780-1870* (PhD, University of New Jersey, 2007) 13; See also Roland Barthes, 'The Reality Effect' in *The Rustle of Language* (University of California Press, trans, 1989), 141-48; and Michel Foucault, *The Archaeology of Knowledge and Discourse on Language* (Pantheon, 1982).

[44] As applied by Nancy F Cott 'ideological' in this context refers to a politically motivated distortion of reality. See Nancy F Cott, Linda K Kerber, Robert Gross, Lynn Hunt, Carroll Smith Rossenberg, Christine M Stansell, 'Beyond Roles, Beyond Spheres: Thinking about Gender in the Early Republic' (1989) 46 (3) *William and Mary Quarterly* in Connolly, above n 43, 12-13.

did not necessarily live out the prescriptions found in the rhetoric.[45] The choice of sources is explained below.

The deceased wife's sister marriage debate spanned a large part of the nineteenth century and was legalised in the colonies more than three decades prior to legalisation in England. Therefore, interrogating the factors that shaped marriage in each society across the decades of the nineteenth century shows how seemingly natural categories, such as brother, sister, marriage, incest and love were bound up with normative prescriptions and were therefore more flexible than they appeared.[46] A social constructionist approach to marriage law reveals that pre-determined hierarchies, enforced by law, such as marriage prohibitions, are arbitrary, rather than external or natural.[47]

Sources

The insistence of the social constructionist on the importance of the social meaning of discourse leads logically to a qualitative methodology in which the discourse about deceased wife's sister marriage is analysed through various written texts.[48] This thesis draws on sources previously neglected by historians. These include legal sources such as parliamentary debates in England and the Australian colonies, parliamentary papers, petitions for and against deceased wife's sister marriage presented in parliament and, English Royal Commission reports on marriage law. Petitions, though a useful source for gauging the interest groups and the numbers of persons or organisations for and against legalisation, and sometimes their occupation or affiliation, were not regularly printed in full and therefore provide limited detail of the actual views of the public and do not assist with identifying the driving forces of

[45] Connolly, above n 43, 12-13. For example, the continued relationship between property, inheritance and status in England in the late nineteenth century may have been limited to a small number of people, however the discourse and ideology of the 'old' feudal system dominated House of Lords debates and the refusal to recognise colonial deceased wife' sister marriage on English soil. See Frew, above n 5, ch 4, 6.

[46] Burr, above n 42, 3. This notion of the social construction of legitimate love and incest was acknowledged in the colonial *Matrimonial Chronicle* in 1870 where it was asked 'Why do we not fall in love with our sisters? Simply because we know that we must not and ought not. People seem to imply that there is some impossibility...The reason you do not entertain a passion for your sisters is not because they are your sisters but because you know that they are – because from infancy you have been trained never to think of each other in the light of lovers. *Matrimonial Chronicle* (1879) 3, 19.

[47] Michel, Foucault, *The History of Sexuality, Volume 1: An Introduction* (Allen Lane, trans, Robert Hurley, 1978); See also Rosemary Hunter, Richard Ingleby, Richard Johnstone (eds), *Thinking about Law: Perspectives on the History, Philosophy and Sociology of Law* (Allen and Unwin, 1995) 125. It demonstrates that marriage is invariable linked to other institutions in society and tends to change as they change. See Eskridge, above n 41, 1433-4.

[48] Burr, above n 42, 24.

reform. Political sources include correspondence about marriage law between imperial and colonial authorities, despatches, recordings of deputations and, draft bills sent from the colonial office to the home government. Reports and letters published by the English Marriage Law Reform Association also figure prominently.

Parliamentary debates and political correspondence do not tell us much about the significance of the marriage debate for other institutional bodies such as religious organisations; nor do they reveal the wider social and economic context of English and colonial societies. In the English context, these political sources are supplemented by large numbers of pamphlets published by religious organisations, Bishops, politicians and other interested parties, bound and archived in the British Library in London. In addition, there are published letters between religious leaders, members of the Bench and members of the Law Reform Association, and speeches given by religious leaders to their congregations and governing bodies. These were sourced from the British National Archives in Kew and the British Library in London. In the colonial context, there were either fewer printed tracts and pamphlets on the topic or less were preserved, but a small number, including printed sermons from church leaders, survive in the Mitchell Library, Sydney, State library of Victoria and National Library in Canberra. One of the most fruitful sources on the topic in the colonial context came from colonial newspapers such as the *Argus, Sydney Morning Herald, Mercury*, and *South Australian Register*, particularly letters to the editors, editorials and reports on developments in London.

These sources largely reflect views on marriage to a deceased wife's sister held by politicians, propertied or wealthy men and religious elites. Even letters to editors are almost entirely limited to male authorship, and only those who possessed the education, time and desire to contribute to the debate. There are a limited number of sources which included the views of women on the marriage controversy, including a handful of pamphlets and the fictional narratives of female novelists explored in chapter five. The *Matrimonial Chronicle* was a marriage matchmaking magazine distributed throughout the Australian colonies and written for both female and male audiences. Letters between the Governor of Victoria, Charles Latrobe, and female and male friends are also telling of colonial views. These at least supply the views of some women, or the perceived views of women on the issue. The novels are also valuable to extend the study of discourse on the marriage question, given that they exhibit pro-reform motives, and were written in the context of the wider public and parliamentary debate.

The Royal Commission Reports into the state and operation of the law of marriage reveal arguments for and against reform made amongst the public and provide some quantitative information on the number of sister-in-law marriages taking place, as well as anecdotal evidence of whether the marriages were being solemnised by priests, and respected or rejected by the community.[49] However, this information is kept to a minimum because this thesis does not seek to establish how people in the nineteenth century experienced marriage or incest, or even whether the general public supported or opposed reform. Had the purpose of this thesis been to establish the historical reality of the experience of marriage in the nineteenth century, different sources, such as diaries, personal accounts and court records would have been chosen. The chosen sources were appropriate for the purpose of demonstrating that marriage is a political institution invariably linked to the political requirements of the day. The purpose is to examine how and why the state framed marriage the way they did in the context of the political, economic and religious systems operating in the respective societies. The sources reveal the power structures that maintained or abolished the marriage prohibition. The rhetorical arguments contained in the sources reveal the respective norms that legislators battled to prescribe through marriage. Though many of the primary sources are legal documents, this thesis explores the wider context through petitions, letters to newspapers, fiction, and through secondary research, rather than focusing on formal processes alone. Sources have been used critically, for example, with awareness that particular newspapers or individuals may have a political agenda or bias. The hope is that use of a wide variety of sources provides a wide range of views on the marriage question. The political persuasion and/or personal circumstances of members of parliament voting on the marriage bills are included in footnotes where voting division lists and biographical information were available.[50]

Structure

This thesis is ordered thematically rather than chronologically and therefore the chapters do not strictly follow the chronology from the date that marriage to a deceased wife's sister was made illegal in 1835 to the date of legalisation in 1907. Each chapter addresses a theme

[49] See Royal Commission on the State and Operation of the Law of Marriage, *First Report of the Commissioners appointed to inquire into the state and operation of the law of marriage as related to the prohibited degrees of affinity, and to marriages solemnised abroad or in the British colonies* (1847-48), XXVIII.

[50] Division lists for the debate and passing of *Lord Lyndhurst's Act* of 1835, discussed in chapter two were not printed and were therefore unavailable for reference.

arising in the debates throughout the century and therefore most of the chapters examine that theme in the context of the whole nineteenth century period. However, the prohibiting and legalising legislation are examined at the beginning and end of this thesis respectively. Chapter one provides an overview of existing scholarship locating this thesis within the current historiography. The review of the literature is divided into six main sections: the history of marriage; kinship, incest and family history; religion and marriage law; property and marriage law; the context of the other nineteenth century marriage debates; and deceased wife's sister marriage specifically. The remaining chapters, two through nine, unravel the marriage debates, each within the context of a particular aspect of English and colonial culture. Developments in the deceased wife's sister debates are explained by reference to wider economic, religious and political developments in each jurisdiction. This enables identification of the norms that the colonial and imperial parliaments attempted to enforce through marriage law. It demonstrates how marriage was constructed by the respective parliaments to reflect those norms and fulfil specific purposes.

Starting with beginning of the story, chapter two explores the origins of the deceased wife's sister marriage prohibition in England, providing the reader with the background information necessary for the comparative chapters that follow. The chapter provides the reader with an understanding of the religious and historical roots of an age old marriage prohibition before the thesis goes on to examine the significance of those roots when the debate explodes in the nineteenth century. It also introduces the relationship between marriage prohibitions and political purpose, a theme which arises again in the nineteenth century colonial/imperial context in chapter seven.

The question of whether marriage is a natural institution is often linked to whether it is a religious institution. Chapter three examines the comparative religious culture of the jurisdictions and the relationship between nineteenth century marriage and religion, with particular emphasis on the link between the Established church and the marriage prohibition. The comparative element of the story begins in this chapter, which asks whether religious norms about the nature of marriage pervaded colonial marriage law as was the case in England. Differences in religious culture in England and the colonies are shown to lead to diverging attitudes to the deceased wife's sister union. The English parliament retained the marriage prohibition for political reasons and to enforce religious norms within marriage. The

colonial parliaments abolished the prohibition for political reasons, to encourage marriage, and to facilitate the co-existence of sectarian religious norms within marriage.

Chapter four examines the marriage debate within the context of the economic culture in England and colonial Australia. It is often the changing purpose of marriage that defines marriage and results in its changing form. This chapter examines the economic purpose of marriage in each jurisdiction and the comparative class norms being enforced through marriage law. The chapter asks how marriage regulation was a mechanism for controlling family property. The English parliament introduced the marriage prohibition because it fulfilled the purpose of clarifying inheritance lines and legitimacy. The legislation was less relevant in the colonies where the class and property system differed. This chapter demonstrates how the perceived purpose of marriage as a regulator of economic relationships affected the shape of marriage in England and the colonies. It demonstrates how the maintenance of the prohibition reinforced rigid class norms in England and its abolition reinforced fluid class norms in the colonies.

Chapters three and four draw on rhetorical argument in newspapers and parliamentary debate to reconstruct the deceased wife's sister debates and identify the perceived purpose of marriage and the social, religious or economic norms associated with marriage. The majority of the primary sources used in this thesis to reconstruct the deceased wife's sister debates are authored by men rather than women. Chapter five seeks to remedy this methodological problem by utilising another source of rhetorical argument, those contained in female authored colonial and English fictional representations of the deceased wife's sister marriage plot. This enables some analysis of sources written by women for both female and male readers. The novels were written within the context of the public debate being played out in newspapers and have clear pro-reform messages. This chapter reveals different and changing social understandings of marriage in the colonies and the mother country. The novels highlight the artificial nature of legal distinctions between sisters in-law and sisters in blood and between so-called contractual and natural familial relationships. The novels highlight the way in which marriage legislation enforced social norms such as the role of women in the family. Differing social conditions, such as the separation of family members in the colonies, led to the enforcement of differing norms for relationships between family members.

Marriage legislation shapes family dynamics and enforces social norms regarding the obligations of family members to one another, and the rights of the individual within the family. Both the common law doctrine of coverture and the canon law doctrine of marital unity, despite difference in jurisdictional source, reflected a communitarian morality which established obligations and responsibilities on the basis of one's position within the family. Philosophically, the deceased wife's sister prohibition was in keeping with this framework. Chapter six examines the abolition of the deceased wife's sister prohibition in the colonies in the context of the colonial legislature's more liberal individual vision of man (and woman) both economically and spiritually. The chapter examines liberal individual arguments in favour of reform in the colonies, demonstrating how liberal ideology shaped marriage and caused a divergence from England in deceased wife's sister legislation.

Marriage is often constructed to fulfil a political purpose or can be shaped by political relationships. Earlier chapters examined the affect of economic and religious norms and policies on the marriage debate and chapter seven examines the marriage debate within the context of political policy. The case study not only illustrates the process by which marriage law developed in two differing societies generally but reveals how it developed within the unique context of empire. Chapter seven explores the political issues arising from disputes between imperial and colonial authorities over marriage law, such as empire comity and a desire for colonial legislative independence. This chapter reinforces the malleable nature of marriage and illustrates that marriage is moulded by the state according to the political requirements of the day.

Chapter eight continues to analyse the marriage debate within the context of empire. It contextualises the comparison of the English and Australian colonial marriage debate within the moralising mission of Empire; illustrates how the rise of scientific discourse and the decline in the power of biblical discourse increased the momentum toward legalisation; and interrogates the influence of colonial legislation on English legislation in the late nineteenth century. This chapter demonstrates that one of the purposes of marriage law within the empire was to draw social and moral boundaries between the coloniser and the colonised. The maintenance of the deceased wife sister marriage prohibition set the English apart from the morally dubious colonials. However, the dominant discourse of the times, in this case the transition from religious to scientific discourse, affected the development of marriage legislation enabling it to prescribe new norms that were in keeping with the perceived truths

of the time. This chapter challenges the concept of marriage as a natural institution by illustrating how changing 'natural' marital relations are defined for the purpose of reinforcing an individual, group or nation's authority or superiority over another individual, group or nation.

Chapter nine brings the thesis full circle, examining the progression of the legalising *Marriage to a Deceased Wife's Sister Act* through both houses of English parliament in 1907, in a similar treatment to that given to the original prohibiting Act in chapter two. The passing of the Act to legalise marriage to a deceased wife's sister reinforces that marriage is not a fixed, unchangeable legal institution. The rhetorical argument examined throughout this thesis reveals the fluidity of both the norms enforced through marriage and the purpose of marriage as an institution. Each chapter demonstrates how the relevant norms were enforced through the maintenance or abolition of the marriage prohibition and how the purpose of marriage differed in two similar yet distinct societies.

Finally, the epilogue asks how this historical case-study, and others like it, can inform debate over same-sex marriage in the twenty-first century. If marriage is a political rather than a natural institution, if marriage is fluid and adaptable, how should this fact affect the contemporary marriage debate?

CHAPTER ONE - CONTEXT

This chapter explores the existing historiography on the subject of marriage and more specifically nineteenth century marriage regulation in England and the Australian colonies. The chapter positions this thesis within the wider context of historical research previously undertaken. Many different approaches have been taken to research and writing on the history of marriage. Historians have taken an anthropological and sociological approach to the development of marriage in various periods and cultures.[51] Political, legal and social historians have examined the same-sex marriage debate within the historical context of transforming marriage laws in the twentieth and twenty-first centuries. Nancy Cott has examined the historical relationship between marriage and the American state since the early republic. [52] Other recent historical works on marriage are focused on how the law of marriage, coverture, separation, and divorce functioned in courts, legal offices, or even among couples themselves; rather than the nature of marriage itself, its political dimensions and its relationship to gender, race, the nation and citizenship.[53]

Research on marriage regulation in colonial Australia can be split along the nineteenth century timeline. Typically research on marriage and sexuality in colonial Australia either centres on the convict experience from settlement to mid-century or on the experience of free settlers, ex-convicts, emigrants and gold prospectors in the latter half of the nineteenth century. Scholars examining the latter half of the nineteenth century have invariably focused on married women's property legislation, married women's legal disabilities, inherited English doctrines such as coverture and dower, or the development of divorce law. The departure from English law in the matter of marriage to a deceased wife's sister was the earliest universal colonial departure from English marriage law in Australia. [54] Diane

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[51] Eskridge, above n 41; Graff, above n 1; Stephanie Coontz, *Marriage a history: how love conquered marriage* (Penguin Books, 2006).

[52] Nancy Cott, above n 18; Martha Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional* Law (Oxford University Press, 2010); Nancy D. Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law* (Beacon Press) 2008.

[53] Felice Batlan, Review, (H-Net, August 2002) http://www.h-net.org/reviews/showrev.php?id=6649, accessed 10 October 2011. For examples of the former, see Hendrik Hartog, *Man and Wife in America: A History* (Harvard University Press, 2000); Finlay, above n 13; Frost, above n 21; Norma Basch, *Framing American Divorce: From the Revolutionary Generation to the Victorians* (University of California Press, 1999); J Gillis, *For Better, For Worse: British Marriages 1600 to the Present* (Oxford University Press, 1985).

[54] On divorce see Henry Finlay, 'Law Making in the Shadow of the Empire: Divorce in Colonial Australia' (1999) 24 *Journal of Family History*, 74-109; Henry Finlay, above n 13; Kirkby and Golder in Diane Kirkby (ed) *Sex, Power and Justice: Historical Perspectives on Law in Australia (*Oxford University Press, 1996). On married women's property see: Golder and Kirkby, above n 13, Ch 13; Wright, *Despotic Dominions,* above n 13.

Chambers, writing in Britain, argued in her article on the deceased wife's sister debate, that the subject, like many of the areas historians have previously chosen to study, has far-ranging implications.[55] A small number of historians, literary critics and women's studies scholars have written about the marriage to a deceased wife's sister debate in nineteenth century England but only one such article has been published about the debate in the Australian colonial context. This thesis draws on a broad spectre of historical inter-disciplinary research, from the work of cultural anthropologists, to critics of Victorian and colonial literature, demographers, legal historians, feminist historians, historians of the family and historians of religion. It seeks to contribute to this historiography by examining the deceased wife's sister debate which was moulded by religious, economic and political historical context.

The History of Marriage

The premise of this thesis is that the universality of marriage is a myth. This has been proven time and again by historians and anthropologists studying marriage in different cultures throughout history and finding immense variation in both the purpose and practice of marriage, its consequences and the rules regulating who may marry whom.[56] Many of these studies are culturally comparative and take examples of marriage practice from a wide variety of cultures across time and internationally. For example, E.J Graff's book, *What is Marriage For: the strange social history of our most intimate institution,*[57] examines debates about marriage in the west over the past one hundred and fifty years. She reveals how social change often preceded legal change and undermined essentialist arguments in favour of the status quo. Graff examines the primary function of marriage in various eras including the keeping of societal order; the control of sexual behaviour and reproduction; ensuring the most useful transition of property, status or money; the consolidation of power within families; or the

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For an examination of similar issues in other British colonies, see Carole Shammas 'Re-Assessing the *Married Women's Property Acts'* (1994) 6 (1) *Journal of Women's History*, 10-30; Deborah Rosen, 'Women and Property Across Colonial America: A comparison of Legal Systems in New York and Mexico' (2003) 60 (2) *William and Mary Quarterly*, 355. See Henry Finlay, above n 13, 52-3. Nineteenth century colonial departures from English law have long been of historical interest. For examples see: B H McPherson, *The Reception of English Law Abroad*, (Supreme Court Library, Brisbane, 2007); Bruce Kercher, *An Unruly Child: The History of Law in Australia* (Allen & Unwin,1995); Alex Castles 'The Reception of English Law in Australia' (1963) 2 *Adelaide Law Review*, 1; and G D Woods, *A History of Criminal Law in New South Wales 1788-1900* (Federation Press, 2002).

[55] Diane Chambers, 'Triangular Desire and the Sororal Bond: the "Deceased Wife's Sister Bill" (1996) 29 (1) *Mosaic.*

[56] See Coontz, above n 51; Graff, above n 1; Eskridge, above n 41; Cott, above n 18; Susan Squire, *I don't: A Contractarian History of Marriage* (Bloomsbury, 2008); Elizabeth Abbott, *A History of Marriage* (Penguin, 2010).

[57] Graff, above n 1.

encouragement of the creation of kinship networks outside the family circle. Graff takes a sociological approach to the history in order to mount an argument in favour of same-sex marriage. The book establishes that we can gain a better perspective on today's marriage debate by remembering that, although each apparently revolutionary proposal to change marriage rules has appeared shocking in any given era, when such proposals surface in public debate, the underlying economic or social changes have often already occurred.[58]

However, Graff's approach differs to the approach taken here in that it is more sociological than legal; her purpose is to present as many examples as possible of changing perceptions of marriage in any given society rather than to reveal the details of a specific historical debate. Graff describes practices in West African and Japanese societies, amongst others, to show how marriage has been culturally and periodically constructed. This thesis narrows the focus to two societies, namely colonial Australia and Imperial Britain, in one time frame, the mid to late nineteenth century. The purpose of this thesis is not to argue for same-sex marriage by reference to the variety of frameworks for marriage that have existed historically and internationally. This thesis reveals the process by which marriage law was culturally and legally constructed in the context of the nineteenth century British Empire. The case-study reveals that marriage is a political creation newly constructed each time legislation is passed to shape its parameters or define its features. Even in the microcosm of nineteenth century anglo-christian societies, such as in England and her Australian colonies, one definition of marriage did not prevail.

Family historian, Stephanie Coontz's book, *Marriage a History: how love conquered marriage*[59] places current conceptions of marriage within their historical context. Coontz demonstrates that marriage as an institution has historically been in flux. She interrogates the notion of the 'traditional' marriage and seeks to establish that marriage has shifted from a union made for political and financial motives to a union made for love. Similarly to this thesis, Coontz explains marriage as a flexible reflection of changing social mores. However like Graff she does so by reference to the evolution of marriage from primitive societies to the

[58] See Adiva Sifris, 'Lesbian Parenting in Australia Demosprudence and Legal Change' in Paula Gerber and Adiva Sifris (eds) *Law in Context* (Federation Press, 2010) 6 in which she argues that it is not unusual for legislatures to resist initially formal change, but the publicity and exposure which rejection brings can often herald cultural change, which in turn precipitates legal change. See Graff, above n 1, 250.
[59] Coontz, above n 51.

present with the intention of stripping the contemporary notion of 'traditional' marriage of its authority.

What these authors have established is that defining marriage is notoriously difficult because so-called defining features such as monogamy, polygamy, reproduction, economic cooperation or exclusive sexual activity have not always been and will not always be characteristics of marriage. Defining marriage by looking at which functions marriage has performed most frequently across time and cultural boundaries does not help us understand what any society's particular marriage system is or how and why such a system changes over time.[60] This thesis aims to demonstrate this process by the use of a confined comparative case study.

Scholars such as Nancy Cott, Nancy Polikoff, Martha Nussbaum, Fay Botham and William Eskridge have examined the legal and political history of marriage. Cott, Polikoff, Nussbaum and Eskridge examine the legal history of American marriage law, politics and culture. These authors advocate new forms of marriage in the twenty-first century, embracing same-sex marriage, and in Polikoff's case, an entirely new legal recognition of relationships of care rather than sexual and romantic relationships exclusively. These studies are often focused on the twentieth century through to today, although Cott's study spans the period from the early Republic to the twentieth century and Eskridge examines various historical periods and cultures in a similar vein to Coontz and Graff. [61] The focus of Nancy Cott's book, though in the American context, is similar to that of this thesis, in that she examines marriage as a political and legal institution. Cott illustrates how marriage has always been regulated and shaped by the state and explores the relationship between the marriage institution and public power. Cott examines marriage in the context of the American national agenda. Though on a

[60] For an examination of this change see Susan Frayser, *Varieties of Sexual Experience: An Anthropological Perspective on Human Sexuality* (HRAF Press, 1985), 248. For the point regarding the studies limitations see Coontz, above n 51, 28.

[61] Nancy D. Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law* (Beacon Press) 2008; Nussbaum, above n 52. Nussbaum examines the political and social philosophy behind the exclusion of same-sex couples from marriage and advocates for a 'politics of humanity' over a 'politics of disgust'. Her book is restricted to the constitutional law of America in relation to sexual orientation up to the present day. Nancy Cott's book, *Public Vows: A History of Marriage and the Nation* (Harvard University Press) 2002 is an examination of the role of the American state in shaping private relationships through the regulation of marriage. The book is theoretically similar to this study and covers the period from the early Republic to late twentieth century, however it is much broader, not comparative and focuses solely on America. Similar to this study, Cott's interest lies in the political and social meaning of marriage and its relationship to the construction of gender, the nation, and citizenship. For a review of the book see Felice Batlan, 'Beneath the Private Mask' H-Law, August 2002, at http://www.h-net.org/reviews/showrev.php?id=6649, accessed 10 October 2011.

much smaller scale, this thesis similarly attempts to uncover the public function of the English marriage prohibition and in so doing, highlight its political creation.

Fay Botham's book 'God Created the Races' explores how cultural epistemology (what constitutes knowledge) and hermeneutics (how one interprets texts) shaped the legitimate parameters of marriage historically. Her study is similar to this case study because she examines a case study of historical marriage prohibition; that of inter-racial marriage in nineteenth and twentieth century America. The book examines the intersection of law, marriage and theology through the case study of inter-racial marriage prohibition, much like this study examines the intersection of law, marriage and theology through the case study of the affinity marriage prohibition. Botham argues that it was the social location of the judges and the views prevalent in their culture that altered the hermeneutics and the cultural epistemology defining marriage. In this way she takes a similar theoretical approach but her subject matter, jurisdiction, and reliance on the common law differs from the approach taken here.[62]

Eskridge cites historical examples as precedent, advocating the acceptance of forms of marriage such as same-sex marriage on the basis that they have existed harmoniously historically.[63] However, anthropologists and social historians have shown that an analysis of history can uncover every variation of marriage that one seeks to find, including polygamy, arranged marriage, and sanctioned marital wife beating.[64] This thesis does not attempt to illustrate how marriage differs internationally; how it has developed across the course of historical eras; or how other societies have accepted same-sex marriage. However, much of this work is integral to this thesis as it is this research that establishes the theoretical framework for a comparative analysis of the nineteenth century case study, namely social constructionism, as applied to the marriage institution.

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[62] Fay Botham, *Almighty God Created the Races: Christianity, Interracial Marriage and American Law* (University North Carolina Press, 2009). For a review of the book see Martin Hardeman, Review (H-Net, June 2011) at http://www.h-net.org/reviews/showrev.php?id=32352, accessed 10 October 2011.
[63] Eskridge, above n 41.
[64] Coontz, above n 51, 10.

Kinship, Incest and Family History in England and Colonial Australia

A number of social anthropologists have written on the historical development of kinship systems and the origins of incest law in England and common law countries. Social anthropologist, Martin Ottenheimer challenges modern assumptions about the biological concerns at the root of marriage prohibitions such as cousin marriage. He repositions the study of incest and marriage regulation within the domain of culture but his research is in the American context.[65] Sybil Wolfram's book, *In-Laws and Out-Laws: Kinship and Marriage in England*[66] also examines kinship and the legal regulation of marriage, particularly incestuous prohibition from an anthropological perspective. Adam Kuper's more recent book, *Incest and Influence: the private life of Bourgeois England* examines the relationship between familial inter-marriage and political power and wealth in the Victorian period.[67] This thesis takes a similar approach to these texts in that it examines the evolving nature of the deceased wife's sister prohibition and associated marriage laws, revealing how marriage regulation has been shaped and moulded by social and cultural context. However, these scholars tend to use community case-studies to examine individual and community behaviours and understandings of kinship. For example, Kuper scrutinizes the personal marriage choices of the Darwin family and other great families of the Victorian era to illustrate the connection between private lives and public fortunes. The focus of anthropologists tends to be kinship and social organisation rather than the development of law or the forces that shape kinship regulation. Sybil Wolfram includes some legal writing about family law in her book but largely relies upon the anthropological fieldwork monograph.[68] Similarly to chapter five of this thesis, Wolfram employs an analysis of fictional literature because 'the novel, particularly in the nineteenth century, supplies a wealth of information about social beliefs and conventions'.[69] However, the book does not tell a chronological story and contextual information about wider changes during the nineteenth and twentieth century, including changes in social class structure, the rise of science, decline of the church and loss of an empire are, by the authors own admission, relegated to notes and included only when absolutely necessary.[70]The important contribution of these texts as a basis for this thesis is their mutual agreement in

[65] Martin Ottenheimer, *Forbidden Relatives: The American Myth of Cousin Marriage* (University of Illinois Press, 1996).
[66] Sybil Wolfram, *In-Laws and Out-Laws: kinship and marriage in England* (Croom Helm, 1987).
[67] Adam Kuper, *Incest and Influence: the private life of Bourgeois England* (Harvard University Press, 2009).
[68] Wolfram, above n 66, 4.
[69] Ibid, 3.
[70] Ibid, 4-5.

regards to the endless social construction of kinship and social organisation. However the methodological approaches differ from that of a legal historian.

This thesis is qualitative rather than quantitative but the author has accounted for the contribution of demographers and referred to some statistics regarding marriage and re-marriage. Peter McDonald's book *Marriage in Australia*, published by the Institute of Family Studies in the 1970s remains one of the most comprehensive summaries of marriage statistics and household patterns in nineteenth century Australia.[71] More recently, Susan Hart's thesis, 'Widowhood and Remarriage in Colonial Australia', considers how widowhood and re-marriage impacted on men and women in the nineteenth century.[72] Hart points out in her introduction that historians have tended to neglect widowhood and re-marriage as a subject of study. She notes that previous research has focused disproportionately on the re-marriage of widows rather than widowers.[73] This makes the case-study of widows re-marrying in-laws all the more ripe for research, though the approach here is qualitative rather than quantitative.

Historians of the family have contributed a great deal of research on the English and colonial family of the eighteenth and nineteenth century. A similarity between the approach taken in this thesis and that taken by historians of the family is the presence of a comparative element; such research tends to recognise that every group or process has a temporal milieu and often historians compare the processes, events or organisation in one society or at one time with that of a different era.[74] However the methodologies associated with family history are quite different from those used in this project. Much work on the history of the family in the 1960s and 70s was characterised by an attempt to wed quantitative and qualitative research. Historians of the family were influenced by demographic studies and anthropology and often used demographic sources such as parish registers, household lists, migration, and marriage records in combination with qualitative sources such as family diaries.[75]This resulted in either

[71] Peter F McDonald, *Marriage in Australia* (Institute of Family Studies, 1974).
[72] Susan Hart, 'Widowhood and Remarriage in Colonial Australia' (PhD Thesis, University Western Australia, 2009).
[73] Ibid, 11-12; See also Ida Blom 'The History of Widowhood: A Bibliographic Overview' (1991) 16 (2) *Journal of Family History*, 191-201.
[74] Martin Sussman, Suzanne Steinmetz, Gary Peterson (eds) *Handbook of Marriage and the Family* (Plenum Press, 2nd edn, 1999)15.
[75]Ibid. See also Alan MacFarlane, *Marriage and Love in England 1300-1849* (Oxford University Press, 1986); *The Origins of English Individualism: Family, Property and Social Transition* (Oxford University Press, 1978).

discrete studies of family life cycle and specific communities[76] or wider sweeping research into the transition of one form of family to another. For example, the so-called 'sentiment school' including Edward Shorter, Lawrence Stone, Leonore Davidoff and Catherine Hall have looked into transitions from the pre-industrial to the nuclear family. These historians have also dated companionate marriage back to the eighteenth century and examined the changing nature of marriage purpose. [77] These historians have both been relied upon and criticised extensively. Criticism is usually based on the questionable accuracy of the breadth of generalisations made with reliance on limited evidence.[78] This body of research has been a useful starting point for inquiry into the changing nature of the family across time and place and the relationship between family structure and inheritance practices.[79] However, this thesis can be distinguished from the work of historians of the family because its focus is not reconstructing phases of the life-cycle – birth, childhood, marriage, migration or death – or transcribing structural change in family organisation. If this thesis proceeded along these lines it would have been more concerned with issues such as the make-up of colonial families compared with English families, inheritance patterns or the affect of migration on marriage patterns. Though worthy research pursuits,[80] these issues are only included to the extent that they affect the legal development of the marriage institution. The history of the family is too large an area of historiography to adequately summarise but scholarship relied upon appear in

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[76] For an example in the English context see Michael Anderson, *Family Structure in Nineteenth Century Lancashire* (Cambridge University Press, 1971).

[77] See Edward Shortner, *The Making of the Modern Family* (Basic Books, 1975); Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800* (Penguin Books, 1990); Lawrence Stone, *Road to Divorce: England 1530-1987* (Oxford University Press, 1979) in which Stone professes his thesis that the eighteenth century was a period when the companionate family and affective individualism were triumphing over the patriarchal family and parental control. See also Leonore Davidoff and Catherine Hall, *Family Fortunes: Men and Women of the English Middle Classes 1780-1850*, (Routledge, 1987); and Randolph Trumbach, *The Rise of the Egalitarian Family: Aristocratic Kinship and Domestic Relations in Eighteenth Century England (*Academic Press, 1978). For divergent views on the origins of affectionate marriage, see Alan MacFarlane, *The Origins of English Individualism: The Family, Property and Social Transition* (Cambridge University Press, 1979); Alan MacFarlane, *Marriage and Love in England* (Blackwell, 1987); and Michael Mitteraur and Reinhard Sieder, *The European Family: Patriarchy to Partnership from the Middle Ages to the Present* (University of Chicago Press, 1986).

[78] See Michael Anderson, *Approaches to the History of the Western Family 1500-1914* (Cambridge University Press, 1980); D Herlihy, *Medieval Households* (Harvard University Press, 1985) 207; For a specific example see D Lemmings who criticises Stone for failing to reconcile his statements that by the end of the eighteenth century 'affective individualism had penetrated the aristocracy' and, that *Lord Hardwicke's Marriage Act* was 'in direct conflict with the principle of affective individualism with regard to the free choice of a spouse'. D Lemmings, 'Marriage and the Law in the Eighteenth Century: Hardwicke's Marriage Act 1753' (1996) 39 (2) *The Historical Journal*, 342.

[79] In the colonial context see John Ferry, *Colonial Armidale* (Queensland University Press, 1999); Patricia Grimshaw, *Families in Colonial Australia* (Allen and Unwin, 1985).

[80] As demonstrated by John Ferry, 'The Will and the Way: Inheritance and Social Structure' (1999) 1 (1) *Journal of Australian Colonial History*, 122.

footnotes. Works on the social history of Britain have also been referred to and appear in footnotes.[81]

Religion and Marriage Law in Britain and Colonial Australia

Imperial historians have consistently given most of their attention to the experience of Christian missions to Indigenous people or to nurturing the secular vision of the Australian bushmen. There is more scholarship intersecting marriage law with religion and state politics in the English context than the Australian context.[82] This particular intersection of subjects is lacking in the Australian colonial context, perhaps due to the assumption that the Australian colonies were secular in nature. This thesis uses the deceased wife's sister debate to reveal more about the relationship between religion and marriage regulation in the colonies.

In the English context Eric Josef Carlson's book explores the legal development of marriage in England during the reformation, and the relationship between canon, civil law and incest prohibition.[83] This pre-nineteenth century history is important for this thesis as affinity prohibitions existed for centuries prior to their reformulation under Henry VIII reign in the sixteenth century, and again when *Lord Lyndhurst's Act* was passed in 1835. The pre-nineteenth century history of affinity prohibition reveals its links with biblical doctrine, its manipulation as a political tool, and its connection with the Established Church of England, all of which continue to affect the debate in both England and the colonies until the twentieth century. The changing authority of the church in matrimonial matters and the abolition of the authority of ecclesiastical courts in 1857 are canvassed in S M Waddam's work.[84] Hazel Lord's article 'Husband and Wife: English Marriage Law From 1750'[85] and Bruce Bennett's article 'Banister v Thompson and Afterwards: The Church of England and the Deceased

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[81] For example, Ernest Sackville Turner's, *Roads to Ruin: the Shocking History of Social Reform* (M Joseph, 1950); and F M L Thompson (ed), *Cambridge Social History of Britain*, 1750-1950.

[82] Missions rather than denominations feature in major studies of dominion and imperialism. See Hilary M. Carey, 'Religion and Identity' in Deryk Marshall Shreuder and Stuart Ward (eds), *Australia's Empire* (Oxford University Press, 2008)190. For examples see Norman Etherington (ed), *Missions and Empire* (Oxford History of the British Empire Companion Series, 2005); A N Porter, *Religion versus Empire: British Protestant Missionaries and Overseas Expansion 1700-1914* (Manchester, 2004).

[83] See Eric Josef Carlson, *Marriage and the English Reformation* (Blackwell Publishing, 1994).

[84] See S M Waddams, 'English Matrimonial Law on the Eve of Reform' *Legal History* (2000) 21 (2), 60 which explores the ecclesiastical courts' handling of matrimonial matters; and S M Waddams, *Law, Politics and the Church of England: the career of Stephen Lushington* (Cambridge University Press, 1992).

[85] Hazel Lord, 'Husband and Wife: English Marriage Law From 1750' (2001-2) 11 (1) S *Cal Review Law and Women's Studies* 1.

Wife's Sister Marriage Act'[86] explores the implications of the deceased wife's sister controversy for the negotiation of church and state authority, a subject which is explored in depth in chapter three of this thesis.

The lack of an Established Church in Australia and the comparatively reduced authority of church over marriage regulation are central to this thesis. Ross Border discussed this relationship in his book *Church and State in Australia 1788-1872,*[87] as did Jean Woolmington in *Religion in Early Australia: The Problem of Church and State.*[88] N K Meaney's article, 'Church of England in Paradise of Dissent'[89]explores the religious context in the colony of South Australia, including a social and political emphasis on the separation of church and state. Religious historians such as Ian Breward have written several books about the religious and church history of Australia and the region, including, *A History of the Churches in Australasia, The Most Godless Place Under Heaven* and, *A History of Australian Churches.*[90] His work challenges the secularism of much of Australian writing about religion, a view incorporated in this thesis, and expressed in Patrick O'Farrell's work. O'Farrell was a historian of the Catholic Church in Australia. His view was that 'the timing of European occupation of the continent, in between the American and French revolutions, cast the new society in a distinctive mould' and that it was Australia's experience of sectarianism that led to religious toleration as an operating principle in society.[91] Michael Hogan expands on this idea in his book, *Sectarian Strand: Religion in Australian History.*[92] Although these authors do not deal with deceased wife's sister legislation, their treatment of co-existing legislative debates over religious education, sectarian conflict, and state aid to religion provide the contextual backdrop for an examination of religious tracts, speeches and pamphlets on the marriage question. These legislative and public debates overlap because each was acutely affected by the lack of an Established Church in the colonies. Successive colonial

[86] Bennett, above n 21.
[87] Ross Border, *Church and State in Australia 1788-1872: A Constitutional Study of the Church of England in Australia* (SPCK, 1962).
[88] Jean Woolmington (ed), *Religion in Early Australia: the Problem of Church and State* (Cassell, 1976).
[89] N K Meaney, 'Church of England in Paradise of Dissent: A Problem of Assimilation' (1964) 3 (2) *Journal of Religious History,* 137.
[90] Ian Breward, *A History of the Churches in Australasia,* (Oxford University Press, 2001); *The Most Godless Place Under Heaven: History of the Australian Churches* (Oxford University Press, 2001) and *A History of Australian Churches* (Beacon Hill, 1988). For an examination of the relationship between religion and empire, see Hilary Carey, *God's Empire: Religion and Colonialism in the British World* (Cambridge University Press, 2011).
[91] See Malcolm Campbell 'Double Jeopardy: In Memoriam of Patrick O'Farrell' (2005) XII (1) *Humanities Research* at http://epress.anu.edu.au/hrj/2005_01/mobile_devices/ch02.html, accessed 20 September 2010. See also Patrick O'Farrell, *The Catholic Church in Australia: A Short History 1788-1967* (Nelson, 1968).
[92] Michael Hogan, *Sectarian Strand: Religion in Australian History* (Penguin Books, 1987) 101.

governments moved to diminish funding to denominational schools and exert greater state control over the provision and organisation of education. There was a belief that this would help alleviate sectarian conflict and encourage toleration. This thesis examines the deceased wife's sister debate comparatively, comparing the colonial religious context explored by historians such as O'Farrell, Breward and Hogan to that in the mother country, and the implications for marriage regulation.

These books provide a nuanced and colonially comparative account of complex religious sectarian relations. This thesis does not attempt to demonstrate how each branch of religious faith in each of the colonies responded to the sister-in-law marriage issue. Given the complexity and extent of sectarian religion in each of the colonies illustrated by the mentioned books, that task would be too wide an ambit, unless it was to be the only purpose of this thesis. In addition, it would result in an Australian colonially comparative thesis about religion, as opposed to a thesis about comparative constructions of marriage. Instead this thesis compares wider cultural perceptions in England and the colonies regarding the role of religion in society, in state affairs and in the regulation of marriage.[93] The purpose is to demonstrate the role of religion in constructing different definitions of marriage.

Though scholars generally have not addressed religious responses to deceased wife's sister marriage in the Australian colonies, Peter Bush's paper 'Debating Marriage: Marrying the sister of a Deceased Wife and the Presbyterian Church in Canada'[94] explored the reaction of the Presbyterian Church to the deceased wife's sister issue in the colonial Canadian context. In addition, Rebecca Kippen's article 'The Church, Conscience and the Colonies: Marriage to Deceased Wife's Sister in Britain and British Australia' examines clerical views of deceased wife's sister marriage in the colony of Tasmania.[95] These two papers provide context for this

[93] For another comparative Australasian work see Hugh Jackson pioneered in *Churches and People in Australia and New Zealand 1860-1930* (Allen & Unwin, 1987). For an early to mid century history of the clergy and churches in an Australian colony, see Allan M Grocott, *Convicts, Clergyman and Churches: Attitudes of convicts and ex convicts towards the churches and the clergy in New South Wales 1788-1851*(Sydney University Press, 1980).

[94] Peter Bush 'Debating Marriage: Marrying the sister of a Deceased Wife and the Presbyterian Church in Canada' (2009) (June) *Fides et Historia* at http://www.thefreelibrary.com/Debating+marriage%3A+marrying+the+sister+of+a+deceased+wife+and+the...-a0218882621, accessed April 2011.

[95] Rebecca Kippen, 'The Church, Conscience and the Colonies: Marriage to Deceased Wife's Sister in Britain and British Australia' in Antoinette Fauve-Chamoux & Ioan Bolovan (eds) *Families in Europe Between the 19th and 21st Centuries: From the Traditional Model to the Contemporary PACS* (Romanian Journal of Population Studies Supplement, Presa Universitară Clujeană, 2009) at http://centre.ubbcluj.ro/csp/Suplement_2009.htm, accessed 5 may 2012.

study by revealing views from within the church in the context of wider colonial Australia and the wider colonial empire.

Hilary Carey has argued that Protestantism may have been a formative influence on the British identity at home, but the idea was subjected to particular challenges and limitations in the colonies.[96] She argues that after protracted debates about state aid to education and religion in the colonies, the separation of church and state in most of Australia in the 1870s (Western Australia 1894) was one of the features of colonial life that distinguished it most from Britain.[97] Although this distinction has been recognised by many of the historians mentioned, there is little comparative material examining the affect of establishment versus no establishment when it came to political questions in England and the colonies, aside from education and church practice.[98] This comparison highlights the role of institutionalised power in the construction of marriage.

Property, Marriage and Divorce Law in England and the Colonial Context

There is a large body of literature dedicated to exploring the legal, economic and social culture of family life, marriage and the role of women in nineteenth century England and British settler societies. Contributors to the legal history of the former British Empire write about a range of colonial experience from America, Canada, Australia, New Zealand, and more. This thesis is informed by the approaches of historians of colonial law and society in the common law colonies of the eighteenth and nineteenth century. For example, John Weaver, John McLaren, Constance Backhouse, Danaya Wright, Diane Kirkby, Andrew Buck, Bruce Kercher, Philip Girard, Jim Phillips, Margaret McCallum, Peter Fitzpatrick, Rusty Bittermann, Carol Shammas, Stefan Petrow, Rosalind Croucher and Hilary Carey, amongst many others. Many of these scholars have dealt with themes such as marriage, property,

[96] Carey, above n 82, 188.
[97] Ibid, 189.
[98] Other works of relevance to religious attitudes in colonial society include: Walter Phillips, *Defending "A Christian Country": Churchmen and Society in New South Wales in the 1880s* (University of Queensland Press,1981); G Nadel, *Australia's Colonial Culture: Ideas and Men in mid Nineteenth Century* (Cambridge, 1957); Bruce Kaye, Tom Frame and Colin Holden, *Anglicanism in Australia: A History* (Melbourne University Press, 2002); and Brian Fletcher, 'Anglicanism and Nationalism in Australia, 1901-1962' (1999) 23 (2) *Journal of Religious History*, 216 in which it is argued that by the twentieth century attachment to establishment had gone and was replaced with pride and nationalism about the Australian race and faith.

gender, religion, judicial process, colonial crime, indigenous relations and colonial and Imperial power.[99]

Narrowing the focus to the subject of this thesis, in the Australian context, Diane Kirkby, Catherine Colebourne and Hilary Golder have explored marriage, divorce and married women's property in the Australian colonial nineteenth century and twentieth century.[100] Diane Kirkby and Hilary Golder's contribution in *Sex, Power and Justice*, a collection of essays about the Australian colonial experience of women, titled 'Marriage and Divorce before the Family Law Act 1975', examines how colonial government concern with rendering their populations respectable and stable altered English precedents to produce more religious tolerance in marriage laws and less restrictive divorce.[101] These themes are expanded upon in chapters 3, 4 and 5 of this thesis. Their work on the legal disabilities of married women[102] provide the backdrop for further discussion of legal marriage doctrines inherited from England, how they evolved in the colonial context and their impact on the deceased wife's sister marriage debate in the colonies. However, the broad focus of Kirkby and Golder's work is the meaning of law's history for women and the broader issue of gendered power relations

[99] Legal history, marriage law and property right are themes arising in many of these scholars research from various colonial perspectives. To name only a few examples, see Margaret McCallum and Rusty Bitterman, *Lady Landlords of Prince Edward Island: Imperial Dreams and the Defence of Property* (McGill Queens University Press, 2009);Philip Girard "Married Women's Property in Nova Scotia, 1850-1910," in Janet Guildford and Suzanne Morton (eds), *Separate Spheres: Woman's Worlds in the 19th Century Maritimes* (Acadiensis Press, 1994); Danaya Wright, "Well-Behaved Women Don't Make History: Rethinking Family, Law, And History Through An Analysis Of The First Nine Years Of The English Divorce And Matrimonial Causes Court (1858-1866)" (2005) *Wisconsin Women's Law Journal* 211; John McLaren and Hamar Foster (eds), *Essays in the History of Canadian Law: British Columbia and the Yukon* (University of Toronto Press, 1995); John McLaren, Robert Menzies and Dorothy E Chunn (eds), *Regulating Lives: Historical Essays on the State, Society, the Individual and the Law* (University British Columbia Press, 2002); J McLaren et al (eds), above n 13; Shammas, above n 54, 9; Mary Beth Combs, *"Cui Bono?* The 1870 British Married Women's Property Act, Bargaining Power, and the Distribution of Resources within Marriage." *Feminist Economics* (2006) 12 (1-2), 51.

[100] Hilary Golder and Diane Kirkby, above n 13, describes the changes occurring in land regulation between 1860 and 1890 and provides an overview of coverture and dower systems and the use of equitable jurisdiction to free up land in colonial Australia; See also 'Marriage and Divorce Law before the Family Law Act 1975' in Kirkby and Golder, above n 54, Ch 10 which explores the differences in the workings of legislation in England and in the colonies including that women and men could marry more easily in New South Wales than in England and there was less focus on religious recognition because of the need to encourage marriage to stabilise the colony; and Hilary Golder and Diane Kirkby, 'Settler Colonies Embrace Married Women's Property Reform' (2004) 22 (1) *Australian Canadian Studies*, 77.

[101] See Stephen Robertson, 'Review: Law, History and Colonialism' (1999) 17 (3) *Law and History Review* 628, 629.

[102] Hilary Golder and Diane Kirkby, 'Mrs Mayne and her Boxing Kangaroo: A Married Woman Tests Her Property Rights in Colonial New South Wales' *Law and History Review* (2003) 21 (3), 585; Hilary Golder and Diane Kirkby, above n 100, 77.

in the colonial environment.[103] This thesis examines gendered arguments within the specific deceased wife's sister case-study but it is more focused on the meaning of these gendered constructions for the development of law, than the other way around. It asks how gendered narratives influence legal development?[104] What gendered cultural factors contributed to the moulding of the marriage institution in this period?

Andrew Buck, John McLaren, Nancy Wright and John Weaver, amongst others, have analysed property law in settler societies within the broader cultural context in which the law has been formed and applied.[105] They locate property law within the political, social and economic context with a view to illuminating how property has been constructed by the human mind and shaped by colonial culture.[106] This project takes a similar approach and seeks to illuminate how marriage has been constructed by the human mind and shaped by colonial culture. Both marriage and property are areas in which interdisciplinary scholarship can deliver deeper insights than traditional scholarship, which only provides a positivist account from within the institutional, professional, and internal value systems of the law. Andrew Buck and Nancy Wright have studied how feudal doctrines of marriage and property law have been applied in different societies, and the cultural influences on the development of property law. For example, dower and primogeniture were eroded in the Australian and Canadian colonial context. Although the subject of marriage and property are intimately connected, property law is the main focus of these scholars, whilst marriage law is the central issue in this thesis.

J M Bennett's article, 'The Establishment of Divorce Law in New South Wales'[107] traces New South Wales divorce law provisions from 1788-1892. Each piece of legislation is discussed from its introduction in parliament, a typically positivist approach, focused on legal institutions.[108] There is little discussion of social context. Divorce law is located as part of Australia's constitutional history, with colonial legislators gradually winning independence

[103] Diane Kirkby in 'Lawyer's History Conversationally Speaking' (2003) 7 *Australian Journal of Legal History*, 47, 50.
[104] Frew, above n 5, ch 5.
[105] See McLaren, above n 13.
[106] Ibid, 2.
[107] J.M Bennett, 'The Establishment of Divorce Law in New South Wales' (1963) 4 (2) *Sydney Law Review*, 421.
[108] For a description of this approach see Rosemary Hunter, Richard Ingleby, Richard Johnstone (eds), *Thinking about Law: Perspectives on the History, Philosophy and Sociology of Law* (Allen and Unwin, 1995) 140.

from Imperial control.[109] Chapter seven of this thesis takes on the positivist, constitutional flavour of J M Bennett's article. However this approach, also taken to some extent in chapter two, is tempered by the rest of the thesis, particularly chapters four, five and eight. These chapters either apply a feminist analysis to pro-reform marriage narratives or contextualise purely legal developments with an examination of the comparative ideas about property, family, love and colonial society.

Henry Finlay's far more recent treatment of marriage and divorce law in colonial Australia is one of the most comprehensive accounts.[110] The first half of the book is concerned with the nineteenth century and charts colonial parliamentary debates on divorce law and the later divergence from English law as social, economic and geographical conditions in the colonies became more established.[111] He notes that changes in divorce law accentuated a growing divergence of attitudes in England and the colonies, to an extent, the result of different social structures; a class based system in the one case and an increasingly egalitarian, democratic social system in the other.[112] However, these wider social differences are not explored in detail in Finlay's book, which is largely focused on charting the attitudes of politicians, as expressed during parliamentary debates, his main source. In reviewing the book, Colin James has argued that it 'begins to fill a significant gap in Australian legal history' but by 'restricting the reading to comments in parliament, many social issues have been hidden'.[113] His review concludes with the following remark: 'It [the book] should provoke broader studies that will show how major reforms are stifled or stumble into reality, despite the isolation of our parliaments and the unrepresentative attitudes of our politicians.[114] This thesis seeks to begin answering this call by examining the wider social context in which the deceased wife's sister marriage debates took place and its significance for the stifling of reform and eventual legislative progress. Finlay's treatment of divorce has been described as revealing attitudes to marriage and leaving it to the reader to discern if 'politicians are speaking their mind,

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[109] Ibid.
[110] Finlay, *To Have but Not to Hold*, above n 13.
[111] Ibid, 1.
[112] Ibid.
[113] Colin James, 'Review: To Have but Not to Hold' (2004-2005) 8 (2) *Newcastle Law Review* 115; Margaret Harrison's review also argues that Finlay's 'almost complete reliance on extracts from the *Parliamentary Debates* in his description... is disappointing' but notes that the book's strength lies in a 'thorough documentation of the attitudes of politicians to divorce in Australia at a time when the colonies were seeking increased autonomy.' See Margaret Harrison, 'Review: To Have but not to Hold' *Melbourne University Law Review* (2006) 30 (2), 594, 61.
[114] Ibid, 122.

adhering to party lines or representing the vested interests of religion.[115] In contrast, this thesis, by its very structure, draws out what Finlay describes as the 'side issues' which are 'no less significant'[116] and examines them in depth. These include what the marriage debates reveal about relations between the mother country and its colonial administrators; the quickening sense of national identity and growing colonial independence; and changes in the status of women.[117] These themes, arising in the divorce debates, are also central to deceased wife's sister debates, in addition to others such as the influence of religion on marriage regulation, and attitudes to kinship and family property. These wider cultural factors are shown to be very influential in the shaping of the marriage institution. There exploration therefore highlights the constructed nature of marriage.

The strength in this approach is the ability to provide social context to the parliamentary debates over deceased wife's sister marriage and use the debates to demonstrate wider social and cultural continuities and divergences between the Australian colonies and the mother country. However, this approach does result in a far less comprehensive presentation of the colonial deceased wife's sister debates and a less rounded survey of parliamentary attitudes than that provided in Finlay or Bennett's treatment of divorce. In spite of this lack, this thesis does attempt to continue Finlay's wide geographical approach to some extent by comparing the colonies with the mother country, and broadening the common focus on New South Wales and Victoria to include South Australia. This thesis seeks to go beyond a positivist, constitutional analysis of marriage law, and utilise post-modern, feminist and comparative theoretical approaches to establish colonial motivations for reform and their links to social, religious, political and economic contexts.[118]

Chapters five and six deal with perceptions of female sexuality in marriage and the English characterisation of the sister-in-law in fiction, as maternal agent first and sexual agent second. In assessing how and why some marriage laws, including deceased wife's sister and married women's property law, diverged from English precedent in the Australia colonies, the thesis draws on previous research into the role of feminist activism in nineteenth century Britain and Australia. Mary Lyndon Shanley's book *Feminism, Marriage and the Law in Victorian*

[115] Ibid, 114-115.
[116] Finlay, above n 13, 2.
[117] Ibid.
[118] For a discussion of theoretical approaches to law reform see 'Explaining Law Reform' in Hunter et al, *Thinking about Law,* above n 108, 135-156.

England examines the motivations of feminists in Britain and the practical successes and failures of their efforts to translate the ideal of spousal equality into law. Shanley examines the complex relationship between contractarian liberalism and social traditions and customs in marriage and draws conclusions such as that the 'principles of justice must govern relations in the family as well as in the public realm'.[119] This text provides contextual background for the shifting discourses of liberalism and tradition which are revealed in the deceased wife's sister marriage debates. Susan Magarey's book, *Passions of the First Wave Feminists*,[120] explores the women's suffrage movement in late nineteenth century colonial Australia.[121] Importantly for the arguments posited in chapter five of this thesis, Susan Magarey locates the moral panic over a declining birth rate and the subsequent focus on maternity as the duty of women, to the period after 1880, helping to explain why the maternal characterisation was not as central to deceased wife's sister debates in the colonies as it was in England.

Lee Holcombe examines the role of feminism in the reform of married women's property law in England from the 1850s. She similarly takes a singular case-study but her focus is on married women's property in Britain and her work is not comparative. Like Finlay and Bennett, Holcombe charts the parliamentary debates chronologically and in detail. She analyses the ideology and partisan considerations involved in each debate. Her work can be distinguished from this thesis because her main focus is the relationship between feminism and politics as revealed by feminist reform efforts and changes in the law.[122] In addition, unlike this thesis the book has limited discussion of secondary sources.[123]

Advances in the status of subordinated groups such as women and those prohibited from marrying, were not always a result of feminist activism and were often the by-products of rule changes to advance male interests. Feminist activism in the colonies did not gain momentum

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[119] Mary Lyndon Shanley, *Feminism, Marriage and the Law in Victorian England 1850-1895* (I.B Tauris & Co Publishers, 1989) 4, 195. Her examination covers married women's property legislation, divorce and infant custody. See Jean Bethke Elshtain, Review 'Feminism and the State' (1991) 53 *Review of Politics*, 735.
[120] Susan Magarey, *Passions of the First Wave Feminists* (University New South Wales Press, 2001).
[121] Susan Magarey, Sue Rowley and Susan Sheridan (eds), *Debutante Nation Feminist Contests 1890s* (Allen and Unwin, 1993). Magarey's book uncovers the activities of feminists in colonial Australia in the 1890s, showing that previous perceptions of first wave feminists as politically limited, sexually repressed and conventional, are incorrect. However this occurs after the story of the development of colonial marriage law discussed in this thesis.
[122] See Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth Century England* (Martin Robertson, 1983). See also Mary Lyndon Shanley, 'Review: Wives and Property, Reform of the Married Women's Property Law in Nineteenth Century' (1985) 28 (3) *Victorian Studies*, 528, 529.
[123] Ibid, 530.

until the 1880s, more than a decade after deceased wife's sister legislation was passed in the colonies. Diane Kirkby has argued that feminist activists, though pioneering married women's property legislation in 1870s Britain, were relatively quiet about the issue in Australia. [124] Therefore the marriage legislation of the 1870s-80s was driven by the desire to protect the liberty and property of men, whilst the voices of the women at the centre of the legislative changes were rarely heard. Despite this, scholars, including Kirkby, have established the role of colonial women's economic activity in the slow erosion of feudal marriage doctrines such as coverture and spousal unity in the colonies, and the thesis does not deny married women's role and agency.[125]

Martha Fineman has argued that the best feminist scholarship 'is about law in its broadest form, as a manifestation of power in society, and for the most part recognises that there is no real division between power and law'.[126] This case-study demonstrates how legal constructions protected the interests of powerful interest groups in society, affecting how institutions like marriage were defined. The marriage narrative is reflective of a continued patriarchal social order in the sense that the transition from feudalism to capitalism proceeded change in the status of women but such change remained on male terms. The deceased wife's sister narrative conceptualises women as passive objects passed around according to the logics of male-organised kinship relations. The decline in kinship, increased liberty in courtship and companionate marriage highlights how kinship organisation shifted from constructing women as objects to be exchanged between men to constructing women as playing a passive role in the regulation of sexuality in the family. Therefore it was the discourse of sexuality rather than alliance that ordered the position of women in systems of kinship and marriage.[127] Carole Pateman's *The Sexual Contract* provides a framework for exploring the transition from feudal to contractual notions of marriage and the position of women within that transition.[128] This thesis similarly questions the neutral reading of institutions like marriage and the reliance on 'natural' categories in maintaining its value.

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[124] Holcombe, above n 122.
[125] For an example see Diane Kirkby and Hilary Golder, above n 102, 585. In the English context Shanley's book explores how Victorian feminists argued that justice for women required a fundamental transformation of the marriage relationship. See Shanley, above n 119.
[126] Martha Albertson Fineman, 'Introduction' in M A Fineman and N S Thomadsen, (eds) *At the Boundaries of Law: Feminism and Legal Theory* (Routeldge, 1991) xxi.
[127] Connolly, above n 43, 48; see also Michel Foucault, *The History of Sexuality, Volume 1: An Introduction*, trans. Robert Hurley (New York, 1978), 106-110.
[128] Carole Pateman, *The Sexual Contract* (Stanford University Press, 1988); see also Frew, above n 5, ch 6.

[129]However, unlike Pateman's book, this thesis is not a work of political philosophy and its focus is not political theory or a critique of patriarchy within marriage. Its scope is narrow in comparison and less theoretical, examining how institutional power, such as that of the church, moulded marriage legislation.

Unlike Pateman and Shanley this thesis does not evaluate political philosophy, and unlike Shanley, Margaray and Holcombes' books the focus is not feminist activism, though the extent of this is one of the relevant factors shown to influence the development of marriage law. This thesis does not chart feminist influence or evaluate marriage with a view to establishing whether it is characterised by equality. Nor does it seek to discover the best ways to ensure equality in marriage. It illustrates the process of the development of marriage revealing the cultural factors affecting its construction in the past and those that may affect it in the future. The legal and social characterisation of women within marriage and family is one of those cultural factors. These texts combined form a rich feminist historiography on the politics of marriage and property and detailed histories of legal developments in marriage. Most of this scholarship has focused on post-1880 developments and political philosophy. This work draws from the existing scholarship but tells a new story, focusing on deceased wife's sister legislation and a range of cultural influences on the construction of marriage.

The debate provides a discourse, the examination of which, gives us great insight into the historical issues at play, in addition to answering broader questions about the complex and contextual nature of law itself. Like divorce legislation or married women's property legislation, deceased wife's sister legislation enables comparative examination because of its co-existence and divergence from legislative debates and developments in England. This thesis seeks to bring the constructed nature of marriage to light, through this neglected debate, in order to contribute to the existing research of legal historians. The following section contextualises the deceased wife's sister marriage debate amongst other significant colonial marriage and property debates of the nineteenth century. The purpose of this is to reinforce the significance of uncovering the deceased wife's sister marriage debates for this historical field, and to demonstrate its significance for the wider story of colonial legislative development in family law. The aim is also to acknowledge the relevance of parallel marriage law debates for the development of deceased wife's sister legislation.

[129] Ibid, 4.

Divorce law caused particular dispute between the colonies and the colonial office, especially in relation to the gendered double standard in the English *Matrimonial Causes Act* of 1857.[130] This area has seen more extensive scholarly attention than other areas of colonial legislation regulating marriage and family.[131]

In contrast to the marriage to a deceased wife's sister issue, the colonies largely followed English divorce law for many decades. The English model of divorce was inherited by all the Australian colonies within seven years of its introduction in England (aside from New South Wales which inherited it sixteen years after it was enacted in England). Most of the colonies removed the double adultery standard within a few years of England, aside from Western Australia and New South Wales who legislated for it 12 and 42 years earlier respectively. Most of the extra and uniquely Australian grounds for divorce which were introduced in the colonies and not inherited from England, were introduced post 1890[132] when a number of other departures from English legislation were taking place. Despite the delay in legislative development, the colonial divorce debates do demonstrate growing colonial independence from as early as 1858 and a consistency of attitudes across the Australian colonies.[133] The deceased wife's sister marriage Acts were the only substantive extensions of marriage to an additional category of persons in colonial times. The early and easy departure of legislation from English precedent in the matter of marriage to a deceased wife's sister makes it a particularly interesting subject of research.

The link between changes to colonial divorce law and English and colonial notions of property were made during divorce debates and has been analysed by historians since. For example, Hilary Golder has found that those in favour of the double standard of adultery for divorce argued that a wife's adultery was far more serious than a husband's since 'a wife's fall could introduce "spurious offspring" into the family and thus distort the orderly and just transmission of property'. Those in favour of reform argued that claims about "spurious

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[130] See Finlay, above n 13.
[131] Bridget Brooklyn, 'Nothing to lose: Women and Divorce in South Australia 1859-1918' in Judith Gurbich (ed) *Special Issue Law in Context: Feminism, Law and Society* (La Trobe University Press, 1990, 8 (2)) 70; Hilary Golder, 'An exercise in unnecessary chivalry: the New South Wales *Matrimonial Causes Act Amendment Act* of 1881' in J Mackinolty and H Raidi (eds) *Pursuit of Justice: Australian Women and the Law 1788-1979* (Hale and Iremonger,1979); Margaret James, 'Not bread but a stone: women and divorce in colonial Victoria' in Patricia Grimshaw, C. McConville and E. McEwen (eds) *Families in Colonial Australia* (Allen and Unwin, 1985) 42-56.
[132] Finlay, above n 13, 52-3.
[133] Ibid, 101-2.

issue" were only relevant in 'cast-ridden societies like Britain'.[134] In addition to divorce law, the relationship between colonial property and marriage has been examined in scholarly research on dower and married women's property legislation. These nineteenth century debates are significant for the marriage to a deceased wife's sister story because like the deceased wife's sister debates, these debates were reflective of the negotiation of colonial cultural values and English legal precedent. They illustrate the affect of colonial culture on the reconstruction of the colonial marriage institution.

In 1836 New South Wales adopted Imperial dower legislation.[135] Dower was a common law property right that provided a widow with the use rights of one third of all the freehold lands that her husband had owned during their marriage.[136] The law was premised on the notion that a husband had a moral duty to protect and provide for his wife even after his death; a necessity resulting from the legal incapacity of married women under coverture. Dower can be understood as an acknowledgment that marriage had the potential to cause the maldistribution of wealth within a family when an heir came into family property.[137] However, in the mid-nineteenth century, legislators annulled dower rights in order to facilitate land transfers and secure capitalistic property relationships. The 1850 *Dower Act* (NSW) transformed dower from a married woman's right in the estate of her husband, to the cash equivalent of one third of the value of the estate during his lifetime. This conceptualised dower not as a moral or legal right but instead as a commodity accommodated to the commercial market.[138] In 1863 when the *Real Property Act* (NSW) came into effect, a husband could simply invalidate his wife's dower by making a statutory declaration.[139] Cases about dower heard in the Supreme Court of New South Wales after 1870 viewed dower as a vestige of English land law unsuited to the colony.[140] Buck and Wright found that although the judiciary framed dower in traditional terms such as 'an abstract legal right' or an

[134] Golder, above n 131, 42.
[135] New South Wales *Dower Act* 3 & 4 Wm IV, c105 (1833).
[136] Nancy Wright and Andrew Buck, 'The Transformation of Colonial Property: A Study of the Law of Dower in Nineteenth Century New South Wales 1836-1863' (2004) 23 (1) *University of Tasmania Law Review*, 97.
[137] Nancy Wright, 'Local Policy and Legal Decisions about Dower in Colonial New South Wales' (2005) *Australian New Zealand Law History E-Journal*, 226, 227 at http://www.anzlhsejournal.auckland.ac.nz/pdfs_2005/Wright.pdf.
[138] Nancy Wright and Andrew Buck, above n 136, 125.
[139] *Real Property Act* 26 Vic. No. 9 (1863) in Wright, above n 137, 232
[140] Nancy Wright and Andrew Buck, above n 136, 126.

'entitlement' or 'provision for a wife', legislators used market rhetoric to describe dower as 'an injury to proprietors and investors' and 'an economic interest'.[141]

Such a conceptualisation of dower, similarly to the emphasis on testamentary freedom over moral duty explored by Rosalind Croucher, undermined the traditional notion of the marriage relationship, in favour of liberal individual rights. The central tenets of the traditional marriage relationship undermined were: the merging of husband and wife; the husband's obligation to protect and provide; and the wife's duty to serve and obey. Kirkby and Golder have argued, in relation to married women's property that by a process of piecemeal pragmatism, without ever being debated as a matter of justice for women, colonial married women's legal status was subtly reformulated.[142] At the centre of this was the slow erosion of a husband's obligations within the state of coverture, and to some extent the modification of married women's legal incapacity in the colonies. Liberal individualism in colonial culture and the erosion of feudal doctrines of property and marriage are discussed in chapter four and six of this thesis.

Deceased wife's sister legislation was being debated in colonial parliaments at the same time as married women's property legislation. This is significant because scholars have identified the married women's property bills in England and the colonies in the second half of the nineteenth century as the greatest challenge to the doctrine of coverture.[143] Coverture was a feudal legal doctrine stating that a husband and wife merged as one legal entity upon marriage. Though it was the biblical 'one flesh' doctrine rather than civil coverture that helped define the marriage prohibition, the notion of marital oneness had a central relevance to the marriage to a deceased wife's sister prohibition, which is introduced in chapter two and explored further in chapter six. It is well known the doctrine was eroded by statute during the nineteenth century as legislatures passed married women's property legislation.[144] Lord Brougham[145] introduced a *Married Women's Property Bill* into English parliament in 1857, which would have abolished altogether the common law doctrine of spousal unity with

[141] Ibid, 127.
[142] Hilary Golder and Diane Kirkby, above n 100, 89.
[143] Ibid.
[144] Ibid, 77, 89.
[145] Between 1844 and 1860 Lord Henry Brougham was a liberal reformer in the House of Lords proposing several reforms ranging from the structure of the court system to real property law and the law of marriage and divorce. Oxford Dictionary of Biography Entry, Lord Henry Brougham, at http://www.oxforddnb.com.simsrad.net.ocs.mq.edu.au/view/article/3581?docPos=2, accessed 12 June 2010.

respect to married women's property.[146] The speech revealed Brougham's perception of the married women's property bill as an extension of Whig principles of individual freedom and responsibility, but the Bill was virtually without support in the Lords and died after its first reading.[147]

Another Bill was introduced in English parliament in 1865. If passed, it would re-position women within marriage and society by giving married women independent rights over property.[148] In similar vein to objections to deceased wife's sister legislation, opponents in parliament feared the Bill would 'disrupt the peaceful foundations of domestic life'[149] and 'cause antagonism between those who we taught to believe they were one'.[150] Mary Lyndon Shanley has commented that the Married Women's Property Bill posed a threat to family unity because it would recognise the existence of two separate wills within an ongoing marriage.[151] Deceased wife's sister legislation constituted a threat to family unity on the same grounds, although the undermining of spousal unity was more ecclesiastical and theoretical than practical. Legalising in-law unions would have sent the message that the notion of marital oneness was shaky. In addition, scholars such as Nancy Anderson have argued that the moral panic over deceased wife's sister legislation resulted from the inward, intimacy of the Victorian family and the incestuous associations of sister-brother relationships.[152]

Further bills were introduced in English parliament and in 1870 the *Married Women's Property Act* was passed, falling well short of the original Bill and failing to create a system of separate property within marital relationships. The Act enabled women to invest in separate property and access legal remedies to protect it but did not grant the right to enter into contracts respecting property. In England women had been campaigning for decades and comparatively there was little demand for married women's property legislation in the

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[146] *Married Women's Property Bill* 3 Hansard, cxliv, 605-619 cited in Mary Lyndon Shanley, '"One Must Ride Behind": Married Women's Rights and the Divorce Act 1857' (1982) 25 (3) *Victorian Studies*, 355, 370.
[147] Ibid, 371.
[148] Shanley, above n 119.
[149] Edward Karslake, MP for Colchester, *Times* (London), 1 June 1868, 6, col b.
[150] *Times* (London), 20 Feb 1873, 6, col c.; *Daily News* (London), 20 Feb 1873, 2, col b.; *Morning Post,* 20 Feb 1873, 2, col c.
[151] Shanley, above n 146, 373.
[152] Nancy Anderson's work is explored further on p45. It's interesting to note that Sybil Wolfram disagrees with Nancy Anderson's claim, stating that such fears existed long before the emergence of the nuclear family in the Victorian era. She argues that in the seventeenth and eighteenth century it was thought necessary to forbid marriages between persons in such intimate contact as members of the same household because otherwise they would engage in extra-marital intercourse. Sybil Wolfram, above n 66, 162. For an example see, J Alleyne, 'The Legal Degrees of Marriage Stated and Considered in a Series of Letters to a Friend' (1774)10 in which it was written 'Let Hymen light his torch – let sensual love be once admitted – every house will become a brothel.'

Australian colonies. However, over the following two decades the Australian colonies (along with Canada, NZ and others) acted upon directives from the mother country[153] and Victoria and New South Wales adopted the 1870 Act.[154]

Kirkby and Golder have suggested that the dulled response to married women's property legislation in the colonies may have resulted from the innovations which had already taken place, providing women with some property rights, and therefore there was little value to statutory reform for married women in the colonies.[155] The challenge represented by married women's property legislation in England – a challenge to the deeply rooted, historically entrenched, definition of marriage as defined by coverture - was less significant in the colonies, where that definition had been slowly eroded over the course of the nineteenth century. Kirkby has uncovered how the doctrine of coverture was not strictly observed in the colonies.[156] Women were resourceful in evading coverture, either by preferring common law marriages or maintaining their hold over property and ensuring their continued rights to their own name, legal entity and business interests, despite their marital status.[157] When a case in New South Wales led to judicial questioning of whether the *Married Women's Property Act* of 1879 (premised on the English 1870 Act) provided a married woman with contractual capacity, implicit in the jury verdict was an expectation that married women might work, buy, sell, make contracts and have those agreements honoured. Kirkby noted that this was consistent with colonial practice despite wives' common law disabilities inherited from England.[158]

While colonists were prepared to turn a blind eye to certain practices, they were less inclined to enshrine those practices as formal legal rights.[159] Despite this, passing deceased wife's sister legislation in the 1870s was much less problematic given colonial attitudes to spousal unity, the conceptualisation of a married woman as having a separate identity to her husband

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[153] Hilary Golder and Diane Kirkby, above n 100, 77.
[154] *Married Women's Property Act* 1879 (NSW).
[155] Golder and Kirkby, above n 100, 77.
[156] Kirkby and Golder, above n 102, 595.
[157] Ibid; See also Grace Karskens, *The Rocks: Life in Early Sydney* (Melbourne University Press, 1997).
[158] Kirkby and Golder, above n 102, 594.
[159] The persisting power of the doctrine of coverture was illustrated in the case of *Jupp v Buckwell* (1888) L.R 39 Ch. D. 148 in which it was held that the *Married Women's Property Act* established a married women's separate identity within a marriage but it did not abolish the unity of husband and wife in the eyes of third parties. In other words, the Act did not alter any rights except the right of a woman to hold separate property within a marriage. See Andrew Cowie, 'A History of Married Women's Real Property Rights' (2009) 1 *Australian Journal of Gender and Law,* 1, 8-9. Despite contractual capacity being granted in the English *Married Women's Property Act* 1882, New South Wales did not pass an Act granting contractual capacity until much later.

and, the preceding erosion of the duties and obligations associated with coverture.[160] The theoretical and religious basis of the prohibition had long been abandoned in the colonies and the legislation would not have the practical implications with regards to women's independence that married women's property legislation would entail. During deceased wife's sister debates, colonial parliaments were not shy about departing from English precedent and were comparatively far less concerned about undercutting both the civil and biblical doctrines of spousal unity. The nineteenth century marriage and property debates provide the legal context in which the debate about marriage to a deceased wife's sister took place. Often changes to the institution of marriage take place in many forms in one period and the nineteenth century was no exception. The intersection between the debates arises throughout this thesis but the focus remains on the singular case-study. The following section introduces the limited scholarship which has examined the specific case-study of deceased wife's sister marriage.

Deceased Wife's Sister Marriage in Britain and Colonial Australia

Nancy Anderson published a regularly cited article on the subject in the *Journal of British Studies* in 1982. She argued that it was the structure of the Victorian household that caused anxiety over deceased wife's sister marriage. Within the Victorian household men and women were restricted from socialisation outside the home, and found their most intimate relationships with their siblings.[161] Anderson argued that the household was a hot-house for repressed incestuous feelings and sister-in-law marriage was perceived as a threat to family purity. This thesis takes up Anderson's argument but broadens the lens through which we view the wife's sister debate and legislative development by examining its connection with institutional structures such as the Established Church and the wider legal doctrines governing marriage and property. Elizabeth Gruner also positions the wife's sister debate within the broader cultural anxieties over the position of wives and sisters in the Victorian family. She argues that the debate exposes the centrality of the sister-brother bond in Victorian culture and that the debate reveals perceptions of female sexuality within the Victorian nuclear family.[162] Mary Jean Corbett's article published in *Victorian Literature and Culture*, similarly to

[160] Note there is a distinction between the ecclesiastical and civil doctrines on marital oneness. See chapter six for an explanation of the significance of each to marriage in the nineteenth century.
[161] Nancy Anderson, 'The Marriage with a Deceased Wife's Sister Bill Controversy: Incest Anxiety and the Defence of Family Purity in Victorian England' (1982) 21 (2) *Journal of British Studies* 67.
[162] Elisabeth Gruner, 'Born and Made: Sister's, Brothers and the Deceased Wife's Sister Bill' *Journal of Women in Culture and Society* (1999) 24 (2), 424.

Gruner's work, examines the narrative of the deceased wife's sister debates in pamphlets and novels in which perceptions of female sexuality, Victorian family dynamics and sibling relationships are exposed.[163] Corbett has also authored a recent book, *Family Likeness,* which examines representations of incest as examples of anxiety about sexual and racial impurity within English families. Corbett argues that the deceased wife's sister controversy exposed the effects of sexual desire on the purity of the English family.[164] The methodological approach taken by several authors of examining fictional literature is engaged in this thesis in chapter five, although a comparative approach in examining the literature is taken. Similar to this thesis, previous research has been informed by the narrative within legal and political debate, published pamphlets and fictional literature. Some of the themes examined in these articles are re-examined in this thesis. One example is the relevance of the controversy to the government's ability to legislate morality and control individual behaviour; and the characterisation of the sister-in-law, by proponents of legalisation, as an asexual, domestic goddess, marrying a brother-in-law purely for maternal motivation.[165]

However, the approach taken in this thesis sets it apart from previous scholarship on the subject in several ways. It is the first comprehensive analysis of the deceased wife's sister debate in England and the Australian colonies. Previous scholarship has focused on the English debates alone and has not included a comparative approach or discussed the narrative in the colonial context. Brian Connolly's article 'Every Family Becomes a School of Abominable Impurity' explores the marriage controversy within Presbyterian and Congregationalist theology in the early American republic, and the theologian's belief that affectionate relations within family were inherently erotic.[166] The only evident research on marriage to a deceased wife's sister in the Australian colonial context is a chapter published in 2009 by Rebecca Kippen.[167] The chapter addresses the ecclesiastical and political origins of deceased wife's sister marriage prohibition and the clerical debate in the colonies with

[163] Mary Jean Corbett, 'Husband, Wife and Sister: Making and Remaking the Early' (2007) 35 *Victorian Family Victorian Literature and Culture* , 1.
[164] Mary Jean Corbett, *Family Likeness: Sex, Marriage, and Incest from Jane Austen to Virginia Woolf* (Cornell University Press, 2008).
[165] See Diane Chambers, above n 55, 3. See Frew, above n 5, ch 5-6.
[166] Brian Connolly, 'Every Family Becomes a School of Abominable Impurity' (2010) 30 (3) *Journal of the Early Republic.*
[167] See Kippen, above n 95, 463.

particular focus on Tasmania. The article forms part of a larger demographic project unrelated to the marriage issue.[168]

The authors have previously been heavily reliant on interpretations of the issue in Victorian literature as opposed to other sources such as newspaper reports, petitions to parliament and religious tracts.[169] Finally, the central purpose of much of the literature is to reveal the implications of the wife's sister debate for our understanding of female sexuality, sibling relations and kinship in the Victorian era. Though these themes are incorporated in this thesis, overall the thesis examines the debates from a legal perspective, shedding light on the legal and social construction of marriage in two societies.

Historian, Cynthia Behrman's article 'The Annual Blister' published in *Victorian Studies* more than four decades ago took a more legalistic approach to the subject. She briefly outlined the origins of affinity prohibition in Britain and examines the parliamentary arguments for and against legalisation. She touched on themes arising within the debate such as the expanding belief in liberal individual choice and religious non-interference as the nineteenth century progressed and, the role of religious authority in the debate over marriage prohibition.[170] By comparing the religious and political contexts of England and the colonies this thesis enables a deeper examination of these themes. More recently Bruce Bennett examined *Banister v Thompson* - a case taking place after legalisation of deceased wife's sister marriage in England – and the implications of the legislation for the Anglican clergy.[171] Very little has been published on the subject for the past decade.

In *To have but not to hold* Finlay briefly establishes that affinity was one of a number of nineteenth century impediments to marriage, including consanguinity, lunacy, male impotence and the previous marriage of either party.[172] These impediments enabled annulment of marriage before divorce became available. This protected the legal fiction that

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[168] See 'Family Formation and Fertility Decline in Nineteenth Century Tasmania' funded by Australian Research Council (DP0454835).

[169] Margaret Morganroth Gullette constructs a narrative from several sources, in addition to Victorian literature, but the focus of her article is positioning the debate within traditional understandings of lifecycle identity and marriage rather than legal change. Gullette, Margaret, 'The Puzzling Case of the Deceased Wife's Sister: Nineteenth Century England Deals with a Second Chance Plot' (1990) 31(Summer) *Representations* 142.

[170] Cynthia Fansler Behrman, 'The Annual Blister: A Sidelight on Victorian Social and Parliamentary History' (1968) 11 (4) *Victorian Studies*, 483.

[171] Bennett, above n 21, 668.

[172] Finlay, above n 13, 7-8; See also *Road to Divorce*, above n 77, 191.

marriage was indissoluble whilst enabling unhappy couples to escape one another.[173] The second chapter of this thesis paints a similar picture of the origins of affinity prohibition. However, it establishes that these prohibitions were more than mechanisms for enabling a divorce of sorts, and explores the historical roots of the prohibition which caused it to be maintained in English law after divorce by an act of parliament and later divorce for the masses became available. It demonstrates, as do the chapters that follow, that marriage is constructed and reconstructed by legislatures, changing shape over time.

[173] In the Report of the Royal Commission on Divorce and Matrimonial Causes (Gorell Commission) 1912 it was reported 'The relationship of affinity might consist of some remote or fanciful connection between the parties...unknown to them until the desire to find a way out of an irksome union'. Before the reformation this device of annulment was widely used and Maitland characterised prohibited relationships as 'a maze of flighty fancies and misapplied logic.' See Pollock and Maitland, *A History of English Laws* (Cambridge University Press, vol 2, 1912) 388.

CHAPTER TWO

The Origins of Deceased Wife's Sister Legislation

This chapter tells the story of the origins of the deceased wife's sister marriage prohibition in England. The remainder of this thesis is largely comparative and the chapters are set in both England and the colonies. However in order to examine marriage in the nineteenth century and to see why marriage in the colonies included in-law unions whilst marriage in England did not, we need to know the historical basis for the prohibition's creation. This pre-colonial settlement chapter sets down the political, feudal and biblical roots of an age old marriage prohibition. These roots are highly significant for the examination of the almost century long parliamentary debate which ensued in England and the Australian colonies from the 1840s, and led to the reversal of the prohibition of marriage to a deceased wife's sister late in the century. The significance of the issues explored in this chapter will be made clear as the thesis progresses. Knowledge of the origins of the prohibition in the English parliament of 1835 also demonstrates that the reasons for introducing the initial prohibition did not reflect the multitude of reasons that arose for maintaining it later in the century; an illustration of the flexibility of marriage in the face of changing circumstances, and political prerogative. Arguments for and against the prohibition shifted from the time of its creation to the time of its repeal. The changing shape of marriage highlights its political rather than natural origins and, the role of the state in formulating marriage to serve a particular purpose or enforce selective norms.

Lord Lyndhurst's Act was passed in England in 1835 to ban marriages within the prohibited degrees of consanguinity and affinity, including marriage to a deceased wife's sister. The marriage prohibition was historically tied to the protection of political power and capital. In the sixteenth century Henry VIII and his parliament under the royals legislated for or against affinity marriage to the degree that suited them. By the early nineteenth century the integrity of affinity prohibitions were questionable and many parliamentarians expressed little belief in them. Despite some references to the immorality of such unions prior to 1835, the parliamentary debate preceding *Lord Lyndhurst's Act* reveals that the motivation for the Act, as in Henry VIII's time, was simply to clarify legitimacy and protect property and succession.

Pre-19th Century: Marriage Prohibition & the Royals

Between the thirteenth and sixteenth century marriage prohibitions were very extensive. The relatives forbidden to marry were those up to and including third cousins by blood or in-law. There is evidence of concern in English society about affinity marriages as early as the fifteenth century. Such concern is evident in publications such as Charles Blount's *To His Friend Torismond, to Justifie [sic] the Marrying of Two Sisters One After the Other* written in 1695 and John Quick's *A Serious Inquiry into the Weighty Case of Conscience Whether a Man May Lawfully Marry His Deceased Wife's Sister,* written in 1703. By 1887 when Alfred Huth compiled his *Bibliography of Books and Papers upon the Impediments to Marriage*, he was able to list 300 publications on the deceased wife's sister controversy and dozens of others on the personal problems of Henry VIII.[174]

Marriage prohibitions were drastically curtailed in the sixteenth century by parliament under Henry VIII,[175] but his interventions confused the law for future generations. Under the Roman Catholic Church, in place in England until the Reformation, the Pope had the power to grant dispensations to allow and annul marriages. In 1503, Pope Julius II had dispensed Henry VIII and Katherine of Aragon, allowing them to marry despite the impediment of affinity created by Katherine's previous marriage to Henry's brother Arthur, who had died in 1502.[176] Early in 1527 King Henry VIII expressed doubts about the validity of his marriage to Katherine of Aragon. Katherine had been pregnant often during the first nine years of their marriage but had only produced one female child and Henry wished to divorce and re-marry in order to secure a male heir. Henry had already chosen his next wife, Anne Boleyn but she also posed a problem as he had previously taken Anne's sister Mary as his mistress. The legal consensus was that coitus created affinity, a notion derived from the 'one flesh' doctrine – that sexual intercourse created physiological 'oneness'. Given that Katherine had not had sexual relations with Arthur, and Henry had had sexual relations with Mary, his current marriage was less incestuous than the one he proposed to make. Therefore Henry argued that contractual marriage created affinity and thus the bond existed with Katherine of Aragon by virtue of her

[174] Turner, above n 81, 100.
[175] Wolfram, above n 66, 21.
[176] Carlson, above n 83, 67.

marriage to his brother but did not exist with Anne Boleyn by virtue of his relations with her sister.[177]

In addition to obscuring the degrees within which marriage was prohibited, for his own purposes, King Henry challenged the historically supported notion that affinity developed from coital relations, arguing that it was contractual marriage that created affinity. The former had theological support, and whilst the latter did not, it served his political purpose.[178] The coital doctrine was accepted in English law until civil courts took over the divorce jurisdiction. In *Wing v Taylor* in 1861, a man sued for the annulment of his marriage on the basis that he had previously slept with his wife's mother. The divorce court, created in 1858, ruled that 'marriage as well as carnal knowledge were necessary to create affinity so as to bring parties within the prohibited degrees'.[179]However, in the sixteenth century Henry had set about passing statutes that would enable his divorce and re-marriage. By the end of his reign, he had issued four statutes regarding prohibited marriages, not all of which were entirely consistent with one another. The first two issued in 1533 and 1536[180] specified which kin were off limits as conjugal and sexual partners, including all the relatives mentioned in Leviticus, with the addition of the wife's sister (not mentioned there). The second two statutes declared that all marriages not expressly forbidden by divine law would be valid.[181] Whether the second two statutes contradicted the earlier rulings prohibiting marriage with a deceased wife's sister was left unanswered.[182]

King Henry's request that the Pope declare his marriage to Katherine unlawful, and the consequences of the Pope's refusal – eventually overthrow of Papacy in England - highlighted the issue of the legality of affinity marriages.[183] Katherine of Aragon's supporters invoked the text of Deuteronomy 25:5-6, which expressly enjoined a man to marry his

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[177] Ibid, 68.

[178] See chapter six for an exploration of the relationship between the biblical 'one flesh' doctrine and the legal doctrine of coverture; see J J Scarisbrick, *Henry VIII* (Penguin edition, 1971) 249ff for a description of Henry's disagreements with the Pope over what constituted affinity.

[179] *Wing v Taylor*, 2 Sw & Tr 278.

[180] *An Act concerning the King's succession* 1533, 25 H 8 c 22 s 3 and *An Act concerning succession of the Crown* 1536, 28 H 8 c 7 s 11.

[181] A provision for dispensations &c 1536, 28 H 8 c 16, s 2 and A provision concerning pre-contracting and degrees of consanguinity1540, 32 H 8 c 38 stated: 'no reservation or prohibition goddess, law except, shall trouble or impeche [Sic] any marriage without the Levitical degrees'. This last statute was passed to enable Henry to marry his fifth wife Katherine Howard, who was a first cousin of Anne Boleyn (who the King had by then beheaded). See Adam Kuper, above n 67, 61.

[182] E Pollack, *Incest and the English Novel 1684-1814* (John Hopkins, 2002) 30.

[183] An Antiquary, *An Historical View of the Restrictions Upon Marriage, especially in relation to England with the true reasons why marriage with the sister of a deceased wife was prohibited* (S Golbourne, London, 1880).

brother's widow in cases where the brother had died without issue. The king's supporters invoked Leviticus 18:18 but the correct translation was controversial. There was controversy over whether the injunction applied only to a man's actions whilst his first wife were alive, or also when she was deceased, given the act of marriage had immortalised her in his flesh. Reliance on essentialist notions of 'natural' marriage partners, in this case, supported by biblical doctrine was, and remains typical of marriage reform debate. Greek, Hebrew, Jewish and Christian theologians, university scholars and canonists in England and on the Continent were called upon to provide evidence for the king. The Henrician divorce exacerbated rather than settled the uncertainty surrounding those rules. The king's divorce produced an intellectual controversy of international significance. The apparent scriptural contradiction between Leviticus and Deuteronomy had been previously and extensively commented upon by religious scholars and the rules of affinity and consanguinity had been invoked in earlier centuries to dissolve the marriages of European nobility. But the nuances of scriptural interpretation had not generated public debate on such a grand scale. This political state of affairs gave rise to discussion, not only amongst religious elites and royalty but within popular culture. For example in the dialogue of Shakespeare's *Henry VIII*:

> Chamberlain – It seems this marriage with his brother's wife has crept too near his conscience.
> Suffolk – No, his conscience has crept too near another lady.

This dialogue reflected Shakespeare's doubt about the genuine nature of the king's sudden guilty conscience regarding his marriage to Katherine.[184] This demonstrates the role of literature in the increasing popularisation of the issue. Hamlet's denunciation of his mother for marrying her deceased husband's brother is another famous example.[185]

Henry VIII statutes were repealed by Queen Mary in 1553 and 1554.[186] When Elizabeth I, daughter of Henry and Anne, came to the throne her legitimacy as Queen rested entirely on

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[184] Turner, above n 81, 100.
[185] Kuper, 'Incest, Cousin Marriage and the Origin of the Human Sciences in Nineteenth Century England' *Past and Present*, 158, 162; Other examples include Elizabeth Haywood's, *The Mercenary Lover* (N Dobb London, 1726) in which a man married an heiress for her money before seducing her sister, impregnating her, persuading her to write a will in his favour and then killing her; or Alphra Behn's, *Love Letters Between a Nobleman and His Sister* (Randal Taylor, 1684).
[186] An Act declaring the Queen's Highness to have been born in most Just and Holy Matrimony 1553, 1 Mary 2, c 1 s 8, repealed the first pair of Henry's statutes; An Act repealing all articles and provisions made against the

her father's invalid marriage with his brother's widow. There was not the same necessity for prohibiting marriages with a deceased wife's sister but it followed from the former prohibition and it seemed right to follow the example by which her own birth had been declared legitimate.[187] One of her first legislative tasks was to re-enact Henry's last two statutes on the matter in 1558.[188] The law of the land thus rested on God's law and the law of the Levitical degrees. After repeal and re-enactment it was not clear whether the reference in the later 1536 Act to the earlier Act of the same year,[189] not itself re-enacted, meant that the wife's sister was forbidden, or whether the reliance placed on Leviticus itself in later Acts meant that the deceased wife's sister, who was not mentioned there, was on the contrary supposed to be permitted.[190] However, in 1563 Archbishop Parker proposed that a Table of Levitical Degrees be accepted as a guideline for prohibition in marriage and when James I came to the throne the table of prohibited degrees was accepted as No. 99 of Constitutions and Canons Ecclesiastical and became the law of the Church of England.[191] The Table extended the degrees of prohibition originally legislated by parliament under Henry VIII by interpreting Leviticus so that relatives thought of as equivalent to those listed in Leviticus were included, and more importantly, any affine relatives were forbidden if the same consanguineous relative was expressly forbidden in Leviticus. This was based on an understanding of affine and consanguineous relatives being analogous. [192] Therefore in the case of marriage to a deceased wife's sister, the wife's sister was treated as if she were the husband's own sister.

Even in these early years there was controversy about the source of the prohibitions. Many lay-members of the Church of England chose not to accept a definition of prohibited degrees,

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See Apostilick of Rome since the 20th year of King Henry VIII 1554, 1 & 2 P & M c 8 s 16 repealed the second pair of statutes.

[187] An Antiquary, above n 183, 24.

[188] Ibid.

[189] *An Act concerning succession of the Crown* 1536, 28 H 8 c 7 s 11; *A provision for dispensations* &c 1536, 28 H 8 c 16, s 2.

[190] Wolfram, above n 66, 26.

[191] *An Admonition to all such as shall intend hereafter to enter the state of matrimony, godly and agreeable to laws* CCC, MS 113, contains various additions with Parker's personal notations. The text is printed in E Cardwell (ed), *Documentary Annals of the Reformed Church of England: being a collection of injunctions, declarations, orders, articles of inquiry, &c. from the year 1546 to the year 1716* (Oxford University Press, 1844) vol 1, 316-20; The Table was printed in the *Book of Common Prayer* (Oxford, 1681), hung in every Parish Church and continued in force until 1940.

[192] This reading of Leviticus was reinforced judicially in two cases in 1847. See *R v Chadwick* and *R v St Giles-in-the-Field* reported in J L Adolphus and T F Ellis, *Queens Bench Reports* (new series) London 1843-56, 1850 vol 11, 205-44, 173-247 and cited in Wolfram, above n 66.

especially as the clergy definition was unwarranted by Scripture.[193] There was an awareness that scripture was vulnerable to manipulation and that marriage law was adaptable and used for political purposes:

> May it not be truly said, that the prohibition had its origin in heresy? That it was first made law by a heretic? And that it was imposed upon his subjects by Henry VIII, not from any real scruples of conscience, but for the purpose of getting rid of an old wife, and making room for a young one?[194]

A tract published in 1774 blamed the prohibition of marriage to a deceased wife's sister on 'the absurdities of crafty and designing priests.'[195] Although the new list of prohibitions were initially absolute, in the time of James I the common law courts prohibited the ecclesiastical courts from intervening after the death of one of the parties and marriages within the prohibited degrees came to be voidable by the ecclesiastical courts during the parties lifetime.[196]

In the 1830s new reasons for changing the marriage law arose. The voidable status of affinity marriage was identified as problematic. It was seen to de-stabilise marriages and more importantly inheritance, because legal legitimacy rested on whether or not a person had any opposition to a marriage that had taken place. In 1835 *An Act to render certain Marriages valid and, to alter the Law with respect to certain voidable Marriages* was passed.[197] The Act retrospectively validated marriages to a deceased wife sister which had occurred prior to 1835, whilst preventing such marriages from taking place legally in the future. In the proceeding chapters of this thesis the biblical, social and economic reasons for maintaining (or abolishing) the prohibition in different societies are revealed. However, parliamentary and

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[193] An Antiquary, above n 183, 26.
[194] An Antiquary, above n 183, 30.
[195] Alleyne, above n 152, 3-4.
[196] See Royal Commission Report, above n 49, 237. For an early case example see *Harris v Hicks* [1692] 2 Salk 548, 90 ER 760 42 in William Salkeld, *Reports of Cases Adjudicated in the Court of the Kings Bench, London* (A Strahan & W Woodfall, Law Printers to the Kings Most Excellent Majesty,1795) vol 2, 548.
[197] The part of *Lord Lyndhurst's Act* that made marriages prior to 1835 legal applied not only to marriage to a deceased wife's sister but to all marriages within the prohibited degrees of affinity, that at the time could be made void by sentence of the ecclesiastical court. The latter clause making marriages illegal from 1835 applied to all prohibited marriages of consanguinity and affinity. *An Act to render certain Marriages valid and, to alter the Law with respect to certain voidable Marriages* 1835, 5 & 6 Will VI, c 54. Hereafter referred to by its common name '*Lord Lyndhurst's Act*'.

public debate when the original prohibiting legislation was passed illustrates that the arguments that developed on either side later in the century were not yet significant. So, why was an Act regarding affinity marriages introduced in parliament in 1835? Why did the Act legalise marriages which had already occurred whilst prohibiting them in the future? The answer to the first question is the perceived necessity, at the time, to clarify and stabilise uncertain and unsettled marriage law. The answer to the latter question is found in the government's anxiety over the security of inheritance lines. For the next seventy years, social, economic and religious arguments for and against deceased wife's sister marriage were relentlessly flung about in parliament and the public arena but at the time of its inception the legislation was simply driven by political agendas, practical concern and a desire to protect aristocratic property. This is illustrative of the political nature of marriage and its adaptability for different uses despite the pattern of claims about its essential and unchanging features.

The Uncertain Nature of Marriage Legislation

In the nineteenth century the English Parliament began to assert more authority over subjects such as marriage which had historically been chiefly in the hands of the Church. *Lord Lyndhurst's Act* was part of the attempt to disentangle a hideous knot of civil regulations, Church custom, biblical proscriptions, common law, and conflicting jurisdictions, as well as certain inequities imposed on Jews, Catholics, Quakers, and non-conformists.[198] The on-going dialogue in literature, media, political and religious commentary focused attention upon the uncertain state of marriage law and secured a place for the issue in societal consciousness. John Quick explains in the opening of his treatise that it was his discovery that such marriages were common and that the question of their legality was a subject of public discussion which led to his decision to contribute to that discussion.[199] In addition, there was an increasing awareness of the number of affinity marriages taking place and the uncertainty of their status. Interestingly, these marriages continued after the prohibiting Act was passed. In five districts in England, there were 1,364 unions within the prohibited degrees between 1835 and 1848, and of these ninety percent were between a man and his deceased wife's sister.[200] The issue

[198] Behrman, above n 170, 484.
[199] J Quick, 'A Serious Inquiry into the Weighty Case of Conscience Whether a Man May Lawfully Marry his Deceased Wife's Sister' (Printed for J. Lawrence at the Golden Angel in the Poultry, and R. Parker under the Royal Exchange,1703) in R Trumbach (ed), *The Marriage Prohibitions Controversy, Marriage, Sex and the Family in England 1660-1800* (Taylor & Francis 1985).
[200] Report of Commissioners, above n 49, xxviii, x-xi For specific examples of couples who held sister-in-law marriage ceremonies illegally, see Ginger Frost, above n 21, 61.

simmered as positions were taken up on either side. It was clear that a number of people disagreed with the state of the law and this was manifested by the number of couples who married despite the chance of a challenge being brought in the courts. Thousands of middle and upper class couples took advantage of their wealth and the more lenient laws of other countries to contract affine marriages abroad.[201] It was very common for unmarried sisters to live with their married sisters and common therefore for them to replace their sisters in the case of death.

The uncertainty of English marriage law and the practice of the middle/upper classes travelling abroad to evade the law resulted in several other debates to reform marriage legislation in the same period. For example, in the month following the passing of *Lord Lyndhurst's Act*, a bill was introduced in parliament in response to the number of young men and women evading the English *Marriage Act* by travelling to Scotland to marry, where parental consent was not required.[202] In addition, parliament discussed the number of English persons taking advantage of Scottish law which allowed for the dissolution of marriage for which English law did not provide. Similarly to the affinity marriage debate, attention was drawn to the importance of clear laws regarding the legitimacy of marriages. Just as the uncertain status of affinity marriages caused anxiety, so too did the uncertain status of marriages and divorces conducted abroad or without official registration. The laws regarding the legitimacy of marriages, divorces and remarriages conducted in Scotland were uncertain and both parliament and society were intolerant of that uncertainty. As Lord Brougham stated in parliament:

> The conflict between the two laws on this point, affecting questions of legitimacy, was productive of serious evil. On such a momentous subject as the validity of marriages, and the legitimacy of children, no doubt should be suffered. The different laws which made a person legitimate in one country, and bastard, or of doubtful legitimacy in the other, was [sic] pregnant with evil.[203]

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[201] Ottenheimer, above n 65, 75-6.
[202] *Marriage Act,* 1753, 26 Geo. II. c. 33; For more on the implications of *Lord Harwicke's Act* see R Probert, 'The Judicial Interpretation of Lord Hardwicke's Act 1753' (2002)123 (2) *Journal of Legal History* 129; Lemmings, above n 78.
[203] UK, *Parliamentary Debates*, House of Commons, 3 September 1835.

In 1836 further reform took place for the purpose of clarifying legitimacy of familial relationships when the *Registration of Births, Deaths and Marriages* and the introduction of civil marriages were debated.[204] These Acts, in addition to *Lord Lyndhurst's Act*, appear to have been introduced within a series motivated by the necessity for clarifying legitimacy. It was argued that a general system of civil registration, rather than the operating system of Church of England registration, was important to ascertain the state and condition of individuals under various circumstances.[205] The *Marriage Act 1836* relaxed strict religious marriage ceremony and allowed civil marriages and ceremony according to different religious custom. Since *Lord Hardwicke's Act* in 1753 the members of dissenting religions had been forced to conform to Anglican ceremony in order for their marriages to be legally valid as this Act required all marriages be solemnized in a parish Church. The law was so stringent that some avoided it by marrying in Scotland.[206] The repeated discussion of the importance of clarifying the legal legitimacy of marriage relationships, whether it be marriages conducted abroad or affinity marriages at home, was a response to concern for the protection of property and the entrenchment of legitimate lines of inheritance. Issues of inheritance, wardship and property hung on the validity of marriage.[207] *Lord Lyndhurst's Act* would end the risks associated with such marriages by defining lines of inheritance and preventing challenges to unions in court. Legislation was shaping marriage to fulfil the legislature's chosen purpose.

Though the successive marriage Acts were introduced with the shared motive of clarifying legitimacy and protecting proprietary interests, the effect of the *Marriage Act* 1836 was to broaden the range of legitimate marriage partners, regardless of religion and ceremony, whilst *Lord Lyndhurst's Act* restricted eligible marriage partners. The 1836 Act was part of the liberalisation of marriage and, whilst *Lord Lyndhurst's Act* was not reflective of this trend, both represent the push for clarification. The 1830s after the passage of the *Reform Bill* were not especially conservative years in terms of legislation and the 1836 *Marriage Act* sat neatly within the reform agenda, whilst *Lord Lyndhurst Act* does not. Religious minorities such as Jews, Catholics and non-conformists clamoured for more rights and had little faith the Established Church would remain. Many controversial reforms were enacted in these years

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[204] *Marriage Act*, 1836, 6 & 7 Will IV, c 85
[205] UK, *Parliamentary Debates*, House of Commons, 12 February 1836.
[206] Behrman, above n 170, 482.
[207] UK, *Parliamentary Debates*, House of Commons, 12 February 1836, vol 31, col 367-85. Wardship refers to the right to custody of an infant. For a history of cohabitation in nineteenth century England and the associated legal impediments of illegitimate marriage and children, see Frost, above n 21.

and those that followed, including the expansion of the franchise, religious minority rights, divorce legislation and women's custody legislation.[208]

However, many argued that the imposition of stricter standards on the marriage contract was very desirable and that marriage was not a matter that could be left to judicial discretion. It was a matter about which there had to be hard and fast rules.[209] Such views were supported by Jeremy Bentham's ideas regarding the codification of the law and the abolition of the common law.[210] He argued that the common law was essentially unknowable, since it was all *ex post facto*, and that it needed replacement by a new legislated code.[211] Though Bentham's codification ideas were seen as somewhat radical in the early nineteenth century,[212] there was some criticism of the common law and an acknowledgment of the need for authoritative rules to be articulated. It was argued that in an era of rapid legal development it was impossible for individuals to know the law.[213] Political authoritative rules defining the parameters of marriage were seen as necessary for its creation and maintenance, yet as the very debate about how to define marriage progresses, marriage is continually treated as apolitical.

Parallel to the government's recognition that citizens were unsure of their legal marital status under the current system was the recognition that the ecclesiastical courts, in which marital and incest disputes were dealt, had many weaknesses. The ecclesiastical courts were under severe and increasing attack from 1829 for several reasons unrelated to their jurisdiction over marital affairs.[214] From 1830 onwards there was growing sentiment that it was offensive to religious liberty that Church of England courts, with episcopally appointed judges, should determine the important civil rights of all citizens; the volume of matrimonial cases was small and therefore the courts lacked the predictability and regularity desirable in courts of justice; family relationships between court officers were common and, many of the diocesan judges lacked legal training. The Ecclesiastical Courts Commission of 1832 recommended the

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[208] Gullette, above n 169, 146; See legislation including *Reform Law,* 1832, 2 & 3 Will IV; *Marriage Act* 1836, 6 & 7 Will IV; *Custody of Infants Act,* 1839, 2 & 3 Vic, c.54; and *Matrimonial Causes Act,* 1857, 20 & 21 Vict, c. 85.

[209] Gullette, above n 169, 487.

[210] Jeremy Bentham, *Traites de legislation civile et penale,* trans, E Dumont, (Paris, 1802).

[211] M Lobban, 'The Concept and Practice of Reform Law' in A Burns & J Innes, *Rethinking the Age of Reform 1780-1850* (Cambridge University Press, 2003), 120.

[212] Dinwiddy, J R, 'Bentham's Transition to Political Radicalism' (1975) 36 *Journal History Ideas* 683

[213] Lobban, above n 211, 120.

[214] Criticisms included: the probate jurisdiction involved constant problems of the relationship with other courts that had jurisdiction to interpret wills; and the law enforced by the ecclesiastical courts which imposed a tax upon the population to maintain the parish church was also a contentious political issue. See Waddams, above n 84, 60-61.

transfer of the whole contentious jurisdiction of the diocesan courts to the two provincial courts (Canterbury & York), where diocesan judges had more formal legal training and the legal process would be centralised, more professional, regular and predictable.[215] The recommendation was never taken up but it illustrates the government's concern with regards to the capacity of the Ecclesiastical courts to resolve legal disputes effectively. *Lord Lyndhurst's Act* abolished affinity and consanguinity litigation, taking a class of annulment cases out of ecclesiastical jurisdiction. In this context, it is understandable that parliament would be pleased to remove affinity and consanguinity marriage away from the ecclesiastical courts by codifying the rules surrounding legitimacy and abolishing the possibility of challenge under the court's jurisdiction. It is likely that ecclesiastical court reform had no bearing on *Lord Lyndhurst's Bill*, since the effect of the Bill was to take a class of disputes out of the court's jurisdiction at a time when the effectiveness of the courts were being questioned. However, there were other primary motivations for passing the legislation, and in light of the relatively small number of affinity incest cases heard by the ecclesiastical courts[216] this relationship was relevant but not essential for the passing of the Act.

Public discussion about marriage to a deceased wife's sister did not escalate until the mid-nineteenth century, but there was awareness of the desirability for certainty and the unsatisfactory state of the law in terms of the voidability of particular marriages. This state of affairs was unsatisfactory for those who had entered into such marriages because, though not many malicious challenges occurred, there was always the risk of a challenge. It was unsatisfactory to religious conservatives because as the *Edinburgh Review* pointed out: 'The supremacy of the law of God was made dependant on the accident as to whether there was anyone spiteful enough or interested enough to procure the intervention of the law of man to give force to the Law of God'. [217] Finally, the state of the law allowed for its manipulation and was both impractical and inefficient. To prevent voiding, a collusive suit could be brought by a friendly party and either dropped or allowed to continue for long periods. On-going suits or

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[215] Ibid.

[216] Between 1828 and 1857 in the London Consistory Court, requests for nullity cases were heard on the following ground: on account of former marriage (23 cases), minority age (3 cases), absence of publication of banns (5 cases), insanity (3 cases), and non consummation on account of impotence (13 cases). There was one case of consanguinity and affinity (in a category other than deceased wife's sister). There were four incest cases in this period (which were primarily brought for marriage to a deceased wife's sister). These were classified as criminal cases rather than matrimonial. The London court heard more matrimonial cases than the rest of the dioceses courts put together, the total annulment cases heard by the London court between 1828 and 1857 was 53. This illustrates that the numbers were relatively small when it came to nullity cases and even smaller when it came to marriage to a deceased wife's sister. Ibid, 70.

[217] Turner, above n 81, 102.

suits that had been dropped were held to bar other actions and this strategy was used by those couples who could afford it, to prevent their marriages from being voided in the future.

Progress in Parliament: Passing Lord Lyndhurst's Bill

If the uncertainty of marriage status and inheritance lines led to the creation of legislation to clarify such questions, what influenced the content of that legislation? Why did *Lord Lyndhurst's Bill* pass in the form that it did? The inconsistency between *Lord Lyndhurst's Act* and other marriage legislation indicates that the Act was not primarily a result of entrenched conservatism. The limited discussion with regards to the morality of such unions indicates that the legislation was not a moral measure. In addition, the prohibition was not enacted in response to excessive litigation as this was fairly limited. The Act reflected a practical pathway to clarification; a consensus that retrospective validation was highly important for the protection of legitimacy for those who had married already; and the perception that the Bishops in the Lords would refuse to pass the Bill unless a clause was inserted prohibiting future unions. The legislation is illustrative of the role of institutionalised power and, practicality in shaping legal marriage. The shape of marriage depends on the requirements of the state in ordering and regulating relationships in society.

The original Bill was proposed by Lord Lyndhurst in Parliament on 1 June 1835. Lord Lyndhurst argued that the confused state of the law was capable of causing great injustice and it was an advantage to society to make the status of such marriages certain, rather than dependent upon the possibility of action by a third party. The main stated goal of the act was to eliminate the uncertain status of children. Lord Lyndhurst argued that the legislation would prevent parties marrying, having a child born to them who as an adult inherits property and has his own children, before a suit is suddenly brought which reduces him to the status of bastard and strips him and his children of hope and fortune.[218] There was speculation that the *Bill* was introduced by Lyndhurst to satisfy his personal agenda which involved his friendship with the seventh Duke of Beaufort. The duke had married two half sisters consecutively. After the death of his first wife, he married her younger half sister, a marriage within the prohibited degrees. The title and prospects of their son, the Marquess of Worcester, were at the mercy of

[218] *Parliamentary Debates,* House of Lords, 1 June 1835, vol 28, cc203-7.

anyone who chose to bastardise him,[219] a challenge which could not occur if Lord Lyndhurst's legislation passed. Lyndhurst's initial Bill intended only to reduce the period in which a challenge could be brought after a marriage had taken place but was modified much before it passed into law in 1835. Parliament urged that the marriage be made completely valid or invalid to prevent any confusion caused by the prospect of voidability. Lord Lyndhurst argued a complete bar on future marriage within the prohibited degrees made practical sense. From the first reading the legislation was presented as a bill not to question or alter the degrees of affinity and consanguinity, but to confirm the stance of the law which for all intents and purposes, already existed. Lord Lyndhurst was reported as stating that 'There were many important considerations connected with the subject, to which he should now not advert, since he did not propose to effect any change in the law'.[220] Affinity marriages had been almost uniformly nullified when a challenge was brought before the courts and the Bill only sought to enforce the law with regard to all marriages and not just those that happened to be challenged.[221] In *A Life of Lord Lyndhurst*, Sir Theodore Martin states that as the Bill only affirmed the current law and adequately settled the uncertainty, it met with limited opposition.

However, when the Bill reached the House of Commons parliamentary discussion reveals that the second clause of the bill almost prevented it from passing and opposition was expressed, particularly against the contradictory nature of the retrospective clause and particularly with regards to marriage to a deceased wife's sister. The initial second reading of the Bill in the House of Commons on 18 August was brief. Mr Plumptre moved an amendment which specifically regarded the degree of affinity of the deceased wife's sister. The amendment was to the effect that exception to the future prohibition should be made in favour of the sister of a former wife, when there were children by that wife less than twelve years of age. Mr Divett commented that 'There can be no doubt that cases might occur where it might be of essential importance both to the father and the children that such a marriage should be permitted'.[222]

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[219] James Beresford Atlay, *The Victorian Chancellors in Two Volumes* (Smith Elder, 1906-8),116.
[220] *Parliamentary Debate*, above n 218.
[221] T Martin, *A Life of Lord Lyndhurst from letters and papers in possession of his family* (John Murray, Albemarle Street, 1883), 331. The discussion in the House of Lords was brief and treated the legislation entirely as a measure of legal codification. There was no further debate, a discussion of which would have been included here. Therefore speculation about the motive for the initial introduction of the Bill results from analysis of the political context at the time, the House of Commons debates, and of secondary sources such as the mover's biographies.
[222] *Examiner*, 23 August1835, 1438, 4.

However, Horace Twiss, a former Under-Secretary for the Colonies and Tory supporter of the Bill, suggested Mr Plumptre withdraw the amendment so as not to 'endanger the Bill in another place.' There was very limited discussion and when the House was counted and there was not a minimum of members to make quorum, the House divided on the amendment and adjourned. When discussion resumed two days later Mr Plumptre's amendment appeared all but forgotten.[223] Despite this, what was best for children with deceased mothers was a major strand of the continuing debate in the following decades.

On 20 August 1835 John Sayer Poulter, the Whig member for Shaftesbury, presented his objection to the second clause of the *Marriage Act Amendment*. The core of his objection was the inconsistency between the first clause which made prior marriages valid, and the second clause which made future marriages void. Mr Poulter moved to have the second clause struck out of the Bill and the speaker suggested the House go into Committee to discuss the subject. That discussion revealed an overwhelming consistency in the view that the law regarding such marriages must be made certain in one way or another. Mr Twiss' statement 'it was impossible to leave the law in its present state; for no error could be greater than that of leaving the law on so important a subject in a doubtful situation' was reiterated by various members throughout.[224] However, despite consensus on the need for a clear legal statement about the status of such marriages, there were various views on what ought to be the content of the legislation. Mr Twiss went on to argue that as the uncertainty of the law was forcing the House to take a firm position either way, it should avoid offending the moral and religious prejudices of a public majority and leave the Bill as drafted.[225] However, other members expressed sympathy for Mr Poulter's concerns. For example, Mr Ewart, a liberal with radical leanings, said that it was not right to purchase present advantage at the expense of future consistency[226] and, that the clause prohibiting future marriages contradicted principles of the law and humanity by punishing children for the offences of their parents.[227] The Committee divided on Mr Poulter's amendment 33 Ayes to 21 Noes, illustrating that there was initial opposition to the future prohibition of all affinity and consanguinity marriages within the prohibited degrees.

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[223] *Parliamentary Debate*, House of Commons, 18 August 1835, vol 30, cc661-3.
[224] *Parliamentary Debate*, House of Commons, 20 August 1835, vol 30 cols 791-5.
[225] Ibid.
[226] Ibid, (Mr Ewart).
[227] Ibid, (Mr Pease).

The dialogue which ensued when the House resumed discussion of the Bill a few days later on 24 August focused on whether a bill which legalised certain marriages retrospectively and made them illegal in the future, fulfilled the purpose of clarifying the marriage law and affirming the status of the parties involved. Again the specific prohibition of marriage to a deceased wife's sister arose when Sir William Follett (Tory member for Exeter) acknowledged that some Honourable members had expressed the view that there were particular degrees of affinity within which marriage should be permitted, and that marriage to a deceased wife's sister was one such degree.[228] However, once again Follett argued that the purpose of the Bill before the House was to create certainty in the law and if any degree of affinity ought to be exempt, this should be done through an additional clause or a separate Bill to be passed thereafter. He advocated the Bill be passed and the law be clarified as soon as possible. Mr Poulter responded by stating that passing an Act which made marriage to a deceased wife's sister, amongst other marriages, absolutely null and void, only to reverse that direction in the following session, seemed confusing rather than clarifying. There was little discussion of the moral, religious or social justification or lack thereof for the future prohibition. For the remainder of the debate, specific degrees of affinity and religious or moral concerns regarding the legitimate degrees to prohibit were treated as secondary issues to be discussed at a later date when the urgent matter of clarifying marriage status had been settled. The strength of the moral opposition to the marriage, arising later in the century, is illustrative of the changing nature of morality and the influence of moral norms on the construction and reconstruction of marriage.

The debate appears to demonstrate that members were for the most part unconcerned with the moral implications of deceased wife's sister unions. One M.P expressed the view that marriage prohibitions – particularly the deceased wife's sister prohibition – lacked integrity because of how the law developed during Henry VIII's reign. Mr Poulter said that 'it was well known that all those prohibited degrees of affinity arose out of a statute of the King a more absurd law than which has never existed.[229] Prior to the Bill similar views had been expressed. In 1815 the issue of affinity marriage arose during debate over *Roseberry's Divorce Bill*, an application for divorce made by the Earl of Roseberry on the basis of his

[228] *Parliamentary Debate*, House of Commons, 24 August 1835, vol 30, cc948-53.
[229] Ibid, 957 (Mr Poulter).

wife's incestuous adultery.[230] During discussion about whether the Countess of Roseberry's monetary provision should be reduced on account of her incestuous adultery with her brother-in-law, many M.Ps expressed the view that affinity unions were common and did not amount to incest. For example, Mr M. A. Taylor

> considered that the case had been much exaggerated, by terming it an incestuous intercourse. He believed that there were numberless marriages in this country which might be void by the strict application of the canon law. He knew many men, of the most respectable character in other respects, who had married their first wife's sister.[231]

Here Mr Taylor acknowledges the existence of multiple kinds of marriage, constructed by the law, the churches, and the relationships that couples form in society. He believed 'of every hundred marriages which were solemnized in this country, three were contrary to the express ordinances of the ecclesiastical canons. These marriages were to his knowledge, constantly recurring...'[232]

During debate of Lord Lyndhurst's Bill in 1835 M.P.s were prepared to sacrifice or ignore the second clause invalidating affinity marriages in the future, to ensure the implementation of the first clause, validating those already solemnised. This retrospective validation is described as a 'certain good' and 'real benefit',[233] 'a comprehensive measure of general relief with regard to the past'.[234] It would 'put an end to a great many cruel cases of hardship[235] and 'prevent parties from flattering themselves with hopes of security for the future'.[236] Given the general

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[230] *Parliamentary Debate*, House of Lords, 1 June 1815 at http://hansard.millbanksystems.com/lords/1815/jun/01/roseberry-divorce-bill.
[231] *Parliamentary Debates,* House of Lords, 14 June 1815, vol 31 cc0-795, 792.
[232] Ibid, 788. This does not lead to the conclusion that affinity marriage was not considered incestuous or undesirable prior to the marriage to a deceased wife's sister debate at all, just that it was the voidable status of the unions rather than their incestuous nature which was perceived as the greatest evil during the drafting of Lord Lyndhurst's Act. According to Sybil Wolfram uneasiness about incestuous marriage existed in the seventeenth and eighteenth century. She cites theories that supported prohibition in these periods which resemble those that arose from 1840 within the deceased wife's sister marriage debate. For example, the notion that prohibiting affine marriage would prevent extra-marital intercourse within the household. Anonymous, *Mr Emmerton's Marriage with Mrs Bridget Hyde Considered* (1682), 47; Alleyne, above n 152, 10; and the theory that sexual unions between relatives could create fatal jealousies within the family. Jeremy Bentham, *Principles of the Civil Code* in Wolfram, above n 66, 164.
[233] *Parliamentary Debate*, above n 224, 951 (Dr Bowring).
[234] Ibid, (Mr Warburton).
[235] Ibid, (Dr Lushington).
[236] Ibid, 949 (Sir William Follett).

consensus regarding the retrospective validation of affinity marriages, it was seen as too greater sacrifice not to pass the Bill on account of objections to future prohibition. The debates support the contention that Lord Lyndhurst's Act was passed, not to prevent immoral unions from taking place but to protect the legitimacy and property of elites who had entered into such unions. This is supported by the fact that challenges to legitimacy were only likely to occur amongst aristocrats, who could afford to take action and had substantial property to gain. In this case marriage was being shaped for the protection of the privileged.

There was concern in the Commons about how the Bill would be received by the Bishops in the Lords. Mr Warburton stated that had Mr Shaftesbury proposed a clause making affinity unions valid in the future, he would have understood and agreed with him in principle but it was not expedient.[237] The following comments clarify the full meaning of his remark regarding expediency:

> Could his hon. Friend venture to predict that, in twenty years' time, he could bring round the right Rev Prelates, in the other House, to consent to declare those marriages valid? And were they for that period to refuse an act of justice to those which had already been solemnized? He, therefore, hoped his hon. and learned Friend would see that it would be better to leave the law in a settled state, by declaring all those marriages void instead of leaving them only voidable.[238]

The final Commons vote was largely in favour of both clauses remaining in the Bill with 75 Ayes and 17 Noes. However the results of the vote alone tell us little about the views of the House on the legitimacy of marriage to a deceased wife's sister. It is questionable whether the Act would have passed in the form described had it been concerned with marriage to a deceased wife's sister alone. However, as it included all the degrees of affinity and consanguinity, some of which the whole of the House would have undoubtedly agreed should be illegal, marriage to a deceased wife's sister may well have been sacrificed for the greater good. There are no division lists available in the Hansard records which could have provided further information about the attitudes of individual parliamentarians, but what the debate does reveal is that those who voted for the Bill were more concerned with its overall purpose

[237] Ibid, 952.
[238] Ibid, 952.

than its detailed substance. Some were prepared to forgo a belief that marriage to a deceased wife's sister and perhaps other affinity marriages should be permitted, in order to keep the Bill clear and simple, and with a view to possibly exempting some specific forms of marriage in the future. Others may not have considered the merits of prohibiting each of the degrees of affinity separately as they were generally not discussed in this manner in parliament.

Perhaps the act of overlooking specifics in favour of passing a clear law quickly is illustrative of parliament's tendency to be influenced by expediency. The debate demonstrates that the subject was introduced almost entirely as a matter of 'legal codification' with no attempt to tie it to discussion of moral values until it hit the Commons and even there such discussion was minimal and muted. In the short-lived debate itself, there is more discussion of why legislation is needed than explanation for its content. It can only enlighten us with regards to the powerful motivation of clarifying legitimacy and inheritance lines, and the role of institutionalised power in the form of the Bishops, in creating a marriage institution that excluded affine partners.[239]

Conclusion

An understanding of the origins of affinity marriage prohibition prior to *Lord Lyndhurst's Act* and the reasons for the *Acts* implementation in the 1830s is important, given that shortly after it passed into law, a seven decade debate began over the legalisation of marriage to a deceased wife's sister. This chapter has provided a brief historical background and endeavoured to establish why *Lord Lyndhurst's Act* was passed. The social, religious and economic arguments that characterised deceased wife's sister marriage debates of the mid to late nineteenth century were not at issue in the 1830s when the prohibiting legislation was passed. This demonstrates that marriage is re-formulated by the state to serve the relevant purpose of the era. In the 1830s the purpose of marriage legislation was to clarify legitimacy and therefore marriage legislation, including deceased wife's sister legislation developed to serve that purpose. However, the marriage prohibition was originally entwined with the establishment of the Church of England in the reign of Henry VIII and, the Church would continue to have a vested interest in the issue. The aristocratic hierarchy would also remain

[239] See O MacDonagh, 'The Nineteenth Century Revolution in Government: A Reappraisal' in P Stansky (ed), *The Victorian Revolution Government and Society in Victoria's Britain* (American Historical Review, 1973), 6.

interested because of the legislation's role in protecting aristocratic legitimacy. These historical links continued to affect the debate and shape of marriage throughout the nineteenth century.

The biblical origins of the prohibition and its central role in the controversy which led to the establishment of the Church of England made it a symbol of church authority. This was reinforced by its inclusion in the Canon law of the Church of England and again in the 1830s when the Bishops in the House of Lords secured a clause in *Lord Lyndhurst's Act* reflecting the Canon law and prohibiting future affinity marriage. In the mid to late nineteenth century the ability to retain the prohibition within the law became a symbol of the ability of the Established Church to retain their authority. The next chapter shows how the marriage prohibition was retained in England for the purpose of protecting religious establishment and enforcing the religious norms of the Established Church in relation to marriage and kinship. It introduces the religious context in the Australian colonies to illustrate that the same purpose for marriage did not exist in the colonies and there the state moulded marriage legislation in accordance with colonial conditions.

CHAPTER THREE

Established Church, Religious Politics and Legislative Reform in the Australian Colonies 1850-1900

> Once more, my Lord-Bishops, you've stood in the way,
> combining a long needed change to delay;
> once more you have dared – 'tis a risky retort –
> the oft-expressed will of the people to thwart;
> too stubborn to learn and too hardened to yield;
> your bigotry dense you again have revealed;
> and in just the same manner seen often before,
> have waved your sectarian banner once more.[240]

The above poem published in *Truth* in 1894 reveals the authors perception that the marriage prohibition was being retained in England to protect the Established Church and enable the marital norms of the church to be prescribed in civil legislation. The separation of church and state in most of the Australian colonies in the 1870s (Western Australia 1894) was one of the features of colonial life that distinguished it most from Britain.[241] Therefore a comparison of the deceased wife's sister debates and legislation reveals that marriage was shaped in the respective jurisdictions in accordance with different purpose and for the enforcement of different norms.

By the 1880s the majority of people living in Australia were native born and historians have argued that it was in this period that a distinctive Australian culture was emerging.[242] However, distinctions between English and colonial Australian culture can be drawn much earlier and comparative analysis of legislative debate highlights those distinctions. Distinctions in religious culture caused the respective legislatures to debate deceased wife's

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[240] 'Another Bone with the Bishops' *Truth*, June 21, 1894 in Marriage Law Reform Association, *House of Lords Debate on the Second Reading of the Marriage to a Deceased Wife's Sister Bill, Comments of the Press*, (East and Blades, May 1895), part 3, 102.
[241] Carey, above n 82,189.
[242] For examples of the expression of an emerging distinctive culture in literature and art see Vance Palmer, *The Legend of the Nineties* (Melbourne University Press, 1954), 54; Bernard Smith , *Australian Painting 1788-1970* (Oxford University Press, 1971), 82.

sister marriage in different ways in the nineteenth century and this is reflected in the legislative outcomes which defined the parameters of marriage.

The colonial parliamentary debates about marriage to a deceased wife's sister appear to illustrate that Australia was largely secular in comparison with England. There is far less discussion of the religious issues relating to marriage to a deceased wife's sister. Those arguments against legalisation that were based on religion were rejected, leading to the legalisation of such unions throughout the colonies in the 1870s. However, given the historical roots of the English prohibition presented in the previous chapter, it is more likely that the absence of a powerful Anglican establishment politically akin to that in England and the diversity of the denominational populations led to a tolerant approach to the marriage question. By mid-century sectarian conflict had influenced the abolition of state aid to religion and education in the colonies and the colonial population was more supportive of the separation between the state and religion than in England. An illustration of the tolerant and liberal approach taken in order to avoid sectarian conflict can be found in the debates over the marriage issue which took place within the Presbyterian Church of Victoria. The Church initially rejected marriage to a deceased wife's sister but later took an approach characterised by forbearance and tolerance.

One of the primary reasons for the protracted nature of the struggle for marriage reform in England was its significance for the relationship between church and state. In England the seven decade debate over marriage to a deceased wife's sister reflected the declining influence of the Church of England. This chapter explores the relationship between church and state in England and the colonies in the nineteenth century and the implications for the marriage issue. The legalisation of marriage to a deceased wife's sister throughout the colonies in the 1870s[243] was not reflective of an irreligious Australia but rather of the necessity for a collective, non-sectarian approach to maintaining Christianity. An examination of discourse within colonial parliaments and churches reveals how liberal attitudes and religious tolerance affected the deceased wife's sister issue in the colonies.

One of the primary political issues in the English debate over legalising sister-in-law unions was the symbolic significance of legalisation for the relationship between church and state.

[243] See Frew, fn 11.

Until the mid-nineteenth century, divorce and matrimonial causes lay within the jurisdiction of the ecclesiastical courts. Since the middle ages matrimony had been governed by canon law rather than common law. Marriage was regarded as a sacrament and the bond it established was indissoluble, depending not on the 'will of man alone but on the ordinance of God'.[244] Although in the eighteenth century the wealthy could apply to parliament for a private Act for the granting of a divorce, canon law and the jurisdiction of the ecclesiastical courts remained unchanged.[245] The secular Court for Divorce and Matrimonial Causes was not created until 1857 with the passing of the *Matrimonial Causes Act*. In the same period the first Bill for legalising marriage with a deceased wife's sister was introduced in parliament. It is against this background – the shifting of marriage and divorce from ecclesiastical to civil jurisdiction – that the debate over legalising sister-in-law marriage began and much of that debate was representative of the tussle between church and state, for authority over marriage regulation. The *Matrimonial Causes Act* was significant in that it removed matrimonial causes from the ecclesiastical courts.[246] However, it was not until the twentieth century that most leaders of the Church of England had reconciled themselves to the divergence between the secular law of marriage and the ideals of Christian doctrine.[247]

Although *Lord Lyndhurst's Act* 1835 was civil legislation making deceased wife's sister unions, amongst others, void from that date, the prohibitions were based on ecclesiastical law which had prohibited marriage within the degrees mentioned or implied in Leviticus since the Reformation. The prohibited degrees were drawn up in the Table of Kindred and Affinity by Archbishop Parker in 1563 which was officially adopted as the law of the church in 1603.[248] Therefore, during debates in the second half of the nineteenth century the Bishops in the House of Lords were consistently opposed to marriage to a deceased wife's sister on the grounds that the prohibition was part of the law of the Church of England. Henry Phillpotts, the Lord Bishop of Exeter, describes the significance of the marriage issue to the church and state relationship in a letter to the Bishop of Litchfield in 1860:

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[244] Archbishop of Canterbury's Group, *Putting Asunder a Divorce Law for Contemporary Society: The Report of a Group Appointed by the Archbishop of Canterbury* (London, 1964-1966), 83.
[245] Lord, above n 85, 16. See also O R McGregor, Divorce *in England: A Centenary Study* (Heinemann, 1957), 12.
[246] Lord, above n 85, 17.
[247] Ibid, 20.
[248] Bennett, above n 21, 668.

> This Table [of Kindred and Affinity] taken in conjunction with the 99th Canon expresses the law of the Church of England in the matter of marriage *in opposition to that of the Church of Rome.* In other words it is an important particular of our reformation, asserting the validity of the Levitical degrees as part of the law of God, which as such, man may not add to, or take from, nor dispense with. The Bill before parliament therefore, if it shall ever pass, will be a direct blow at the English Reformation.[249]

The movement to legalise sister-in-law unions was fiercely opposed by the Anglican hierarchy and on an almost annual basis private members bills were discussed in the House of Commons before being defeated. Those that passed the Commons were defeated routinely in the House of Lords where twenty-four Anglican bishops had votes. As the nineteenth century progressed the Church of England became more and more isolated on the issue due to non-conformist and Roman Catholic support for marriage reform. The pressure increased when such unions became legal in many countries and in many British colonies.[250] Although historically the Pope had provided dispensations to allow sister-in-law unions, the English Bishops argued that the House of Lords could not recognise the power of parliament to dispense with the law of God, any more than it could recognise the power of the Pope to dispense with the law. It was argued that the legalisation of marriage to a deceased wife's sister would endanger the relationship between Church and State.[251] On May 9 1889 fourteen Bishops assembled in the House of Lords to assist in defeating another legalising Bill.[252] In 1907 one parliamentarian repeated a typical argument against reform recycled from earlier debates over the course of the nineteenth century:

> The Church of England, following the universal practice of the Western Church, has always prohibited these marriages... in the Canon ... all marriages which have anywhere been contracted within the degrees of

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[249] Letter from Henry Philpotts, Bishop of Exeter to the Bishop of Litchfield, 1860, including Rev H N Oxenham, 'The Deceased Wife's Sister Bill considered in its social and religious aspects' (Spottiswoode & Co, 1885)in Ecclesiastical Law Pamphlets 1860-1888, British Library (BL), 5155g 27, 15.
[250] Bennett, above n 21, 669.
[251] Marriage Law Reform Association, *Marriage to a Deceased Wife's Sister, Remarks of the Convocation of Canterbury's 'Articulus Cleri' and the debate in the House of Lords in 1883 with Appendix and Report of Royal Commission 1847* (London, 1885) 8-9.
[252] *Advocate*, August 10, 1889, 6.

> consanguinity or affinity prohibited in the 18th chapter of Leviticus should be dissolved by the authority of the Bishop... Therefore, so far as the Church of England goes, there can be no more doubt...I am therefore justified in saying that what the hon. Member asks us to do so lightly, and as a matter of mere expediency, is to alter the custom which has lain at the root of the idea of Christian marriage from the very earliest time.[253]

Such arguments about the essential and God given definition of marriage appear time and again in marriage reform debates. Yet, as was the case with marriage to a deceased wife's sister, essentialist arguments are usually overcome by the fact that marriage is a legal and political creation, and is inevitably re-shaped by legislation. In letters between Mr. Charles Haig, a non-conformist constitutionalist and unionist and Reverend Bullock Webster, Chaplain to the Bishop of Ely, published in the *Guardian* in 1891, Mr. Haig states 'it is only the presence of the Bishops of the Church of England in the House of Lords which has prevented the Bill from passing into law. It is the Established Church which ties its prayer-book and reading of the divine law, round the neck of those who decline to accept its teachings.'[254] In response the Reverend Bullock wrote: 'our marriage law is no mere ecclesiastical rule which the circumstances of the time make it wise to dispense with. We believe it to be of divine authority, recognised and enforced by Jesus Christ, and therefore impossible to set aside.' Haig reminded the Reverend that the 'Church is established by the state...'[255] Even as the Marriage Act was finally passed in 1907, one member warned parliament that it would be 'an instalment of disestablishment...a bit of the Church will be broken off from the State and left with jagged edges.[256]

The politics of the Established Church and state in England were quite different from the politics of sectarian conflict and denominational diversity in the Australian colonies and this influenced debate over marriage regulation.

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[253] *Parliamentary Debates*, House of Commons, 24 April 1901, vol 92, cols 1184-252, 1197 (Griffith-Boscawen).
[254] 'Letters from Mr Charles Haig to Rev G R Bullock-Webster, Chaplain to the Bishop of Ely' *Guardian*, (London), March-April 1891.
[255] Ibid, 6.
[256] Anderson, above n 161, 68-69 in Kuper, above n 67, 72, fn 102.

Church and State in Colonial Australia

Whilst in the mother country arguments against legalisation of marriage to a deceased wife's sister were often tied to the existence of the Established Church, in the Australian colonies where there was no Established Church the situation was quite different. A Sydney case in 1861 reinforced that there was no Established Church in the colony of New South Wales.[257] The case gave rise to the question of whether English laws regarding the Established Church were inherited in the colony. The Chief Justice pointed out that such law is applicable in the colony only when the legislature or the courts declare it, and consequently he declared that 'the King's Ecclesiastical Law of England has no applicability to the circumstances of this colony'.[258] His honour set out the legal position of the Church of England in the colony compared to its position in England:

> During the rise and progress of the system all persons in England were supposed to be members of the Established Church. That church was recognised by various statutes to be the church of the whole people. The holders of land were obliged to pay tithes for the support of the members of that church...the Bishops had seats in parliament...the Church was recognised as an institution by the law and was by the law established. But the Christians in this country who were or would have been members of a church established in the United Kingdom, have never in any statute been recognised as being members of a church established here by law, any more than the members of the Roman Catholics, Presbyterians, Independents, Unitarian, or Jewish congregations have been. The colonial legislature...has in no instance given the Church of England precedence over other collections of Christians. Having here no tithes, no church rates, no peers – there being no circumstances which assimilate the political status of the Church of England members to that of the same class...in the United Kingdom – it's obvious that the laws by which the Church of England is regulated there can have no applicability...[259]

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[257] *Reverend George King v the Right Reverend the Lord Bishop of Sydney* [1861] Sydney Banco, Legge's Supreme Court Cases, Vol. XI, 1311.
[258] Ibid, 1313.
[259] Ibid, 1314. See J T Ross Border, *Church and State in Australia 1788-1872: A Constitutional Study of the Church of England in Australia*, London (SPCK, 1962), 263. By this time it was clear that there would not be an

In Australia the Church of England was unsuccessful in claiming the position of Established Church. The churches were cast—and cast themselves—in a suppliant and subservient role. The Catholic Church and other denominations bid for liberty and equality causing significant sectarian conflict. The arbiter and determining authority in this conflict was the state and the disposition of the state in regard to religious adherence was neutrality. The state had arrogated to itself the power to be above religion and to have authority superior to it.[260] The treatment of religious arguments in the colonial debates over state aid to religion, denominational education and marriage regulation is illustrative of the significance of the lack of an Established Church for religious questions in colonial politics in the latter half of the nineteenth century. In many British colonies, including those in Australia and Canada the state felt free to act independent of the blessing of church denominations on the matter of marriage to a deceased wife's sister. The state was in a process of freeing itself from the power of churches in increasingly religiously diverse societies. The historic national Churches of England and Scotland had been financially disestablished when the government decided to cease its funding of religious institutions; the state would further limit the influence of churches over public policy. However influential they remained, churches had become diverse voices among many to be listened to by political leaders, rather than being able to directly influence the actions of the state on issues they believed important to the spiritual and moral health of society.[261]

In 1855 the Bishop of South Australia, Bishop Short, who had previously been insulated from public opinion by legal privileges, social eminence and state grants to the church, told the clergy that the 'Church of England's had no peculiar connection with the local government or civil court of the colony beyond any other Christian body.'[262] The problem of transporting

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Established Church in Australia. However it is important to note that in a number of British colonies such as New South Wales, and Upper and Lower Canada, there were spirited attempts in the first third to half of the nineteenth century by Anglican hierarchies to have the Church of England recognised as the Established Church. For the reasons explained in the thesis these attempts were unsuccessful.

[260] O'Farrell, above n 91, Ch 2.

[261] Peter Bush, 'Debating Marriage: Marrying the sister of a Deceased Wife and the Presbyterian Church in Canada' (2009) *Fides et Historia* at http://www.thefreelibrary.com/Debating+marriage%3A+marrying+the+sister+of+a+deceased+wife+and+the...-a0218882621, accessed 17th Jan 2011, 67.

[262] N K Meaney, above n 89, 154. As a high churchman Short frequently clashed with his predominantly Evangelical flock and with the province's Nonconformists. In 1850 at a bishops' conference in Sydney he supported the doctrine of baptismal regeneration; he provoked protest from the South Australian Church Society and the formation of a vigilant committee to petition the archbishop of Canterbury for protection from episcopal interference with doctrine. Short was unperturbed and assured his flock of his dislike of most of the Tractarian

the Established Church of England from the mother country was common to all the colonies. Though there was a significant amount of unofficial religious discrimination in the colonies, there was never a significant majority willing to entrench denominational privileges legally.[263]

The rejection of an Established Church and the perception that the marriage question was a state issue rather than a religious issue influenced the shape of marriage in all of the Australian colonies. Bishops in the English parliament continued to oppose the legalisation of marriage to a deceased wife's sister on religious grounds until an Act was passed in 1907. It was the strength of religious opposition, the political power of the Church of England and its dominance which was highly influential in the retaining of the prohibition for so many decades. The contrasting religious context of colonial Australia resulted in a different outcome. Speaking in the English House of Commons on the *Deceased Wife's Sister Bill* in 1901 former South Australian Governor James Ferguson explained how the religious make-up of the colony had resulted in the passing of the legislation to legalise the union.

> They [mdws laws] operated first in South Australia because the colony is known to be heterogeneous with regard to religion, and the parliament there was very impatient with any restrictions of laws founded upon ecclesiastical rules, and therefore it was only necessary to tell them that the main objection to its being passed here was the fundamental law of the Church of England, to make them say, "We have no Established Church here".[264]

Marriage to a Deceased Wife's Sister: Religious Argument in Colonial Parliaments

Bills to legalise marriage to a deceased wife's sister were passed in South Australia in 1857, 1860, 1863 and 1870 with the earlier Bills being disallowed by the crown. A Bill was passed

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beliefs. Australian Dictionary of Biography Entry at http://adb.anu.edu.au/biography/short-augustus-4577, accessed 21 October 2011. The Tractarian's, led by Edward Pusey (who strongly objects to deceased wife's sister marriage in the English debate) a group of Anglican academics and clergymen were increasingly unhappy with the lack of seriousness with which the establishment regarded its religious duties, with the failure to appreciate the catholic heritage of the church, in particular its historical and theological insights predating the reformation, and with its erastianism — the willingness to subordinate the legitimate claims and prerogatives of the church to the requirements of state policy. Herbert Schlossber, 'The Tractarian Movement', The Victorian Web at http://www.victorianweb.org/religion/herb7.html, accessed 3 June 2011.

[263] Breward, above n 90, 126.

[264] *Parliamentary Debates*, (House of Commons) 24 April 1901, vol 92, col 1240.

in Victoria in 1870 and 1872 and in New South Wales in 1876. In isolation the parliamentary debates on marriage to a deceased wife's sister, particularly in South Australia, appear to support the contention that colonial Australia was largely secular by the mid to late nineteenth century and sectarian perspectives on political issues had little significance. Comparatively with England there was far less discussion of the religious issues relating to marriage to a deceased wife's sister in colonial parliaments, and those arguments against legalisation that were based on religious sentiment were rejected, leading to the legalisation of such unions throughout the colonies. However, the assertions of secularism in the debates are more likely to reflect the quest in the colonies for denominational equality before the law.[265] In the decades of colonisation there was resistance to the Church of England's attempt to control marriage. Sectarian diversity continued to influence perspectives on marriage regulation and by the 1870s many religious denominations believed that a tolerant approach would best serve their interests. Although religious arguments were made out on either side of the debate, in contrast to the English parliamentary debates, secular rather than religious arguments were more prominent in all three colonies. Arguments premised on liberal rights and tolerance were dominant in colonial parliamentary debate and some parliamentarians advocating legalisation rejected any discussion of religion.[266]

Between 1873 and 1875 the *Wife's Sister Bill* was debated in the New South Wales parliament. Arguments both for and against marriage to a deceased wife's sister arose on religious grounds. Mr Buchanan, Honourable Member of the Western Goldfields, who moved the second reading of the legalising Bill, said the prohibition in force was a remnant of ecclesiastical domination, which was not the word of God but a device of mankind. Here he invoked the power of the State in constructing marriage. He argued that in the colony the Wesleyans, Jews and Church of England were in favour of the union and only the Presbyterians were against such marriages.[267] In contrast, Mr Campbell and Mr Innes argued

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[265] Breward, above n 90, 80.

[266] For another member of the Committee's speech rejecting the arguments of Reverend Nish cited shortly, see Rev A R Boyd & A B McCay, *Critique's of Mr Nish's Interpretation of the Divine Law of Incest* (Speech delivered before the General Assembly of the Presbyterian Church of Victoria, Melbourne, 1873).

[267] (NSW) *Parliamentary Debates* (Legislative Assembly) 28 November 1873 (Mr Buchanan, Honourable Member for Goldfields) in *Sydney Morning Herald*, (Sydney), 29 November 1873, 5. Mr David Buchanan was a Scottish Presbyterian radical who was outspoken against state aid to religion and strongly advocated secular education. In 1860 he published The Sinfulness and Barbarism of State Churches, attacking state aid to religion and 'the bloody State Church of England'. He was also opposed to papal authority and few members of the assembly lashed out against 'the Papists' as provocatively as Buchanan but since sectarian outbursts were a recognised part of colonial politics, members usually ignored them. Buchanan is famous for having introduced several divorce bills and amendments introducing simple equal adultery and attempting to introduce desertion as

against legalisation on the basis that the majority of English society was against such marriages because they were not consistent with the Bible and they did not wish to see the purity of English society changed.[268] The reference to an English majority rather than an Australian majority is striking and illustrates that political men still looked to home for guidance, particularly on moral and religious issues. Other parliamentarians emphasised the irrelevance of religious argument suggesting that: it had been public sentiment not scripture which had prohibited affinity marriage; a statute declared such marriages void and a statute could declare them not void; and the parliament could not decide matters of scriptures but could decide on this matter, one of a humanly imposed qualification.[269] The Bill was postponed in order to look into its practical application but in comparison with English parliamentary debates on the issue there was no heated disagreement over its religious implications.

By the time of the second reading speech in 1875 even those who did not support legalisation of sister-in-law unions were arguing against it on secular grounds. It was becoming clear that religion was irrelevant to the question or at least less important than other factors. The Bill was read a first time in the Legislative Assembly in 1875 on the same day as the *Divorce Bill* which was beginning to take priority. The *Wife's Sister Bill* passed through the Legislative Assembly very quickly and was discussed in the Legislative Council. Mr John Campbell, a dedicated supporter of the Church of England, stated that he was against the Bill on secular principles because all Christian principles had been done away with in the colonies.[270] Mr Charles Campbell, who had argued on religious grounds in previous readings, suggested that the debate should be had with reference to secular reasoning: "We have no Established Church and no Ecclesiastical Courts, and to a certain extent we were not a Christian country,

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a basis for divorce. Australian Dictionary of Biography Entry at http://adb.anu.edu.au/biography/buchanan-david-3099, accessed 12 August 2011.

[268](NSW) *Parliamentary Debate*, 4 March 1874 (Mr J Campbell) in *Sydney Morning Herald*, (Sydney), 5 March 1874, 2. John Campbell was a Sydney born, English educated Anglican benefactor, merchant and politician. He was a great supporter of the Church of England in the colony, contributing 10,000 pounds to found the Diocese of Riverina and, contributed to the endowments of the bishopric of Goulbourn and the Sea of Grafton and Armidale. He also enabled the founding of the Bishopric of Fiji. Australian Dictionary of Biography Entry at http://adb.anu.edu.au/biography/campbell-john-1872.

[269] (NSW) *Parliamentary Debates* (Legislative Assembly) 28 November 1873 (Mr Foster, Mr Brown and Mr Fitzpatrick respectively) in *Sydney Morning Herald*, (Sydney), 29 November 1873, 5.

[270] (NSW) *Parliamentary Debate* (Legislative Council), 6 May 1875 (Mr J Campbell) in *Sydney Morning Herald*, (Sydney), 7 May 1875, 2, col 3.

so he should not attempt to argue the question as if we were." He opposed the Bill instead because 'it would unnecessarily revolutionise the whole life of the country.'[271]

A piece in the *Sydney Morning Herald* takes a humorous perspective on the significance of religious sentiment in parliament:

> The House has been debating for two or three hours on the deceased Wife's Sister Bill, and as the majority of the speakers have, up to this time, been in favour of the measure, the canonical objections to such unions have been very lightly passed over. At length Drummond rises, he has no moral aversion to a man marrying his wife's sister if he is at all smitten in that direction, but what he does object to is that in the discussion of the question the laws of the church should be so contemptuously disregarded. Having given utterance to this exordium, he pauses a minute and a rich smile breaks over him, like the ruddy fruit bursting through the dry husk of the pomegranate. "If you are going to drive through the discipline of the Church in this manner" he says with a dry chuckle which prepares the House for something good, "you had better act openly and abolish its control altogether, *Up! like men, and marry your grandmothers!"* The House roars.[272]

This satirical representation of events in parliament is illustrative of the light-heartedness with which the religious implications of the Marriage Bill were treated. Issues unrelated to religion including practical amendments were further debated in both houses and in Committee and the Bill passed into law on the 16 Feb 1876 after receiving royal assent.[273]

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[271](NSW) *Parliamentary Debate*, 6 May 1875, (Legislative Council) (Mr C Campbell) in *Sydney Morning Herald*, (Sydney), 7 May 1875, 2, col 3. Charles Campbell was John Campbell's brother, also an Anglican, and a pastoralist who obtained permission from the Colonial Bishops Committee in England in 1854 for a new See of Goulbourn and a new Bishop and provided endowment from his father's estate (left to him and his brothers). He became Chancellor of the diocese and won the bishops eulogies for his accurate and detailed knowledge of the laws and customs of the Church of England. Australian Dictionary of Bibliography Entry at http://adb.anu.edu.au/biography/campbell-charles-1871.

[272] A Literary Vagabond, 'Home Senator v Mr Drummond' *Sydney Morning Herald,* (Sydney), 26 Feb 1857, 5.

[273] NSW *Parliamentary Debate*, (Legislative Council), 16 Feb 1876, 17 Feb 1876.

Similar arguments were made out in the South Australian parliament, including that there was no state religion and laws based on purely theological grounds would be tyrannical.[274] One parliamentarian said it was an 'honour' that the colony was rid of a state church and that he could 'respect the scriptures but despised State Church councils and convocations', a statement which elicited the response 'hear, hear' and a laugh.[275] The second reading of the *Marriage Deceased Wife's Sister Bill* was introduced in the Victorian parliament on 31 October 1872. Mr Ramsay, in supporting the motion, expressed the view that, but for the opposition of a clerical section of the community, a similar Bill would have been law some years ago. The opposition to the measure was the same as that against the Education Bill, and was proceeded by what he could characterise by no other terms than 'clerical obstinacy'.[276] Mr G V Smith said it was not for the House to 'lay down God's law or to assert what it was, or what it was not and he was satisfied the House, having separated Church and State, would not attempt it.'[277] The colonies were at a great advantage because they were free of the ecclesiastical prejudices that entangled liberal action in the mother country.[278]

Unlike English parliamentarians, colonial parliamentarians rarely relied on ecclesiastical reasoning in arguing against legalisation of sister-in-law unions. Both advocates of marriage reform and those supporting the status quo relied upon secular reasoning when arguing their cause. Many parliamentarians, even those with strong religious faith, rejected ecclesiastical reasoning because of a belief in the separation between church and state and the necessity of accommodating religious diversity. For example, in the Australian colonies the Presbyterians were in conflict with the Anglicans. Therefore, arguments relied upon in England about the God given attributes of the marital union, including rules establishing who could legitimately enter the union, were discarded in Australia, where marriage was being constructed according to local state and societal requirements.

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[274] (SA) *Parliamentary Debate*, (Legislative Assembly), May 20 1857, col 133.
[275] Ibid.
[276] (Vic) *Parliamentary Debate*, (Legislative Assembly), 31 October 1872, col 1968. Mr Robert Ramsay was a Scottish Presbyterian and a member of Chalmer's Presbyterian Church. He had a firm belief in national education and the separation of church and state. In 1876 he insisted on a special Victorian edition of the Nelson series of school readers which omitted any reference to the name of Christ. Ramsay's father Andrew Ramsay was a Presbyterian minister who was asked in 1847 to form a congregation in Melbourne 'unconnected with the state.' He formed the Synod of the Presbyterian Church of Victoria in 1850.
[277] Ibid, col 1969.
[278] Ibid, col 1968.

Religious Diversity and Tolerance of Marriage to a Deceased Wife's Sister

This chapter has explored how the existence of the Established Church in England and its absence in the Australian colonies effected the marriage to the deceased wife's sister issue. In addition to the lack of an Established Church in the colonies, sectarian conflict throughout the early nineteenth century and denominational diversity in all three colonies, led to a tolerant approach to the marriage question. In South Australia, a large proportion of the population were dissenters and non-conformists, a population more interested in preventing state interference with religion than promoting the teachings of the bible. In New South Wales and Victoria there was an Anglican majority but there were large proportions of Roman Catholics and a history of sectarian conflict. By the 1870s the various churches realised they were facing the same enemies: growing secularism, increased migration to the suburbs, low-church attendance, and the growing authority of science over religious doctrine. Therefore inter-denominational cooperation and tolerance was the best policy for retaining a Judeo-Christian order. The South Australian population included a majority of non-conformists, comparatively low numbers of Anglicans and a politically powerful group of Methodists. Society was particularly self-consciously liberal, opposed to special privileges, and state assistance to religion.[279] Therefore it is unsurprising that the strongest movement for the reform of marriage law existed in that colony where the division between church and state and denominational equality was considered so important.

By the second half of the nineteenth century the primary issues that had caused sectarian division in all three colonies, such as competition for state aid and rivalry over denominational and state schooling, had come to an end. The issue of whether the state would fund denominational religion had helped to divide denominations and the abolition of state aid helped to bring them back together. The churches remained divided on moral issues such as reform of the liquor industry and gambling.[280] Despite this the churches recognised the common enemy was the spirit of rationalism, a reliance on science rather than traditional church doctrine and the bible and, dominant liberal ideals. Such ideology challenged religious authority and fierce debates about the sanctity of the Sabbath and reform of marriage law,

[279] Meaney, above n 89, 155.
[280] Breward, above n 90, 32; see also W W Phillips, *Defending "A Christian Country": Churchmen and Society in New South Wales in the 1880s* (University Queensland Press, 1981).

were the first significant challenges to religion as the arbiter of moral judgment.[281] Therefore it was in the interests of all denominations to advocate Christian morality generally, rather than irritating sectarian divisions. On moral matters Australians generally opted for some liberty of choice, supported by important sections of the Anglican, Presbyterian and Roman Catholic churches, which rejected, on principle, legislation for compulsory righteousness.[282] It became common place for clergyman of all denominations to deplore the fact that division among themselves made moral challenges even more difficult to face.[283] It was in this context that instances of cooperation such as the stance on deceased wife's sister marriage become more and more frequent.[284]

The granting of responsible government to the colonies in the early 1850s brought new groups to political power because of the generous provision for male suffrage. The sister-in-law marriage debates demonstrate that early colonial parliaments were strongly Christian but determined to separate religious and political authority. Broadly speaking Protestants saw their respective colonies as Christian societies without an Established Church. They believed in a free-church and state, both spheres with God-given responsibilities and separate roles that ought not be confused by making the church political, or involving the state in spiritual matters.[285]There was dispute both within and between denominations regarding sister-in-law marriage but rather than preventing reform, such dispute encouraged the various colonial parliaments to reinforce their neutrality, leading largely to the rejection of religious arguments within parliaments. Even the Australian Anglican clergy were divided on whether Scripture forbade marriage with a deceased wife's sister. There were those that believed clergymen should be able to decide for themselves whether to solemnise marriages in matters of conscience; those that believed the word of God should be respected above the authority of the state, though it was disputed what the word of God was on the matter; and finally those that believed that clergymen had a duty to uphold the law and solemnise such marriages.[286] Perhaps to discourage further disagreement in 1858 at the third conference of delegates from the congregational churches of New South Wales, South Australia, Victoria and Tasmania, it

[281] Hogan, above n 92, 96.
[282]Breward, above n 90, 33.
[283] Hogan, above n 92, 96.
[284] Inter-denominational groups emerged in this period such as the Society for the Promotion of Morality in the 1870s and the Evangelical Association in the 1870s.
[285] Breward, above n 90, 139; see also J S Gregory, *Church and State in Victoria: A study in the development of secular principles of government as revealed by the abolition of State aid to religion and denominational education in Victoria* (M A Thesis, University of Melbourne, 1951).
[286]Kippen, above n 95, 1.

was agreed that all impediments to marriage to a deceased wife's sister should be removed and that divorce laws analogous with those in England should be adopted in the colonies.[287]

The views expressed during several synod meetings of the Presbyterian Church in Victoria illustrated the confused position within one denomination and perhaps the clergy more generally on the issue of marriage reform. Before the *Deceased Wife's Sister Bill* had received royal assent in Victoria, the Presbyterian Church sent a unanimous petition to the Queen pleading that assent be withheld on the basis that the Bill was against the law of God. However, after the petition was ignored and the Bill was passed, there was a change of opinion amongst the Brethren leading to a retreat from the position of unanimous support for the position just a few months earlier. This reveals that some clergy respected the view of the state on marriage in addition to the view of their church, and perhaps some who individually supported reform, felt the legal change gave them permission to perform such marriages. A Committee of the Presbyterian Church was set up to investigate the question and the appropriate response of the Church to the change in the law.

In 1873 Reverend Andrew Robertson gave a speech in Melbourne entitled '*Forbearance The Divinely-Ordained Mode of Preserving Unity in the Church*' in which he encouraged forbearance and religious tolerance, and the liberal right of the individual, whether clergy or layman, to decide on moral matters such as marriage to a deceased wife's sister.[288]

> All we contend for is freedom to hold the belief that marriage to a deceased wife's sister is not contrary to the Word of God, and that, holding this belief, we shall be at liberty to act in accordance with the same; in other words we seek that the question be left an open one in the Presbyterian Church of Victoria'[289]

Reverend Robertson quoted Dr Duff who was the moderator at a previous meeting of the Presbyterian Assembly on the marriage question. Dr Duff stated: 'I have come to the conclusion that divine and divinely ordained scriptural way of dealing with all differences of judgment on all disputed points whatsoever, excepting the grand fundamental doctrines

[287] *Sydney Morning Herald*, Wed 10 March 1858, 5.
[288] Rev Andrew Robertson, 'Forbearance the Divinely-Ordained Mode of Preserving Unity in the Church' (Speech delivered at the Presbyterian Assembly on the Marriage Question, Melbourne, 1873).
[289] Ibid, 6.

essential to salvation is to be found in the exercise of mutual, friendly, brotherly forbearance under the influence of God like charity'[290]. Reverend Robertson said that the Christian principle of forbearance was an essential guiding tool particularly in the infant colony of Victoria and that the Church had little or no hope for progress and success unless it adopted that principle. In relation to marriage to a deceased wife's sister, he said 'you cannot preserve the unity of the church, nor secure its progress and success, but by making this an open question'. Reverend Robertson spoke of freedom and independent thought within the church, the existence of which was essential to its survival. He said that a church that had ministers and members that clung to one view of the marriage question was not a church in which independence and freedom of thought were cherished.[291] His speech embraced both forbearance and liberalism within the church and reinforced a sense of religious tolerance and the division between church and state, both of which were growing sentiments that heavily influenced attitudes to the deceased wife's sister issue: 'I shall never devote my energies to any ecclesiastical organisation which can only accept of the services of its ministers at the sacrifice of liberty of thought and action.'[292] 'On the right to personal choice in regards to marriage to a deceased wife's sister' the Reverend said 'I have no desire, none in the slightest, to insist on our friends understanding that twentieth chapter [of the bible] as I understand it. If they leave me to hold my view, I leave them entirely free to hold theirs'. To this statement the audience enthusiastically responded 'Hear, Hear'.[293]

In a similar vein to Reverend Robertson and Dr Duff, Cooper argued for forbearance in the church: 'The duty of the Church when a difference of opinion arises within her pale, regarding either the scripturalness of her standards or the exact nature of their teaching, is to make the matter in dispute one of forbearance, until clearer light is given to her...'[294] The themes that shine through in Cooper's Sermon are both the necessity for a non-denominational universal appreciation for the work of Christianity; and a liberal individual view of marriage choice. He quotes Bishop Jeremy Taylor in his speech in support of the liberal view: 'It were good, if standing in the measure of the Divine law, we should lay a snare for no man's feet by putting fetters upon his liberty without just cause, but not without

[290] Rev Andrew Robertson, above n 288, 7.
[291] Ibid, 8.
[292] Ibid, 10.
[293] Ibid, 4.
[294] Reverend John Cooper, 'Our Standards and Their Teachings as bearing on the Marriage with the Sister of a Deceased Wife, Considered in the light of Scripture and Common Sense.' (A Sermon preached in the Presbyterian Church, Coburg, on the evening of Sabbath, Melbourne, 26 October, 1873), 14.

great, great danger.'[295] His argument that the church must develop and change with the times in order to 'attend to the operations of God's doings on the earth'[296] is further evidence of the pragmatic view of Christianity which had developed in the colonies. The relationship between liberal individualism, pragmatic religious practice and the separation of church and state, which develop in the parliamentary debates over the deceased wife's sister issue, are highlighted in Reverend Cooper's speech. He argued that 'the duty of the church is not to intermeddle with the internal affairs of the state, or by a mistaken zeal for purity to attempt by forms of discipline to coerce her members into the life of love. Her members are to cherish... that they are not like other men, and should not demand that their brothers comply with their interpretation of inspired truth.'[297] The views of these churchmen are important for illustrating how marriage was shaped in each society by the relationship between religion and the State.

James Nish was another supporter of forbearance and a liberal attitude to the deceased wife's sister issue. He argued that the Church does not propose that absolute uniformity of opinion is essential to ecclesiastical fellowship and in support of liberal individualism he quoted the scriptures 'instead of interfering with one another's liberty, they were ever to bear in mind that they were accountable, neither to one another, or for one another, but each for himself and to their common Master.'[298] He made no moral argument in his pamphlet for or against marriages to a deceased wife's sister or its social consequences, writing that 'On such points every man will speak as he affects' and he had no 'right or warrant to enter upon such speculations'.[299] He went even further as to suggest that a new chapter - the right of private judgment - be prepared and added to the Confession on liberty of conscience.[300]

There were of course those that disagreed with the principle of forbearance when it came to matters such as marriage to a deceased wife's sister. Dr Adam Cairns spoke of the 'imminence of danger' at the thought of legalisation. He criticised those who supported the colonial Acts, accusing them of pretending to be 'so much wiser than preceding generations'. Presumably in sarcastic tone, he asserted: it was 'so amiable to abandon the prejudice of a barbarous or fanatical sect, and to float pleasantly with the current of a popular opinion! It is

[295] Ibid.
[296] Ibid, 3.
[297] Ibid, 12.
[298] J Nish, 'Is Marriage with a Deceased Wife's Sister Forbidden in Scripture' (Speech delivered before the General Assembly of the Presbyterian Church of Victoria, Melbourne, 26 October 1873), 65.
[299] Ibid, 65-66.
[300] Ibid, appendix 1.

so becoming for ministers of religion to be in accord with the liberal spirit of the age! It is so prudent to respect the judgment of the majority, and to agree to differ when it is not safe but profitable to do so.'[301]

A comparison of the debates in the colonies and the mother country highlights the influence of religious context on responses to the sister-in-law marriage issue. In the colonies where there was competition between religious sects there was more tolerance for varied opinion. In addition, lacking the political power of Established Church leaders, the history of marriage as a matter for ecclesiastical jurisdiction was more easily surrendered. Aside from the collaboration between secular politicians and Protestant churches on the education question, in the political arena some Protestant leaders found their natural allies in the conservative factions, usually with the rural squatter base, who were themselves trying to hold back the tides of liberalism and secularism.[302] Aside from the scriptural arguments which relied on interpretation Dr Cameron, a Minister at St Kilda, believed that in the colony of Victoria where there was an absence of conservative associations and restraints...the duty of the Church as the guardian of morality was all the more important, and the Church should not clear the way for the incoming tide of change.[303] The Rev Dr Cairns rejected Nish's call to make the deceased wife's sister an open question. He argued that in no country has domestic life been as pure and happy as in our native land. In Scotland and in England alike the marriage tie has been held sacred, and as a consequence the family home has been a 'well-spring of all the virtues.'[304]

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[301] Adam Cairns, 'A Sermon' (Addressed to Chalmers Presbyterian Church Congregation, Melbourne, 1873) (George Robertson, 1873).
[302] Hogan, above n 92, 97.
[303] A Cameron, 'The Scripture Law of Marriage with Special Reference to Marriage with a Deceased Wife's Sister' (Speech delivered as Minister of St Kilda Congregation, Melbourne, 1872) (Mason, Firth & M'Cutcheon, 1872), 62.
[304] Cairns, above n 301, 39. Adam Cairns was a Scottish Presbyterian who was commissioned to found a Melbourne congregation, set up a theological training institute, promoted colonial education and worked for the union of Victoria's divided Presbyterian churches. Cairns' theology was modelled closely on that of Thomas Chalmers; he remained bound to the doctrine of verbal inspiration of the Bible and to the Free Church confessions and standards. Antagonistic to the continental influences of Schleiermacher and Hegel alike, he believed that to question the authority of any biblical injunction was to overthrow the basis of Christian faith. Though imbued with great evangelical fervour, Cairns would never substitute the 'inner light' for the solid 'Word of God' which he equated with the Bible. This underlay his fierce opposition to and his denunciation of attempts to legalize marriage with a deceased wife's sister. Cairns was too old and set in his ideas to adjust to the new science of the post-Darwinian era. Australian Dictionary of Biography Entry at http://adb.anu.edu.au/biography/cairns-adam-3140, accessed 2 September 2011.

The Reverend D S McLachlan, speaking in favour of the church remaining traditional in its interpretation of the scriptures and the prohibition, said it was all the more important because the feeling in the public mind is that affinity is no bar to marriage.[305] Like other opponents of change, he played down the authority of colonial legislation when he said that the question before the church was whether to expunge the prohibition from the Confession simply because the legislature of this colony, which has a population not much larger than that of Glasgow, has passed an Act which legalises marriage to a deceased wife's sister.[306] He argued that the Church's convictions should not be regulated by the legislature and after years of petitioning against such marriages it was wrong for the Church to suddenly change tack and mirror the view of the government.

Religion provided an important and nostalgic link with home. The clerical leadership, lay support, administrative directives, financial support, architectural styles, liturgical traditions, doctrine and dogma were transplanted from Britain. The religiously inclined immigrants remembered the churches of their youth and wished to preserve English religious nostalgia but by mid-century many ex-convicts and native born persons considered Australia home and the un-Australian image of the church retarded the development of a sense of Australian nationalism.[307] Despite some resistance, the resolution of the Presbyterian General Assembly in Victoria that the matter of marriage to a deceased wife's sister should be left to individual conscience was significant and marked a change of direction which gathered momentum for the rest of the century, weakening solidarity among Presbyterians and fostering relaxation of requirements in other churches as well.[308]

Conclusion

The tight knit relationship between the Established Church of England and the prohibition of marriage with a deceased wife's sister, the roots of which were discussed in chapter two, continued to influence the English debate throughout the nineteenth century and lengthened the process of reform significantly. The differing religious and political context in the Australian colonies made it less difficult for reformers to push through legislation that

[305] See *Presbyterianism in Victoria* 1872, Pamphlets Vol VIII, 41. ((SLV) State Library Victoria 204 T34E V58).
[306] Ibid, 52.
[307] Grocott, above n 93, 218.
[308] *Churches in Australia*, above n 90, 83.

legalised the union. The parliamentary debates appear to demonstrate a secular attitude in the colonies. However the fact that many highly religious men chose to argue on secular grounds, indicates that there were forces other than secularism which were influential. Given the historical context of sectarian conflict over other political and religious issues in the colonies, denominational diversity, and the lack of any one church's political power in parliament, it is likely that it was tolerance of differing denominational views on marriage to a deceased wife's sister rather than secularism that resulted in legalisation.

Protestants often reacted badly to state infringement of explicit scriptural prohibitions. How 'literally' it was permissible to interpret Holy Scripture was one of the most debated theological topics for Protestant Evangelicals in the second half of the 19th century. In cases where the state did infringe scripture, Protestant's moved to socialise culturally their members against acts that may be legal but still offended scriptural law. This was the case with the marriage to a deceased wife's sister prohibition in England. In the late nineteenth century when legalisation appeared inevitable, Protestants in British Parliament turned their attention to maintaining their clergy's right to continue the cultural socialisation of the Protestant community against such unions. Another response was that taken by some of the Presbyterians in Victoria. They left interpretation up to the individual and allowed marriage to a deceased wife's sister by subjecting the precise terms of condemnation in the Old Testament to the 'gospel of love' revealed by the New Testament. The discussion amongst Victorian Presbyterian Church leaders and their resolution of forbearance is an example of the position taken by many churches in the colonies.

The marriage debate highlights the contrast between English Church Establishment and colonial religious pluralism and mirrors the broader post-Enlightenment shift from Established religion to denominational religion. Religious belief and practice was steadily recast in this period as an active commitment of citizens to their internalised and self-policed values, rather than the passive duty of subjects to rulers. The transformation took place in the face of challenges posed by secular forms of knowledge, of democratic participation in political life, and of management of plural religious traditions in emergent 'nation states'. The marriage debate highlights the way in which colonial societies struck these challenges earlier than 'home cultures'. The colonial legislatures abolished the prohibition and shaped the institution of marriage to prescribe marital norms that were in keeping with the active

commitment of citizens to their self-policed values.[309] The English legislature maintained the prohibition to prescribe marital norms that reflected the norms of established religion. Each case is illustrative of the constructed nature of marriage and the process by which political ideals and dominant knowledge discourse shape marriage.

Although religion continued to be an important element of the marriage debate until the marriage was legalised in England in the early twentieth century, the developments described above reduced the influence of religion, and other cultural elements became increasingly relevant to the marriage controversy. By the time of the final debate, the argument which had previously been relied upon to retain the civil prohibition, such as that marriage with a deceased wife's sister was unnatural and against biblical law, had been largely abandoned. For this reason, the following chapters focus not on the religious strand of the debates but on other significant cultural factors that changed the shape of marriage.

[309] The author would like to thank Dr Michael Roberts for his comments on this chapter some of which are incorporated here.

CHAPTER FOUR

Comparative Notions of Property, Marriage and Inheritance in England and Colonial New South Wales: Implications for the Marriage Controversy

Chapter two demonstrated the intimate connection between marriage law, the church and the aristocratic interest in securing legitimate inheritance lines. Chapter three expanded upon the connection between the marriage debate and the Established Church comparatively and in more detail. This chapter expands upon the marriage prohibitions connection with the aristocratic interest in property. Differences in cultural understandings of property and class between England and the colonies permeated the marriage debate. The chapter reveals that the purpose of marriage law was different in each context because of differences in philosophical and practical perceptions of property. Differing cultural understandings of what constituted family property and how property should be protected had a significant influence on the direction of the deceased wife's sister debates in the colonies and in England. The Imperial government's refusal to recognise legally performed deceased wife's sister marriages in the colonies reflects the English refusal to condone a distinctive, liberal conception of property.

A central role of English marriage legislation was the maintenance of the aristocracy through the protection of inheritance and succession, both of property and status.[310] English marriage laws were initially inherited or at least presumed to apply in the colonies but the absence of English class and religious structures made central aspects of English marriage law redundant in the colonies. Despite this, there was a reluctance to relinquish the class structures, and legal framework of the mother country which resulted in a clash of marital law and marital practice. Tension developed between those colonists who wished to maintain a landed aristocracy upon which marriage and property laws were dependent, and those who saw the future of the colony in democracy and other forms of wealth and status. By mid-century, a majority had come to reject the idea of an English aristocracy in the colonies. The development of marriage law in this period is illustrative of the process of the relinquishing of English legislation which depended upon the notion of a colonial aristocratic culture. In keeping with the central aim of this thesis – to examine how legislation constructs marriage as opposed to reinforcing some naturally existing institution -this chapter asks how differing notions of property

[310] For an explanation of how *Lord Hardwicke's Act* achieved this purpose see Probert, above n 202, 131. *Lord Lyndhurst's Act* was also a means of achieving this aim. See Frew, above n 5, ch 2 of this, specifically Lord Lyndhurst's speech, *Parliamentary Debates,* above n 218.

constructed the marriage institution in different forms. In so doing it illustrates that economic purpose shapes marriage in various ways.

The Purpose of Marriage Regulation in Early Nineteenth Century England and Australia

Marriage and divorce law in England had evolved to reflect the needs of the propertied classes and their desire to preserve an untainted line of succession for the passing of their property. The law established marriage as a powerful instrument of male accumulation.[311] English marriage laws were characterised by consolidation and constraint - (for example parental consent and the regulation of inter- religious marriage) and the regulation of marriage and its politics had everything to do with property and its transmission.[312] For example, in the mid eighteenth century opposition to clandestine marriage came from parents and guardians from the upper classes who were concerned with the orderly transfer of property.[313] Common lawyers were concerned about the tangle of complex legal claims of property that accompanied clandestine marriage.[314] The landed gentry supported many bills aimed at curtailing clandestine marriage which culminated with the passing of *Lord Hardwicke's Act* in 1753. The landed gentry did not necessarily object to clandestine marriage in itself but to the possible ramifications with regards to property transmission. This is made clear by the support in 1822 for the removal of that same legislation, on the ground that its existence was by then perceived as a barrier to the protection of property. The landed gentry lobbied for the removal of the legislation because it had come to be used to undo marriages of long standing, and thus to disturb property settlements. In 1822 they lobbied for legislation to abolish the Act's nullity provisions for those married as minors or without parental permission.[315] Therefore historically in England, marriage prohibitions were used in whichever way necessary to

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[311] Bettina Bradbury, 'Colonial Comparisons: Rethinking Marriage, Civilization and Nation in 19th century White Settler Societies' in Phillip Buckner and G Frances (eds), *Rediscovering the British World* (University of Calgary Press, 2005) 137.
[312] Pollack, above n 182, 46.
[313] Lawrence Stone estimates that prior to 1753 no more than half the English population were marrying according to the rules of canon law. Pressure for reform came from masters who were concerned that they would lose servants and apprentices upon marriage; and poor law authorities who were concerned that clandestine marriage would lead to more families reliant on state aid. Lord, above n 85, 6-7. See also R B Outhwaite, Clandestine Marriage in England 1500-1850 (Hambledon Press, 1995); Stone, above n 77.
[314] Ibid.
[315] *An Act for Amending the laws respecting the solemnisation of marriages in England* (Marriage Act) 1823, 4 Geo 4, c 76.

preserve the continuity of the male estate.[316] The laws of marriage and property were instruments of containment; rigid rules maintained the social and political position of the privileged.[317]

In the Australian colonies where the structures and institutions of privilege did not exist to the same extent the flexibility of marriage and property law was essential for the success of new societies. Property and marriage law were instruments of flexibility; increasing opportunities, whether it be the opportunity for a deserted wife to re-marry a useful breadwinner, for a widower to marry his sister-in-law enabling her to embrace the role of wife and mother, or for a squatter to obtain maximum commercial use of his land.[318] Marriage laws were confused until the 1850s and therefore marriage was loosely defined. Kirkby and Golder suggest that many people believed themselves to be legally married by virtue of their de-facto relationship.[319] McDonald also suggests that many people in the colonies chose informal marriage and that there was a general feeling that English marriage laws had no relevance to the lives of ordinary people.[320] Finlay suggests, even more so than in England, bigamy based on the presumption of death made marriage and re-marriage more flexible. A person could be presumed dead if they had not been heard of by their families for seven years. In the colonies this allowed for regular remarriage, either of convicts who had left their first spouse in the mother country or by women whose husbands had disappeared to the goldfields or beyond the seas.[321] By mid-century the gold rush and mineral booms enticed many men away from their homes, forcing colonial parliaments to address the issue of desertion and parliaments

[316] Pollack, above n 182, 50.
[317] Note that to characterise English property law as inflexible and British colonial property law as flexible and liberal is too simplistic, particularly given that many of the liberal elements of English property law that had developed by the nineteenth century such as, freedom of testation and the abolition of tenures and their feudal burdens, were inherited in the British colonies. For an examination of the nuances of liberalism and land law in England and colonial British North America, see Philip Girard, 'Land Law, Liberalism and the Agrarian Ideal: British North America, 1750-1920' in McLaren et al (eds), above n 13.
[318] The need for flexibility of marriage regulation was present from settlement right through to the late nineteenth century. Initially when convicts arrived in Australia many thought they were released from their matrimonial engagements and many women pretended they were widows so they could contract new marriages. In a case of disputed dower rights in the New South Wales Supreme Court in 1834, Forbes J acknowledged that 'many people believed when a man is transported for life to this colony, he comes as a new man. Therefore many people have contracted matrimony and have treated their issue by such marriages as their legal heirs, as if they had never been married before.' In that case a widow in New South Wales was entitled to her dead husband's property via dower even though he had a wife and children in England. See *Davis and Crispe* [1834] NSWSupC 100 in *Australian*, 13 June 1834 at http://www.law.mq.edu.au/scnsw/Cases1834/html/davis_v_crispe__1834.htm accessed 4 Jan 2011.
[319] Kirkby and Golder, above n 54,152.
[320] McDonald, above n 71, 31-35.
[321] See Finlay, above n 13, 30.

recognised the necessity of enabling re-marriage in the colonies to protect deserted wives from destitution.[322]

Early marriage policy in the colonies, particularly the convict colonies, was characterised by one sole purpose; to encourage marriage as a means of establishing a society. Australian politicians saw fostering marriage among freed convicts as a critical element in cleaning up Australia's tainted image as a convict colony.[323] In New South Wales, from the moment that the first fleet landed, Governor Philip took steps to encourage family formation and directed convicts into marriage and parenthood. David Collins, Judge Advocate of New South Wales at the time, recorded that Governor Phillip offered comforts and privileges to married couples that would be denied to singles and none who applied to marry were ever rejected, except when it was clearly understood that either of the parties had a wife or husband living in England.[324] *Lord Hardwicke's Act* 1753 was passed in England to prevent clandestine marriages between partners under twenty-one years without parental consent, and was not in keeping with the colonial policy of encouraging marriage.[325] In 1837 the *Sydney Gazette* reported that the English legislation was:

> So defective and oppressive as to render [the Act] already, to all intents and purposes, a dead letter, though very little more than twelve months have elapsed since our sapient legislature rendered it the law of the land.
>
> There is not a single chaplain of any of the three Established Churches, who has been resident in the Colony for the last twelve months, and who

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[322] Ibid, 29

[323] Bradbury, above n 311,136; On 24 Feb 1810 Governor Macquarie issued a lengthy proclamation regarding the decency and morality of the colony of New South Wales. He argued that there were two reasons for marriage, firstly material security because cohabitation referred no valid title upon a woman if her husband died intestate; the second was that men and women living in a state of cohabitation could expect no favour nor patronage from the Governor. The proclamations made no real impact probably because marriage in New South Wales, unlike at home, had never had much to do with the security of property. Men and women had agreed to marry for a number of reasons, but rarely because they felt it could help a widow's claim to a family estate. Alan Atkinson, *The Europeans in Australia: A History* (Oxford University Press, 1998), 327. However, the view of marriage as a moral regulator remained throughout the century. In 1895 it was reported in the Sydney Morning Herald: 'Society and the Churches have always been in agreement that marriage is an institution which ought to be encouraged in the interests of morality and social order.' *Sydney Morning Herald*, 24 September 1895. In 1910 The married person's "physical life like their moral life is healthy, quieter, more natural". 'Marry and So Live Long' in *Sydney Morning Herald*, 16 April 1910.

[324] Kirsty Reid, *Production and Reproduction in Gender, Crime and Empire: Convicts, Settlers and the State in Early Colonial Australia* (Macmillan, 2008), 92.

[325] Frew, above n 5, ch 1 provides an account of the purpose and practicality of *Lord Hardwicke's Act* 1753.

> has been regularly, during that time, in the habit of solemnizing marriages, who has not transgressed its enactments, and thereby rendered himself liable to a prosecution for felony.[326]

The Act required the consent of a father, guardian or mother to the marriage of youths. In the event that none of these were available, the Act required that a guardian be appointed by the Supreme Court. The *Sydney Gazette* called for a petition from the clergy to have the law repealed, reporting that:

> At least two-thirds of the females who arrived by Mr. John Marshall's Female Emigrant ships are under the age of twenty-one years, and have neither parents nor lawfully appointed guardians, nor any guardians appointed by the Supreme Court.[327]

The provisions of *Lord Hardwicke's Act* were tied up with notions of uninterrupted lines of inheritance and were unsuited to the colonial population. Most convicts and some emigrants lost contact with their spouses and families in England and it was tempting for them to contract new marriages in Australia regardless of their previous marital status.[328] Many people were unsure of their legal status, which resulted in couples living without the benefit of a marriage ceremony and at the turn of the twentieth century forty percent of women and thirty percent of men remained unmarried at the age of fifty.[329] As Henry Finlay suggests, traditional thinking on the subject of family and marriage was not compatible with the colonial situation.[330] Colonial authorities did not necessarily encourage or assist those who were transported in reuniting with their families[331] and were not disturbed by the new alliances – often bigamous – that convicts contracted on arrival. The severing of family ties which occurred for most convicts and emigrants, in addition to their lack of inheritance made parental consent for marriage all the more irrelevant, just as it was irrelevant for the working

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[326] *Sydney Gazette*, 12 October 1837
[327] Ibid.
[328] Those who had left lawful husbands and wives in England were encouraged to marry again which involved describing themselves as widows. Atkinson, above n 323, 327; see also 'Trial of Bridget Brien', *Sydney Gazette*, 3 Aug 1811; Evidence to the Select Committee on Transportation, House of Commons, 21 Feb 1812, 32 (William Bligh). For an example of the problems this caused for inheritance see *In the Estate of Bradbury* [1837] NSW SupC 22, *Sydney Gazette*, 1 April 1837 accessed at http://www.law.mq.edu.au/scnsw/Cases1836-37/html/in_the_estate_of_bradbury_183.htm#1a).
[329] Golder & Kirkby, above n 54, 155.
[330] Finlay, above n 13, 26.
[331] Although sometimes reunification was offered as a reward for good conduct. See A G L Shaw, *Convicts and the Colonies* (Melbourne University Press, 1966).

classes at home. The colonies inherited English marriage law but not the population for which it had evolved.[332] The disparity between working class attitudes to marriage and English marriage law continued to affect the development of marriage regulation in the convict colonies over the following century. As a result of convict beginnings, and the development of egalitarianism in the colonies[333] marriage was regularised among all classes of the population and was regulated for the purpose of building stability in a developing society, rather than maintaining class divisions through the protection of property. The need for strict laws of inheritance was not present to anything like the same extent as in England.[334] The legalities of marriage had less significance for most convicts and new emigrants in Australia, as was the case for the large numbers of labouring classes in preindustrial England.[335] There was little scope for the application of laws designed to preserve property settled on daughters and ensure good matches for sons.[336] Similarly to *Lord Hardwicke's Act* 1753, *Lord Lyndhurst's Act* 1835 was motivated by the desire of the propertied classes to protect succession. Yet at the time when such Acts were believed to apply in the colonies, these concerns were far from paramount. In the eighteenth and nineteenth centuries marriage developed in England to serve the State's chosen purpose. The marriage law inherited from England did not serve colonial society and therefore marriage was reconstructed in new ways.

Property, Inheritance and Lord Lyndhurst's Act

The complex motivations for the passing of *Lord Lyndhurst's Act* in 1835 were discussed in chapter one. This section explores one of those motivations - the desire to protect property and inheritance – and its relevance to the sister-in-law marriage story in the colonies. As discussed in chapter one, prior to *Lord Lyndhurst's Act* a marriage within the prohibited

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[332] For a discussion of the class system inherited from England and the class context in New South Wales, see Ged Martine, *Bunyip Aristocracy The New South Wales Constitution Debate of 1853 and Hereditary Institutions in the British Colonies* (Croom Helm, 1986).

[333] Here I refer to egalitarianism politically and socially and the egalitarian property system discussed by A R Buck in 'Property Law and the Origins of Australian Egalitarianism' (1995) 1 *Australian Journal of Legal History,* 145.

[334] Finlay, above n 54, 74, 75.

[335] Ginger Frost has shown that the largest category of those who chose cohabitation over marriage in England were the poor. Often cohabitees had sensible reasons for not marrying such as: economic flexibility – enabling each to go back to their natal home if things became difficult; to avoid the fees charged by the church; and men could avoid the legal obligation to financially support wives. For a comprehensive history of cohabitation in nineteenth century England, see Frost, above n 21. See also G N Gandy, 'Illegitimacy in a handloom weaving community: Fertility patterns in Culcheth, Lancashire, 1781-1860 (D Phil, dissertation, Oxford University, 1978); J Gillis, *For Better, For Worse: British Marriages 1600 to the Present* (Oxford University Press) 1985; Anderson, O, 'The Incidence of Civil Marriage in Victorian England and Wales' (1975) 69 (1) *Past and Present* 50.

[336] Finlay, above n 54, 76.

degrees was voidable and an ecclesiastical court could declare that no marriage had been contracted. Therefore the legal status of such a marriage was never secure; the legitimacy of the children could be impugned, in order to exclude them from inheritance of property or succession to title.[337] According to persistent rumours, *Lord Lyndhurst's Act* was instigated by the seventh Duke of Beaufort, who had contracted a marriage with his deceased wife's half sister which he wished to safeguard. By legalising such marriages retrospectively (making them illegal only in the future) *Lord Lyndhurst's Act* would guarantee the legitimacy and inheritance of the Duke's son.[338] Lord Lyndhurst's description of the motivation behind the Bill is indicative of the class based purpose for its creation:

> Parties might marry and have children born to them; the eldest son might come to the age of twenty-five, and on the supposition, as no proceeding had ever been taken, that he was legitimate, and as such was entitled to succeed to his father's property, he might, marry; he might have children; and between ten and fifteen years afterwards there might be a suit in the Ecclesiastical Court; he might be bastardized, and his children deprived of the means and the hopes of that fortune which they had been accustomed to consider as their own—deprived of the estate and of all claim whatever upon it. It was for the purpose of obviating this evil that he should now propose to introduce a Bill.[339]

The Duke may not have been the only aristocrat with an interest in legitimising an in-law union and there was speculation in the House of Commons that the retrospective validation and future prohibition of the marriages served the needs of those aristocrats with an interest in in-law unions whilst ensuring the support of the Bishops, who objected to the legislative removal of an ecclesiastical prohibition.[340] However, aristocratic concerns were more to do with removing the marriages 'voidable' status thereby preventing a challenge to legitimacy, than a specific desire for the legalisation of in-law marriages. In fact, Randolph Trumbach noted that aristocrats tended to avoid marriages between brothers- and sister- in-law, unlike

[337] Kuper, above n 67, 66.
[338] See Marriage Law Reform Association, 'The Duke of Beaufort and the Marriages Bill' (Marriage Law Reform Association, 1873); See also *Parliamentary Debate*, above n 218.
[339] *Parliamentary Debate*, above n 218, 205 (Lord Lyndhurst).
[340] Ibid.

the bourgeois, many of whom perceived the unions as having similar advantages to cousin marriage.[341]

Old Roots in New Soil? The Displacement of the Aristocratic Landed Interest

Historically, marriage prohibitions such as that discussed were reflective of the contest for economic and political power and pitted aristocratic prerogatives against ecclesiastical authority.[342] Therefore property, inheritance, and ecclesiastical political power were central to debates over marriage prohibitions of which the deceased wife's sister was no exception. Michael Roe has argued that in the early nineteenth century the Imperial government sought to establish an alternative authority in the convict colonies, having realised that they were growing beyond prison farms. That authority was to come from the Church of England and the landed gentry.[343] In early New South Wales the landed gentry saw themselves as the leaders of colonial society and there was some effort made to establish an aristocracy. The aristocracy could be traced to the officers of the military establishment, the civil establishment or to the New South Wales Corps, in the first twenty years of Australian history, to free settlers sent out while the foundation ideal of peasant proprietorship retained some force, or even to convict ranks.[344] They were mostly loyal to the Church of England, held freehold land, and aspired to the ideals of English society.

In the first half of the nineteenth century English opinion developed that the colonies were too good to be monopolised by paupers and convicts. 'Why should Australia and Canada be made fiefs of the parochial workhouses and the unions?' asked *The Times.* 'Colonies with scarcely a gentlemen or a good income would become increasingly like the United States whose real history has already done so much to strengthen the cause of limited monarchy and hereditary government'. Sentiments favouring the transplantation of a complete slice of British society gathered amongst some in the colonies. A member of the gentry, Charles Cowper, told a meeting of his peers in 1844 that they should 'act as English gentleman anxious to make this a second England'.[345] However there was English opposition to the establishment of a colonial

[341] Randolph Trumbach, above n 77, 18-21; see also Kuper, above n 67, 5-28.
[342] Corbett, above n 164, 16.
[343] Michael Roe, *Quest for Authority in Eastern Australia 1835-1851* (Melbourne University Press), 6.
[344] Ibid, 35.
[345] *Sydney Morning Herald*, 31 May, 1844.

aristocracy. After serving as under-secretary of the colonial office in 1834-5, W.E Gladstone reflected on the difficulties of transplanting English social distinctions overseas: 'If we had in our emigration colonies such a distribution of property as would favour the creation of a body resembling the English House of Peers, we must still bear in mind that it is not merely by the absolute fact of large possessions, that the efficacy of that body is preserved among us along with its popularity.'[346] The peerage was deeply entrenched in the social and political framework of the country and this could not be realised to the same extent in the colonies. 'Until the large properties are numerous, we cannot think of transmittable distinctions'.[347] Central to establishing an aristocracy was ownership of property and the ability for preceding generations to inherit wealth through land. However, the development of land law in the colonial environment thwarted the establishment of an aristocracy and neither aristocratic prerogative nor ecclesiastical authority was particularly weighty in mid-nineteenth century Australia when compared with the mother country. Since English property law and ecclesiastical authority were so central to nineteenth century English marriage, it is hardly surprising that new forms of marriage emerged in colonial Australia.

The aristocracy relied on English notions of property defined by feudal origins. The characteristics of feudal property included the distinction between real and personal property and the notion that property was a trust to be held for the benefit of the next inheritor.[348] The English law defined property as fixed, exclusive and involving continuous obligations. However, the 1846 *Land Act* in New South Wales recognised squatting and essentially allowed squatters near permanent occupation through a leasehold system, undermining the philosophy of the landed elite. The gentry called on the Imperial authority to reject the new legislation arguing that it did not reflect the natural feeling of men. They said that the possession of land, in the mind of all Englishman with aristocratic birth and political power, was connected with the notion of stability and it was natural to wish to possess that with which the eye has long been familiar.[349] However, the squatters believed they had more claim to colonial land than the Queen, after all it was their work that had made the land liveable. The squatters were not interested in the land as such and their perception of land as a commodity meant that land ownership did not have the same political and social implications

[346] Ged Martine, *Bunyip Aristocracy The New South Wales Constitution Debate of 1853 and Hereditary Institutions in the British Colonies* (Croom Helm, 1986), 31.
[347] P Knaplund, *Gladstone and Britain's Imperial Policy* (London, 1927), 167-183.
[348] Buck, above n 333, 155.
[349] Select Committee, Legislative Council, *Crown Lands* (3 October 1849).

that it did in the mother country.[350] The fluidity of social class which had begun with the crossover of interests between squatters and landholders continued, with an influx of thousands of immigrants with a mix of trade skills, political ideals, religious beliefs, domestic ideologies and social aspirations. As Penny Russell has argued, in the colonies those who sought a claim to the 'best society' bore the secret, uneasy awareness that their claim to social merit was somehow suspect. Against rigorous English criteria for selection, few would have measured up. Even those who could claim links to the highest pedigree of English society knew that they belonged to cadet branches, often descended from wastrel or impoverished younger sons who had given up their English credentials to make fortunes through means of dubious respectability.[351] Dreams of exclusiveness, caste, and inherited social position were forced to give way before the material and social realities of a brash, democratic, colonial world.[352] Mass immigration, a diverse population and colonial land law stunted the development of a colonial landed elite for whom English marriage law may have been quite suitable.

As the pastoral occupation of Crown land spread in the first half of the nineteenth century in New South Wales, leasehold (a form of personal property), rather than freehold emerged as the most economically significant form of land holding.[353] With the introduction of adult male suffrage in 1858 the political importance of landed property diminished further. Land law reforms in the 1860s including the abolition of primogeniture – a mechanism by which land was passed from father to first born son - confirmed that the dominant notion of property as inheritance had been replaced with property as commodity.[354] In 1867 Mr Blyth introduced the South Australian 'Bill to provide for the better administration of the estates of person's dying intestate'. Parliament admitted that 'we ought, in a country like this, to provide a more just mode of distributing real property[355], than that which is retained in the old feudal law of primogeniture.' Mr Blyth's promotion of liberal property ideas extended to his view on

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[350] Buck, above n 333, 155.
[351] Penny Russell, *Savage or Civilised: Manners in Colonial Australia* (University of New South Wales Press, 2010) 434. Julian's character in *Dale's* novel *With Feet of Clay* is one such person. See Frew, above n 5, ch 6.
[352] Ibid.
[353] Buck, above n 333,165.
[354] Ibid, 165.
[355] 'Real property' or realty was property in land and, and was distinguished from all other forms of property, labelled 'personal property', personalty or chattels. Each was treated completely differently under the law. The distinction between the two classes of property arose because under common law the remedy for the wrongful taking of land was a real action (action realis) in which the thing itself (res) could be recovered. The owner of personal property could not bring an action for specific recovery but rather compensation or damages for the loss. Andrew Buck, The *Making of Australian Property Law* (Federation Press, 2006).

marriage and he was instrumental in drafting the next marriage deceased wife's sister Bill a few years later. [356]A similar view of colonial property was expressed in the *Sydney Morning Herald* in 1859:

> The land is not all in possession of a limited number of families from generation to generation. It is greatly subdivided; it is held to a great extent by small capitalists; it is the working man's saving bank; and it is constantly being mortgaged and transferred.[357]

English marriage law ensured that inheritance remained within the family and that any right to inherit real property and the political influence attached to it were protected. Although international law was said to recognise marriages universally if solemnised legitimately in the country of domicile, the English *Statute of Merton* qualified the attached right of inheriting land in England.[358] The statute applied solely to the succession of English real estate and according to a piece in the *Sydney Morning Herald* was 'inseparably connected with English land' so that it may be said that it were 'inscribed on her soil.'[359] Such legislation existed to consolidate the landed interest and maintain the political and social power inherent in land.

If land was perceived as commodity in the colonies, without social or political ramifications, it was unnecessary for marriage laws to safeguard real property as fixed, exclusive, and held in trust for the benefit of a legitimate inheritor.[360]Therefore the link between English notions of property and the deceased wife's sister marriage prohibition was severed in the colonies. An article in the *Sydney Morning Herald* noted that 'the kind of marriage under consideration derives much of its importance, and consequently its interest as a subject of controversy, from its connection with the inheritance of property....'[361] So what did this mean for the deceased wife's sister marriage controversy? First, it meant that whilst the voidable status of sister-in-

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[356] *South Australian Register*, 19 August 1867, 2.
[357] *Sydney Morning Herald*, 23 June 1859, 4 cited in Buck, above n 333, 163.
[358] The statute declared a child born out of lawful wedlock a bastard, preventing them from inheriting legitimately. For commentary on the law in the period see Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic in Regard to Contracts, Rights and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions and Judgments* (Little, Brown & Co, 1883), 125-7.
[359] A Patriot, 'Marriage with a Deceased Wife's Sister- Important Decision' *Sydney Morning Herald*, 31 May 1856, 6.
[360] For a small scale study of the relationship between property, inheritance and social structure see John Ferry, 'The Will and the Way: Inheritance Practices and Social Structure' (1999) 1 (2) *Journal of Australian Colonial History*, 122.
[361] A Patriot 'above n 359, 6.

law unions and the implications for property brought the issue into the English political arena and led to *Lord Lyndhurst's Act* in 1835, it was several decades before the question of whether that Act even applied came under consideration in the colonies. Second, when it did come under consideration in the 1870s, though the same prerogative of clarifying marriage rules existed, it was not aristocratic and ecclesiastical interests that shaped the legislation. Distinctly colonial considerations such as asserting colonial legislative power and local issues such as desertion were more significant.

As mentioned in the introduction of this thesis, in those colonies established before *Lord Lyndhurst's Act* passed in-law marriages were still voidable[362] and therefore the need to clarify legitimacy did become one issue in colonial debate. Colonial parliaments were concerned with addressing any conflict of law between the mother country and the colonies, as well as amongst the colonies themselves. Whilst parliamentarians did recognise that a marriage legitimate in Australia and illegitimate in England could deprive a wealthy heir of his inheritance on English soil, clarifying legitimacy was not meant primarily to prevent challenges to inheritance. In fact some parliamentarians argued that a change to the law was unnecessary because there had never been an ecclesiastical court within the colony in which a marriage could be challenged.[363] Ultimately, clarifying the legality of the union would serve other means, such as preventing men from marrying and then later deserting their wives, on the basis that the marriage was within the prohibited degrees and was never valid.[364] In addition, it would send a message to the Imperial powers that an Australian marriage was as legitimate as an English marriage and that the colonial legislature should have the power to pass laws that would be recognised throughout the empire. Marriage to a deceased wife's sister was legalised throughout most of Australia in the 1870s but the relationship between English notions of property and the marriage contract led to further controversy about the recognition of colonial marriages and associated rights of inheritance on English soil. In both

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[362] See Frew, above n 5, ch 1 for a fuller explanation of the inheritance of English law. Note that in the first half of the century most people would have been unaware of what the law in the colonies was with regards to affinity marriage. In 1842 a man wrote this letter to the Editor of the Sydney Morning Herald: 'As the English Marriage Act is so vague and defective, particularly in regards to British subjects resident abroad...you will much oblige by answering the following: Can a man marry his deceased wife's sister? Or would the Bishop allow his clergy to marry such parties?' Letter to the Editor, *Sydney Morning Herald*, 25 June 1842. In 1862 a similar letter is written to the Editor: 'I was married to my first wife's sister by a minister who knew the fact and my marriage is registered according to the Act – therefore I wish to know whether my marriage is legal or not? I have three children the fruits of that marriage registered in my own name - I wish to ask have I made myself liable to penalty for false registration? If marriage to a deceased wife's sister is not legal, should not the ministers and others be acquainted with that fact?' Letter to the Editor, *Sydney Morning Herald*, 17 June, 1862.

[363] New South Wales, *Parliamentary Debate*, Legislative Council, 4 March, 1874 (Mr C Campbell).

[364] New South Wales, *Parliamentary Debate*, Legislative Council, 14 May, 1875 (Mr Docker).

jurisdictions the shape of marriage was a by-product of the negotiation of economic interests, institutional power, and the practical needs for ordering society. Marriage law did not reinforce a static and natural institution but rather, the institution was constructed and reconstructed according to local needs.

Property, Inheritance and the *Colonial Marriages (Deceased Wife's Sister) Bill*

The tussle between Imperial authorities and colonial authorities with regards to the English recognition of sister-in-law marriages contracted legally in the colonies and the implications of colonial/Imperial relations for marriage is discussed in chapter seven. This section examines the lead up to the passing of the *Colonial Marriages (Deceased Wife's Sister) Act 1906*– which enabled English recognition of colonial deceased wife's sister marriages - with particular reference to English arguments against recognition which were based on English notions of property. Once legalisation had taken place in the colonies, the parameters of marriage had shifted, and colonial marriage was distinct from English marriage. The debates in the three and a half decades preceding the passage of the Act in 1906 reveal that the English refusal to recognise colonial deceased wife's sister unions on English soil was in essence the refusal to allow a colonial challenge to the English notion of real property, and to accepted notions of natural marital relations. In other words, marriage law in England was shaped for a different purpose and prescribed different norms to those prescribed in the colonies and therefore English marriage was inadequate for the colonies and colonial marriage would have proved inadequate in England. The debate illustrates the importance of differing notions of property in England and the colonies to the marriage question; the insistence of many English parliamentarians to hold on to the distinction between real and personal property; and the perception that significant problems would be caused by allowing colonial challenges to the English lines of inheritance. The *Colonial Marriage (Deceased Wife's Sister) Bill* was perceived as a threat to English notion of property. The Lord Chancellor claimed that 'the only thing' the Bill would do was 'alter the law of inheritance in England as to realty'.[365]

Several parliamentarians in the House of Commons noted the need for different marriage and property legislation in such differing contexts as England and colonial Australia:

[365] *Parliamentary Debate,* House of Lords, 8 July 1898, vol 61 cc283-308, 289 (Lord Chancellor).

> The conditions and relations of a colony are so different from this country...no reasonable man could contend that a law that is just and proper for the colony is necessarily just and proper or suited to the requirements in the mother country... [366]

> Suppose this country were to attempt to force upon the Colonial Legislature some law of succession which would give a title to land different from that conferred by the law of the Colony, what would hon. Members, speaking on behalf of the Colonies, say? They would immediately say that this country was endeavouring to tyrannize over her Colonies...and to force upon them a law of succession which their laws and their Constitution did not recognize.[367]

Hardinge Giffard recognised marriage and inheritance practices in the colonies may differ from those in England. However, like many others he condemned the suggestion that the English notion of legitimacy, succession and title to land should be changed to reflect colonial conditions. The idea that the Bill would legitimise children of deceased wife's sister unions contracted in the colonies, allowing them to inherit property in England, was usually condemned on the basis of the risks associated with allowing challenges to lines of inheritance. This demonstrates the continuing role of English marriage legislation in the containment of privilege through the control of inheritance.

The concern was that if the Bill was enacted a person could return to England from Australia, and on the ground that he had been legitimatized by the Act, successfully 'claim that which was now the property of other people'. The fear that the Bill would 'lead to the disturbance of property and the unsettlement of titles' and could even 'disturb the succession of titles to Peerages and high dignities' was enough to ensure that the Bill be rejected. Those who opposed it argued that it could cause great scandal if the actual holder

[366] *Parliamentary Debate,* House of Commons, 27 February 1878, vol 238 cc406-39, 416 (Sir Henry Holland).
[367] *Parliamentary Deb*ate, House of Commons, 27 February 1878, vol 238 cc406-39, 426 (Sir Hardinge Giffard).

of a Peerage were dispossessed by a claimant who was born illegitimate under English law yet managed to have their title legitimised by colonial legislation.[368]

Sir Henry Holland and Earl Percy expressed similar concerns a year later, again drawing attention to the colonial departure from traditional and established marriage and property law. Sir Henry felt that recognising colonial marriages would alter 'an old established law of England - a rule of inheritance which may affect every honour and all the real property of the realm'. Both he and Earl Percy were offended by the contention that England should alter laws so well-established because the colonies passed legislation contrary to traditional doctrine.[369] They were concerned that the Bill would open the door to endless litigation when colonial settlers returned to England to claim land which had long passed into other hands.[370]

As far as those who opposed the Bill were concerned the well established law of succession was fair in principle, it applied to all classes, it allowed children of sister-in-law unions in the colonies to inherit personalty, and it was only in the case of real property that the law of the place where the property was situated prevailed.[371] They argued that the taint of illegitimacy would not attach to the children of colonial marriages because in every respect such children would be treated as legitimate. The only difference was that they would have no capacity to inherit land as they were not born of a marriage which could be contracted in England.[372]

Supporters of the Bill perceived the lack of recognition of colonist's marriages and their children's right of inheritance in England as a remnant of feudal principles. Mr Osborne Morgan pointed out the practical difficulty of maintaining the distinction between real and personal property and allowing issue born of a marriage in the colonies to inherit the former but be deprived of the latter:

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[368] *Parliamentary Debate*, House of Commons, 28 February 1877, vol 232 cc1164-94, c1189 (Attorney-General for Ireland, Mr Gibson)

[369] *Parliamentary Deb*ate, House of Commons, *27 February 1878, vol 238 cc406-39, 416* (Sir Henry Holland); *see also, Parliamentary Deb*ate, House of Commons, *27 February 1878, vol 238 cc406-39, 421* (Earl Percy) in which he stated: If there was no other reason for opposing the Bill than this, he should say that the peace and quiet, the safeguards which were necessary to the enjoyment of property and the maintenance of the most intimate relations of life which had hitherto existed in this country, rendered it necessary to oppose the Bill.

[370] Ibid.

[371] Ibid. The *lex loci rei sitae* is a doctrine which states that the law governing the transfer of title to property is dependent upon, and varies with, the location of the property for the purposes of the Conflict of Laws.

[372] Ibid, 418.

> According to the law it was proposed to change, if a man who contracted a marriage with a deceased wife's sister in Victoria or South Australia, where it was perfectly valid, returned to England, he carried with him his Colonial status for every purpose except the inheritance of real property. Suppose he invested his money in the funds, the children of the second marriage were perfectly legitimate with regard to it, and if he bought the lease of the house in which he lived, the case was the same. But if he bought a piece of freehold land—say for the purpose of building a stable—then he might be a married man within his house and a widower outside it, and his children might be legitimate inside the house and bastards when they went into the stable. That was an anomalous state of things.[373]

Alexander Beresford Hope also directly linked the rejection of the *Colonial Marriages (Deceased Wife's Sister) Bill* with the desire to protect the feudal notion of property, stating that the laws making a person legitimate in one part of the Empire and illegitimate elsewhere were only upheld 'to keep up the old feudal notion about the importance of land'.[374]

It was not until the twentieth century that the *Colonial Marriages (Deceased Wife's Sister) Bill* was passed.[375] Between the 1870s and 1907 those who married legally in the colonies went unrecognised as legal partners in England and their children were illegitimate under English law. This chapter has shown that in two Anglo Judaeo-Christian societies in the same period, marriage differed to the extent that the English were unable to recognise colonial marriages between partners who were excluded from marrying at home. In England prohibiting marriage to a deceased wife's sister was in keeping with the familial and societal norms the legislature wished to prescribe. The maintenance of class distinctions; the maintenance of traditional inheritance of property; and the enforcement of roles within the family so as not to confuse the social and economic position of its members, were reinforced

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[373] *Parliamentary Deb*ate, House of Commons, 27 February 1878, vol 238 cols 406-39, 420 (Mr Osborne Morgan).

[374] *Parliamentary Deb*ate, House of Commons, 27 February 1878 vol 238 cols 406-39, 425 (Berseford-Hope). Sir Hardinge Giffard responded to Beresford Hope by arguing it was not, as he had suggested, keeping up the old feudal notion about the importance of land; but the law of real property was based upon the, to him, perfectly intelligible principle that there was a difference between moveable and immoveable property., *Parliamentary Deb*ate, House of Commons, 27 February 1878 vol 238 cols 406-39, *426* (Sir Hardinge Giffard).

[375] *Colonial Marriages (Deceased Wife's Sister) Act,* 1907 (UK).

by marriage legislation including the exclusion of in-laws from marriage. Abolishing the prohibition in the colonies was in keeping with the familial and societal norms the colonial legislature wished to enforce: the right of a husband to choose his wife and to use his property as he chose and his economic and social responsibility to protect and provide for his wife and children. Marriage was used to enforce selective norms and fulfil economic purpose and the shape of marriage was dependant on shifting views of marriage and property in each society.

In the colonies traditional doctrines of property were eroded and marriage laws grew out of a culture of liberalism. The relationship between liberal individualism in the colonies and the marriage debate is discussed in chapter six. The following chapter brings the marriage debates to life through a comparative examination of nineteenth century narratives in both English and Australian settings. This thesis has drawn on rhetorical argument in parliamentary debates, letters to editors, pamphlets and magazine pieces to illustrate the different and changing perceptions of the purpose of marriage. The chapter draws on the pro reform arguments presented in literature as another example of the changing and differing perceptions of marriage in the nineteenth century. The characters in Mary Alice Dale's novel *With Feet of Clay* were victims of the conflict between the English and Australian colonial laws examined in the previous chapter. The novel illustrates that the negotiation of social status in the colonies was quite different to in England and highlights that the dislocation of individuals from extended family affected perspectives on sister-in-law marriage in the colonies. Whilst the economic and religious context were highly significant in constructing marriage, so too were social understandings of family.

CHAPTER FIVE

English and Australian Literary Versions of Marriage to a Deceased Wife's Sister

Authors in Australia and England chose sister-in-law marriage as a central theme for fictional novels during the nineteenth century. Whilst several scholars provide analysis of the marriage and/or sibling plot in nineteenth century English literature[376], there are few examinations of the deceased wife's sister plot. Those scholars who have addressed this specific narrative have done so from a variety of perspectives, including Elizabeth Gruner's[377] discussion of the deceased wife's sister plot, nature, maternity and the Victorian family; Margaret Gullette's[378] investigation of the deceased wife's sister narrative and the construction of marriage and life-course ideology; and Diane Chambers[379] conclusions regarding the implications of the sister-in-law marriage debate for the regulation of female desire and the sororal bond. Mary Jean Corbett is the author of *Family Likeness,*[380] which includes an examination of representations of the sister-in-law marriage plot in Victorian literature. This chapter aims to build on this scholarship by utilising a comparative approach and examining the English marriage plot alongside a colonial interpretation of the sister-in-law marriage narrative. The chapter compares three Australian and English novels which portray narrative versions of the marriage to a deceased wife's sister issue in the late nineteenth century. The comparison demonstrates how cultural differences and similarities in England and the colonies constructed marriage. For example: differences in the class culture; differences in political priorities; in conjunction with similar notions of kinship and family. In England several authors utilised the sister-in-law marriage issue as a theme in their narratives.[381] These novels tended to carry either pro-reform or anti-reform messages regarding whether marriage to a

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[376] For example Pollack, above n 182; Nancy Anderson, 'Cousin Marriage in Victorian England' *Journal of Family History* (1986) 11, 285; Boon, Joseph and Deborah Nord 'Brother and Sister: The Seductions of Siblinghood in Dickens, Elliot, and Bronte' (1992) 46 (2) *Western Humanities Review* 164; Sarah Brown, *Devoted Sisters: Representations of the Sister Relationship in Nineteenth Century British and American Literature*, (Ashgate Publishing, 2003); Marianne Hirsch, *The Mother/Daughter Plot: Narrative, Psychoanalysis, Feminism* (Indiana University Press, 1989).

[377] Elisabeth Gruner, above n 162, 424.

[378] Gullette, above n 169.

[379] Diane Chambers, above n 55, 19.

[380] Mary Jean Corbett, above n 164. See also Polly Morris, 'Incest or Survival Strategy? Plebeian Marriage within the Prohibited Degrees in Somerset, 1730-1835' in John Fout (ed), *Forbidden History: The State, Society and the Regulation of Sexuality in Modern Europe* (University Chicago Press, 1992) 139-69.

[381] For examples see: Joseph Middleton, *Love Versus Law* (T. C. Newby, 1855); Mary Elizabeth Braddon *The Fatal Three: A Novel* (Simpkin, 1888); Henry James, *The Romance of Certain Old Clothes* (The Atlantic Monthly, 1868); Thomas Hardy, *Tess of the d'Urbervilles* (The Graphic, 1891); Harriet Martineau, Deerbrook (E Moxon, 1839); and Edward Morgan Foster, *Marrianne Thornton: A Domestic Biography* (E Arnold, 1956), Ch 6.

deceased wife's sister should be legalised. Arguments on both sides were expressed in parliaments, pamphlets and the press.

In recorded history only one author incorporated this issue into an Australian novel. Mary Alice Dale was the author of *With Feet of Clay*[382], the story of the Cornwallis family, a family of two parents and two daughters who emigrate from England to New South Wales, and the sister-in-law marriage which eventuates within that family. Mary Alice Dale was born at Sheffield, England and came to Australia with her husband in the 1880s. The characters in her novel are not Australian born but her novel is largely an Australian tale. The novel was praised in New Zealand's *Evening Post* [383]for powerfully addressing the important political issue for women of differing marriage laws between England and the colonies. Dinah Mulock Craik was a successful English novelist and poet, who published a Victorian bestseller, *John Halifax, Gentlemen* (1856). Her novel *Hannah*[384] is set in England and is the story of Hannah's relationship with her brother-in-law Bernard Rivers. William Clark-Russell was a great Victorian nautical novelist and author of over forty novels, some of which had great success in Britain and America.[385] This chapter will compare Dale, Clark-Russell and Mullock Craik's novels and use the novels as tools for an analysis of social and political perceptions of the sister-in-law marriage in the nineteenth century.

A comparison of the literary representations of sister-in-law marriage in the Australian and English novel reveals both consistencies and distinctions. All three novels convey pro-reform messages, highlighting the power of the law in affecting the lives of individuals, the ability of

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[382] Mary Alice Dale, *With Feet of Clay* (George Robinson & Co, Melbourne, Sydney, Adelaide, Brisbane and London, 1895). For a nineteenth century review of the book, see 'A Deceased Wife's Sister' *Mercury* (Tasmania), 18 Feb, 1895, 3.

[383] 'New Books' *Evening Post*, Rōrahi XLIX, Putanga 93, 20 Paengawhāwhā 1895, 1, accessed at http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=EP18950420.2.58&l=mi&e=-------10--1----2-- December 2010.

[384] Dinah Mullock-Craik, *Hannah*, (Harper and Brothers, 1877). *Hannah* is a pro-reform novel in favour of allowing marriage to a sister after the death of a spouse. Mullock- Craik fought for a number of causes through her novels, including adoption - *King Arthur*: not a love story (1886); judging a person by their mind and not the appearance of their body - *Olive* (1850), *A Noble Life* (1866); love of a man and a woman is a higher duty than that towards parents and marriage without love is a disaster - *A Life for a Life* (1859), *Young Mrs Jardine* (1879); married women's property rights - *A Brave Lady* (1870); servants as human beings - *Mistress and Maid* (1862); the right of in-laws to marry after the death of a spouse - *Hannah* (1872). See 'Dinah Mullock Craik' at http://webspace.webring.com/people/th/helen_victOrian/Craik.html, accessed 30 November 2011.

[385] His most famous story, *The Wreck of the Grosvenor* (Revised Category Edition, British Fiction Series) (first published 1877), sold widely in Britain and America and remained in print through much of the twentieth century. Clark Russell had laboured in the fiction market for almost a decade, publishing over a dozen stories set on dry land. These included several sensation novels which appeared throughout the 1870s, amongst them William Clark Russel, *Deceased Wife's Sister*, (Bentley, 1874). *Deceased Wife's Sister* was

men to use the marriage prohibition to abandon their wives and responsibilities, and the vulnerability of women as mothers. The novels explore the affects of the law on the lives of their characters and ultimately convey the message that marriage to a deceased wife's sister ought to be legal in England. However there are many distinctions in the narration and characterisation of the players in the sister-in-law marriage plot. Each novel uses different narrative mechanisms to emphasise pro-reform themes which tend to reflect the narratives in parliamentary debates. In England there was a battle of characterisation, in which pro and anti-reformers established opposing images of the sister-in-law character to support their cause, whilst in the colonies, the conflict of laws issue was more central to the debate. An analysis of these narratives is useful for the inquiry of this thesis because it reveals how the discourse that constructed understandings of marriage and family, in addition to differing functional needs, constructed marriage in each place. The narratives reveal why the colonial parliaments legalise sister-in-law marriage in the 1870s whilst the unions remained illegal in England until 1907. The chapter introduces the consistencies between the narratives and explores the pro-reform agenda; it examines the distinctions between the narratives, evaluating their significance for the deceased wife's sister story in England and the Australian colonies.

An Introduction to the Narratives

Mary Alice Dale's novel *With Feet of Clay* is the story of the Cornwallis family, Mr and Mrs Cornwallis and their daughters Bertha and Margaret, who immigrate to Australia in the late 1880s after the legalisation of sister-in-law marriage in the colonies. Bertha and Margaret are characterised by opposing physical and personality attributes and are not very friendly with one another. Bertha is sent to England to finish her education whilst Margaret remains in Australia until she is married. Proposals of marriage are made to both young women and both accept. Bertha is to be married to a wealthy family friend by the name of Mr Durward Leister and Margaret is to be married to an English emigrant living in the colony by the name of Julian St John. On Bertha's return for the wedding, prior to her own, she and Julian fall in love but the wedding to Bertha's sister Margaret goes ahead as planned. In the period that follows Julian begs Bertha to run away with him so that they might marry but she refuses to betray her family despite her unsatisfactory relationship with her sister. When Margaret dies the way is open for Bertha and Julian's love and eventually they are married and bear a child. When Julian inherits the English earldom he had been in line for but had failed to obtain

before immigrating to Australia, the family return to England to take up their position in 'society'. However, the illegitimacy of their marriage and their son's inheritance is well known (to all but Bertha) and she suffers social isolation in ignorance of the conflict in the law. The novel takes a dark turn when Julian chooses to remain in his position of power and status and retain his property and advocates Bertha and the child return to Australia. Their relationship looks to end tragically as a court case is instigated but eventually the family is reunited and embraces their long held love for one another.

Though Dinah Mullock Craik's novel also advocates for legal change and for the legalisation of marriage to a deceased wife's sister, the narrative is quite different from Dale's Australian tale. Craik's novel tells the story of a governess, Hannah, who moves to her brother-in-law's house after the death of her sister Rosa, to care for her late sister's baby daughter. Hannah does not fall in love with her brother-in-law until long after her sister's death and the process is organic and gradual. Hannah Thelluson is a self-sufficient governess of thirty. She is reluctant to give up her independence when her sister Rosa dies in childbirth and Rosa's husband, the young clergyman Bernard Rivers, asks her to take charge of his house and infant. The great inducement in accepting the offer is that Hannah wishes to care for her sister's baby. Hannah has always been aware of 'one great want in her nature — the need to be a mother to somebody or something'.[386] Before Hannah leaves her post as governess, her employer, Lady Dunsmore, whose husband is backing the bill to legalize in-law marriages, deliberately tells Hannah about Lord Lyndhurst's 1835 legislation and tactfully warns her of the gossip and the emotional complications that may arise when a single sister and brother-in-law live in the same house. This scene announces virtually the whole of the plot and predicts the course of the novel. After a long-drawn agony — social ostracism, the irritability that arises from an attraction they cannot act upon, and the failure of the bill to pass Parliament — Hannah and Bernard take their life in their own hands by refusing to obey their country's laws. They move to France, take up French citizenship, marry, and live happily ever after.[387]

Finally Russel Clark's novel *The Deceased Wife's Sister*[388] published in 1874 appears much like an anti-marriage reform novel but ultimately sends a pro-reform message. Maggie and

[386] Mullock-Craik, above n 384, ch7-9.
[387] Shortly after the novel was published, Dinah Mullock-Craik accompanied a friend to Switzerland, where she married her late sister's widower, pre-Raphaelite painter Holman Hunt.
http://www.victorianweb.org/authors/craik/mitchell/4.html; See also Kuper, above n 67, 76.
[388] Clark Russell, above n 385.

Kate are two orphaned sisters who live with a domineering aunt. Kate marries Major Rivers[389] and they have a child. They invite Maggie to live with them but she refuses. When Kate dies in childbirth, Maggie and her aunt take care of the baby and Maggie and Major Rivers marry. However, when Kate's baby dies, and Maggie and Major Rivers have another child who is born deaf and blind, the relationship deteriorates and Major Rivers leaves Maggie for another woman. Maggie is reunited with a cousin (who earlier in her life wished to marry her), Major Rivers is killed in a duel, and Maggie and her cousin marry.

Pro-reform Narratives

The pro-reform narratives in these novels provide insight into the perspective of these female authors and the perceived perspectives of their readership on marriage to a deceased wife's sister in comparative settings. The narratives illustrate comparative perceptions of how marriage was being shaped by colonial culture, and by English culture, in the same period. The pro-reform narratives reproduced in newspapers, parliamentary debates and in these novels, included: the union ought to be legal because the most suitable replacement mother for children after their mother's death was an aunt; it was unjust that the union be legal in some jurisdictions and not others; and the colonial legislatures ought to be able to legislate independently of Britain in areas of local concern. The first narrative was dominant in England but far less prominent in the Australian colonies. The latter narratives were more commonly employed in the colonial context. Parliamentary debates, Dale's representation, and the relative lack of public response to the legalisation of in-law marriage, indicate that it was far less problematic socially for a man to marry his sister-in-law in the colonies. One explanation for this is that in-laws were not perceived as real sisters and the relationship was not perceived as incestuous or biblically prohibited.[390] As explored in chapter three the traditional roots of this notion were biblical and the colonies lacked an Established Church, had a diverse religious population, and had no bishops in parliament to enforce one view of biblical interpretation.[391]This may well have resulted in a shift of perception when it came to the substance of in-law relationships and therefore the 'maternal' characterisation which was

[389] The name is likely a reference to Bernard Rivers in Mullock-Craik's novel *Hannah* and/or St John Rivers who was Jane Eyre's cousin whom she nearly married.
[390] This was frequently stated in parliamentary debates. For example, New South Wales, *Parliamentary Debate*, Legislative Council, 4 March, 1874 (Mr Cox); New South Wales, *Parliamentary Debate*, Legislative Council, 25 Feb 1874 (Sir William Manning).
[391] See Frew, ch 3.

required in England to de-sexualise the relationship between the adult in-laws was not required in the colonial context.[392]

The other narratives dominated in the colonies and Dale's novel, parliamentary debates and newspaper reports emphasise the legitimacy problem caused by inconsistent prohibitions and the view that the colonial legislature had a right to have their independence respected.[393] Colonial fiction of the 1890s often expressed a developing distinctive Australian culture and Dale's novel reflects the relinquishing of traditional English understandings of marriage and kinship and a pre-occupation with colonial legislative independence.[394] Historically, critics of Australian women's writing have downplayed its value by reference to the tendency of authors to write romantic fiction for English audiences and their failure to write about important issues in colonial society.[395] However, this view has since been revised and 'domestic romance' reclassified as 'settler romance', which often did illustrate how gender, national identity and class identity are interconnected.[396] In rejecting the pro-reform 'maternal narrative' and taking up the 'conflict of laws' narrative (both explored below) Dale's novel combines the genre of romantic settler fiction with the traditionally male literary domain of colonial political and legal concern. Colonial writing of the period is characterised by progressivity and optimism about a distinctive colonial culture.[397] For example, renowned nineteenth century colonial poet and literary critic Charles Harpur proposed a 'good national system of education' and integrated colonial political concerns into his writing. Other colonial authors clamoured for various freedoms, ranging from universal suffrage through to a

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[392] See quotation of Mr Longmore *Parliamentary Debates*, above n 276, col 1971. See also, Mr Langton comments at *Parliamentary Debates*, Victorian Legislative Assembly, above n 276, col 1970, quoted in Frew, below, 143.

[393] 'If the colonies have any independent legislative power, this is precisely one of those social questions to which it applies' *Daily News* in the *Mercury,* 29 Dec 1860. For similar comments see *Mercury,* 18 November 1889 and *Argus*, 18 November 1870.

[394] For several decades Imperial authority prevented the legalisation of sister-in-law marriage in the colonies, refusing to provide royal assent. The political aspect of the English and Australian legislative debates is examined in chapter seven. A description the Privy Council's refusal of the colonial Bill's and eventual assent can also be found in Jeremy Finn 'Should we not profit from such experiments when we could?'(2007) 28 (1) *Journal of Legal History* 31, 36.

[395] See John Barnes, 'Australian Fiction to 1920' in Geoffrey Dutton (ed), *The Literature of Australia* (Penguin, 1964), 158-9.

[396] Margaret Allen's study of three South Australian women writers looks at the interconnection between class, national and gender identity. Other feminist critics have challenged the marginalisation of women's writing by insisting on its connections with nationalist themes. See Kay Ferres on the feminisation of Australian culture in Kay Ferres (ed), *The Time to Write: Australian Women's Writing 1890-1*930 (Penguin, 1993). See discussion in Susan Sheridan, *Along the Faultlines: Sex, Race and Nation in Australian Women's Writing 1880s-1930s* (Allen & Unwin, 1995) 44-45.

[397] See 'The Kangaroo Hunt' reprinted in Michael Ackland (ed), *Charles Harpur: Selected Poetry and Pros* (Penguin, 1986), 20. See also the writing of Ada Cambridge, Henry Lawson, Catherine Martin and Banjo Patterson.

republic. This sentiment gathered momentum as the century progressed and federation was less than a decade away when Dale's noel was published. Mary Alice Dale's novel, 'With Feet of Clay' locates the story of sister-in-law marriage within this wider political and legal narrative as opposed to mirroring the domestic concerns being emphasised in England. Michael Ackland suggests that colonial life seemed to sanction the putting aside of conventions and much colonial literary criticism and indeed colonial history has demonstrated the social perception that colonial Australia was a place where adventure and creativity were celebrated, whilst domesticity and family remained social ideals at home.

Mother or Lover: The narrative of motherhood

The debate over marriage to a deceased wife's sister in England gave rise to moral panic and those who opposed the legalisation of sister-in-law unions genuinely thought the nation was on the verge of a great evil. The Archbishop of Canterbury likened a change in the law to wrenching a stone from a building, which would then collapse.[398] It was considered such a serious issue by some that 'one gentleman who had been Lord Chancellor of England, more than once, declared that if marriage with a deceased wife's sister ever became legal, 'the decadence of England was inevitable,' and that, for his part, he would rather see 300,000 Frenchmen landed on the English coast'.[399] Their fear robbed them of the ability to recognise that, if evil consequences were expected, they would have already been apparent as a result of thousands of sister in law unions that had already taken place.[400] A comment in the *Court Journal* acknowledged that marriage was constructed differently elsewhere: 'The ecclesiastical objections to marriage to a deceased wife's sister does not prevent a great number of such unions being accepted and recognised, provided the parties have availed themselves of the marriage laws of some country where the prohibition does not exist.'[401]

Literary interpretation of the debate confirms Gullette's view that public opinion and the law always adjudicate for an imagined person or type of person. Whether marriage to a deceased wife's sister was perceived as correct or legal depended whether the people who married were

[398] Hansard CCXIV, 1879-83 (13 March 1873).
[399] G E Howard, *A History of Matrimonial Institutions* (Humanities Press, 1964, first published 1904) cited in Ottenheimer, above n 65, 77.
[400] Turner, above n 81, 121.
[401] *Court Journal*, June 16 1894 in *Comments of the Press*, above n 240, 91.

considered criminal types or not. Therefore the marriage prohibition debate was a war of characterisations.[402] The rhetoric of criminality, of the guilty, sexually driven couple conspiring to be rid of their sick relative was prominent in English debates over sister-in-law marriage. Craik's novel is illustrative of the opposing characterisation of the morally upstanding couple involved in the controversy. Within this pro-reform narrative the sister-in-law was often characterised as a spinster and a maternal aunt and the widower as a lonely, morally upstanding father, wishing to re-marry to protect his children from motherlessness. Most of the firsthand letters published in the media were written by middle-class, middle-aged men with wealth, power, status and respectability and this assisted reformers in winning the characterisation battle.[403]

In Mullock Craik's novel *Hannah*, the author relies on Victorian family values and constructions of female sexuality in characterising Hannah as a mother rather than a lover. Craik's novel typifies the pro-reform narrative in England. Central to the narrative is the characterisation of the sister and brother-in-law as god-fearing, pure-hearted, law-abiding people. Bernard looks at Hannah's 'pure face' and 'no wear and tear of human passion troubled its ecclesiastical peace.'[404] Mr Rivers is 'a man, a father, a clergyman, surely he was made for better things' than misery.[405] Later in the novel Hannah realises her 'position' in her brother-in-law's house, she declares 'Be thou chaste as ice, pure as snow, thou shalt not escape calumny.'[406]

The novel critiques the prohibition of in-law marriage by emphasising the innocence of those who are affected by it. In attempting to protect her servant, Grace, from the prohibition, Hannah questions Mr Rivers about what the law says with regards to sister-in-law marriage and Mr Rivers answers 'in 1835 the law was altered or at least modified: all such marriages then existing were confirmed and all future ones declared illegal.' Highlighting the constructed nature of marriage and the contradiction between its natural pre-existence and its obvious political creation, Hannah replies 'Then what was right one year was wrong the next?'[407] Although the novel draws attention to the inadequacy of the law, it does so by invoking sympathy in the reader for Hannah, an innocent woman and mother with strong

[402] Gullette, above n 169, 155.
[403] Ibid, 156-157.
[404] Mullock-Craik, above n 384, 121.
[405] Ibid, 50.
[406] Ibid, 132.
[407] Ibid, 93.

morals. The pro-reform message of the novel, like many pro-reform pamphlets in the period, is reliant on the maternal characterisation and, the love between Hannah and Bernard is subordinate to and a product of, their shared love for the child of the first marriage. Bernard originally writes 'for help from his wife's sister – who though almost a stranger to himself, could not but feel, he said, the strong tie of blood which bound her to his child.'[408] Any critique of the law occurs against the backdrop of maternal motivation and innocence which is reinforced by Hannah's apparent ignorance of her position in her brother-in-law's house.

This pro-reform narrative was expressed in both English and colonial parliamentary debates but was more prominent in the former context. Those opposed to legalisation argued that 'the proposed measure...would dangerously interfere with domestic happiness and the most sacred relations of private life...'[409] the sister would be 'merged into the stepmother, and all the best affections of the sister would be lost'. In response, advocates of reform invoked the maternal characterisation in Craik's narrative arguing 'All those dangers, evils and unhappiness which so frequently resulted from the introduction of stepmothers into families, such as the disaffection of the children, were mitigated, if not removed, by the introduction of an aunt in the place of a mother.'[410] In a letter from a working man to the Secretary of the Marriage Law Reform Association published in 1864, the writer described his reasoning for marrying his sister-in-law after the death of his wife:

> I would prefer the alternative of marrying my wife's sister to placing the care of my child at the disposal of one that had no natural affection which would restrain her in her displeasure, and cause her to grieve for his errors, and exult and be proud of his virtues...my child has not experienced the want of a mother's love; neither have I had to contend with a strange disposition.[411]

Similarly in *Hannah*, the deceased wife's sister is the best wife a man can have. She is sympathetic to her brother-in-law's loss, maternal toward the children; she is the superior

[408] Mullock-Craik, above n 384, 11.
[409] *Parliamentary Debates*, House of Commons, 22 February 1849, vol 102, cc1101-28, 1125(Mr Napier).
[410] *Parliamentary Debates,* House of Commons, 03 May 1849, vol 104, cc1162-239 1162 (Mr Cockburn).
[411] Cunningham, Jas (James), *Marriage with a deceased wife's sister: letter from a working man*, 25 March 1864 (The Making of Modern Law, 26 October 2010), 2.

option for step-mother and companion.[412] The caricature of the wicked stepmother is invoked, reinforcing the notion that the sister-in-law is the best step mother for children. Hannah looks at her baby niece and thinks 'Oh, if this baby's father ever brings home a strange woman to be unkind to her, what shall I do?'[413] At almost equal intervals in the novel, the narrative returns to Hannah's maternal role in both Bernard and Rosie's life. This is particularly the case after Bernard and Hannah share intimate time or conversations that might invoke feelings of discomfort from readers who opposed sister-in-law unions. Hannah's maternal role is the 'magic' which makes all the unsavouriness of her relationship with Bernard vanish. The power of Hannah's maternal passion is emphasised above all else:

> There are women for whom mother-love is less an instinct or an affection than an actual passion-as strong as, sometimes even stronger than-the passion of love itself; to whom the mere thought of little hands and little feet...gives a thrill of ecstasy as keen as any love dreams.[414]

Her feelings for the child are always foremost whilst her feelings for Bernard trail behind. '[W]henever papa wanted aunty, little Rosie was remorselessly sent away, even though auntie's heart followed her longingly all the while.'[415] Not only is *Hannah's* maternal nature emphasised in relation to her feelings for her niece but her feelings for her brother-in-law are also initially maternal. She feels deeply sorry for him 'a child's anguish could not have been more appealing...' She watches him as he 'wept - also like a child'.[416] 'He was so completely a young man still, she said to herself and felt almost old enough and experienced enough to be his mother.'[417] She devotes herself to him 'as a nurse does to a sickly naughty child...'[418]

Similarly, in Clark-Russel's novel, *The Deceased Wife's Sister*, Margaret is characterised repeatedly as a mother rather than a lover. The reader is informed that Major Rivers never perceives her as his true wife because the law forbids her this status. Major River's lack of

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[412] Gruner, above n 169, 435; For an examination of the maternal narrative in the American marriage to a deceased wife's sister debate, see Horace Mann, Letters from the Right Rev Bishop McIlvaine of Ohio and Other Eminent Persons in the United States of America, in Favour of Marriage with a Deceased Wife's Sister (Marriage Law Reform Association, 1852), 7.
[413] Mullock-Craik, above n 384, 41.
[414] Ibid, 31.
[415] Ibid, 73.
[416] Ibid, 37.
[417] Ibid, 42.
[418] Ibid, 51.

legal responsibility to Margaret, and Margaret's love and longing for him, highlights her vulnerability. She begs him to reciprocate 'tell me that your love for me is still as it was when Kate's child came to me at her bequest and as her sanction for our love – and I will dry these eyes.'[419] Her vulnerability as a 'wife' is juxtaposed against her competency as a 'mother'. When she becomes destitute and is living in a tiny servant's room in the dirty borough, rapidly running out of money to feed herself and child, she will not leave her child in the care of another. She says 'only the mother's eye could watch her, only the mother's caresses soothe her, only the mother's patience bear with her.'[420] 'I would starve with her but would not leave her. We might die together but in death I should still be at her side.'[421] Despite her love for Major Rivers nothing is stronger than the love she feels for her child. When her child dies of measles she feels she has no purpose: 'Now my child is dead I may die. There is no restraint imposed upon me now.'[422]

This narrative, which was routinely invoked in support of reform, illustrates how many pro-reformers relied on Victorian family values and constructions of female sexuality well into the late nineteenth century to push the bill through its final stages.[423] In the House of Commons debate in April 1901, one parliamentarian argued:

> When a poor man with a family has the misfortune to lose his wife some assistance for his domestic concerns become indispensable, assistance for which he cannot afford to pay and which must be rendered immediately. All circumstances and all feelings point to the sister of the dead wife, and when once she becomes a permanent inmate the result is inevitable.[424]

The report of the Royal Commission into the Marriage Laws included the evidence of injury inflicted upon the labouring classes for whom an aunt was indicated as better qualified than any other to be the step-mother of an orphan family.[425] Mullock Craik puts a name to this

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[419] Clark-Russel, above n 385, 23.
[420] Ibid, 127.
[421] Ibid, 128.
[422] Ibid, 167
[423] Such pro-reform narratives came up against the counter argument that if domestic affection were to be used as a measure of the most suitable marriage partner, a person would never marry outside of their family.
[424] *Parliamentary Debates*, House of Commons, 24 April 1901, vol 92, cc1184-252, 1229 (Sir Henry Fowler).
[425] Robert Jenkins, *The Repeal of the Prohibition of Marriage to a Deceased Wife's Sister Advocated* (Marriage Law Reform Association, 1883), 26.

hypothetical maternal aunt. Hannah and her brother in-law were 'bound together, as it were, by the link of a common grief'[426] and their love was a product of mutual parenthood:

> To my mind there is nothing more natural than that a man and woman together, fighting together, unselfishly the battle of life, with common ties and common interests, their affections centred in a family which the woman treats and loves as her own'.[427] 'How shall I be able to teach my little girlie to love her father if I do not love him myself a little? I may in Time!'[428]

Such narratives, invoked in parliament, media reports and popular literature of the period, demonstrate a fear of female sexuality. Pro-reformers relied on acceptable notions of companionate brother/sister relationships to legitimise marriage to a deceased wife's sister. Hannah's lack of sexuality, maternal motivation for marriage, and moral purity overshadows any unsisterly passion that a reader might perceive in her. She was a woman who had 'not been used to living with any man before' except her father![429] Her moral purity is confirmed by her lack of attractiveness when compared with her dead sister. In pro-reform narratives the sister-in-law character is invariably less attractive than the first wife and her sexuality is suppressed. Hannah is described as visually plain: 'she had no special attraction of any kind' and 'utterly unlike her sister Rosa' who possessed beauty. Hannah is void of sexuality, 'a born old maid' and an 'old governess'.[430] Even when Hannah and Bernard finally embrace their love for one another in the final pages of the novel, Hannah 'lifted up her hair and showed him the long stripes of grey...' to which Bernard responds that a man marries a woman 'not for this beauty or that' but because 'she suits him and sympathises with him...'[431]

Comparing the English novels with a marriage narrative in the Australian setting reveals interesting distinctions. The characterisation of the sister-in-law as a mother rather than lover is lacking in the Australian tale. Dale's novel, *With Feet of Clay*, though also pro-reform, characterises Bertha and Julian as lovers. The author abandons the notion that deceased wife's

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[426] Mullock-Craik, above n 384, 35
[427] Charles Cameron, *Marriage with a Deceased Wife's Sister* (Marriage Law Reform Association,1883) cited in Gruner, above n 162, 437.
[428] Mullock-Craik, above n 384, 51.
[429] Ibid, 50.
[430] Ibid, 13-14.
[431] Ibid, 306.

sister unions should only have legal legitimacy for the sake of children. In fact, Julian does not approach Bertha because he requires a mother for his children and when the two are married neither have children of their own. The passion between Bertha and Julian, though restrained, is real and the narration implies that their love is reason enough for a change in the law: 'Bertha had won the passionate love of his heart – never in reality given before – never to be given again. And he intended, all obstacles withstanding, to win her, for his wife'.[432] In contrast, Craik draws a distinction between passion and love in her novel, 'Passion is a weak thing; but love, pure love is the strongest thing on earth' and 'it is only for young lovers, passionate, selfish, uncontrolled, that society must legislate'.[433]

Dale's novel does not follow the usual path of emphasising the dead wife's beauty and the second wife's plainness. Bertha is described as 'Edgar Poe's rare and radiant maiden',[434] whilst Margaret (her dead sister) has eyes like 'two currents set in a face of doe'.[435] Margaret is described as unattractive, unintelligent, of ill health, weak, self conceited and the black sheep of the family: 'When mother nature makes a human being...short of intelligence, she invariably fills up the vacuum with self-conceit, so that the dull and idiotic shall never be aware of their own deficiencies'.[436] Though Bertha's passionate love for Julian is not expressed through her dialogue, it is evident by her distress and illness when Julian marries her sister. Bertha does not appear an angel to mother Julian in his distress over the death of his wife; they are not brought together by their mutual grief or parenthood and their passion for one another is quite evident long before the sister's death takes place.

In maternal pro-reform narratives such as *Hannah*, the living sister's admiration for her dead sister and the distance between sister and brother-in-law prior to the death is emphasised. By communicating the consent or presumed consent of the dead sister to the in-law union, the criminal characterisation of the sister-in-law is challenged by the morally upstanding characterisation. It is made clear in Craik's narrative that Hannah knew very little of Bernard prior to Rosa's death: 'Hannah had seen almost nothing of them, beyond a formal three days visit.'[437] 'In their slight intercourse, the only thing the sister (Hannah) had ever cared to find

[432] Dale, above n 382, 65-67.
[433] Mullock-Craik, above n 384, 181.
[434] Dale, above n 382, 5.
[435] Ibid, 69
[436] Ibid, 68.
[437] Mullcok-Craik, above n 384, 10

out was that he loved Rosa and Rosa loved him.'[438] The distance between Hannah and Bernard, their limited knowledge of one another, and Hannah's discomfort at thoughts of 'filling Rosa's place – 'how terrible for him to see another face in the room of that dear, lovely one'[439] - remind the reader of the couples morality and good nature, and the natural inevitability of their eventual union. The consent of Rosa to the union with Bernard is essential to the pro-reform agenda of the author. Bernard and Hannah accept the idea of Rosa's consent sadly: 'Yes; you are the mistress here now. I put you exactly in her place – to manage everything as she did. She would wish it so. Oh if we only had her back again!- Just for one week, one day![440] The consent is confirmed when a conversation is recalled in which Rosa expressed the view that clergymen ought to solemnise unions between brother and sister-in-law when wives are tragically lost.[441] Corbett argues that within this narrative, honouring a wife's dying declaration, even when it meant breaking the law, became another means of disavowing everything but the purest intentions and most enduring fidelity to the deceased.[442] The second wife was frequently cast as a living reminder of the other, naturalising the second choice by emphasising its inevitability.[443] The call for an end to the affine ban on marriage relied on exclusionary logic.[444] Men of the respectable classes would choose a sister-in-law as a second wife because a man prefers a woman who is known intimately in her domestic circumstances over a stranger whose character, habits and family history cannot be so readily determined.[445] Davidoff and Hall suggest that in the nineteenth century the biological and familial identity of wife and sister were different but the social identity of wife and sister shared many characteristics flowing from the feminine ideal. As a result a sister-in-law could almost be merged with a man's wife, imitating her feminine role in the household, her similar maternal relationship with children, and her companionate relationship with him.[446]

In Jas Cunningham's letter to the Marriage Law Reform Association, he describes the relationship between his new wife and his deceased wife:

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[438] Ibid, 11
[439] Ibid, 34.
[440] Ibid, 48
[441] Ibid, 61.
[442] Ibid, 64
[443] Ibid, 62
[444] Pollack, above n 182, 178.
[445] Corbett, above n 164, 20. For an exploration of kin marriage as a protection against contamination, see Pollack, above n 182.
[446] Davidoff and Hall, above n 77, 351.

> [T]hose relics which are calculated to call up the remembrance of my late wife, are as sacred to my present wife as they are to myself; we can both mourn over her loss and sprinkle flowers over her grave – it is almost bringing the dead to life.[447]

In Mullock Craik's narrative and its many reproductions the husband-wife-sister relationship is presented as a symbol of unity. The desire for both sisters to be connected to one another eliminates and controls potential male desire for the unmarried sister. The single woman - in Craik's narrative Hannah - privileges unity with her sister Rosa, and cannot conceive of herself as a rival for her sister's place. The husband's grief after his wife's death encourages a new relationship based on comfort and companionship and acts as an antidote for sexual attraction: 'Hannah was certain that had Rosa lived she might have come about their house continually, and he (Bernard) would have had no sort of feeling for her beyond the affectionate interest that a man may justly take in his wife's sister'.[448] However, the replacement after Rosa's death, with her perceived consent, allows for the continuation of the sacred family circle.[449] The pro-reform narrative utilised here promotes the legalisation of sister-in-law marriage, whilst reinforcing the social norms associated with Victorian constructions of marriage and family.

In contrast, in the Australian novel, Bertha and Julian do not require Margaret's consent to their union and Bertha is not cast as a replacement for her sister. The love between Bertha and Julian is presented as always 'having been more real than that of Julian and Margaret' and Margaret is cast as an infirm character. Whilst Hannah's love for Bernard grows organically from their mutual affection for their child over a long period of time, Bertha and Julian fall in love before the first marriage to Bertha's sister even takes place. The novel demonstrates that maternal suitability was not an essential requirement for acceptability of a sister-in-law union in this colonial representation. In comparison with the mother country, the maternal narrative was less prevalent in the colonies than other narratives within the pro-reform agenda.

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[447] Cunningham, Jas (James), *Marriage with a deceased wife's sister: letter from a working man,* 25th March 1864, 2 accessed in *The Making of Modern Law*, Gale, 26 October 2010.
[448] Mullock-Craik, above n 384, 305.
[449] Chambers, above n 55, 25.

However, other sources reveal that the death of mothers was common[450] and some men did see their aunt as a suitable replacement. Samuel Mitchell of Northampton in Western Australia indicated that one of his reasons for remarriage was to provide care for his children. He lamented the difficulties of a widower with young children, stating in his diary that 'the position of a parent with eight motherless children is not to be viewed lightly, especially when there is no deceased wife's sister's soothing and guiding hand available.'[451] The proportion of one parent families in late nineteenth century colonies was significant. For example, in 1891 16.7 per cent of all Victorian families with dependent children were sole parent families. Of the 1891 figures, 38 per cent of these sole parents were men, reflecting high rates of maternal mortality.[452] Therefore, whilst the use of the maternal characterisation for imagining a morally upstanding sister-in-law was not prominent in Australian debate, the practical solution of aunt as replacement mother did feature. These narratives demonstrate how discourse about the role of women within the family shaped constructions of marriage in the nineteenth century.

Inheritance, Status and the Conflict of Laws Narrative

Dale's novel is less typical because the maternal characterisation is not central to the story and the criticism of the English law is more overt. In addition, the Australian setting allows the author to critique aspects of English society whilst covertly comparing it with the colonies. Unlike Hannah, Bertha is not a mother and unlike Mr Rivers, Julian is not a clergyman but an entrepreneur travelling to make his fortune. Unlike the narrative in *Hannah*, in which Hannah and Bernard struggle almost sub-consciously with the social and religious implications of their feelings for one another, Bertha and Julian are not faced with these issues until they return to England. The deterioration of their relationship is a direct consequence of the marriage prohibition in England. When it is discovered that Margaret and Bertha were in fact not blood sisters (Margaret was adopted) Julian begs for Bertha back and blames the law for his actions: 'It was not my fault that the law seemed to make our marriage illegal'.[453] This highlights the capacity of the law to create legitimacy in one period or place and deny it in another. In the final chapters of the book the reader is reminded of the responsibility of the

[450] Peter McDonald, *Families in Australia: A Socio-Demographic Perspective* (Australian Institute of Family Studies, 1995).
[451] Samuel Mitchell, *Looking Backward: Reminiscences of 42 years* (privately printed, Northampton, Western Australia, 1911) 9 cited in Hart, above n 72, 55.
[452] Peter McDonald, above n 450, 22 in Tracy Summerfield, 'Families of Meaning: Dismantling the Boundaries between Law and Society' (PhD Thesis Murdoch University, 2004) 102.
[453] Mullock-Craik, above n 384, 284.

law for the predicament of the characters when Mr Durward asks Bertha to return to Julian and reminds her that 'the circumstances were against him; he did not think you were or ever could be his wife' 'Those seeming circumstances were not under his control'. The law even had the capacity to change Julian's feelings for Bertha: '[T]he knowledge that Bertha was not and could not be his wife was already lowering her in his eyes, and doing its work like the subtle and deadly poison that it was.'[454] When Bertha returns to Julian, his eyes 'sank in bitter shame and humiliation' and the two are reunited in acceptance that the cruelty of the law had forced them apart. This pro-reform narrative highlighted the malleability of marriage and the unjust nature of conflicting marriage law in the British Empire, a narrative prominent in colonial parliamentary debates and regularly invoked by reformers in the House of Commons:

> It seems to me an extraordinary anomaly that marriages which are valid in every self-governing British colony, under Acts approved by the Crown, should still be considered invalid...when the parties or their children come to the mother country, which...they regard as home.[455]

Narratives similar to Dale's were relayed in the House of Commons by those supporting the *Colonial (Deceased Wife's Sister) Marriage Bill*. The Bill, which eventually passed one year prior to legalisation of sister-in-law marriage in England, made sister-in-law marriages which had taken place in the British colonies legitimate on English soil. One parliamentarian argued that what is 'morally wrong in London must be morally wrong in Sydney' and that if great English families were to emigrate to the colonies where such a marriage is legal the children of such unions should be entitled to succeed to the estate on returning to England.[456] Though the battle of characterisations described by Gullette did play itself out in the colonial parliaments and press, it was the conflict of laws narrative that dominated the debate in the colonial environment.

As explored in chapter four marriage to a deceased wife's sister legislation, like all marriage legislation, was inextricably linked to issues of inheritance and legitimacy. The repeated discussion of the importance of clarifying the legal legitimacy of marriage relationships, whether it be marriages conducted abroad or affinity marriages at home, was a response to

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[454] Ibid, 160.
[455] *Parliamentary Debates*, Series 4, Vol 92, col 1193, 24 April 1901, (Sir Frederick Pollock).
[456] *Parliamentary Debates*, Series 4, Vol 92, col 1231, 24 April 1901.

concern for the protection of property and the entrenchment of legitimate lines of inheritance. *Lord Lyndhurst's Act* 1835 was designed to end confusion regarding the legitimacy by making a clear legal distinction between sister-in-law unions made before and after the date of the Act. However, in practice it complicated issues of legitimacy and gave rise to a conflict of laws issue, particularly for families travelling throughout jurisdictions of the British Empire. In exploring a sister-in-law union in the Australian setting, Dale's novel compares colonial understandings of legitimacy and inheritance as against those in the mother country, in which the prohibiting legislation originated.

Dale introduces notions of social status and inheritance by explaining the characters' motivations for migrating to Australia at the beginning of the novel. In the process Dale establishes Australia as a place where class distinction and social status are less significant and status can be created rather than inherited. Mr Henry Cornwallis is disinherited by his father for marrying a servant girl in 'want of refinement and good breeding'[457] and has made his home in Australia where he hoped that his wife's 'want of education and refinement would not be so glaringly apparent'.[458] The family has escaped the superficiality of status based criticism in England to settle in Australia. Henry Cornwallis' social conscience gives rise to growing contempt for his unrefined wife and concern about her influence on the children. His contention is that Australia holds little hope for the education of the brighter and prettier of his two daughters and he sends Bertha back to England 'to give her a home education such as can only be taught in an English home'.[459] Whilst Bertha is engaged to a wealthy Englishman, her sister remains in the colony where she is engaged to Julian.

Like Mr Cornwallis, Julian had escaped to Australia partly to make his fortune, and partly as his status in England would be regarded more highly across the seas. Having once been in line for his uncle's earldom, until the birth of a cousin who would now succeed, Julian's ambitions included marrying 'the first Australian heiress I meet'.[460] 'There will be no difficulty on that point, I shall put the earldom well to the fore, and that must be worth a good round lump of hard cash in Australia.'[461] The relative classlessness of Australian society is emphasised by Julian's choice to emigrate in order to escape the social critics in England and make his

[457] Dale, above n 382, 7.
[458] Ibid, 8,
[459] Ibid, 5.
[460] Ibid, 20.
[461] Ibid, 21.

fortune. His contention is that in the absence of an inherited title he will create his status in the colonies. This sets the scene for the deceased wife's sister marriage narrative as it will take place in the context of a society in which status and wealth can be created and therefore lines of inheritance are less crucial to long-term stability and respectability.

The crucial importance of status in 'society' is introduced in the novel when Bertha and Julian return to England where the regulation of marriage and its politics had everything to do with property.[462] In the colonies Julian's earldom was no more than 'a round lump of hard cash' and therefore any concern with inheritance in the colonial parliamentary debates centres around recognition of marital status on return to England rather than within the colony. In the novel Julian is forced to consider whether Bertha 'was really the Countess of Erlington and whether little Harry was Lord St John, or could ever succeed to the earldom'.[463] When the family return to England where their marriage is illegitimate, Bertha is not received by her neighbours and Julian's friends. One friend comments 'Bertha is not Lady Erlington, you can hardly expect her to be received by those whose titles are unquestioned'.[464] In England Bertha is 'despised by women who possess neither her beauty nor her worth; far from her own country and friends'.[465] By juxtaposing the couples' happy marriage in Australia against their illegitimacy and misery in England, Dale highlights the artificial nature of the prohibition. In both Dale's novel and the colonial press, the debate about sister-in-law marriage does not centre on its moral, social and religious legitimacy, instead the focus is the conflict of laws, the legislative autonomy of colonial authorities and whether the mother country had the right to deny legitimacy granted in British colonies.[466] The narrative strips the debate of essentialist arguments about the God given nature of marriage, presenting marriage as a legal construction. Bertha asks 'what right has one country to dishonour the true and lawful wife of another?'[467]and objects to being stripped of her legitimacy as Julian's wife:

> I am not going to give up my good name quietly; I shall try if I cannot get justice for myself and children. In Australia I am Lord Erlingford's lawful wife, and it cannot be that I am not so all over the world. It cannot be that

[462] Pollack, above n 182, 46.
[463] Dale, above n 382, 144.
[464] Ibid, 163.
[465] Ibid, 167.
[466] For a more in depth examination of the political issues see chapter seven.
[467] Dale, above n 382, 209.

> the mere fact of me living in a different place can alter it. It is absurd and impossible![468]

The variation in the status of sister-in-law unions across the British Empire was a boon for the cause of pro-reformers in England. The narrative in Dale's novel played out in the press and pamphlets of both the colonies and the mother country. The following is a typical comment drawing attention to the mother countries' responsibility to serve the interests of the colonists:

> [D]oubts having arisen as to the validity of the marriage of a man with the sister of his deceased wife, it is expedient to remove these doubts. It is the same in Victoria, in Tasmania, in New South Wales, and in Queensland. I would be the last man to undervalue the Imperial spirit so far as our colonies are concerned... It must be remembered that the marriage law of the colonies is not a matter for themselves exclusively. Every law sanctioning these marriages passed by any Colonial Parliament was passed by the consent and with the authority of the British Crown.[469]

On the other side of the argument parliamentarians emphasised the 'lower standards' of colonial society and jeered at the prospect of altering English law to mimic that in the colonies. In 1872, Alexander Beresford Hope, a staunch opponent of deceased wife's sister marriage, congratulated the 1872 proponents of a bill introducing the secret ballot (previously introduced in the colonies) for not relying on the Australian argument 'of which they had heard so much last year they might almost have thought they were convicts'.

He said it was:

> ridiculous to adduce a colony's tentative apprenticeship of a few years in Cabinet and Parliament as making evidence of what ought to rule the oldest and most respected and most powerful Legislative Assembly in the world.[470]

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[468] Ibid, 199.
[469] *Parliamentary Debates*, House of Commons, 24 April 1901 vol 92 cc1184-252, 1231 (Sir Henry Fowler).
[470] *Parliamentary Debates*, House of Commons, 15 Feb 1872, Series 3, Vol 209, Col 503 cited in Finn, above n 394, 35.

Similar sentiment was expressed at a Church Union public meeting eleven years later:

> If for the last 280 years we have been able to get on with these differences, surely it is too much to say that we are to alter and adapt our laws to this lower standard of Colonial society, and that we are to fling to the winds the traditions of 1,200 years at the dictates of an Australian Parliament (cheers).[471]

Those who opposed the legalisation of sister-in-law unions in the colonies did so on the basis that the marriage law should remain consistent with the law of England, rather than on any deeper moral basis.[472] Those who advocated legalisation often did so on the basis that marriage law should be consistent across the colonies rather than with the mother country.[473] The centrality of the conflict of laws issue in Dale's novel is emphasised when Mr Durward says to Bertha 'England and Australia are the same country' and Bertha replied 'then why are their laws so different on a vital point like this?' to which he can only reply 'I cannot say?'[474] By virtue of the necessity of referring to colonial marriage in opposition to English marriage, the colonial discourse highlights the adaptability of marriage as an institution in different societies.

The Desertion Narrative

Russel Clark's novel *The Deceased Wife's Sister* published in 1874 takes a third approach to the pro-reform agenda. Maggie Holmes unnatural passions for her brother-in-law Major Rivers arise before her sister Kate's death and lead Maggie to much misery. It appears that Maggie is being punished for her unnatural passions, particularly when her baby is born deaf and blind, deformities considered at the time typically associated with incestuous lineage. However, the pro-reform message lies in the tragedy of Major River's desertion of his wife, which is only enabled by the legislation which proclaims his marriage to Maggie illegitimate.

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[471] English Church Union Public Meeting, 'Report of the Proceedings of a meeting in opposition to marriage to a deceased wife's sister (June 7, 1883, Church Printing Company) 7 (British Library, London, call no. 5176.bb.15(5)).

[472] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 1873 (Mr Charles Campbell); see also *Brooke v Brooke* (1861) 9 H.L.C. 193; New South Wales, *Parliamentary Debate*, Legislative Council, 6 May, 1875.

[473] New South Wales, *Parliamentary Debate*, Legislative Council, 6 May, 1875 (Mr De Salis). See Frew, above n 5, ch 7 for a more comprehensive analysis of the political relevance of the marriage issue in the colonies.

[474] Dale, above n 382, 209.

Maggie and her child are vulnerable victims of his broken promises and of the law which provides them no protection: 'Had not Major Rivers desertion made my innocent child the offspring of sin? Was she not illegitimate – born with no claims of righteous parentage? Again and again, as these bitter thoughts swept through my mind, I feverishly kissed the little face that nestled close to my breast'. [475] It is the final irony that Maggie's marriage to her cousin is completely acceptable when her marriage to her brother-in-law was both legally and socially inappropriate.[476] The desertion narrative appears as a sub-plot in Craik's novel *Hannah* in which Grace Dixon (Hannah's household nurse) and her child are abandoned after her husband discovers their marriage is illegitimate.[477]

Those who opposed legalisation argued on the basis that a change in the law would only benefit a few immoral men who had incestuous desires for their in-laws:

> Now, who would be relieved by this measure? A few men who have attached themselves to a *forbidden* object. And the interests of those few are to outweigh those of the wives, widowers, spinsters and children who would be affected.[478]

The pro-reform reaction to this was to emphasise the cost of the prohibition for innocent women and children:

> It is now in the power of a husband who has married a deceased wife's sister to desert her without any provision, and to marry another woman without involving himself in any penal consequences. Some few days ago a poor woman applied to a police Magistrate, stating that her husband had married another woman, and deserted her. The Magistrate, of course, said, 'If he has done so, he is liable to a prosecution for bigamy;' but it turned out that the poor woman was sister to her husband's first wife, and the Magistrate was obliged to inform her that he could give her no assist.'[479]

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[475] Clark-Russell, above n 385, 141.
[476] Kuper, above n 67, 76. For a discussion of cousin marriage see Frew, above n 5, ch 8.
[477] Mullock-Craik, above n 384, 86.
[478] 'A Parents Appeal to Members of Both Houses of Parliament, against Lord Bury's Bill for Legalising Marriage with a Deceased Wife's Sister' (Printed by Henry Colbran, 1858 in Bristol Selected Pamphlets 1800), 7, accessed 28 May 2009 at http://www.jstor.org/stable/60230368.
[479] *Parliamentary Debates*, House of Commons, 19 February 1862 vol 165 cc458-89 *at 475* (Sir George Grey).

However, the female voice was largely absent from the debate over marriage to a deceased wife's sister and as Gullette asserts it 'was mainly a battle between men'.[480] Russel Clark's narrative, the sub-plot in *Hannah*, and the threat of desertion in *With Feet of Clay*, highlight the cost of illegitimacy for women and children deserted by their husbands.

Pro-reformers in both English and colonial parliaments argued that the prohibition enabled men to abandon their responsibility to their wives and children. Desertion and abandonment were very real concerns in colonial Australia. Though Bertha is ultimately reunited with Julian, the threat of desertion is present in Dale's narrative. On the families return to England, Bertha's illegitimacy dominates their lives and Julian is seduced by Evelyn who wishes him to abandon Bertha and marry a third time. When Julian and Bertha end up in court arguing over the legitimacy of their marriage, Mr Durward (representing Bertha) suggests that Julian had married Bertha for her wealth, had been aware of the illegitimacy and had always intended to desert Bertha.[481] The desertion concern was discussed in the New South Wales parliamentary debate in November 1873, during which Mr Arnold argued that legalising sister-in-law marriages retrospectively was justified, even if it did sanction polygamy or bigamy in this special circumstance, because it would assist two innocent parties, the deserted wife and the additional wife who married a man without knowledge of his prior connection with his sister-in-law. The House responded to this speech with 'Hear Hear' and growing concern over desertion was consistent with several decades of concern over male abandonment of colonial women and children.[482] During the same debate Mr Stuart argued for legalisation on the basis that 'If a man married two sisters and the second marriage were void, all of his property would go to the first wife's children on his death, and the children of the second would be left destitute'.[483] There were cheers at the proposition that, a man who deserted his first wife for a second should be stuck with two wives to support and two wives

[480] Gullette, above n 169, 146.
[481] Mullock-Craik, above n 384, 226.
[482] In the 1840s the New South Wales and Van Diemen's Land governments passed maintenance legislation in an attempt to enforce (and perhaps create) the financial responsibilities of men towards their families. See *An Act to Provide for the Maintenance of Deserted Wives and Children* 4 Vic, No. 5, 1840. Christina Twomey, 'Without Natural Protectors: Responses to Wife Desertion in Gold-Rush Victoria' (1997) 108 *Australian Historical Studies* 22, 27. For further discussion of wife desertion in early colonial Australia see: Jools, Penny, 'Mother Headed Households' in Ailsa Burns, Jill Bottomly and Penny Jools (eds), *The Family in the Modern World: Australian Perspectives* (George Allen and Unwin, 1983) 201; Anne O'Brien, 'Left in the Lurch: Deserted Wives in New South Wales at the Turn of the Century' in Judy Mackinolty and Heather Raidi (eds), *In Pursuit of Justice: Australian Women and the Law 1788-1979* (Hale and Iremonger, 1979) 96-105.
[483] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 1873 (Mr Stuart).

to punish him.[484] The desertion narrative demonstrates how practical concerns shaped marriage in the nineteenth century.

Narratives of 'Family' in the Nineteenth Century

All three novels are characterised by the pre- nineteenth century historical notion of family, which was partly responsible for the existence of the deceased wife's sister marriage prohibition. Chapter three explored the religious arguments against marriage to a deceased wife's sister and their relative weight in England and the colonies. Although these were very significant, particularly in England, Gullette points out that much popular literature around the 1870s reflected the view that the public were no-longer concerned with the religious implications of such marriages.[485] For example, in Dales's novel and in Craik's novel little attention was paid to religious grounds for the relationship's incestuous nature. The church fathers proved too puritanical for some nineteenth century tastes. Though it may have been the Bishops who delayed the passing of the legislation in the English parliament, the interests of the Bishops alone were not responsible for the controversy outside of Parliament.[486] This is reinforced by the novels in which all three couples experience feelings of shame – not explicitly based entirely on religious feeling - and have difficulty accepting their love for their respective in-law. The nuclear conception of family as we understand it today was a new concept in the late eighteenth and nineteenth century both in the colonies and in England. Prior to this a wider understanding of family structure had prevailed for centuries. The sense of shame expressed by the characters was nurtured by the notion that a sister-in-law was just like a sister. As Corbett states, the debate over marriage to a deceased wife's sister (and indeed the existence of these novels) is representative of profound differences in the meaning of family and incest in the eighteenth, nineteenth and twentieth century. Prior to the late nineteenth and early twentieth century, a sibling's marriage would not only create new ties between families, it would also expand and re-shape one's own family through its incorporation of new members.[487]

[484] The Bill was passed in New South Wales by 15 votes to 9 in June 1875. New South Wales, *Parliamentary Debate*, Legislative Council, 3 June, 1875.
[485] Gullette, above n 169, 151, 153.
[486] Gullette, above n 169, 151, 153.
[487] Corbett, above n 164, 59.

In pamphlets, press and fiction in England and its colonies, writers expressed concern about the danger of deceased wife's sister marriage and the potential damage it could do to brother and sister relationships within the family. This is illustrated by an anonymous, editorial against a proposed colonial deceased wife's sister bill.[488] The editorial argued that legalisation of marriage with a deceased wife's sister would have deleterious consequences for the 'social and domestic relations which have hitherto been recognised with great purity in most English lands'[489] ...the law would 'interrupt the happiness [and social harmony] of families';[490] it would 'do away with those feelings of sacred and pure love which now existed in the breast of every man who looked upon his wife's sister as his own'.[491] Similarly, in England concerns about the break-down of family life and the deterioration of the brother-sister relationship commonly appeared. One Parent's Appeal to the House of Lords against legalisation of deceased wife's sister marriage stated that 'It is no answer to say that the wife's sister is no more dangerous than any other young girl, who might be equally intimate with the husband. *No other can be so intimate.*'[492] In his testimony to the Royal Commission on Marriage, Edward Pusey, a prominent Anglican Churchman, warned 'in whatever degree the marriage law was relaxed, in that degree the domestic affections would be narrowed'.[493] If a more narrowly bounded idea of family and the contract model that deems marriage dissoluble work in tandem to loosen the ties of kinship by casting affinity as a merely metaphorical relationship, a sister-in-law will lose her privileged status as sister.[494] The most strongly insisted upon argument against repealing the deceased wife's sister prohibition was that marriage produces the most unreserved intimacy with the family of the wife; that all her relations became the relations of the husband; and that the law ought to induce a husband to regard his wife's sister as his own.[495] This illustrates the role of the law in constructing notions of 'natural' sexual and marital relations.

In Craik's novel, Bernard regards Hannah as his sister and introduces her to everyone who approaches as 'My sister – Miss Thelluson. Sometimes it was sister-in-law but always pointedly *sister' (my emphasis)*. When he approaches her after Rosa's death, he does so as her brother, and the pair struggle to come to terms with their feelings for one another. Whilst

[488] Likely to have been written by John Storie, a Presbyterian minister in Tasmania.
[489] *The Mercury* 1872a in Kippen, above n 95, 6.
[490] *The Mercury* 1873g, ibid, 6.
[491] *Launceston Examiner* 1873b, ibid, 7.
[492] A Parent's Appeal, above n 94.
[493] *Commission Report*, above n 49, 66.
[494] *Commission Report*, above n 49, 53, 66.
[495] Ibid.

brother and sister in-law marriage was perceived as a threat to the Victorian family, other familial marriages, such as cousin marriage were perfectly acceptable. This reflected a society in which prohibited illicit sexual relations had social rather than biological grounds. Incest was analogous with adultery or fornication and was therefore a social crime rather than a sexual one.[496] Aside from consanguineous and affine marriages, in the Victorian period a close degree of relatedness between marriage partners was something of an incentive, rather than an impediment to marriage, at least amongst the upper classes because of shared values, associations, and habits of language and thought.[497]

Pro-reformers utilised this notion in their narratives, emphasising the companionate vision of the sibling (blood and affinity) relationship as a blueprint for romantic relationships, just as cousin relationships could be seen as such.[498] As Corbett suggests, many nineteenth century romantic narratives were shaped by adhering to familial terms and seeking the satisfaction of kin.[499] Therefore, pro-reform authors such as Mullock Craik represented their characters as companions rather than lovers. It is the familial domesticity of Hannah and Bernard's initial connection; the purity of Hannah's maternal instinct; the parenting role; and the love between blood sisters and affines alike, that results in the love and eventual marriage between Hannah and Bernard. Their romantic love develops from familial connection and their familial affection nurtures their romantic love. Corbett suggests that over the course of a century middle class incest such as cousin and sister-in-law marriage came to appear, in contrast with the habits of the working classes, as potentially positive strategies for preserving bourgeois morality and health.[500] This is emphasised in the English novels, in which the choice of the sister-in-law as a second wife, occurs in the context of domestic affections. It is reinforced further by the romantic cousin relationships in the shadows which will the reader to question whether the law ought to distinguish between the marriage of sibling in-laws as opposed to cousins.[501]

Unlike the English novels, in the Australian setting, Dale's narrative challenges the notion that in-law love only develops within the context of domestic affection and familiarity and is therefore less conservative and more individualistic in its pro-reform message than the novels

[496] Morris, above n 2, 235- 6.
[497] Corbett, above n 163, 3; see also Kuper, above n 67.
[498] Anderson, above n 161, 72.
[499] Corbett, above n 164, 81.
[500] Ibid, 13.
[501] See ch 8 on the distinction between cousin and deceased wife's sister marriage.

set in England. The love between Julian and Bertha exists outside the paradigm of family and domesticity. This is emphasised by the lack of children when they fall in love. Despite these differences, Dale's novel remains reflective of traditional understandings of family. When Bertha and Julian St John meet, he is introduced as her 'future brother-in-law'[502] and in the context of their flirtation Bertha tells Julian 'I feel as if you are my brother already'.[503] Bertha's perception of Julian as a brother leads her to cover 'her face with her hands and shed tears of misery and shame'[504] when Julian declares his love for her. In the beginning she rejects Julian's advances and says she will not 'yield to this great dishonour and treachery'.[505] Although Julian plans to marry Bertha as soon as Margaret dies, for Bertha, Margaret's death alters 'nothing; he had married her sister...'[506] Therefore, whilst Dale presents Bertha as struggling to let go of the notion that unbreakable ties had been created by the marriage of her sister to Julian, at the same time she advocates the nineteenth century ideal of marriage for love's sake.

In this way the novel highlights the perceived threat of unrestrained incestuous desire resulting from liberal individual choice in the context of affective bourgeois domesticity. The revelation of Margaret's adoptive status and the resulting lacking affinity between Bertha and Julian ensures the narrative's palatability for a wider audience. The incorporation of the adoption story is significant because adoption was an example of non-biological kinship ties within the family, providing a mechanism, though in the English context not a legal one, for severing the bonds created by birth and replacing them with artificial ties.[507] It is the artificiality of Margaret's tie to the family and the lack of her natural kinship which comes to matter most for Bertha and Julian, enabling them to be together without offending against natural kinship. Therefore, it is the negotiation of ideas about legally and naturally constructed marriage and kinship that shapes the parameters of marriage.

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[502] Dale, above n 384, 48.
[503] Ibid, 51.
[504] Ibid, 77.
[505] Ibid, 81.
[506] Ibid.
[507] Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth Century America* (University of North Carolina Press, 1986) 268. Michael Grossberg refers to adoption in the American context where it was legal in the nineteenth century. In England and Australia adoption was not permitted until the twentieth century, however the social practice of adoption still represents the creation of family ties other than through biological kinship. For an example of how the adoption narrative highlights this in similar narratives in the American context, see Edgar Allen Poe, 'The Spectacles' in *The Complete Tales and Poems* (Vintage Books, 1975), 689.

In the case of the English story the ideal of marriage for love is advocated cautiously by emphasis on its symbiotic relationship with the passionless mother and the domestic, feminine ideal.[508] In the Australian setting, the presence of liberal individualism and the notion that one should have free marriage choice is clearly present, although this is undercut in part by the author's decision to end the narrative with the revelation that Bertha and Julian were not legally in-laws after all.

Conclusion

The three novels convey three pro-reform narratives not only conveyed in these narratives but repeated in pamphlets, press, parliament and popular fiction in the nineteenth century. The maternal characterisation of the sister-in-law was a narrative more prominent in England than the Australian colonies, where the conflict of laws narrative predominated. In both England and Australia, the narrative of desertion was utilised to highlight the affect of the marriage prohibition on women and children who could be abandoned by their husbands/ fathers. Australian culture and the colonial setting led Dale outside of the traditional English pro-reform narrative and, in part, away from the narrative of domestic familial affection leading to romantic love. Ultimately, the nuclear family had replaced traditional forms consisting of wider kin in both England and Australia. In the nineteenth century, for the first time in five thousand years marriage came to be seen as a private relationship between two individuals rather than one link in a larger system of economic and political alliances.[509] However, the hang-over of past notions of familial kinship and obligation remained[510] and the English and Australian narratives reflect the notion that a sister-in-law was much like a blood sister. A comparison of these narratives highlights the artificial nature of legal distinctions between love in marriage and love in other partnerships, between sister in blood and sister-in-law, between daughter by blood and daughter by adoption. It was within the rhetoric presented here and in other sources that the debate over the appropriate way to shape marriage, the

[508] For an examination of the rise of the nuclear family and its accompanying separate gendered spheres see Stephanie Coontz, '"A Heaving Volcano": Beneath the Surface of Victorian Marriage' in *Marriage, A History,* above n 51, ch 11.
[509] Ibid, 146. The narrowing of affections to the immediate family accelerated as the nineteenth century progressed. In the late eighteenth and early nineteenth century, newlyweds who could afford to do so, took bridal tours to visit kin who had been unable to attend the wedding, and took honeymoons with friends and relatives. After 1850 the honeymoon increasingly became a time for couples to spend time alone and remove themselves from the company of others. By the 1870s wedding planning books were advising couples to skip the "harassing bridal tours" and "enjoy a honeymoon of repose, exempted from the claims of society."
[510] Ibid, 167.

purpose it should fulfil and the norms it should prescribe, played out. The discourse regarding the position of women within the family played a significant role in shaping marriage in the nineteenth century.

Despite the continuing beliefs about the relationship between brother and sisters in-law expressed in this chapter, the development of marriage law in the colonies reflects a more individual vision of man within the family than that in England. This was expressed in the parts of Dale's novel that gave weight to the wills of individuals like Bertha and Julian outside the context of their families, and appears time and again in public rhetoric about sister-in-law marriage. In chapter three it was shown that colonial religious bodies tended to take a tolerant approach to the question of sister-in-law marriage, often emphasising the right of the individual to make a decision as to the legitimacy of the union. Chapter four demonstrated the reluctance of many English politicians to interfere with English notions of property and inheritance. It explored the relationship between English marriage law and traditional notions of property and inheritance and established that flexibility of marriage and property law was essential for the success of newly established colonial societies.[511] It demonstrated that colonial Australia was, comparatively, a classless society in which individual merit mattered as much as familial connections and inherited property.

This chapter fits into the pattern, and demonstrates the power of the pro-reform narrative that individuals ought to be able to marry as they chose. The character of Julian is illustrative of how the emigration of young men to the colonies in search of fortune, meant severance from the class structures and marriage laws at home, and the associated English inheritance or social status. The next chapter explores the affect of the liberal colonial climate on the marriage debate. The abolition of the prohibition and resulting inclusiveness of the marriage institution reflected a set of social norms characterised by individual free choice. The cultural differences that have emerged through comparative study thus far, and their influence over the legislative development of marriage, demonstrate that marriage is political, not natural. The comparative deceased wife's sister controversy brings to life the state's capacity to construct marriage so that it is reflective of local conditions. The following chapter explores the process of that construction further.

[511] Frew, above n 5, ch 4.

CHAPTER SIX

Colonial Liberalism and the Deceased Wife's Sister Marriage Debates.

The legal doctrine of coverture merged a woman's legal identity with her husbands' on marriage and was one of the main ordering doctrines at the centre of English property and marriage law. Under coverture the very being or legal existence of the woman was suspended during the marriage.[512] The biblical 'one flesh doctrine' was also described as merging a woman with her husband upon marriage. As shown in chapters two and three, the deceased wife's sister marriage was prohibited on the basis of the biblical one flesh doctrine because when a man married, he became 'brother' to his wife's siblings, the sibling relationship barring him from any future marriage with an in-law.[513] Blackstone conflated the biblical one flesh doctrine and the common law doctrine of marital unity known as coverture. Glanville Williams and many other historians have since identified the error of Blackstone in assuming that the legal doctrine of coverture was derived from the biblical one flesh doctrine.[514] There are both jurisdictional and technical differences between the two. Coverture is a common law doctrine and the one flesh doctrine is a canon law doctrine; coverture implied that a husband becomes his wife's guardian on marriage, whilst the one flesh doctrine implied the wife is entirely absorbed in the husband. Theoretically, under coverture the wife disappeared as a legal entity, but it is more accurately described as a husband becoming his wife's legal guardian upon marriage.[515] The scriptural sense of marital unity was primarily concerned with

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[512] Sir William Blackstone, *Commentaries on the Law of England: Of Husband and Wife* (Co Lit, 1765-1769) ch 15, 112. Also see *Murray v Barlee* (1834) My & K 209 at 220 (Lord Bougham: 'a wife's separate existence is not contemplated, it is merged by the coverture in that of her husband.'

[513] Note that whilst marital unity explained the prohibition of marriage to a deceased wife's sister to an extent, the prohibition was also defined by certain interpretations of Levitical prohibitions, and marital unity constituted one of many justifications for the prohibition. Connolly, above n 43, 140; see also Hartog, above n 53, 105-6.

[514] Glanville Williams agreed with Maitland that the one flesh doctrine implied a woman dissolved into her husband, whilst coverture implies he becomes her guardian, but he acknowledges the link between the two doctrines. He writes: 'the main idea which governs the law of husband and wife [until the intervention of equity] is not that of a "unity of person ", but that of the guardianship, the mund, the profitable guardianship, which the husband has over the wife and over her property'. This is not to deny that the doctrine of unity played a part in developing some of the rules of law.' Glanville L Williams, 'The Legal Unity of Husband and Wife' *Modern Law Review* (1947) 10 (1), 16, 18.The distinction between 'one flesh' and 'one civil person' underscored the distinction between the sacred and the civil. Two could become one legal entity at the behest of civil law, but only through the will of God could two become one flesh. Connolly, above n 43, 140.

[515] Sylvia R Frey and Marion J Morton, *New World, New Roles: a documentary history of women in pre-industrial America* (Greenwood Press, 1986) 98.

the elaboration of kinship, whilst the common law union of husband and wife had far-reaching legal implications.[516]

Although the biblical one flesh doctrine was not mirrored accurately in the legal doctrine of coverture, an understanding of marriage as the physical, legal, economic and social union of two people dominated marriage discourse and this discourse informed legislation and popular understandings of marriage. Despite the distinction between marital unity under canon law and coverture under common law, the discourse of marital oneness, both biblical and legal, informed one another, and the formulation of marriage as conflating the pair into one legal person, was in a psychological sense, inextricably linked to the conflation of kin. This psychological connection of legal and ecclesiastical oneness is expressed by the following extract written by Henry Livingston, theologian and pastor of the reformed Church in New York City:

> Marriage produces a union 'whereby two persons become one, not merely as to legitimate commerce, but one in regard to themselves, and the new relations thereby formed with others. God pronounces them one. Men account them one. They consider themselves one. So completely they are one that the respective relatives and families are constituted equally near of kin to both husband and wife'.[517]

At the core of many marriage reform movements in the nineteenth century was a challenge to the feudal doctrine of coverture.[518] The doctrine came under fire during the nineteenth century with the introduction of married women's property legislation. Deceased wife's sister legislation was being debated in the same period as married women's property legislation in both England and the Australian colonies. Though the sources of the doctrines were quite separate, the ideological basis for them bears similarity. Both the common law doctrine of

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[516] A man assumed legal rights over his wife's property at marriage, and property that came to her during marriage. While a husband could not alienate his wife's property entirely, any rents or profits from it came to him. Any personal property or money saved by a woman transferred straight to her husband on marriage and he could use or dispose of it as he saw fit. Shanley, above n 146, 361. A married woman could not enter into a contract and any contracts she made were absolutely void. See *McCormick v Allen* (1926) 39 CLR 22; finally a husband was liable if his wife committed a tort or misdemeanour. See *Murray v Barlee* (1834) 3 My & K 209 at 220.

[517] John Henry Livingston, 'A Dissertation on the Marriage of a Man with his Sister In-Law' (Deare & Myer, 1816), 22.

[518] Feudal is a widely used term which requires definition. In this chapter I use the term in the sense described by – Pateman, above n 128, 118, fn 2.

coverture and the canon law doctrine of marital unity reflected a communitarian morality which established obligations and responsibilities on the basis of one's position within family. Australian colonial historians have established that the reaction to Married Women's Property legislation in the colonies was muted compared with that in England.[519] Similarly, this thesis has demonstrated the comparatively dull response to Marriage to a Deceased Wife's Sister legislation and the lack of vehement opposition which delayed reform in England. This chapter explores why these differing reactions may have occurred; and the success of liberal individualism as a pro-reform argument in the colonial context. Historians have shown how liberalism was integral to colonial culture.[520] The lack of resistance in the colonies, to breaking the deceased wife's sister marriage taboo, came from a weaker vision of Christian salvation, but it also came from a more fully formed liberal individualistic vision of man (and woman) both economically and spiritually. This chapter explores how the colonial culture of liberalism constructed marriage in the colonies, whilst other ideologies were shaping marriage in England.

Marital Unity and Deceased Wife's Sister Marriage

The marriage prohibition was largely based on the biblical notion of the unity of flesh of husband and wife and this doctrine rested on Genesis 2: 22-23:

> Adam said this is now bone of my bones and flesh of my flesh; she shall be called woman because she was taken out of man. Therefore shall a man leave his father and his mother, and shall cleave unto his wife and they shall be one flesh.

The fictional unity of husband and wife was reinforced by a system of hierarchical familial relations. Coverture though enforcing guardianship rather than complete dissolution of personhood incorporated these status relationships in the common law.[521]

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[519] Hilary Golder and Diane Kirkby, above n 100, 77-93.
[520] Stuart Macintyre, *A Colonial Liberalism: the lost world of three Victorian visionaries* (Oxford University Press, 1991); Greg Melleuish, *A Short History of Australian* Liberalism (Centre for Independent Studies, 2001); Ian Cook, *Liberalism in Australia* (Oxford University Press, 1999).
[521] Sylvia R Frey and Marion J Morton, above n 515, 92; see also Carole Pateman & Mary Lyndon Shanley (eds), *Feminist Interpretations and Political Theory* (Pennsylvania State University Press, 1991)166.

Blackstone wrote in his commentaries on the laws of England:

> By marriage the husband and wife are one person in law...The same degrees by affinity are prohibited. As a husband is related by affinity to all the consanguinei of his wife, so, visa a versa, the wife to all the husband's consanguinei: for the husband and wife being considered one flesh, those who are related to the one by blood, are related to the other by affinity; therefore a man after his wife's death cannot marry her sister, aunt or niece.[522]

The Bishop of Peterborough spelt out the relationship between the 'one flesh' doctrine and prohibitions on affinity marriage in the House of Lords in 1870:

> God did lay down distinctly the principle that when a man marries a woman the twain are one flesh. From that I deduce the principle of the law forbidding marriages of affinity—namely, the principle that the relations of the wife are the relations of the husband, and that the relations of the husband are the relations of the wife: a man cannot, therefore, marry a relation of his wife in the same degree as that in which he is forbidden to marry his relation in blood. This, indeed, appears to be a definite and distinct principle on which we can found our legislation. It has a finality. If you do not maintain this principle, you put another and an opposite one in its place—namely, the principle that the relations of the wife are no relations of the husband...supposing you do this, you must, if you wish to be consistent, go on and abolish the whole of the prohibited degrees in the table of affinity.'[523]

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[522] Sir William Blackstone, *Commentaries on the Laws of England in Four Books*, vol 1 [1753] Ch XV Of Husband and Wife, 435, n5, as cited by Charles J Brown, *Marriage Affinity Question* (Speech delivered at a meeting in Edinburgh and London, 16 Feb 1871) (Hamilton, Adams and Co, 1871), 6.

[523] *Parliamentary Debate*, House of Lords, 19 May 1870, vol 201, cc895-965, 939 (Bishop of Peterborough),; See also the Bishop of Lincoln's comments: 'In the Divine law, both of the Old and New Testament, it was declared that "man and wife are one flesh;" and, therefore, to endeavour to legalize a man's marriage with his wife's sister is very like an endeavour to legalise his marriage with his own sister.' *Parliamentary Debate*, House of Lords, 19 May 1870, vol 201, cc895-965, 939, 928 (Bishop of Lincoln). Affinity marriages were incestuous because the relationship was one of consanguinity as well as affinity. This was based on the literal interpretation of Genesis 2 that husband and wife "become one flesh" and that marriage meant physiological, as well as spiritual and legal union. Anderson, above n 161, 74. Ephesians, Chapter 5, Verse 31 also refers to a husband and wife becoming one flesh. The 'one flesh' argument from Genesis was transmuted into biological theory,

During the 1872 Victorian parliamentary debate, one member quoted a letter from Basil the Great to Diodorus in the middle of the 4th century, which stated that a wife is the closest kin a man can have as she is his flesh and therefore 'by means of the wife, the sister also passes into the kindred of the husband'.[524]

The doctrine of marital unity supported the long held notion that a marriage constituted the marriage of entire families as opposed to individuals. This began to wane in the nineteenth century with the rise of companionate marriage. In colonial Australia such familial constructs were weak from the time of settlement. This was in part because of the lack of Established Church doctrine; in part because colonials defined themselves in opposition to the *ancien regime* and its hierarchical social structures; and finally because many colonials whether convict or immigrant arrived alone leaving families behind in England. [525] As discussed in chapter four, visions of an institutionalised aristocracy, such as W C Wentworth's in New South Wales, were flattened by liberalism.[526] Tolerance of conflicting views was at the heart of colonial liberalism and opened up a broad space in which a vibrant pluralism developed.[527]Both religious constructs such as marital unity, and legal constructs such as coverture that were not in keeping with liberal individualism, were quickly renegotiated in the colonial setting. The result was the reconstruction of marriage, that could be distinguished from marriage in England, and was reflective of local conditions.

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with the contention that sexual intercourse causes a physiological change in the marriage partners that makes them blood relations and could cause the slow degeneration of the race. The *Saturday Review*, defending this theory, suggested that "we do not need to prove absolutely that a true case of blood relationship is established. The probability is enough..." Anderson, above n 161, 75. This view was disseminated in the media and by churchmen to congregations. See Brown, above n 522, 5. According to the existing marriage law, founded on the Word of God: 'The man may not marry any of his wife's kindred nearer in blood than he may of his own, nor the woman of her husband's kindred nearer in blood than that of her own'.

[524] (Vic) *Parliamentary Debate*, above n 276, 1972 (Mr Mc Bain).

[525] Having said this, Carole Pateman has shown that despite the transition from status to contract as the principle around which relationships between men were organised, relationships between men and women remained patriarchal and were defined by subordination, duty, obligation and responsibility. Marriage under common law continued to be defined by the merging of a woman's legal and sexual identity with her husband. See Susan Mageray, 'Sexual Labour: Australia 1890-1910' Susan Mageray, Sue Rowley and Susan Sheridan (eds), *Debutante Nation Feminist Contests 1890s* (Allen and Unwin, 1993) Ch 8. However liberal principles were more suited to capitalist economic growth in the colonial environment and were to some extent embraced over and above traditional doctrines.

[526] Gregory Melleuish, 'Australian Liberalism' in J R Nethercote (ed) *Liberalism and the Australian Federation* (Federation Press, 2001), 29.

[527] Winsome Roberts, 'Liberalism: the Nineteenth Century Legacy' in J.R Nethercote, above n 526, 45, 50.

Liberalism and Contractual Marriage

In the late eighteenth and nineteenth century the contractual notion of marriage emerged, though a contract between unequal parties. The contractual marriage construct was far more flexible than the construct of marriage as being constituted by God. Marriage constituted by God was unalterable and unseverable, but if marriage was contracted, it followed the dictates of contract, and was not quite so immutable.[528] Contractual understandings of relationships were supported by liberal thinking, which had emerged in the eighteenth century in relation to an individual's right to have utmost freedom over property as a means of self-fulfilment.[529] For example, the unlimited right to leave property by will, had become the general rule in England well before the beginning of the nineteenth century.[530] Rosalind Croucher has argued convincingly that testamentary capacity reflected a balancing of elements – proprietary power *per se* as against moral duty. Nineteenth century cases on testamentary capacity in both England and Australia illustrate that testamentary freedom was valued as a broad right and although a man was expected to fulfil his moral duty – by providing for his wife after his death – the testator's choice was valued over the 'stereotyped and inflexible rules of a general law'.[531] New South Wales cases on testamentary capacity illustrate freedom was prized as an adjunct to property ownership.[532] This emphasis on [male] liberal individualism undermined previously fixed rules of law and medieval restraints, which were tied up with the feudal notion of marriage and the legally enforceable obligation of a man to provide for his wife and children. This legislative and judicial attitude to testamentary freedom was part of a broad transition from a feudal marriage framework to a contractual one.[533] Such legislative changes highlight the affect that a new belief in individual right could have on traditional constructs of

[528] The tension between religious marriage and marriage as contract had a profound effect on theological notions of incest and affinity. Connolly, above n 43, 22; Grossberg, above n 507, 20.
[529] Rosalind Atherton (now known as Croucher), 'Expectation Without Right: Testamentary Freedom and the Position of Married Women in Nineteenth Century New South Wales' (1988) 11 (1) *University of New South Wales Law Journal*, 133, 114.
[530] Ibid, 133.
[531] Ibid, 138.
[532] Ibid.
[533] Early English debates over divorce are also illustrative of the shift to contractual marriage. Advocates of the *Divorce Act* tended to frame marriage in contractual terms in order to argue, like any other contract, it should be dissoluble if either party violated its terms. See Lord Lyndhurst's use of contractual language in 3 *Hansard*, cxlv, 505 cited in Shanley, above n 146, 368. Note that liberal assertions valued the liberal individual rights of men whilst reinforcing the duty and dependence of women.

the marriage relationship, which had hitherto restrained the rights of individuals in favour of enforcing hierarchical obligation and responsibility.[534]

Throughout the nineteenth century liberal rights arguments continued to challenge the moral obligations at the core of marriage and an emphasis on the individual rights of men highlighted the inequalities between men and women. Mary Lyndon Shanley argued that the English *Divorce Act* of 1857 constituted the opening wedge in the effort to obtain legal recognition of the independent personality of married women.[535] In 1855, Caroline Norton, a widely read writer and agitator of women's rights in England published a letter to the Queen:

> [N]ever will they [legislators] succeed in acting on the legal fiction that married women are "non-existent", and man and wife are still "one," in cases of alienation, separation and enmity, when they are about as much "one" as those ingenious twisted groups of animal death we sometimes see in sculpture; one creature wild to resist and the other fierce to destroy.'[536]

Norton refers to the legal disabilities of women under coverture. The discourse of marital oneness referred to by Norton had far reaching implications in England, both social and legal. However in the colonies this discourse was being transformed to reflect colonial relationships between individuals and between individuals and property.

The following section examines the application of coverture in the colonial context to illustrate the affect of a liberal culture on social understandings of marriage. Though not directly linked to the deceased wife's sister marriage debate, the application of coverture and the debate about married women's property in the colonies are illustrative of the colonial culture of liberalism; a culture which significantly shaped responses to deceased wife's sister marriage. The erosion of traditional forms of economic and social ordering, some of which

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[534] During a speech in the House of Lords on the *Married Women's Property Bill* (1870), The Right Honourable Lord Coleridge argued that the inequitable stripping away of the ancient obligations of a husband to protect and provide for his wife was good reason to allow women property rights. See, Lord John Duke Coleridge, 'Married Women's Property Act (1870) Amendment Bill' (Speech delivered in the House of Lords, June 21 1877) (A Ireland & Co, 1877) 5-6.

[535] Shanley, above n 146, 356.

[536] Caroline Norton, *A Letter to the Queen on Lord Chancellor Cranworth's Marriage and Divorce Bill* (Longmann, 1855), 28.

were discussed in chapter four, helped create a climate in which opposition to the legalisation of deceased wife's sister marriage was comparatively marginal.

Over the course of the nineteenth century there was cause in the colonies to modify marriage and property law to suit local conditions at the expense of traditional doctrines such as coverture and the principles it entailed. Criticisms of coverture were common throughout the common law world. They were made in England but they had a particular resonance with the mobile migrant societies of settler colonies, and in Australia, where the fictional availability of land was an incentive to migration.[537] The doctrine of coverture developed in feudal agricultural society and was ill-suited to an expanding commercial economy. As discussed in chapter one, in the convict colonies of Australia, coverture had always been more flexible than it had been in England. In New South Wales, women who married convicts retained their legal identities and ability to make contracts, sue, be sued and own property.[538] The courts were forced to recognise married women in these circumstances because their husband's felon status stripped him of legal capacity leaving both husband and wife impotent under the law.[539] Historians have found that many women were active in the economic market of the early nineteenth century, owning and renting property, and manipulating coverture in order to avoid debts. The use of a husband's name gave women some opportunity for trade, sometimes without a husband's knowledge.[540] Therefore married women and men acted to some extent as individual agents and were perceived as individuals in society.

In the early part of the nineteenth century the NSW Court of Civil Jurisdiction bent the rules so that married women could hold property.[541] Several other colonial innovations circumvented the common law regulating the marriage relationship, in favour of approaches that embraced individualistic ideology. For example, in New South Wales the equitable doctrine of separate use was imported from England in 1814 after the creation of the Supreme

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[537] Kirkby and Colebourne, above n 100, 209.
[538] *Davis v. Crispe* [1834] NSWSupC 100 in *Australian*, 13 June 1834, accessed http://www.law.mq.edu.au/scnsw/Cases1834/html/davis_v_crispe__1834.htm, Feb 2011.
[539] Wright and Buck, above n 136, 110. However on cessation of the husband's sentence the wife would come under coverture and forfeit her property and legal rights. See Notes to *Cooper v Clarkson* (1831) at Bruce Kercher, Decisions of the Superior Courts of NSW 1788-1899 (http://www.law.mq.edu.au/scnsw/html/research.htm).
[540] *Sydney Gazette*, 14 Feb 1830 in which a husband placed a notice to warn third parties that he would not be responsible for any debts incurred by his wife who had left him; Paula Byrne, 'A Colonial Female Economy: Sydney, Australia' (1999) 24 (3) *Social History*, 287, 289, 291.
[541] Bruce Kercher, above n 54, 50.

Court with equitable jurisdiction.[542] It was treated as a flexible equitable concept and manipulated to allow married women more property rights.[543] Equity judges sometimes inferred a husband's intention to settle profits on a wife if she ran a business and kept her profits separate. Unwritten postnuptial settlements between husband and wife usefully subverted the common law's insistence that the married couple were one person.[544] Later in the century, the demands of a modern market allowed wives temporary legal existence.[545] By the 1860s technicalities of conveyancing and the Torrens system of land registration had provided married women more property rights (Torrens was introduced in SA in 1858, implemented in 1862 in the eastern colonies and in WA in 1874). Land registration was administered in ways which allowed a married woman to hold and sell land.[546] Although it did not directly challenge the doctrine of coverture, the Torrens system facilitated colonial women's holding of real property and some women were treated as economic agents despite lacking formal reform of coverture.[547] Kirkby and Golder have argued that land reforms in colonial Australia embodied an essentially individualistic concept of land ownership and had an obvious appeal to the liberals who were beginning to dominate colonial politics.[548] These legal modifications were not put in place to provide women equality or improve women's property rights, but rather to enable men to transfer, buy and sell land more easily by removing the constraints which had historically defined property relations within marriage. How did liberal property reforms and the liberal culture of the colonies shape colonial marriage law? How would property and marriage legislation based on liberal principles accommodate coverture and the relational rights and disabilities created by marriage?[549]

Liberalism, Pragmatism and Deceased Wife's Sister Marriage

By the 1870s the erosion which had already occurred, facilitated by liberal individualism, resulted in far less need for married women's property legislation in the colonies. Coverture

[542] Kirkby & Colebourne, above n 13, 209; Lee Holcombe, *Wives and Property,* (Martin Roberton, 1983); Susan Staves, *Married Women's Separate Property in England 1660-1833* (Harvard University Press, 1990).
[543] Ibid, 209.
[544] Kirkby and Golder, above n 102, 596.
[545] Ibid, 210.
[546] Kirkby and Colebourne, above n 13, 207-21.
[547] Kirkby and Golder, above n 100, 89.
[548] Kirkby and Colebourne, above n 13, Ch 13, 212.
[549] The *Real Property Act* 1861 included provision for co-proprietorship which required a written statement from a woman who came to a marriage with title to land, before her husband could be registered as a co-proprietor (s77). A husband could also transfer land to his wife and visa versa further subverting the notion that husband and wife were one person. See Kirkby and Colebourne, above n 13, 213.

had proven a flexible doctrine in the colonies and liberal arguments had successfully undermined the obligations at its core. Liberal individualism was in part also responsible for the lack of opposition to deceased wife's sister legislation in the colonies and liberal arguments regarding a man's right to marry whom he chose littered parliamentary debates.[550] When it came to debating the validity of marriage to a deceased wife's sister in the Australian colonies, the idea that such a marriage would undermine the 'divinely ordained' relationship between husband and wife and resulting kin was much less of an issue than it was in England. By placing the debate within the larger context of individualistic constructs of property and marriage and a booming market economy which required flexible land law, this chapter explains why deceased wife's sister legislation did not invoke the opposition it did in England.[551]

Many opponents of the bill in England conceded that the relationship was not physically consanguineous, but claimed that it was so psychologically. They argued that there was a natural instinctive revulsion against the idea of a man marrying his wife's sister, just as presumably there was against other incestuous relationships.[552] This instinct was nature's pronouncement of prohibition. Man-made law was necessary however to support natural law, because natural instinct, the Bishop of London warned, "is a weak and precarious barrier against human passion"[553] Those opposed to legalisation argued that when a man married a woman having sisters, they become in that hour *his* sisters – they entered his house and lived on terms with him of familiar intimacy and endearment and that such a relationship would be

[550] Note that the same arguments in favour of a man's freedom of marriage choice were influential in the early nineteenth century American context. In 1827 Mr Donald McCrimmon, one of the ruling elders of the Presbyterian Church, was suspended from sealing ordinances, and from the exercise of his office, by the session of Ottery's Church, for marrying his deceased wife's sister. The language of individual autonomy was implicit in his appeal. He argued that he had the right to choose his wife based on his status as a willing, autonomous individual. He argued that the court had ruled contrary to the predominant understanding of marriage in the early nineteenth century. See Colin McIver, *Ecclesiastical Proceedings in the case of Mr Donald McCrimmon, a Ruling elder of the Presbyterian Church, for marrying his deceased wife's sister* (Printed by the author, 1827), 11-16. For an examination of arguments based on liberty in the American context see Connolly, above n 43, 84-106.

[551] Note that the influence of liberal economics is only one colonial cultural element which combined to influence responses to the marriage question. It is to be read in conjunction with other cultural elements discussed in previous chapters, particularly the lack of Established Church doctrine and less intense preoccupations with sin and salvation. In addition, liberalism was changing ideas in England in the same period, however, it was less influential on marriage law in the mid to late nineteenth century than it was in Australia.

[552] 'A Parents Appeal to the Members of Both Houses of Parliament against *Lord Bury's Bill* legalising marriage with a deceased wife's sister' in *Bristol Selected Pamphlets*, 1800 at <http://www.jstor.org/stable/60230368> accessed 4 April 2010. This argument was far less prevalent in the colonies but it was argued on occasion. See New South Wales, *Parliamentary Debate,* Legislative Council, 4 March, 1874 in *Sydney Morning Herald*, 5 March 1874, during which Mr Campbell describes such unions as repugnant and a threat to the purity of society.

[553] Anderson, above n 161, 76.

wholly improper and unjustified if not based on sisterly relation.[554] In contrast, during the Victorian parliamentary debate in 1872 Mr Longmore said any suggestion that a man's sister-in-law was the same as his sister was absurd:

> Dr Cameron has sought to prove, in a discourse which he recently delivered in Melbourne, that a man had no right to marry his deceased wife's sister, by the argument that husband and wife...became one when married and therefore the sister of the wife occupied the exact same position as that the sister of the husband occupied. No greater absurdity could be conceived. There was no blood connection between a man and his deceased wife's sister.[555]

Mr Langton similarly rejected any notion that marriage involved the acquisition of one another's kin, arguing there was no relationship between brother and sister-in-law – 'it was only a legal connexion. Certainly there was not the same relationship between a man and his deceased wife as there was with a person born of the same stock.'[556] In a sense this was a rejection of the doctrine of marital unity which conflated affinity and consanguinity by giving affinity a religious and natural justification rather than acknowledging it as a legal construct.

Advocates of legalisation in England and her colonies argued on the basis that a man had a liberal right to marry who he liked. As discussed in chapter one, such argument had already forced the erosion of the husband's duty to protect and provide for his wife in favour of testamentary freedom and the annulment of dower rights. We have seen how the proprietary obligations of coverture were chipped away in the colonies. The liberal individual thinking predominating with regards to land was also significant for other questions which impacted individual freedom of choice. If a man was not to be controlled by common law coverture in his property dealings, why should he be controlled by ecclesiastical union in his choice of marriage partner? In the first issue of the *Matrimonial*

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[554] Brown, above n 522, 5; See also comments of Mr Napier in the House of Commons in 1849: 'the proposed measure...would dangerously interfere with domestic happiness and the most sacred relations of private life, he should feel it his duty to give to it his most earnest, firm, and determined opposition.' *Parliamentary Debate*, House of Commons, 22 February 1849 vol 102 cc1101-28, 1125.
[555] (Vic) *Parliamentary Debate*, above n 276, 1971.
[556] Ibid, 1970.

Chronicle, a magazine for the promotion and facilitation of marriage matching, the editors introduced the publication by reference to their understanding of marriage in the colonies:

> [O]ur principles are to give all persons their liberty and their own free will to do as they think fit, provided such liberty does not interfere with the free will or happiness of others.[557]

In the deceased wife's sister debate in the colonies, marriage premised on the one flesh doctrine would again lose out to (masculine) liberal individualism and pragmatism. The South Australian press reinforced the individual's right to marriage choice:

> In the colonies common sense has been allowed to shake off the trammels of tradition there has been an invariable tendency to desire freedom of conscience on this point.[558] [W]hilst the law should not coerce, it shall not prohibit. A doubtful point will then be left, as it ought to be left, to individual judgment, choice and decision.[559]

Scholarly writing on the marriage question also supported liberal choice of marriage partner. An article published in the *Melbourne Review* quoted David Hume who said: 'The heart of man delights in liberty. The very image of constraint is grievous to it...If the public interest will not allow us to enjoy in polygamy that variety which is so agreeable in love, at least deprive us not of our liberty which is so essentially requisite.'[560] According to Grossberg 'The nineteenth century vision of marriage served to make the law of domestic relations an ally, not a competitor, in the creation of society grounded as much as possible in the bourgeois ideal of unregulated private competition and individual choice.'[561]

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[557] *Matrimonial Chronicle*, 1879 1 (1), 1.
[558] 'Marriage with a deceased wife's sister', *South Australian Register*, 10 June 1869, 2.
[559] *South Australian Advertiser*, 16 August 1858, 2; South Australian parliamentary debate during which the Attorney General argued (during debate over the first Bill which was passed in the colony but never given royal assent) that 'no man should be compelled to do a thing which he believed to be wrong, neither would he forbid a man to do a conscientious act merely because he thought it wrong (Hear, Hear). (South Australia) *Parliamentary Debate*, Legislative Assembly, May 20, 1857, col 135.
[560] St John Topp 'The Marriage and Divorce Laws' (1879) 16 *Melbourne Review*, 430, 432, 438.
[561] Grossberg, above n 507, 20.

Arguments about an individual's rightful choice to marry whom he liked were present in both English and colonial parliamentary debates. However, in colonial parliaments, liberal rights arguments succeeded, whilst in England they were continuously overridden by a commitment to traditional and religious doctrines defining marriage and the social implications of changing the marriage relationship.[562] The following comments made by the Duke of Argyle in the House of Lords, quoted at length, are illustrative of the challenge of balancing individual rights and the stability of society:

> It was necessary to go to the centre of the question at once, and to ask, what right had the Legislature to prohibit this particular kind of marriage? Since he last spoke on this subject he had been overwhelmed with letters — a correspondence voluminous and, he might also say, painful. He had generally found the question pressed home as the burden of their song— "What right have you to interfere with my individual freedom in this matter? You may not approve of the marriage, and I do not ask you to; but what right have you to prevent individual men from exercising their individual discretion upon the matter? He still adhered to the principle that society should not interfere with individual freedom except on clear and distinct grounds; but he need not point out that the question of right, as applied to this class of marriage, involved the general question of the right to impose all prohibitory degrees, and he would reply—"We have the same right to interfere in this case as we have to prohibit a man marrying his step-daughter. We have the same right as that by which we draw our prohibitory degrees at all." It was of the essence and of the nature of all Marriage Laws. If he was asked...on what the right to interfere depended, he would say it depended upon the fact that on the Law of Marriage in its two great divisions—namely, the conditions under which a man might contract a marriage, and the conditions under which a man might dissolve his marriage—society itself depended.[563]

[562] For examples of liberal rights arguments in parliament, press and the church see: *South Australian Advertiser*, Mon 16 August 1858, 2; New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 1873; Nish, above n 298, 65.
[563] *Parliamentary Debate*, House of Lords, 24 May 1886 vol 305, cc1793-820, 1802 (Duke of Argyle).

There were some members of the House of Lords who disagreed. For example, Lord Westbury argued that 'the existing Act was founded altogether on a misapprehension, upon an undue assumption of the right to bind the consciences of others, and that it ought as soon as possible to be expunged from the statute book...'[564] However, the Duke of Argyle's argument carried significant weight in the House of Lords, along with constant references to tradition. The essential and 'natural' features of marriage, it was argued, should be maintained, for it was the law of marriage that reinforced those 'natural' features and therefore upheld morality.

The *Times* reported that the law of marriage ought not to be treated as open discussion except under the pressure of the gravest practical necessity as any law of marriage is of necessity a restraining law.[565] In parliament Mr Gladstone protested against the liberal argument which 'might be urged with equal force for the overthrow of our whole ecclesiastical legislation...' He questioned why England should have any rules on such subjects 'if every man carries in his own breast a monitor so perfect as to be a safe guide for him to follow'.[566] These debates are illustrative of the negotiation of the law's role in constructing marriage. They reveal that the law does not enforce the pre-existing or natural attributes of marriage but in fact creates the attributes of marriage which are fluid and changeable. Therefore, the marriage to a deceased wife's sister debate was, in part, about the extent to which the law ought to impose specific forms of marriage on individuals.

Conclusion

The comparative deceased wife's sister story demonstrates that England was bridled by notions of marriage laws rooted in an agrarian feudal past, whilst colonial authorities were

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[564] *Parliamentary Debate*, House of Lords, 19 May 1870, vol 201 cc895-965 *col 936*; See also Mr Milnes 'We simply want people to be allowed to please themselves. You may not think these marriages desirable, but you have no right to interfere with them on the part of others who entertain a contrary opinion. Let each man take this question to his individual conscience. *Parliamentary Debate,* House of Commons, 22 February 1861 vol 161, cc842-52, *847-8* (Mr Monckton Milnes); See also Mr Lowe: '[W]hen a law denied a man, upon no religious ground that he himself acknowledged, upon no principle of morality and not upon grounds coextensive with the scope of the legislation of the House, but simply upon the ground of an authoritative interpretation of Scripture peculiar to certain phases of religious belief, the right of doing what he believed to be permissible and expedient for him, it infringed his natural liberty, and subjected him to a persecution wholly alien to the spirit of our age and of modern legislation. *Parliamentary Debate*, House of Commons, 09 May 1855 vol 138 cc240-87(*Mr Lowe*).

[565] *Times*, Friday, May 20, 1870, 9, 26755, col C.

[566] *Parliamentary Debate*, House of Commons, 9 May 1855, vol 138 cc240-87, *273* (Mr Gladstone). It was absurd to complain of the prohibition of this marriage on the ground that it interfered with individual liberty. Every society was bound to draw up some Marriage Law interfering with individual liberty. *Parliamentary Debate*, House of Lords, 24 May 1886, vol 305 cc1793-820, col1803.

free to embrace a more modern approach based on market economics and individual liberalism.[567] Rapid industrialisation and changing economic conditions reduced the importance of landed property in both England and her colonies, forcing the erosion of doctrines such as coverture which had historically enabled capital formation. Whilst liberal, contractual notions of marriage and property developed throughout the Empire in the nineteenth century, in England the feudal relics lingered, whilst economic conditions in the Australian colonies affected rapid change. The effect of the differing pace of this transition was diverging legislative responses to property and marriage problems in the colonies.

Traditional notion of marriage prevented legalisation of deceased wife's sister marriage in England, whilst liberal contractual notions of marriage enabled legalisation in the colonies. Each dominated because each served the needs of elite men in differing contexts. Although the deceased wife's sister debate and its outcome celebrated individual marriage rights in the Australian colonies, women's views on the issue went unheard and in both England and her colonies, the central question was how to best serve the needs of men. English marriage was structured in part to retain the power structures which protected the property of the English land-holding elite and the property and conscience of the religious hierarchy. In the colonies liberal individualism served the needs of men and the legislatures were to use marriage legislation to facilitate their individual choices, both in property dealings and marriage. The comparative analysis demonstrates that, although debates about sister-in-law marriage were steeped in the language of essentialism characterised by references to the 'natural' roles of family members, and 'natural' sexual relationships (particularly in England), marriage was simply defined in each jurisdiction in accordance with its changeable purpose.

Pro-reform arguments in the colonies regarding the right of an individual to marriage choice were often presented in conjunction with the right of the colonies for freedom from Imperial control. Therefore, often those who argued that legalisation should take place on the basis of liberal individual rights, also argued on the basis that the uniformity of New South Wales law

[567] This does not demonstrate that women in the colonial context were freed from patriarchal marriage. As Carole Pateman argued in her book, above n 128, contract was the modern means of creating relationships of subordination. Colonial modifications of English law may have rid marriage of some traditional elements but women remained subordinate in marriage even after the passing of married women's property legislation. Writing in the American context, Carole Shammas has suggested that the reason no one voiced strenuous protests about the confiscation of a wife's patrimony by her husband or his creditors in the seventeenth and eighteenth century, has something to do with the fact that at that time, marriage with a dowry, coverture, and lack of divorce, constituted the principle method of capital formation for men in society. Pateman, above n 128, 118; Shammas, above n 54, 25.

with the other Australian colonies was as important, if not more important, than uniformity with the law of England. For example, Mr Buchanan argued that a man had an inherent right to marry who he liked and that the need for consistent law across the colonies was sufficient to carry the Bill, especially as Victoria and South Australia had passed similar measures.[568] Similarly, Mr Richardson said that marriage to a deceased wife's sister had been legalised in Adelaide, Queensland and Victoria and even though it was not legal in England, 'Australians had just as much capability to judge for themselves as the English did.'[569] Mr De Salis argued that 'it is more important that the law is consistent throughout the Australian colonies than with England'; and that 'a man should be able to make his own decision on conscience - the law should not interfere with that liberty.'[570] As the number of colonies passing sister-in-law marriage bills increased, a discourse emerged in which the marriage question was central to issues of colonial legislative independence. There was a conflict between how legislators in the colonies wished to frame marriage compared with legislators in England and as a result the political relationship between the colonial and Imperial authorities was significant for the development of marriage in both places.

[568] (New South Wales) *Parliamentary Debates*, Legislative Assembly, 28 November 1873, 5 (Mr Buchanan).
[569] (New South Wales) *Parliamentary Debate*, Legislative Council, 25 Feb 1874.
[570] (New South Wales) *Parliamentary Debate*, Legislative Council, 6 May, 1875.

CHAPTER SEVEN

Marriage to a Deceased Wife's Sister and the Colonial Relationship with the Mother Country 1850-1900

Previous chapters have shown how the marriage institution is framed within the context of the specific culture in which it operates. This chapter examines how marriage legislation developed within the unique context of empire. It reinforces the malleable nature of marriage and illustrates that marriage is moulded by the state according to the political requirements of the day. The political culture of the colonies in combination with the colonial/Imperial relationship in part directed the colonial marriage to a deceased wife's sister debate. New South Wales and South Australia are the main colonies of interest for this chapter as they provide both points of difference and commonality. Differing English law applied in these jurisdictions depending on the date of settlement, but there was dissatisfaction with the state of affinity marriage law in both colonies and both passed legislation legalising sister-in-law unions in the 1870s.

In the colonies the purpose of sister-in-law marriage legislation was not only to send a message to the public that the union was acceptable, but to send a message to the Imperial authorities that the colonies were creating marriage on their own terms. The deceased wife's sister legislation came to represent far more than the marriage of individual widowers to their in-laws. The issue of sister-in-law marriage encouraged a sense of connectedness between the colonies and a preference for consistency of law between the colonies, in place of consistency with England. The debate over marriage law illustrates how the desire to work independently of England precipitated the desire to work together as an Australian federation. This chapter explores the Home Office's policy of maintaining empire uniformity in matters of marriage legislation from early settlement; the growing attitude that the Imperial authorities should not interfere with local matters; and the conflict of laws problem introduced in chapter five, which resulted from the mother country's refusal to recognise the legitimacy of colonial sister-in-law marriage. The chapter introduces the sources of marriage law in the colonies, presenting the factual political story and establishing the nineteenth century Imperial position on colonial marriage law.

The English and colonial elites were bound together by common values but they found themselves divided on some points of policy. As we have seen, for several decades Imperial

authority prevented the legalisation of sister-in-law marriage in the colonies. However colonial legislation eventually passed and was eventually recognised in England. The marriage debate was a political dispute played out in colonial and English newspapers. This chapter examines that dispute in the context of early Imperial policy on marriage. It reveals that the political context within which marriage is constructed is central to the resulting shape of marriage in any given society. Chapter eight goes on to analyse the deeper ideological significance of the English refusal to recognise colonial legislation and, the significance of the eventual recognition of colonial legislation in encouraging an Imperial Act to legalise sister-in-law unions.[571]

As explained in the introduction of this thesis, marriage to a deceased wife's sister was valid, voidable or illegal in each colony, depending on whether the colony was acquired by settlement, conquest or cession, and whether this had occurred prior to or post the legislative prescription in England. In addition, in those colonies where the marriage was voidable by ecclesiastical court ruling, but there was no ecclesiastical court in existence, the marriage was de facto civilly in-dissoluble. It was determined that the Australian colonies were established by settlement, despite the existence of an Indigenous population. According to the Imperial government, colonies acquired by settlement at the beginning had no laws, except those the colonists carried with them. These were understood to be, with certain limitations, the common and statutory laws of the realm in force at the time when the colony received from the mother country its constitutional settlement.

Despite South Australia's original connection to New South Wales, its date of settlement was fixed at December 28, 1836 when it was established as a distinct colony. For many years it was difficult to establish whether New South Wales was to be treated on the same basis as the settled colonies for the purpose of applying English law. New South Wales was a penal colony and Governors exercised plenary power over all of the inhabitants. The situation was cleared up in 1828 when an *Act to provide for the administration of Justice in New South Wales and Van Diemens Land* was passed.[572] All laws in force in England at this time became the laws of the colony. Although the dates of settlement and therefore the inheritance of laws in the colonies vary, all of the Australian colonies inherited English statutory and common

[571] *Deceased Wife's Sister Marriage Act* (1907) 7 Edw 7, c 47.
[572] Alex Castles 'The Reception of English Law in Australia' (1963) 2 *Adelaide Law Review*, 1, 8-9.

law. In *Cooper v Stuart*[573] the court in New South Wales acknowledged that in addition to legislation the English common law and unenacted general principles applied in the colony, even if they may not have been suited to local conditions. In that case Lord Watson, referring to Blackstone, stated:

> [A]s the population and wealth of the colony increase, many rules and principles of English law which were unsuitable to its infancy, will gradually be attracted to it, and that the powers of remodelling it belong also to the colonial legislature.[574]

Therefore, questions about the extent of the power of the colonial legislature are paramount in understanding the development of colonial law. Some English legal principles were embraced despite obvious problems associated with differing conditions,[575] whilst others were rejected or remoulded to suit colonial conditions.[576] The next two chapters illuminate the process by which marriage was constructed in the context of empire. Both colonial legislation and English legislation was maintained in opposition or in relation to legal developments and political rhetoric elsewhere in the empire.

As discussed in chapter two, *Lord Lyndhurst's Act* prohibiting sister-in-law marriage, came into effect in England in 1835. Therefore in colonies established before 1835, such as New South Wales, the English prohibition of sister-in-law marriage was not yet in force. Such colonies inherited the English law at that time, which was that sister-in-law marriage was voidable if a suit was brought in an ecclesiastical court but not void automatically. For colonies such as South Australia settled in 1836, the English prohibition was in force and became the law of the colony, making sister-in-law marriage void *ab initio.*[577] When the Australian colonial legislatures entered into parliamentary and public debate over the legality of sister-in-law marriage, much of this debate was characterised by confusion about whether *Lord Lyndhurst's Act* applied in each colony. Once it had been established that in some

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[573] *Cooper v Stuart* (1889) 14 Ap Cas 286.
[574] Ibid, 292.
[575] See *Fitzgerald v Luck* cited in Castles, above n 54, 7: Mercantile law principles relating to sales in markets were part of the common law inherited in the colony in 1828 but in 1836 when the case was decided, there were still no public markets in New South Wales. The judge indicated that when public markets were established the principles would apply.
[576] For a discussion of this process and examples see Bruce Kercher, above n 54.
[577] 'The Law Relating to Marriage with a Deceased Wife's Sister in the Colonies of Great Britain' (Foreign and Commonwealth Office Collection, London, 1871) 7.

colonies sister-in-law marriage was void whilst in others it was voidable, questions arose about the need for uniformity, whether it be with England or across Australia. Marriage law is particularly illuminating of the process of law making in the context of empire because of its significance for cross border legitimacy and the perception of its moral role in society.

In establishing the impact and relevance of the deceased wife's sister legislation, it is useful to provide some background regarding the relationship between the Imperial and colonial governments in matters relating to marriage and divorce. Colonial marriage law provides an example of the Colonial Office's attempt to establish some sort of uniformity of law throughout the Empire. The provisions of English law on the subject were to be taken as model and deviations from English law were openly discouraged.[578] Uniformity was perceived as essential in the case of marriage legislation for many reasons. These included the relationship between marriage and morality, discussed in more depth in chapter eight; and the relationship between marriage and property introduced in chapter four. In addition, dispute over variation in marriage law created a forum for resistance against Imperial interference in colonial law and policy. The negotiation of the marriage rules that were to apply in the Empire is illustrative of the variability of marriage and of its political nature.

Some two decades prior to the introduction of deceased wife's sister legislation in Australia, there were differing views in the Colonial Office with regards to the role of the Imperial Government and marriage law in the colonies. The over-arching policy of the Imperial government, to maintain uniformity and prevent the colonies from passing their own legislation regarding marriage and divorce, was generally maintained in this period but despite the general policy of the Colonial Office there was some dispute on the subject. In 1853 in relation to South Australian marriage procedure Herman Merivale, Under-Secretary for the colonies, expressed the view that the importance of the marriage law went beyond the boundaries of individual colonies. With every desire to respect the independence of the colonial legislature, he was firmly of the opinion that the law of marriage is 'really too important and almost too Imperial in its character to allow such enactments to pass without full examination'.[579] Merivale believed that an Imperial Act should govern marriage in the colonies or alternatively the colonies should be sent a draft Act and encouraged to copy it.

[578] David B Swinfen, *Imperial Control of Colonial Legislation 1813-1865 A Study of British Policy towards Colonial Legislative Powers* (Oxford Clarendon Press,1970), 69-70.
[579]Letter from Wood to Merivale, 18 April 1853; Minutes by Merivale, 22 April 1853 (C.O 323/75, South Australia) cited in Swinfen, above n 578, 70.

Lytton, the South Australian Colonial Secretary disagreed, writing that 'Private and Domestic Relations such as Divorce [sic] should be left as much as possible to the communities which had formed their own politics and know their own social grievances'.[580] In practice deviations from the English model did occur but they were usually of minor importance or passed for a limited period. The main rationale for the policy was Empire comity. Ensuring uniformity of marital status, legitimacy and descent within the Empire was an important policy consideration, especially as British subjects within the Empire were free to move around, both between the colonies and back and forth to the mother country. This was all the more relevant in Australia because many emigrated with the intention of making their fortune and returning home.[581]

The following correspondence on the question of whether the English *Matrimonial Causes Act* 1857 introducing an expanded form of divorce, would extend to the colonies, occurred just after divorce legislation was introduced in England.[582] It illustrates contrasting perspectives on the appropriate policy for dealing with colonial marriage legislation. On 7 December 1857 the Victorian Governor, Sir Henry Barkly sent a despatch to the Secretary of State for the Colonies, The Right Honorable Henry Labouchere asking for advice regarding the applicability of English divorce law in the colonies. The despatch included the opinions of Mr Merivale and Mr Stanley of the Colonial Office. Mr Merivale wrote:

> [I]t is a very grave question whether we shall carry our principles of free colonial legislation so far, as to allow any province to legislate for itself, on such a subject as this. I believe that a uniform marriage and divorce legislation would have been a great boon to the Australian colonies, and moreover that it would have excited little or no jealousy about Imperial interference...But I fear it is too late to undertake such task now.[583]

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[580]Letter from Barkly to Labouchere, 7 Dec 1857 (C.O 309/43); Minute by Merivale, 17 Feb 1857 (C.O 42/613); Letter from Head to Labouchere, 14 May 1858; Minute by Lytton, 8 June 1858 in Swinfen, above no 578, 71.

[581] Henry Finlay, above n 54, 56.

[582] Prior to 1857 a limited form of divorce was available to the very wealthy who could afford the annulment process or to attempt to have a private bill passed in parliament to grant the individual a divorce at substantial cost. The latter also entailed lengthy debates about a couple's intimate marital relationship in the House of Commons. Prior to the Matrimonial Causes Act, marriage and divorce were governed by the ecclesiastical court and the canon law of the Church of England. A civil divorce court was created by the Matrimonial Causes Act which opened divorce up to the general public to be granted through ordinary civil litigation. For more on the development of English divorce law see Stone, above n 77.

[583] No 121 Melbourne 7th Dec 1857 Hi s Excellency Sir Henry Barkly, KCB to The Right Hon Henry Labouchere, On the Subject of Divorce with two enclosures, cited in Henry Finlay, above n 54, 43.

Here Merivale is referring to developing anti-Imperial sentiment with regards to interference with marriage and divorce legislation in the colonies. In contrast Lord Stanley had added his opinion to the letter stating:

> I am quite clear that not even the greatest advantage of a uniform law of marriage throughout the empire wd [sic] justify an attempt at legislating on the subject by Imperial authority.[584]

Despite this, Lord Stanley was agreed that the colonies should be invited and encouraged to introduce legislation similar to that in England. On the 12th April 1858 he sent a Circular to the Governors of the Australian colonies to that effect. He wrote:

> Her Majesty's Government regard this subject as within the class of general internal affairs which the duty and right of regulating belong to the Colonial Legislature under free institutions. But they are at the same time fully sensible of the great importance of the uniformity of legislation on this head, so far as it can be attained without injury to these principles of Colonial Government, and the danger as well to public morality, and to family interests, which might arise from the Law of the Colonies, on the subject of Marriage and Divorce differing materially from that of the Mother Country and of each other.[585]

In the spirit of the policy to maintain uniformity, the Imperial parliament not only encouraged the colonies to adopt English legislation but restrained the legislative power of the colonies by refusing to assent to draft bills.[586] Leading up to the first deceased wife legislation in the colony of South Australia, many other colonial marriage bills were disallowed by the Imperial government and colonial authorities were openly chastised for their unruly attempts to break away from English models. In 1859 the Parliamentary Under-Secretary at the Colonial Office wrote to the Governor of South Australia, Lord Carnarvon, expressing the colonial office's 'regret, that the South Australian parliament had thought it advisable to introduce, even a

[584] Ibid.
[585] 12th April 1858 Circular from Lord Stanley to the Governors of the Australian Colonies, Downing St, in Finlay, above n 54, 46.
[586] For example the Victorian colonial Bill passed in 1870 was refused royal assent. See Finn, above n 394, 36.

comparatively minute alteration of the English model of the *Divorce Act*.[587] In 1860 John Pascoe Faulkner attempted to pass a *Divorce Bill* in Victoria to abolish the double standard ground for adultery[588] and introduce four years desertion as a ground for divorce, but that too was promptly disallowed. Once again in this case the Secretary of State for the Colonies, the Duke of Newcastle's reasoning for disallowance was based on the evils of disparity with the marriage laws of the empire. He stated:

> [M]arriages legally dissolved in one colony would be held still to exist in another. One man could find himself subject to an unexpected prosecution for bigamy. Children legitimate in one part of the Empire might find themselves unable to inherit their parent's property anywhere else...[589]

The correspondence regarding marriage and divorce law in the late 1850s demonstrates the developing tension between allowing the colonies to govern with respect to internal affairs, and the desire for uniformity across the empire, especially in relation to the personal status conferred by marriage, divorce and inheritance laws. It demonstrates that each government has the capacity to construct marriage to fulfil a chosen purpose. In addition, the correspondence reveals a tension between the benefits of legal uniformity with the mother country as against the benefits of legal uniformity with the rest of the Australian colonies, if simultaneous uniformity could not be achieved. As has been explained in the thesis thus far, sister-in-law marriage was invalid in England and heavily debated inside and outside parliament for over seven decades. In England, the debate hung on issues of religious interpretation and morality as well as legitimacy.[590] In the Australian colonies it was issues of colonial legislative control and questions about uniformity of law that were central to the parliamentary debates.[591] There were four successive attempts at passing a deceased wife's sister bill in South Australia between 1857 and 1871 and, consistent with historical policy in the area of marriage and divorce, all were disallowed by the home government.[592] When the

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[587] See CO 13/99, 1 June 1859 in Finlay, above n 54, 59.
[588] The double standard for adultery enabled husbands to divorce their wives for the singular offence of adultery on the part of a wife but required that a wife prove an additional ground such as cruelty in addition to adultery in order to obtain a divorce from her husband. For a discussion of the parliamentary debates on the double standard in Australia see Finlay, above n 13.
[589] Henry Finlay, above n 54, 57.
[590] Frew, above n 5, ch 3 and 4.
[591] Ibid, ch 5 & 7.
[592] Foreign and Commonwealth Office Collection, above n 577, 5.

South Australian *Deceased Wife's Sister Bill* (1858) was rejected by the Imperial authorities, the previous Under-Secretary at the Colonial Office, Frederic Rogers wrote:

> [W]hatever be the technical powers of the colonial legislature, the received doctrine of "responsible government" the British Crown has not parted with the right and duty of interfering to protect its dependencies from ill advised legislation which affects the foundation either of government or Society.[593]

However, marriage to a deceased wife's sister was to be one of the issues that would set the relationship between England and the colonies on a new path towards colonial independence and the issue of uniformity was to be central to the debate. The legislative developments from the 1850s through to the turn of the century in the colonies and in England reflect the dominant rhetoric at any given time. From the rhetoric of Imperial 'protection' expressed above by Rogers, which supported the maintenance of English laws and moral norms in the colonies in the 1850s and 60s when colonial Bills were being refused royal assent; to the rhetoric of 'separation' that appears after colonial legislation is given royal assent in the 1870s. The latter rhetoric, discussed in depth in chapter eight, was employed to demonstrate the insignificance of colonial legal developments for English law, on the basis that colonials were lesser moral peoples than the English.

In 1873 the first sister-in-law marriage bill received royal assent and the other colonies soon followed South Australia's lead. Throughout the debates on sister-in-law marriage the question continued to arise: what kind of uniformity of marriage legislation would best serve the colonial population? In the New South Wales parliamentary debates views for and against uniformity with English law were presented. Some parliamentarians remained loyal to the parent nation. Mr Charles Campbell said these marriages were not approved of by the decent public in England nor was the law passed in New Zealand, the colony most like England in terms of the character of its inhabitants. He relied on the attitudes of the English parliament to demonstrate that such marriages should not be legal in the colonies. He emphasised the relationship between the inhabitants of the colony and their 'real' home, arguing that colonial

[593]Letter from Rogers to Merivale, 5 May 1858 (C.O 323/87, South Australia) in Swinfen, above n 578, 71.

legalisation would not allow the children of such marriages to inherit property in England.[594] Sir George Innes too felt that the law should be kept consistent with the law of England.[595]

However, the overall consensus was that England was being left behind while the rest of the empire and many other parts of the world moved to legalise marriage to a deceased wife's sister. One parliamentarian said that although the bill had been rejected many times in England, the rest of the world did not prohibit these marriages and South Australia and Victoria had been cited in the House of Commons, as good examples of action that should be taken in England. Canada expressed dissatisfaction that the mother country did not have laws consistent with its colonies and the United States moved to legalise such marriages.[596] Empire wide developments and their influence on English law are discussed further in chapter eight. In South Australia one parliamentarian saw the reform of the English law as a necessary move in the fulfilment of a true imperialist duty: 'I believe that the true policy of Imperialism is to knit together the Empire by similar laws, customs, and institutions, and to give a just and impartial consideration to the wishes of our countrymen beyond the seas.'[597]

During the latter half of the nineteenth century there was a desire for independent legislative authority in the Australian colonies on many matters other than marriage.[598] The colonial office was concerned with how the interests of the Empire as a whole could be best met whilst meeting the needs of individual colonies. By the mid to late nineteenth century, in many areas of legislation, the bias in the office was against uniformity, and against the literal translation of English laws into colonial statute books.[599] However, the Imperial government had more reason to disallow colonial legislation with regards to marriage and divorce. The uncertainty of English marriage laws led to confusion regarding legitimacy and inheritance in England and increased the desire for uniformity in the colonies to prevent further confusion. This occurred in other areas of law where it was seen as necessary to avoid confusion or where

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[594] (New South Wales), *Parliamentary Debates*, Legislative Assembly, 28 November 1873 (Mr Charles Campbell); see also *Brooke v Brooke* (1861) 9 HLC 193.
[595] (New South Wales), *Parliamentary Debate*, Legislative Council, 6 May, 1875.
[596] (New South Wales), *Parliamentary Debates*, Legislative Assembly, 28 November 1873.
[597] (South Australia) *Parliamentary Debates*, Legislative Council, 24 April 1901, Vol 92, col 1193.
[598] For examples see: A R Buck "This Remnant of Feudalism:" Primogeniture and Colonial Culture in Colonial New South Wales' J McLaren et al (eds), above n 13,169-189; A Stephen, 'Australian Nationalism in the Eras of Imperialism and 'Internationalism', in J Arnold et al (eds), *Out of Empire: the British Dominion of Australia* (Mandarin, 1993); and L Trainor, *British Imperialism and Australian Nationalism: Manipulation, Conflict and Compromise in the Late Nineteenth Century* (Cambridge University Press, 1994).
[599] Swinfen, above n 578, 76.

uniformity was seen not to cause any ill effects in the colonies.[600] By the late nineteenth century, the Imperial government's interest in maintaining uniformity of marriage legislation only encouraged a sense of colonial connectedness. The main push was for colonial consistency of legislation rather than any radical push for independence.[601] However, marriage law was named in the newspapers as one of the joint colonial interests which were thought to require a federal union:

> There are joint interests, so clear and palpable, that no-one could doubt the value of a common organisation for their protection and development. The South Australians by an overwhelming majority legalised marriage to a deceased wife's sister. Victoria talks of authorising divorce. The other colonies follow the English law. It seems dangerous and absurd for any small community to legislate alone on questions which form the very basis of our social lives.'[602]

Other matters that were said to require a federal union included the establishment of the electric telegraph in connection with Europe; regulation and encouragement of emigration; and adjusting tariffs.

In the last three decades of the nineteenth century the deceased wife's sister legislation in Australia became the calling card for press pieces in support of divorce reform and colonial independence or at least reduced interference by the home government in marriage legislation. In the South Australian media as early as the 1860s a disgruntled tone accompanied newspaper columns on the issue of the Imperial parliament's failure to allow legislation in the colonies. Reporters expressed frustration at having to open a discussion 'worn threadbare in this colony', seeing it as unnecessary to prove what had already been proven, namely, that the marriage was not contrary to scripture, morals, social harmony or public convenience.[603]

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[600] A perception of superior Victorian morality was another reason for maintaining legislative uniformity in areas such as marriage which was seen as the axis of family and civilisation. This is discussed in depth in chapter eight.
[601] (New South Wales) *Parliamentary Debates*, Legislative Assembly, 28 November 1873 (Mr Buchanan).
[602] *Sydney Morning Herald,* 12 June 1857, 4. Note the error in the report regarding 'legalised' sister-in-law marriage in South Australia. The colonial legislature did pass a Bill in 1857 but it did not receive royal assent and therefore did not come into force.
[603] *Adelaide Advertiser*, 23 May, 1861, 2.

In December 1889, commenting on divorce law reform, the *Advertiser* referred to the deceased wife's sister legislation to illustrate a weakness in the Imperial Government's call for uniformity of marriage law:

> The excuse of Lord Knutsford - for vetoing the *Divorce Bill* – that it is desirable to maintain the uniformity of marriage and divorce laws throughout the Empire – means nothing to Australians. They know what they want – and what they want they will have – without separation if possible but with it if necessary. As a matter of fact the marriage laws are not uniform as it is. Australia recognises but England still forbids marriage with the sister of a deceased wife.[604]

In the same month the *Register* published a similar report, this time making it very clear that a strong relationship existed between a desire for colonial independence and the fight for freedom of interference when it came to colonial marriage legislation. On December 6th the following comment was published:

> Everyone in Australia knows that the feeling about marriage with a deceased wife's sister was very greatly stimulated by the continual re-buffs which were administered to the colonies and to this province in particular, on this subject. Among anti-British politicians in Australia it is customary to express the experience of the past on this subject by saying "the Queen's veto is all that is required to convert a debated measure into a universally popular one" and it is undeniable that undue attempts to interfere with the legislative authority of the Australian Parliaments provokes a degree of resentment which is most prejudicial to sympathetic relations with Great Britain.[605] There is no reason why this community should meekly take a denial, and forbear to re assert its wishes[606].

The use of the term 'Australian' in these reports is illustrative of emerging nationalistic sentiment. The desire for independent colonial marriage legislation arose out of concern for

[604] *Adelaide Advertiser*, 4 December 1889.
[605] *Register*, 6 December 1889.
[606] *Adelaide Advertiser*, 23 May 1861, 2.

legitimacy across the colonies and it was this that led to the call to work together across the colonies due to the practical need for uniformity. Latter attempts to legislate for marriage to a deceased wife's sister, particularly in South Australia, were recontextualised in the context of emerging nationalistic sentiment. However, the development of this legislation is reflective of a gradual increase in nationalistic feeling rather than the more pointed agenda of independence that developed amongst some colonial radicals and later working class leaders.[607]

Though South Australia was at the forefront of the deceased wife's sister legislation debate with the Colonial Office, similar sentiment was expressed in the media of other colonies. For example, in the *Mercury* on18 November 1889 it was reported that time would only render colonial legislators more resolved that their Bills should become law and that opposition would only increase the desire to pass the law. The desire would increase with the feeling that the colonials had the right to legislate as they pleased upon what they regarded as their own affairs.[608]

In Victoria deceased wife's sister legislation took on a similar association with colonial outrage at Imperial interference. An *Argus* journalist's explanation for why Victorian politician Mr George Higinbotham was introducing a legalising Bill, despite the Imperial Government's recent rejection of the South Australian legislation was that he saw the rejection as an additional reason for bringing forward his measure. The author remarked that the deceased wife's sister debate provided too greater opportunity to refuse for a politician to administer a rebuke to an interfering Secretary of State and establish the right of dependent legislatures to do as they pleased.[609] The author of that article went as far as to say that Mr Higinbotham was not interested in the grievance of 'a few ardent widowers' at all and was in fact using the legislation as a vehicle to push his colonial independence agenda.

The rejection of the South Australian Bill was seen by some in that colony and in others as a monstrous interference with the colonial right of self-government. The attempts and rejections had been going on for some decades. In 1857 the first South Australian Bill was passed and sent home for the Queen's approval. The approval was refused on the ground of continuity to the law of England. Between 1857 and 1870 the Bill was again passed three times (1858,

[607] See Tom O'Lincoln, *United We Stand: Class Struggle in Colonial Australia* (Red Rag Publications, 2005).
[608] *Mercury,* 18 November 1889.
[609] *Argus*, 18 November 1870.

1860 & 1863) and as often rejected. In October 1860 when the South Australian government introduced the Bill for the second time, the Bill raised important questions with regard to the functions and powers of the colonial legislature, and the extent of its dependence on the home government. There were some objections to the Bill on the grounds that it had been previously rejected by the home government and unless royal assent could be obtained there was little point in passing the Bill again. However, Mr Blyth insisted that if a Bill benefited the moral and social condition of the community they had a right to introduce it. The Bill was carried through every stage with a majority of two to one. 'Marriages of this kind were very frequent in the colony and it was very desirable that the question of their legality be set at rest' 'If the colonies have any independent legislative power, this is precisely one of those social questions to which it applies.' 'It is bad enough to have our social freedom fettered by medieval prejudice, but it would be utterly unjust and intolerable for us to force those restrictions on our colonists.'[610] Here the author of the article highlights the colonial legislatures capacity to construct marriage in any form they see fit.

He also recognises the necessity for Imperial recognition of colonial authority: 'if the royal assent is still refused what becomes of the rights and privileges of the colonists, and what is the use of the Colonial Parliament? Have the colonial representatives an independent power of legislating on local matters affecting their social state or not?'[611] Mr Burford, in the South Australian parliament, thought the fact that the Bill was repugnant to English law worked in its favour, a comment which invoked laughter in the House. [612]He argued that South Australia had exhibited their repugnance to English law by abolishing State religion, by the adoption of the Ballot and the admission of Jews in Parliament (Hear, Hear). Repugnance to English law formed no ground of objection in his mind.[613]

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[610] *Daily News* in the *Mercury,* 29 Dec 1860. Sir Arthur Blyth was an Anglican land investor and politician in South Australia. He was a communicant of the Church of England, but of liberal persuasion. He strongly opposed State aid to churches and fought for the rights of the working classes. See Arthur Blyth, *Australian Dictionary of Biography* Entry at http://adb.anu.edu.au/biography/blyth-sir-arthur-3016; The Late Mr. Neville Blyth *South Australian Register*, 17 February, 1890, 5 accessed 16 November 2011.

[611] Ibid, 3.

[612] (South Australia) *Parliamentary Debates*, Legislative Assembly, May 20, 1857, col 133. Mr William Burford was a member of the Church of Christ and sought better opportunities in business and religious freedom in South Australia, arriving in 1838. Burford had seven children by his first wife and married his deceased wife's sister, Mary Anne Messent in 1859, two years after his first wife's death. See http://adb.anu.edu.au/biography/burford-william-henville-1851.

[613] (South Australia) *Parliamentary Debates*, Legislative Assembly, May 20, 1857, col 133.

It was not until 1865 when the *Colonial Laws Validity Act* passed, that the colonies could freely legalise the union.[614] However, the legislation was ineffective in the case of South Australia and in June 1870 the third *Deceased Wife's Sister Bill* was disallowed for the same reason given on the previous occasion.[615] On the 30th of March 1871 the colonial government was finally advised that royal assent had been granted. [616] The eventual passing of the South Australian Bill into law conveyed the message that persistent requests for royal assent would lead to success and encouraged colonial administrations to lobby the Imperial power by deputations stating the colonial case and sending draft bills for approval.[617]

In fact the stated reasoning for the grant of royal assent to the South Australian Bill was that 'it would not be right to resist further the wishes of the colony, so clearly and repeatedly expressed'. This conveyed the message that while Downing Street claimed to exercise a veto upon legislation, it nevertheless recognised the right of the colony to have its own way, even upon a question which might be regarded as involving repugnancy provided that the demand was made unanimously and deliberately. It was reported in the *Argus* that 'So useful a lesson as to the virtue of pertinacity is not likely to be thrown away'.[618] It was clear that however the Imperial government chose to proceed, colonial marriage legislation would have implications for colonial legislative independence and marriage was being shaped in part by the political agenda. The *Mercury* reported that marriage and divorce questions were particularly pertinent

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[614] *Colonial Marriages Validity Act* (1865) 28 &29 Victoria, Cap 64.

[615] Despatch from Lord Kimberly to Governor South Australia, 27 August 1878, South Australia. (Public and Miscellaneous Offices and Individuals, No 10,984, Despatch 145 at the British Library C.O 13/136).

[616] Summary of Correspondence and Progress of Bills, 27 August 1878, South Australia. (Public and Miscellaneous Offices and Individuals, No 10,984, Despatch 145, at British Library C.O 13/136); *Proceedings of the Colonial Conference*, 14 April,1887 (Marriage Law Reform Association 1888) 5; See also A Parsons and A L Campbell, 'The South Australian Centenary of Legislation' *Journal of Comparative Legislation and International Law* (1936) 17, 21–39, 35.

[617] As we have seen some were already doing so, for example the Victorian colonial Bill passed in 1870 was refused royal assent. See Finn, above n 394, 36. A second Bill passed in 1872 and received royal assent in March 1873. See Despatch from the British Council Office to the Under Secretary of State, received 27 March 1873, Victoria (Colonial Office in Public and Miscellaneous Offices, vol 3, Victoria, no 2950, British Library C.O 309/111). Similar activities were occurring in the other Australian colonies, particularly throughout the 1870s. The Tasmania Act was assented to on the 9 August 1873. The New South Wales statute was assented to on 27 November 1875. See (New South Wales), *Parliamentary Debate*, Legislative Council, 16 Feb 1876. Queensland bills passed the lower house in 1861 and 1863 but were rejected by the legislative council until 1875 in which year the Queensland Act also received royal assent. See (Queensland) *Parliamentary Debates*, Legislative Assembly, 6 June 1877, vol 22, col 28. It will be illustrated in chapter eight that the marriage question was not simply confined to Australia but was an empire wide issue. A Bill to legalise the union in New Zealand was passed by the Legislature in 1880 but was refused royal assent on the grounds that, as drafted, it was *ultra vires*. In South Africa in 1887 a Bill had been passed but had not received royal assent because of the prospect of the confederation of the South African provinces, the question was postponed, to be discussed by a federal parliament. See *Proceedings of the Colonial Conference*, above n 616, 5, 15, 26.Canada legalised the union in 1882.

[618] 'Marriage to a Deceased Wife's Sister' *The Argus*, 15 June 1871.

to the issue of legislative independence because from the colonies point of view they were local questions which the colony had a right to deal with however they saw best and in which the Imperial government had no right to interfere. The author argued that the level of legislative independence was not only relevant to whether the marriage bill received royal assent but to the general relations of the colonial legislature to the Imperial Government and the whole subject of the right of the Imperial Government to disallow legislation on the internal affairs of the colonies.[619]An expectation of cooperation from the Home Government had developed in the colonies and the media revealed the colonial desire for mutual respect for legislative initiatives: 'As the Home Government has sent us out their Bill on the subject of Matrimonial Causes and Divorce, and as we shall no doubt pass it into law, it is to be hoped that they will equally study our wishes, and give us the benefit of our own Bill, which now awaits the usual sanction'.[620]

Marriage was both a public and private issue, a local and universal matter, and therefore an area interconnected with questions about the power of the local authorities to legislate for local conditions and the power of the imperial government in regulating matters of public morality, as well as private individual choice. It became clear that the wishes of the colonial parliaments could not be ignored and that the momentum of legislative development would not be stalled. One parliamentarian stated in the South Australian parliament:

> [N]othing in nature ever stood still, we were either going forwards or backwards, and the tie which united the mother country with her colonial dependencies was - at which point the excitement in the House grew wild and Mr Speaker called Order! So Mr Cathcart Mason may continue -'the tie between the mother country and the colonies would probably be much weakened if in the consideration of this question regard was not had for the opinion of the self-governing colonies.[621]

The speaker expressed the idea that imperialism would be strengthened by allowing colonial governments their independence. The language illustrates that imperialist ideology, that the

[619] Editorial, *Mercury*, 18 November 1889.
[620] *The South Australian Advertiser*, 16 August 1858, 2.
[621] (South Australia) *Parliamentary Debates*, Legislative Assembly, April 1901, Series 4, Vol 92, col 1211-2, 24.

Empire was a unity of free peoples, remained strong both in the Home Office and in the colonial parliament.

By 1875 sister-in-law marriage had been legalised in a majority of the Australian colonies. In the following years the focus shifted from legalisation in the colonies to legal recognition under English law and on English soil. For couples who were legally married in the colonies, with proprietary interests in England, such as those in the novels discussed in chapter five, English recognition of colonial marriage was essential in protecting legitimacy. In 1875 Sir Thomas Chambers wrote to the Secretary of State for the Colonies, the Earl of Carnarvon, advising that doubts had arisen as to the effect of legislation passed in the colonies to legalise marriage to a deceased wife's sister. He wrote: 'As it is obvious that nothing can be more disastrous than that questions of legitimacy and inheritance left unsettled, to introduce strife and controversy into families, and to be decided years hence, after protracted and costly litigation, I have drafted a Bill designed to remove all such doubts.' He said that the home government's sanctioning of the colonial marriage Acts led colonists to believe that colonial marriages would be legitimate and recognised everywhere.[622] The object of his Bill was to reinforce this by providing that the legalities associated with inheritance and legitimacy for the offspring of valid marriages in England would also apply to marriages made under the colonial acts.

The Colonial Office replied on 8 July to the effect that the proposed legislation could not be condoned because it would have the effect of giving validity in the United Kingdom to marriages of this description entered into by residents of the United Kingdom who had simply made a trip to the colony for the purpose of procuring celebration of the marriage, thereby intentionally evading the law of England. For these reasons the home government would not support the measure.[623]

The issue of English recognition arose again in 1876 when Queensland, the second last colony to pass a Bill legalising sister-in-law marriages, sent the Bill to the Imperial

[622] Correspondence between Sir Thomas Chambers and the Secretary of State for the Colonies on the subject of the Laws passed in several of the Colonies and allowed by the Imperial Government Legalising Marriage with a Deceased Wife's Sister, 1875, enclosed in Despatch from Governor Sir W F D Jervois to M E Hicks-Beach, 6 February, 1878, South Australia (Victorian State Library, South Australian *Parliamentary Papers*, 1878, no 38, 1).

[623] Correspondence between Sir Thomas Chambers to Sir Robert Herbert, 8 July 1875 South Australia (Victorian State Library, South Australian *Parliamentary Papers*, 1878, no 38, 1).

Government asking for royal assent. A Despatch was laid before the Queensland parliament from Lord Carnarvon which rejected the Bill on the basis that unlike any other colonial Bill of this kind, it included clauses which stated that such marriages would be recognised under English law on English soil. The Bill would have provided for a valid marriage between a domiciled Queensland man and an English woman celebrated in England. The deputation suggested that the approach of the other colonies which legalised marriage to a deceased wife's sister within the colony alone was the appropriate approach for Queensland.[624]

Whether at the time of drafting the other colonies intended that marriages made under colonial legislation would be recognised in England is unclear. However, later in 1876 representatives of the colonies introduced a deputation on that subject to the Earl of Carnarvon for the purpose of convincing his Lordship to advise that the Imperial government pass legislation making such marriages legitimate in England as they were locally. Once again the legislation's bearing on the future relationship between the Imperial government and the colonies were stressed. Mr Darvill stated:

> Now it never can be the desire of Her Majesty's Government, I am sure under your Lordship's advice, to ever do anything which should diminish that deep feeling of loyalty which is maintained throughout the colonies. I am earnestly desirous as a colonist that the deep feeling of loyalty, which no-one has been so prominent in maintaining than your Lordship should be continued between Her Majesty's Government and the people in the various Colonies, but disregard of the present appeal will I fear shake that confidence which everybody must hope to see maintained between the different parts of the British Kingdom.[625]

There was quite a strong insistence that the Imperial Government make a declaration validating this class of colonial marriage in England:

> We note that your Lordship knows what the value of those colonies is to the British Crown; your administration has been one that has known how

[624] The *Argus*, 29 September 1876.
[625] Deputation to the Earl of Carnarvon on the subject of Acts passed in the colonies of South Australia, Victoria, Tasmania, New South Wales and Queensland for legalising marriage with a deceased wife's sister, 3 April 1876, 10 (State Library of New South Wales, Mitchell Wing, M DSM/ 042/ P23).

> to reconcile the independence of the colonies with their rights as communities subject to the British Crown, and we trust you will increase if possible their confidence and their allegiance by affirming this Bill'.[626]

The Honourable Robert Lowe M.P added 'I fear if this is not done now the time will come when we shall have to regret it'.[627] The Earl of Carnarvon did not respond to these comments with favour. His language demonstrates that he was quite taken back by any suggestion that marriage to a deceased wife's sister legislation could have such a strong bearing on the relationship between England and the colonies: 'I hope that unity stands upon more solid foundations than that, and that no questions of this kind can shake the feelings of loyalty or attachment to the mother country.' His response to the request illustrates the power struggle between the colonial administrators and the Imperial Government. He sternly rejected any suggestion that the Imperial Government should 'in consequence of certain colonial statutes, which have been passed by **servants of the Crown** (*my emphasis*), be obliged to rescind its opinion'.[628]

At the Colonial Conference held in London in 1887[629] Sir John Downer, representing South Australia, was one of the Australian colonies' leading political and legal figures; on behalf of the English Marriage Law Reform Association, he tried to persuade the British government to bring the English law relating to marriage with a deceased wife's sister into line with the more liberal colonial legislation. More importantly, he argued the need for a bill in the Imperial Parliament to make colonial judgments enforceable in the United Kingdom as a practical step towards Imperial Federation. He also argued for a uniform law for the Empire in relation to

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[626] Ibid, 6 (Lord Houghton).

[627] Ibid, 9. Robert Lowe was a member of the Legislative Assembly in New South Wales in the 1840s at which time he supported a laizzez faire government and a national non-denominational education system in the colony. In 1844 Lowe, with the backing of the Pastoral Association, launched on 30 November a weekly journal, the *Atlas*, the declared purpose of which was to lobby for responsible government and for colonial control of colonial waste lands. 'This is the colony', Lowe wrote, 'that's under the Governor, that's under the Clerk, that's under the Lord, that's under the Commons, who are under the people, who know and care nothing about it'. In 1850 Lowe returned to England with his family and was a member of the House of Commons at the time of the Deputation in 1876. Australian Dictionary of Biography Entry at http://adb.anu.edu.au/biography/lowe-robert-2376. See also John Cannon, 'Robert Lowe' *The Oxford Companion to British History* 2002 *Encyclopedia.com,* accessed 27 October 2009.

[628] Ibid.

[629] *Proceedings Colonial Conference*, above n 616.

the winding up of estates in bankruptcy, but the British politely refused to endorse any of these schemes.[630]

Even after federation, Australia continued to lobby the Imperial government to legitimise Australian marriages to deceased wife's sisters under English law. In 1905 the previously cited despatch sent from the Lord Northcote, the Governor-General of Australia to the Colonial Secretary, Mr Lyttelton, stated that 'in Australia such marriages were legally and socially like any other marriage'. Such marriages 'were commonly solemnised' and, given the English government had sanctioned the legalisation of such marriages in Australia, 'those who contracted such marriages were entitled to assume they had rights in the parent country'. He wrote: 'it is unjust to Australian citizens that the full recognition accorded to their marriage and its consequences in Australia should be taken from them when they remove to another part of the Empire'. [631] The lack of recognition in England demonstrates that a marriage is meaningless unless recognised by the State.

This chapter has shown that in the early decades of the nineteenth century there was significant disagreement about the state of marriage law in the Australian colonies and the way in which marriage should be regulated. By mid-century the central issue in debates over marriage and divorce was whether the colonial legislatures should have the power to regulate their internal affairs, or whether the uniformity of marriage law across the empire should be maintained. By the 1870s sister-in-law marriage bills, particularly in South Australia, had become vehicles for pushing the colonial legislative independence agenda. During this decade most of the colonies passed bills legalising sister-in-law unions despite their illegality in England. Later in the century the colonial agenda shifted from legalising such marriages to advocating recognition under English law. There was a strong colonial insistence that the English authorities recognise the status and legitimacy of such marriages, and any children or proprietary claims resulting from them.

The conflict highlights the political significance of empire wide, or in the contemporary sense, international change in marriage regulation. While separate colonies or nations are able

[630] Sir John Downer, Entry Australian Dictionary of Biography at http://adbonline.anu.edu.au/biogs/A080355b.htm, accessed 8 March 2010.

[631] It was only after much pressure from the colonial public and authorities that the English parliament passed the *Colonial Marriages (Deceased Wife's Sister) Act* in 1907recognising marriages under colonial legislation as legitimate in England. *Colonial Marriages (Deceased Wife's Sister) Act* (1907).

to mould marriage appropriately to suit local conditions, fulfil chosen purposes, or prescribe chosen norms, they do not do so in isolation. As was the case in the nineteenth century, the political context within which marriage law is developed plays a key role in how it is shaped.[632] It is well established that English law had a lasting influence on the development of colonial law in the nineteenth century, but after the legalisation of sister-in-law unions throughout the empire, the question became could colonial legislation influence the development of English law? This is one of the questions addressed in the next chapter.

[632] For contemporary examples, see Gaita, above n 633.

CHAPTER EIGHT

The Road to Legalisation in England: Scientific Discourse and Marriage to a Deceased Wife's Sister in the Context of Empire

Apart from issues of legitimacy and inheritance, why were the English so determined to disallow colonial marriage bills? Why did the Imperial power begin granting royal assent to deceased wife's sister bills from the 1870s and recognise colonial marriages on English soil with the passing of the *Colonial Marriage (Deceased Wife's Sister) Act*? Finally how did the legalisation of such unions, in Australia and across the empire, affect the marriage debate in England? To answer these questions this chapter examines the moral role of marriage in Victorian society within the specific context of the moralising mission of Empire; the influence of scientific discourse on the racialisation of the 'other' and on the biological definition of 'incest'; and the power of widespread colonial change in forcing legalisation of sister-in-law marriage in England.

This thesis has revealed variability in marriage and established that marriage is moulded in order to fulfil a chosen purpose or to prescribe norms for family life. This chapter illustrates how the English legislature rejected colonial deceased wife's sister legislation and maintained their prohibition in order to reinforce the norms of the Victorian family. The acceptability and inclusion of sister-in-law marriage in colonial and international marriage law exacerbated a sense of uncertainty in England. English understandings of marriage, once thought to be solid, were exposed as fluid. Waleed Aly argues that in order to regain a sense of solidity and certainty, and to shore up a perceived loss of cultural identity, it is a cultural constant that groups will look for a scapegoat, against which the dominant culture can define itself.[633] In the nineteenth century as marriage was exposed as a fluid and changeable institution, the English State defined marriage in opposition to the colonial. By mid-century, anti-reformers in England regularly rejected the pro-reform argument that England should legalise sister-in-law marriage because such a marriage was legal across much of the empire and the world. Anti-reformers invoked images of the 'heathen' other, whether white convict or black savage, to argue for the maintenance of English marriage legislation; one of the pillars of English civilisation.

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[633] See Waleed Aly, 'Islam, immigration and the great dividing range' in Raymond Gaita, *Essays on Muslims and Multiculturalism* (Penguin Australia 2011). Victor Marsh cites Aly's argument in the context of same-sex marriage in Victor Marsh (ed) *Speak Now: Australian Perspectives on Same-Sex Marriage* (Clouds of Magellan, 2011) xxxi.

As the nineteenth century progressed, scientific and biological discourse came to racialise understandings of 'difference'. With the granting of royal assent to colonial bills, the English parliament no longer saw it as imperative that white colonial citizens be prevented from making their own marriage laws. Despite this, the English maintained their prohibition and refused to recognise colonial marriages on English soil until the turn of the century. Scientific and biological discourse also influenced understandings of 'incest' and the formulation of incest as consanguineous was being used as leverage for marriage reform. This discourse fed the momentum of the pro-reform movement in England. In addition, the pressure described in chapter seven was also increasing from within the empire. The marriage debate was an empire wide issue and pressure for reform had been brewing across the empire and internationally, in places such as Canada[634], India, and America.[635] As the prohibition was abandoned across the empire the Imperial power was being left behind. Legalisation in the colonies played a

[634] Similar to the progression of bills in Australia, in the Canadian colonial parliaments, bills to legalise the deceased wife's sister union passed but were refused royal assent. Eventually a Bill was assented to several decades before its equivalent in England. In Canada the first attempt to change the law began in 1880 when the Member of Parliament for Jacques Cartier, Mr Girourd, introduced a bill that would have legalised marriage with a deceased wife's sister (and to a deceased husband's brother in addition). The Bill was defeated on the second reading by 140-19. On April 21 Senator Ferrier introduced the Bill in the Upper House and on moving the second reading he said there was 'a cry for relief from the grievous disability now resting on the people of Canada. The Bill was halted by a hoist motion carried by 33 votes to 31; two years later it was reintroduced, several amendments were voted upon, and on May 17 1882 the Bill was passed. *An Act concerning Marriage with a Deceased Wife's Sister* (1882), S C, c 42. It is important to note that parts of the economic and religious context in colonial Canada and Australia were similar and likely to have influenced marriage law in a similar fashion. For example, Canadians, like other British colonial societies, and indeed American and European societies in the nineteenth century, were responding to a more religiously, ethically, morally and culturally diverse public sphere, sacralised the home, and debated the relationship between medicine-science and religion-tradition in defining and legitimising the nature of the family. In choosing to avoid a singular policy on marriage and in valorising private definitions and personal opinion of clergy and lay people on the question of men marrying the sister of a deceased wife, Presbyterians in Canada, as was the case in colonial Victoria, contributed to ideals of individual conscience and diversity of moral opinion and practice. Peter Bush, 'Debating Marriage: Marrying the Sister of a Deceased Wife and the Presbyterian Church in Canada', *Fides et Historia* (2009) 10. See also *Report of Committee on Marriage with Sister of a Deceased Wife*" (The Presbyterian Church in Canada, Acts and Proceedings, 1884); William Gregg, Marriage with a Deceased Wife's Sister Prohibited by the Word of God, Toronto (Adam, Stevenson & Co Publishers, 1868); and Stevenson, Ronald C, 'Federal Marriage Legislation' (1997) 20 (1) (Spring) *Canadian Parliamentary Review* 11

[635] The Governor General of India issued a Proclamation to the effect that such marriages were not prohibited to native Christians in 1876. The union was legalised in the colonies of, amongst many others, Natal in 1877, Mauritius in 1881, Canada in 1882, and Barbados in 1884. See 'Public Opinion on the Marriage to a Deceased Wife's Sister 1875 to 1888' (Foreign Commonwealth Office Collection, 1883). In the United States as early as 1695 deceased wife's sister marriage was raised in public discourse, in a published letter signed by many prominent Boston Ministers, condemning the marriage. A similar debate to that in England began in the early nineteenth century and significant numbers of pamphlets, books and newspaper articles were written on the subject. The American debate has its own intricacies and nuanced colonial variations which are beyond the scope of this thesis but once legalisation had occurred in America, she featured much like the Australian colonies in the English commentary on the subject. For an analysis of the American marriage controversy and the history of marriage in America see: Connolly, above n 166; William Marshall, *An Inquiry Concerning the Lawfulness of Marriage Between Parties Previously Related by Consanguinity or Affinity* 1843 (Kessinger Publications, 2009); Mather et al, *The Answer of Several Ministers in and near Boston to that case of Conscience, Whether it is Lawful to Marry his Wives own Sister?* (1695) in Connolly, above n 166; Ottenheimer, above n 65; Hartog, above n 53; and *Letters from the Right Rev. Bishop McIlvaine of Ohio,* above n 412.

significant role in forcing reform in England and in 1907 the seven and a half decade marriage debate came to an end with the legalisation of marriage to a deceased wife's sister.

Marriage, Morality and Imperialism

In the English parliament anti-reformers often referred to developments in the British colonies and in the United States in order to point out the rampant sexual immorality in such places. Debate over the Bill illustrated how the construction of English marriage and 'home' depended upon the sexually permissive and immoral 'other'. Despite the special position of the white Australian and Canadian colonies in the Empire with their democratic governments, there remained a difference between the English and the colonial English in Imperial discourse.

Chapter seven demonstrated the Imperial government's reluctance to allow colonial control of marriage legislation because of concerns about uniformity and the perception that marriage was a building block for stable societies. Marriage practice and regulation signified a certain level of civilisation and tampering with marriage regulation threatened the moral standing of citizen and nation.[636] The Imperial government had claimed a role in civilising inhabitants and shaping morality in its colonies and were cautious about enabling variations in legislation with such a central place in the moralising mission.[637] Domestic propriety and moral responsibility were central to the construction of notions of difference and claims to authority within a range of British colonial communities in this period. An emphasis on gender and sexuality was one of a number of ways in which colonisers, both at home and in the colonial administrations, neutralised potential divisions amongst themselves, emphasised their distinction from the colonised, and reassured themselves of their separate identity and right to rule.[638] This process of 'othering' played out on two levels in the Australian colonies. On the one hand, all colonists, including convicts, could be viewed in opposition to the racial 'other'

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[636]See Registrar General, Introduction to the Census, 1851 which stated 'Marriage is generally the origin of the elementary community of which larger communities...and ultimately the nation are constituted and on the conjugal state of the population, its existence, increase and diffusion, as well as manners, character, happiness and freedom ultimately depend...' cited in Davidoff and Hall, above n 77, 321.

[637] Kirkby and Golder, above n 54, 150.

[638] Kirsten McKenzie 'Women's Talk and the Colonial State: the Wylde Scandal 1831-1833' in *Gender and History* (1999) 11 (1), 42 cited in 'Regulating Society, purifying the state: gender, respectability and colonial authority' in Kirsty Reid, above n 324, 58. If imperialism was to fight against South Africans, the Sudanese, Afghans, and the Irish, then the Deceased Wife's Sister Bill was another battle against the other, namely, the barbaric sexual other hidden underneath the cultured facade of English society. See Nagai, 'A Harem in the Home' (2002) 8 *Australasian Victorian Studies Journal,* 46.

represented by the indigenous savage. Colonisation was justified by the civilising mission and rationalised by the grand moral premise that the English were bringing civilisation to the savage world. The colonial elites shared a belief in the civilising force of the empire and believed that the civilised knew, as no savage could, how to manage and control their impulses, their appetites and their passions.[639] The English considered themselves more moral than others and expressed the belief that it was British manners and customs to which other nations conformed because of the elevated level of the British moral character. White people were seen as having more character than people of colour, and among whites, people with British descent were regarded as having the most character.[640] However, savage instincts and uncouth passions were thought to lurk in all human beings and the ability to control one's sexual needs and wants was central to the acquisition and maintenance of one's character.[641]For this reason the civilising mission occurred in parallel, both throughout the empire and at home. The missionary philanthropic movement started in England in the first decades of the nineteenth century and sought to make loyal, moral and industrious subjects of the working classes at home, as well as 'savages' abroad.[642] By the 1820s missionary philanthropy infused English culture. Therefore, in addition to the racial other, white colonials, whether 'foul mouthed convicts', 'haggard uncouth gold diggers', 'a half naked race of children' or the 'brutish drunkard' were symbols of the uncivilised other. The working poor both overseas and at home were equal in their depravity to the 'savage'.[643]Civilisation was believed to be achieved in stages. It involved the transition in the mode of production from hunting and gathering to pastoral and agriculture, but it further included changes in social institutions, in ideas of justice and property, in custom and culture, and in the role of women. [644] It was thought to be the regulations of civilised society that guided the process and tamed and restrained animal passions.

Throughout the sister-in-law marriage debate, the union was repeatedly represented as incest and polygamy, which made opposition to the Bill look like a crusade against the degeneration

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[639] Russell, above n 351, 6.
[640] L Falconer, 'The Mother Country and Her Colonial Progeny' *Law Text Culture* (2003) 7 (1), 149, 154.
[641] Ibid, 154, 5.
[642] Alison Twells, *The Civilising Mission and the English Middle Class 1792-1850* (Palgrave Macmillan, 2009), 2.
[643]One new settler wrote in his diary in the 1840s of the immoral behaviour of squatters: in the colonies 'a set of money making bachelors could become by their own volition 'half savages, half mad.' 'Gentlemen will endure poverty and forgo all their former comforts and the finer feelings of the heart to make their fortune' Russell, above n 351, 5-6, 85, 89 fn 8.
[644] Twells, above n 642, 12-14.

of the English home to a primitive stage[645] In the House of Commons in 1849, Mr Goulbourn argued that if the protection afforded by the law were removed, sisters and nieces would be 'left exposed to the passions of those with whom they were now living in safety'.[646] Domesticity and marriage were not inherently systems of moral purity and sexual order; rather, they tended to incite lust and provide sites for the emergence of a subterranean desire that could only be checked by the laws of incest.[647] The belief appeared to be that familial ties removed the requirement for sexual restraint which was so tirelessly upheld in other arenas of social life and that if marriage to a decease wife's sister were legal, that restraint would be required within the family circle as well, eliminating the familiarity and safety of the home.[648]

The discourse of savagery, working class promiscuity, demoralisation and poverty were emphasised by those against all forms of incestuous unions.[649] Since the early days of the colonies, such discourse had been associated with the colonial population, particularly in relation to large numbers of cohabiting couples whose relationships did not have the legitimacy of marriage.[650] For most of the early to mid-nineteenth century, marriage law in the Australian colonies was confused and uncertain and therefore the marriage status of colonial inhabitants was often ambiguous. Historians have suggested that irregular marriage was the norm, and although this has been questioned more recently, the middle class opinion was that immorality was rife in colonial Australia, and most convicts cohabited outside legal marriage. In the first half of the century, many gentlemen of respectable birth lived with ex-convict women as their mistresses and some later married them. In the late 1840s the Governor of New South Wales, Sir Charles Fitzroy, invited the wives of politically powerful men to dinner, including those who were known to be the former concubines of men who were now their husbands.[651]The Bigge Reports described female convicts as degraded, profligate, and abandoned, reporting the "unrestrained prostitution of so many licentious

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[645] Nagai, above n 638, 47.
[646] *Parliamentary Debates,* House of Commons, 3 May 1849, vol 104, cc1162-239, 1180.
[647] Connolly, above n 43, 96.
[648] Wolfram, above n 66, 34. Lord O'Hagan reinforced this view in his speech to the House of Commons in 1873 when he stated 'temptation is bred of opportunity and dies when it is lost' Lord O'Hagan, High Chancellor Ireland, 'Marriage to a Deceased Wife's Sister' (Speech delivered in the House of Lords, 13 March 1873, Marriage Law Defence Association) 6.
[649] Corbett, above n 164, 8.
[650] See Joy Damousi, *Depraved and Disorderly: Female Convicts, Sexuality and Gender in Colonial New South Wales* (Cambridge University Press, 1997).
[651] Carol Liston, Sarah Wentworth, *Mistress of Vaucluse* (Historic Houses Trust NSW, 1988) 47. See also Anita Selzer, *Governors' Wives in Colonial Australia* (National Library of Australia, 2002).

women".[652] At home the English middle class defined themselves in opposition to the colonial 'other' and idealised notions of domestic order and marriage served to separate the morally dubious nature of convict settlement from the higher moral endeavour that drove colonial progress.[653]

Anderson has argued that the English Deceased Wife's Sister Bills represented a threat to this English middle class identity because of heightened anxiety about incestuous relations in Victorian society. The persistent rejection of colonial deceased wife's sister bills and the later refusal to recognise colonial marriages in England maintained the binary opposition between liberal sexuality in the colonies and restrained sexual morality in the Victorian home. The Victorian household, in which men and women were restricted from socialisation outside the home and found their most intimate relationships with their siblings, was according to Anderson, a hot-house of repressed incestuous feelings. The early nineteenth century Victorian family had a strict moral code which restricted heterosexual relationships outside of the family making the emotional bonds within the family all the more intense.[654] The extremely close relationship that existed between siblings in Victorian families ignited a panic response to the resemblance of incest in a sister-in-law marriage. [655] The home was the location of virtue and moral order, but an emphasis on familial bonds born of love, affection and intimacy created a space within which too much liberty could lead to lust and licentiousness. In the eyes of theologians, incest was the logical outcome of excessive liberty in the home.[656] In addition, there was a history of on-going concern about incest amongst the working classes. Incest was associated with overcrowded housing and the male members of lower class families who were unable to 'restrain their animal impulses'.[657] Victorian critics of the bill argued that those who favoured the legalization of marriage with a wife's sister were motivated by their own incestuous passions.[658] Therefore, the bills to legalise in-law marriage threatened to expose the licentious passion under the chaste façade of the ideal

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[652] Thomas Bigge, *The Bigge Reports*, 1823, 70 (Australiana Facsimile editions, No. 68, Libraries Board of South Australia, 1966).
[653] McKenzie, above n 638, 42.
[654] This was reflected in the arts, poetry and literature in the period which focused on brother/sister devotion, often at the expense of romantic relationships outside of family.
[655] Anderson, above n 161, 70, 72. Leonore Davidoff and Catherine Hall agree 'the 19th century middle class home, with its pure and happy brother/sister relationships, free from sexual pollution, spawned a twilight world of pornography and prostitution encouraged by late marriage and long periods of adult celibacy. Davidoff and Hall, above n 77, 84.
[656] Connolly, above n 43, 46. In the American context see Jan Lewis, 'The Republican Wife: Virtue and Seduction in the Early Republic' (1987) 44 (4) *William and Mary Quarterly*, 689.
[657] Corbett, above n 164, 6.
[658] "Deceased Wife's Sister," *Saturday Review*, LV, 815; Letter to The *Times*, April 13, 1849, 6.

Victorian home. Nagai has argued that The Deceased Wife's Sister Bill confronted the English public with the shocking reality that the English home was potentially incestuous and polygamous. [659] By rejecting the colonial marriage bills, the immoral sexuality within the sacred Victorian hearth, could be rectified in the colonial space. References to the sexually permissive colonial 'other' supported the binary opposition that helped maintain constructions of sexuality within the Victorian family. This demonstrates that marriage was constructed to regulate sexuality in society and therefore the dominant norms or practical requirements of sexuality in society shape marriage in unique and divergent forms.

Colonial moves towards legalising the union were branded insignificant on the basis that colonials did not have the same elevated level of English middle class morality. The United States of America was also included in this colonial othering process. The United States was incorporated into Britain's Imperial fold by representation as an exotic, uncivilised, colonial hinterland, linked to Britain's other white colonies. Anne Windholz has argued that nineteenth century English rhetoric referenced American's as "cousins" and Britain as the "mother" country.[660] In an effort to associate the marriage law reform movement in England with the sexual immorality of the colonies and other nations, Percy Greg insisted, marriages in other countries "are not examples, but hideous warnings. A cankerous license, a social rottenness simply indescribable, has followed step by step the first relaxation of Christian tradition." Greg claimed that in countries where marriage with a deceased wife's sister is allowed, "incestuous marriages, conjugal unfaithfulness, and facility of divorce are now rife, and are producing consequences which we may well shrink from describing or even contemplating." The Bishop of Oxford said "it would indeed be an evil day for England when we began to take the pattern of our laws from the medley of crude legislation which a score of inexperienced communities had chanced to enact."[661]

The *Saturday Review* cited evidence from America to prove that the legalisation of marriage with a deceased wife's sister had created "a perceptible and painful constraint ... a consciousness of evil tendency which itself is the nature of sin."[662] E Divett referred in parliamentary debate to the example of the American state of Utah – the territory of the

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[659] Nagai, above n 638, 46.
[660] Anne Windholz, 'An Emigrant and a Gentleman: Imperial Masculinity, British Magazines, and the Colony That Got Away' (2000) 42 (4) *Victorian Studies*, 631, 633.
[661] Anderson, above n 161, 73, 82.
[662] "Deceased Wife's Sister" *Saturday Review*, LV, 116.

Mormons who practiced polygamy – as "almost a model nation in the opinion of these marriage law reformers"[663] The Rev C A Fowler deplored the fact that America and Germany, where the divorce law was relaxed and marriage to a deceased wife's sister was permitted, were degenerating into the primitive state of polygamy:

> The tendency of the Christian Church has been to restrict, or to draw tighter, the reigns, which in earlier ages, were cast loose to allow men and women to follow their own irregular passions. Amongst many nations polygamy and incest are not regarded with abhorrence as they are by those minds which have been raised and purified by the teaching of CHRIST in the blessed Gospel. It would be sad indeed if the world were to go back instead of forward in the way of purity, and consign us again to the looseness of heathenism.[664]

Defenders of the prohibition who believed it restrained sexual passion argued that the restraint of sexual passion was a mark of higher civilization. Matthew Arnold's biographer said that Arnold's repugnance to the Wife's Sister Bill was due to "his strong sense. . .that the sacredness of marriage, and the customs that regulate it, were triumphs of culture which had been won, painfully and with effort, from the unbridled promiscuity of primitive life." Theodora Chapman, an anti-feminist moral guardian, argued that the "general note of Christ's teachings is one of restraint of natural impulses-especially in regard to the strongest of human passions," and that human progress is a record of slow steps upward from the brute level. "To annul the prohibition of marriages of affinity is distinctly a retrograde step for us English people to make from the position which we have reached among mankind. It is surrendering a bit of the field of life to the domination of passion which, in the interest of the family, the greatest of human institutions, had been fenced off from that domination."[665] Representation of colonial inhabitants as the 'other'; the sexually permissive; those lacking in domestic propriety; enabled positioning of the English middle class family as supreme in the social and moral hierarchy of the empire. This supremacy was invoked time and again to support the continued prohibition of sister-in-law marriage in the name of preserving the 'English' family. In the *Times* in 1870 the moral inferiority of 'other countries' was emphasised: '[W]e

[663] Nagai, above n 638, 54.
[664] Ibid, 54.
[665] G W S Russell, Matthew Arnold (New York, 1904), 203. Theodora Chapman, "Marriage With a Deceased Wife's Sister," Nineteenth Century and After, LIII (1903), 985.

do not think the marriage relations are in so happy a condition in many of the countries appealed to. There prevails a liberty of divorce and a licence of marriage which is at present very repugnant to English feelings.'[666]

In the House of Lords in 1880 Lord Coleridge said that if 'one or the other', meaning the colonies or England, 'is to give way, it ought not to be this great country, the mother of nations, the home of a domestic purity and happiness... unsurpassed, in the whole history of the world.'[667] In the second reading speech of the *Deceased Wife's Sister Bill* in England in 1907, the Lord Bishop of Hereford continued to maintain the superiority of the English when he said: 'I do not see why it is in any way due to them that because this law, which some of us hold to be an inferior law, has become prevalent in the Colonies, the burden of that inferiority should be laid upon us in this country'.[668] The Lord Bishop appeared to be distinguishing himself and his class from the colonial elites who advocated for legalisation in the colonies.[669]

It is clear that a belief in English moral superiority influenced Imperial policy until late in the nineteenth century. It was still invoked by these staunch defenders of the marriage law, to justify the static position of the English on the issue after 1880, when most of the metropolis had moved to reform the law. However, in the last decades of the nineteenth century, many pro-reformers highlighted the similarities between the English and their colonial brethren, in a bid to illustrate that people of English blood did not view sister in law marriage as wrong, and perhaps not even as constituting 'incest'. The discipline of science came to pervade political and public discourse. There was a growing tendency to define the 'other' in racial and biological terms and there was a growing understanding of incest as defined by biological sexual relations.

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[666] *Times,* 20 May 1870, 9, 26755, col C.
[667] *Parliamentary Debate*, House of Lords, 25 June 1880, vol 253, cc810-32 824.
[668] *Parliamentary Debate,* House of Commons, 22 February 1907, vol 169, cc1151-215 1151. John Percival was appointed the Lord Bishop of Hereford in 1895. Whilst Queen Victoria was opposed to the idea, since Percival was known to favour the disestablishment of the Church in Wales, Rosebery prevailed. Graham Neville characterises him as a 'Low-church Political Liberal'. He attracted criticism (including an excommunication by Frank Weston, the bishop of Zanzibar) when he invited nonconformists to take holy communion at Hereford Cathedral to mark the coronation of George V. He had more success on a national level, championing the cause of adult education in particular – he chaired the first meeting of the Workers' Educational Association in 1903. Sadler, John (2004). "Percival, John (1834–1918)". Oxford Dictionary of National Biography, Oxford University Press at http://www.oxforddnb.com/view/article/35471, accessed June 2010.
[669] For a variety of perspectives on the relative social standing of colonial elites see Martine, above n 346.

Scientific Discourse, the Racial 'Other' and the Biological Basis for Incest

In the late nineteenth century the marriage debate was heavily influenced by growing scientific understandings of sex, race and marriage.[670] Science informed understandings of race and scientific discourse constructed racial difference as the defining characteristic of the 'other'. As we have seen, the moral superiority of the English was still emphasised by some who supported the status quo, particularly in parliamentary debate, but there was a growing tendency to refer to white morality more generally. If the 'heathen' at home and in other countries were seen in similar cultural terms in the early nineteenth century, by the 1840s there was an increase in the popularity of biological understandings of cultural and racial difference.[671]

Imperial administrators and Australian colonial administrations shared the attitude that whites held a superior moral position than the indigenous inhabitants. The Right Honorable Robert Lowe's defence of the morality of the white colonial, during the deputation to the Earl of Carnarvon on the marriage question, illustrates an appeal to similarities. He hoped that the Earl would see that Australian colonials were just like Englishmen, and their morals and marriages just as respectable:

> One speaker has already said that they [the colonists] are merely Englishman residing in another place...If they [the colonists] are not altogether the same constitutionally speaking, they are the same in feeling, in sensibility and, I think in morality, and I do not think that the Colonial Legislature are a bit more likely than the English Government to sanction any flagrant violation of the moral law.[672]

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[670] The term 'race' was used by about 1800 but it was used to refer both to a permanent, fixed, physical or biological type and to cultural, linguistic, religious or family groups. The idea of peoples, nations, classes and races all merged together. As the century progressed scientific notions of physical difference increasingly came to characterise 'race' discourse. Twells, above n 642, 13.

[671] Although Alison Twells argued historians have tended to over-secularise the missionary experience and ignore the central place of religion, and the belief that Christ belonged to all of humanity, the fact that missionaries were motivated by a belief in the common origin of human beings does not cancel out the increasing racial and scientific language constructing understandings of 'difference' in wider society and political discourse. In this context the 'heathen' at home is analogous with the white British convict 'heathen' in Australia. See also Nancy Stephan, *The Idea of Race in Science: Great Britain 1800-1960* (MacMillan, 1982); George W Stocking, *Victorian Anthropology* (Free Press, 1991); Catherine Hall, *Civilising Subjects* (University of Chicago Press, 2002).

[672] Deputation to the Earl of Carnarvon, above n 625, 9.

In 1894 Lord Dunraven introduced the second reading of the deceased wife's sister legalising Bill in the House of Lords by reference to legalisation in nations and colonies where people were of the same 'blood'. The implication was that the moral position of people of the same 'blood', the same racial and biological line, was to be taken seriously. After describing legalisation in France, Lord Dunraven went on to state a case for legalisation in England, by reference to the development in places where people were 'more nearly akin to us in blood'. He explained the process of legalisation across the German Empire and the Scandinavian nations. He then turned to another country 'still nearer to us in blood, the United States', where legalisation of these marriages in the thirteen original States of the Union had been followed throughout the rest of the states. His final comparison was with the people of the colonies, people of 'our own kith and kin...men of our own modes of thought and religion' whom he described as 'ourselves beyond the sea'. In those places legalisation had spread from South Australia to 'every one of them, in New Zealand, in Canada, beyond the Cape.'[673] In the final section of this chapter we will see how legalisation in the colonies, particularly in Australia, created significant pressure for the English to legalise on home soil. Discourse locating colonial Australians as 'ourselves beyond the sea' dismantled the binary moral opposition between the English marriage and the colonial marriage.[674]

As well as constructing understandings of racial difference, science was reformulating incest as a product of reproductive sex and hereditary. Such discourse leant support to the pro-reform movement. Doctors, biologists, phrenologists, social commentators and anthropologists were being drawn into debates about marriage and the family.[675] Hereditary was believed to include the transmission of positive and negative characteristics. It was understood that physical deformities, disease, character flaws and positive characteristics could be transmitted to children based on the phrenological qualities of the parents. Phrenology was a brain science that located innate moral and intellectual faculties in the brain, and a proto-eugenics that fit comfortably with the developing scientific racism of the

[673] *Parliamentary Debate*, House of Lords, 15 June 1894, vol 25 cc1165-204, 1173.
[674] This of course refers only to the white, Christian marriage in the colonies.
[675] W R Wilde, *On the Physical, Moral and Social Condition of the Deaf and Dumb* (John Churchill, 1854); S M Bemiss, *Report on the influence of marriages of consanguinity upon Offspring* (Transactions of the American Medical Association, 1858), 319-425; Alfred Huth, *Index to Books and Papers on Marriage between Near Kin, Appendix to Report of the First Annual Meeting of the Index Society* (Index Society Publications, London, 1879). From the 1860s, the first generation of anthropologists became obsessively concerned with the incest taboo. A Kuper, 'Incest, Cousin Marriage, and the Human Sciences' (2002) 174 *Past and Present*, 158, 159-60. See also Kuper, above n 67.

nineteenth century.[676] Phrenology replaced theology as the guide to the moral and sexual reformation of society. The famous phrenologist George Combe addressed the adverse effects of incestuous reproduction. Marriage between blood relations, Combe wrote, 'tend decidedly to the deterioration of the physical and mental qualities of the offspring'.[677] A weekly column on the science of phrenology and its application to courtship and marriage appeared in the Australian colonial newspaper, the *Matrimonial Chronicle,* first printed in 1879. The first lines in the first issue read: 'Although phrenology is laughed and sneered at by many an educated man in this country, yet we fearlessly assert that there is no science built on a more solid foundation.' The columns went on to explain how the specifics of organ size and scull shape could be studied in courtship for the purposes of securing a partner with a desirable temperament.[678] This is one illustration of scientific discourse within the popular literature circulated amongst the public.

In the middle of the nineteenth century as the debate about marriage to a deceased wife's sister gained momentum, a second debate about cousin marriage began.[679] The protagonists in the cousin marriage debate appealed to science rather than theology.[680] Cousin marriage had been legal for a century but scientists and medical practitioners began to argue that inbreeding may be a cause of congenital defects.[681] Charles Darwin became concerned with cousin

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[676] Connolly, above n 43, 193.

[677] George Combe, *The Constitution of Man Considered in Relation to External Objects* (Allen and Ticknor, 1834), 71.

[678] An example of an extract from the phrenology columns is as follows: 'Take [measure] the distance of the back of the head from the external opening of the ear and you will get the length of the domestic faculties – love of home, friends, children, animals...' *Matrimonial Chronicle* 1 (2) (Aug 1879), 15. The *Matrimonial Chronicle* was what we would describe today as 'tabloid journalism' covering such topics as: how to meet a wife; courting rules; and famous marriage stories.

[679] Until 1540 the Catholic Church branded the marriage of first cousins as unacceptable but parliament legalised marriages between first cousins so that Henry VIII could marry Catherine Howard, who was the first cousin of a previous wife Anne Boleyn. Scarisbrick, above n 178, ch 7-8. However, the move was approved by many protestants and followers of Luther who believed that marriage prohibitions would be based only on the express language of the bible. Following Henry's legislation, cousin marriage was accepted by the main Protestant churches in England in the colonies. Kuper, above n 67, 162. Metropolitan aristocrats in the eighteenth century regraded cousin marriage as perfectly appropriate and in the nineteenth century cousin marriage became more acceptable among the gentry and middle classes. According to Nancy Anderson, it was likely significant that Queen Victoria had married a first cousin and several of her descendants had also married cousins. 'Given the popularity of cousin marriage amongst the landowners of the House of Lords and wealthy bourgeoisie, it is unsurprising that a legislative campaign did not get under way'. Anderson, above n 376, 291. Therefore throughout the nineteenth century while sister-in-law marriage was hotly debated, cousin marriage remained acceptable.

[680] Kuper, above n 67, 83.

[681] The British medical press was raising questions about the risk to offspring. See Charles Brooks, 'The Laws of Reproduction considered with reference to the inter-marriage of near blood relations' (1856) 1 (8) *The Medical World*, 201; James Gardner 'On the intermarriage of reactions as the cause of degeneracy of offspring' (1861) 1 *British Medical Journal*, 290.

marriage and expressed personal worries about hereditary diseases and cousin marriage in particular.[682] Scientific discourse about inter-marriage appeared in deceased wife's sister marriage debate but it co-existed, especially in the English context, with the view that the marriage prohibitions were transcendent and supported by ecclesiastical doctrine.[683] The interest in genealogy did spread amongst the aristocracy and to the bourgeois, and doctors began warning that taints as well as desirable qualities pass from generation to generation.[684] In the late nineteenth century this scientific discourse began distinguishing the biological and reproductive from theological constructions of incest based on biblical law. The following excerpt from the *Nurses Journal* illustrates how scientific discourse was delineating consanguinity from affinity:

> If objections had been made to marriages of consanguinity and it had been made illegal for first cousins to marry, there would have been much which could with force and propriety have been urged. For it is indisputable that the old prejudice against such marriages is founded on physical facts, and that the offspring of such unions are endowed with a double share of every family taint inherited by their parents. But to forbid marriages which can have no harmful result from such a physiological reason, between persons who might reasonably desire to marry is to stretch legislation into tyranny.[685]

The discourse of science was making its way into colonial and English parliamentary debates as early as the 1870s. Mr G V Smith made the following remark in the Victorian Legislative Assembly:

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[682] Kuper, above n 67, 84.

[683] When Francis Galton published Hereditary Genius in 1869, the term hereditary "was then considered fanciful and unusual". Francis Galton, Memories of my Life (London, 1908), 288 cited in Kuper, above 67, 87.

[684] Kuper, above n 67, 86; See also Francis Galton, *Hereditary Genius: An Inquiry into its Laws and Consequences* (Macmillan, 1869). However, as we have seen in the marriage debate, the ecclesiastical constructions of 'natural' sexual relations still held considerable weight in society.

[685] *Nursing Record*, June 23, 1895 in *Comments of the Press,* above n 240, 109. A similar '...as far as any instinct of human nature is concerned, the marriage of first cousins , which is now permitted, is far more objectionable than any marriage of affinity only, and yet it would be thought most oppressive to impose again the old legal disability of the marriage of first cousins. ' *Spectator*, June 23, 1895 in *Comments of the Press,* above n 240, 99-100.

> If an honourable member believed...that injury physiologically would result from it [mdws] – that such marriages tended to deteriorate the human race – he would be justified in opposing it...[686]

A year later, the radical John Bright made a similar remark in the House of Commons:

> Was there any man of common sense who would not say that on every natural ground the marriage of first cousins was more objectionable than the marriage of a man with his deceased wife's sister?[687]

The legislative contradiction between legal cousin marriage and illegal sister-in-law marriage, at a time when scientific understandings of reproduction, hereditary and sexual relations were growing in popularity, was becoming indigestible for the English public.[688] Despite this, the bishops in the House of Lords and their supporters had considerable influence over the marriage debate. References to Church doctrine remained in the debate right up until the turn of the century.[689] The final push for legalisation of marriage to a deceased wife's sister came from within England's empire.

The Influence of Colonial Reform on English Legislation

So often discussion of Imperial/colonial history centres around the effect of Imperial law on the development of colonial law. However in this case, it was colonial legislation which played a large part in the eventual legalisation of marriage to a deceased wife's sister in England, after over seven decades of debate.[690] In chapter seven it was revealed that the Australian colonial authorities, particularly in South Australia, were very persistent about obtaining assent to their marriage bills and recognition of their marriages in England. The next section demonstrates that in addition to the discourse of science, the position of England within the Empire was a factor that influenced the construction of marriage at the turn of the century.

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[686] (Vic) *Parliamentary Debates*, above n 276, 1968 (Mr G V Smith).
[687] *Parliamentary Debates*, House of Commons, March 6, 1850, vol 109, col 429 cited in Kuper, above n 67, 66.
[688] See *Comments of the Press*, above n 240.
[689] For example see *Parliamentary Debates,* above n 253.
[690] See Finn, above n 394.

In 1871 there were nearly fifty colonial dependencies. In seven colonies, marriage with a deceased wife's sister was valid.[691] In thirty-five colonies the union was considered voidable as it had been prior to 1835 in England.[692] Finally, in seven colonies, the marriage was void by virtue of the operation of the Imperial Act or by colonial legislation.[693] Therefore, there were 40 colonies in 1871 in which marriage to a deceased wife's sister was legal and a mere seven in which such marriages were illegal. English reformers used the colonies to advocate for legal change in the mother country.

As was revealed in chapter seven, South Australia was a pioneer in deceased wife's sister marriage legislation. The granting of royal assent to bills legalising sister-in-law marriage across the empire in the 1870s and the passing of the *Colonial (Marriage Deceased Wife's Sister) Act*, reflected a significant change in the nature of the empire. It was no longer a single entity around the central mother country, with a single set of moral and legal values, but a federation of colonies, with hundreds of different legal and sexual boundaries.[694] This chapter has shown how the English maintained their prohibition by reference to the colonial 'other'. However, they were eventually forced to reconstruct the meaning of marriage and incest, in part, because of new found meanings within the Empire. The Deceased Wife's Sister Bills illustrate that the relationship between England and her colonies was not always hierarchical, nor did it flow one way from the centre to the periphery. The sexuality which the English banished to the margins at the beginning of the nineteenth century played an important role in changing the English marriage law at its end. The Empire wide marriage debates reveal that which was uniquely English could become a great impediment to the unity of empire.[695] The variability in understandings of marriage created a whirlwind effect in which ideas about natural marriage choices were passed around and new constructions emerged.

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[691] British Guiana, British Kaffraria, Cape of Good Hope, Ceylon, Heligoland, Natal, South Australia. In some cases the marriage was valid when a dispensation was granted. See 'The Law Relating to Marriage with a Deceased Wife's Sister in the Colonies of Great Britain' above n 577, 6.

[692] Antigua, Western Australia, Bahamas, Barbados, Bermuda, Canada West, Channel Islands, Dominica, Flakland Islands, Gibaltra, Gold Coast, Grenada, Honduras, Isle of Man, Jamaica, Montseratt, Malta, Mauritius, New Brunswick, New Foundland, New South Wales, Nevis, Nova Scotia, Queensland, St Christopher, St Helena, St Lucia, St Vincent, Sierra Leone, Tasmania, Tobago, Trinidad, Turks & Caicos, Virgin Islands. These were acquired or established before 1835 (the date of *Lord Lyndhurst's Act*) and therefore no Act prohibiting the marriage applied. These colonies did not have ecclesiastical courts and the English courts had no authority over marriages made in them, therefore the marriages were technically voidable but in a practical sense indissoluble. Ibid, 7.

[693] Canada East, Hong Kong, Labuan, Lagos, New Zealand, Prince Edward Island, British Columbia and Vancouver Island. Ibid, 8.

[694] Nagai, above n 638, 55.

[695] Ibid, 58.

The introduction of the South Australian Bill in 1870, after two earlier Bills were disallowed, was motivated at least in part by appeals from the English Marriage Law Reform Association[696] who sent a draft Bill to the South Australian Parliament in 1870.[697] The first reference to the colonial position in the Imperial parliament came in 1872, where a proponent of reform suggested that the giving of assent to the South Australian Bill strengthened the case for reform.[698] In a document prepared by the Colonial Office it was stated 'the recent sanction by Her Majesty's Government of the South Australian Bill, is an admission that there is in such unions nothing opposed to religion or morality and this 'well advised step must... be followed in all parts..'[699]

After the colonial Acts had received royal assent English reformers used the colonies to advocate for legal change in the mother country. The case for reform was strengthened by reference to widespread reform in the colonies and the absence of a harmful result.[700] Once more, referring to colonial developments in support of the Bill, Captain Jessel reminded the House of Commons that the Bill originated in the colonies and brought the House face to face with the colonial view of the matter, the whole of the evidence in favour of the Bill came from the colonies, they had unanimously demanded that the Bill be passed, and almost the whole world was in favour of the principles of the Bill.[701]

Some pointed to the Imperial duty of the government to pay attention to the almost universal colonial legalisation of such unions:

> It seems to me an extraordinary anomaly and injustice that marriages which are valid in every self-governing British colony, under Acts approved by the Crown, should still be considered invalid, or be liable to have their validity disputed for any purpose, when the parties or their children come to the mother country, which....they regard as home.[702]

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[696] (South Australia) *Parliamentary Debates*, Legislative Assembly, col 1657, 9 Feb 1870.
[697] (South Australia) *Parliamentary Debates*, Legislative Council, col 162, 9 June, 1870.
[698] Finn, above n 394, 36.
[699] The Law Relating to Marriage with a Deceased Wife's Sister in the Colonies of Great Britain' above n 577, 9.
[700] *Parliamentary Debates*, House of Commons, 5 Feb 1902, Series 4, Vol 102, Col 424.
[701] *Parliamentary Debates*, House of Commons, 24 April 1901, Series 4, Vol 92, col 1243.
[702] Ibid, col 1193, Sir Brampton Gurdon.

During the House of Commons debate in 1902, Sir Joseph Lees QC read out the operative provisions of the New South Wales, Queensland and Western Australian legislation.[703]

A letter from the Governor General of Australia, Lord Northcote to Mr Lyttleton in 1904 referenced the on-going debate about the influence of colonial legislation on English developments: 'My Ministers do not desire to be considered to be intruding on the controversy which has subsisted for many years as to whether the British laws should be assimilated to those of Australia and other parts of the Empire...'[704]

Since mid-century, respected Englishmen had travelled abroad to make affinity marriages. For example, Sir Holman Hunt, a famous English pre-Raphaelite painter, wed his deceased wife's sister in Switzerland in 1875 with the assistance of his friend Dinah Mullock-Craik, the author of pro-reform novel *Hannah*, discussed in chapter five. Hunt was later to fight for the *Deceased Wife's Sister Bill* as Chairman of the Marriage Law Reform Association. Charles Joseph LaTrobe, the first Governor of the Colony of Victoria, also travelled to Switzerland in 1855 and married his deceased wife's sister Rose De Meuron. Interestingly, LaTrobe was not given another colonial post by the Imperial Government after the marriage, despite promises beforehand that he would be granted a position. He too, became involved with the English Marriage Law Reform Association, writing to the President, Joseph Stanbury, for advice on his legal position in the colony of Victoria.[705] No doubt such marriages and the involvement of well-respected English men not only increased the visibility of deceased wife's sister marriages taking place outside England but also increased the pressure on the English parliament to accept that the union was within the sexual morality prescribed in England, as was the case elsewhere. It is telling that even in 1855 Mr LaTrobe was well supported by his

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[703] *Parliamentary Debates*, col 424 cited in Finn, above n 394, 37.

[704] Despatch from the Governor General of Australia to Mr Lyttelton, on the subject of Marriage with a Deceased Wife's Sister, 12 December, 1904, South Australia. (Darling & Sons, 1904). Others continued to argue that the colonial and English laws should be kept quite separate. One parliamentarian forcefully rejected the suggestion that the British government should follow the colonies lead: '[W]e must follow the example of the colonies in this matter. But are we in this matter to follow their law? It is a very good thing that we should support the colonies in all Imperial matters, but when we give the colonies self-government it is one thing to say "We won't legislate for you; you must legislate for yourselves," and it is quite another thing to say that we in future should be legislated for by the colonies, for that is what you are asking.' *Parliamentary Debates*, Series 4, Vol 92, col 1199, 24 April 1901 House of Commons.

[705] See Letter from Fanny Perry to Charles LaTrobe, 10 Sept, 1855 (MS 13354/33, Fonds Petitpierre, Archives de l'Etat, Neuchâtel). The author would like to thank Diane Reilly for kindly supplying copies of LaTrobe's letters and personal papers, sourced during research conducted in Switzerland.

friends and colleagues in the colony, including the Bishop of Melbourne and his wife, who wrote letters supporting Latrobe's decision to make the union. Fanny Perry wrote:

> My Dear Mr LaTrobe, I knew it all! I have for some time had an impression that you were going to marry...I confess that had it been anyone else I should have felt a kind of uncomfortable feeling about it, but as it is, my dear husband and I unite in offering you our warmest wishes...'[706]

Supporters of reform in England repeatedly emphasised the fact that such a marriage was perfectly legal in other countries. In 1851, the freshly formed Marriage Law Reform Association, sent questionnaires to the United States and published the replies in a pamphlet entitled *Letters from the Right Rev. Bishop McIlvaine of Ohio, and other Eminent persons in the United States of America*, in favour of Marriage with a Deceased Wife's Sister. The American answers collected in the pamphlet characterise these marriages as 'natural and suitable', and as promoting 'domestic happiness'.[707] In 1873 Rev Applebee travelled from London to Boston where he delivered a speech on the subject at a public meeting. He argued that England had the 'shame' of standing completely alone among the nations of the world, stating that none of the predicted social disorders had occurred in New England or Germany or the Catholic countries where the marriage was legal. His words highlight the continuing role of the 'moral other' in maintaining the prohibition in England:

> They [Englishman] emphatically thank the Lord that they are not as other men: not as this benighted Roman Catholic, nor as this benighted Protestant German, and beyond all, not as this incestuous New Englander.[708]

The comparison with other British colonies and the United States became an issue for the English when legalisation began to take place in the 1870s and 1880s because colonials were asserting a sexual morality different from that in England and spreading rapidly

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[706] Ibid.

[707] *Letters from the Right Reverend Bishop McIlvaine of Ohio,* above 412, 7-8; *People* reported that the Earl of Dunraven had cited the legalisation and satisfactory results in the United States, Canada, Australia, France, Germany, Sweden and Norway in support of reform in England. *People*, June 17 1895 in *Comments of the Press,* above n 240, 107.

[708] Reverend J K Applebee, 'Marriage with a Deceased Wife's Sister' (Speech delivered at a Public Meeting in Boston, 11 Feb 1873) (Journal Printers Office, Birmingham) 5.

throughout the common law world. Applebee believed Englishmen were not so superior to other civilised nations as to be able to disregard the example which other civilised nations set. In the House of Lords in 1880, Lord Granville favoured the use of the colonies as a testing ground for change in the marriage laws. He suggested that England may learn from the experience of the colonies, and if bad results do not occur, that the English might be encouraged to make the change.[709] The idea that the Imperial power might learn from its colonies was taken up by Jeremy Finn in his article 'Should we not profit from such experiments' which identified a handful of legislative instruments, including the deceased wife's sister legislation, which the English appeared to test run in their colonies.[710]

At the Colonial Conference in 1887 Mr Downer, in arguing that the English Government recognises the issue of valid colonial marriages, for the purposes of inheriting land in England, said that England was being left behind on the marriage issue by her own empire as well as the rest of the world.

> I think there is no country in Europe in which these marriages – that is to say marriages in the colonies – would not be recognised. They would be recognised I think in every one of the United States. They would either be immediately recognised with no question at all by most of the States of Europe, or their recognition could easily be obtained by a very simple process; England is the only country in which marriages which have been in effect sanctioned by the English Government in the colonies are not recognised.[711]

As shown in chapter seven, in the main, the colonists advocated for English recognition of colonial marriages, rather than for a change in the English law. Mr Downer stated at the Colonial Conference that he 'would not presume to express any opinion to the Imperial Government on the question of her own laws'.[712] However, the reformers of the English marriage law were firmly united with the colonies, forming a decisive majority. It was natural

[709] *Parliamentary Debate,* House of Lords, 25 June 1880, vol 253 cc810-3, 825 (Lord Granville).
[710] Finn, above n 394.
[711] *Proceedings of the Colonial Conference*, above n 616, 9.
[712] Ibid, 11.

that the *Colonial Marriage Act* intended to recognise marriages in England, was proposed in tandem with an English Bill to legalise at home.[713]

In the late nineteenth century in the colonies there was a feeling that the English refusal to recognise colonial marriages, even after assent had been granted, had in Mr Downer's words 'affixed a stigma to the marriage relations in the colonies' which prevented colonial inhabitants from returning to the 'Mother Country'[714]. Mr Wisdom, representing Canada at the Colonial Conference, also suggested that the lack of English recognition created a 'feeling of irritation' and tended to 'throw a slur upon our marriages'. A third speaker at the colonial conference emphasised the relevance of the social position of those who married in the colonies and then returned home; 'when they come here, they are looked upon in...a social light almost as persons who are not married at all.' Although the promoters of English recognition of colonial marriages often referred to the grievance in regards to inheritance of real property, they were concerned with complete recognition in England for the purposes of reinforcing that a marriage in the colonies carried the same social weight as marriages performed in England.[715] In this sense, the push to have colonial marriages recognised in England was - to use contemporary language – as much about discrimination as it was about money.

Conclusion

Despite references to the essential, fixed and biblical elements of marriage as an institution, the English state and colonial legislatures saw themselves as capable of shaping marriage. This chapter has shown that the debate about marriage to a deceased wife's sister was an empire wide issue. Therefore, marriage was constructed in different shapes in different societies, and those in power were forced to defend their respective constructions of marriage. Often that defence occurred by reference to 'natural' or God given sexual morality in opposition to 'unnatural' or sinful sexual behaviour. Constructions of Victorian sexual morality, marriage and family in nineteenth century England were erected in opposition to the colonial other. English anti-reformers relied on the alleged relative immorality of colonials to dismiss the significance of colonial moves to reform the marriage law from within the empire.

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[713] Nagai, above n 638, 57.
[714] *Proceedings of the Colonial Conference*, above n 616, 13.
[715] Ibid, 19-20.

However, scientific discourse came to influence notions of difference and of incest in the last quarter of the nineteenth century. As marriage to a deceased wife's sister was legalised across the empire, pro-reformers highlighted the similarities between Englishmen and white colonial brethren, and used colonial legislation as an example in the House of Lords.

By the turn of the century the meaning of incest had transformed entirely and was defined in scientific and biological terms. The replacement of biblical formulations of incest with scientific formulations, in conjunction with the empire wide abandonment of the marriage to a deceased wife's sister prohibition, led to increased support for legalisation of the union in England in the last two decades of the nineteenth century. By 1907 when the prohibition was finally abolished, disagreements over biblical interpretation had largely been set aside, though the positioning of the Church in opposition to the state on a matter of morality remained the primary concern for a minority of opponents. Resistance continued from some quarters, but the passing of the *Colonial Marriages (Deceased Wife's Sister) Act* in 1906 increased the pressure on English parliament and in part forced the Imperial Act legalising marriage to a deceased wife's sister in England in August 1907.[716]The following chapter examines the passage of the final English *Marriage to a Deceased Wife's Sister Act.*

[716] *Deceased Wife's Sister Marriage Act*, 1907 (7 Edw 7, c 47).

CHAPTER NINE

The Annual Blister Bursts: Legalisation in England[717]

The protracted nature of the reform movement to legalise deceased wife's sister marriage in England has enabled an in-depth analysis of the process by which colonial marriage diverted from the English model and how English marriage changed by the turn of the century. It has highlighted that marriage partners are included or excluded by legislators who are vested with the power to regulate marital institutions and to decide who gains admittance, as part of their authority over the local health, safety, and welfare of the community.[718] The way in which this authority is exercised depends on the variable cultural factors discussed in previous chapters. By 1907 there had been several marriage to a deceased wife's sister bills pass through the English Parliament. Between 1851 and 1889 the House of Lords rejected bills thirteen times and the House of Commons also rejected them a number of times, though between 1849 and 1907 bills were carried in the Commons by large majorities nineteen times.[719] In 1858 a Bill passed its third reading in the House of Commons, seven years after the formation of the Marriage Law Reform Association[720] but it was rejected by the House of Lords. Between 1870 and 1907, with the exception of 1904 and 1905, a Bill had come before parliament every year only to be rejected.[721] The closest a Bill came to passing before 1907 was in 1883 when one was read a second time in the House of Lords and in 1896 when another was read a second time and finally passed through the Lords, only to suffer extinction in the other House.[722]

Why did the Bill to legalise marriage with a deceased wife's sister finally pass both Houses of Parliament in 1907? Cynthia Behrman, the only historian to have examined the passing of the 1907 Act over fifty years ago, argued that extra parliamentary support for the Act had not been well organised over the years. This was in part because of the stigma associated with the issue and the resulting disincentive for individual's speaking out on the subject.[723] The formation of the Marriage Law Reform Association in 1851 and the Association's

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[717] The marriage question was referred to in the Gilbert and Sullivan opera *Iolanthe*, in which the Queen of the Fairies sings "He shall prick that annual blister, marriage with deceased wife's sister".
[718] Cott, above n 18, 4.
[719] *Parliamentary Debate*, House of Lords, 20 Aug 1907, vol 181, col 348.
[720] *Parliamentary Debate*, House of Commons, 7 June 1907, vol 175, cols 962-1020, 962 (Viscount Helmsley).
[721] Ibid.
[722] *Parliamentary Debate*, above n 719.
[723] Behrman, above n 170, 470.

relationship with advocates of change in the colonies appears to have provided more momentum to the movement. The main differences between previous Bills and the successful Bill were that the successful Bill was for the first time a Government measure rather than a private members Bill; and it was drafted along the lines of the *Colonial (Deceased Wife's Sister Marriage) Act* which had passed both Houses of Parliament the year before. Behrman argued that the previous year's Bill seemed to make it psychologically easier for Parliament to accept the idea of change.[724]

More importantly, the abolition of the prohibition was a reflection of the cultural changes that had occurred during the preceding seventy five years. This thesis has shown that the states chosen purpose for the institution of marriage and the chosen norms that the institution prescribes about family relationships, sexuality, gender roles, economics and so on are reflected in gradual changes in the shape of marriage. In addition, economic, political, religious and social change facilitates the re-moulding of the marriage institution over time to reflect the society in which it operates. Some of these cultural changes have been discussed in earlier chapters as having occurred much earlier in the century in the Australian colonies, or having never occurred at all because of the differing social and religious context. For example, by 1907 the relationship between church and state in England had shifted. The comments in the final debate and in the press reflected a new tolerance for diversity of religious and secular persuasion. The major push for reform came from dissenters, and from liberal minded people, who felt that the law of the land should not impose theological proscriptions upon those of different religious persuasion.[725] As was explained in chapters three and six, these were strong features of legal change in the colonial context several decades earlier.

In the last decade of the nineteenth century the Church of England seemed increasingly isolated, as reform was supported by Nonconformist and Roman Catholic opinion. Queen Victoria was in favour of the Bill, and the Prince of Wales spoke and voted for change in the House of Lords.[726] By 1907 the issues that the Bill presented for the relationship between marriage, church and state, rather than natural or biblical law, were the central tenets of opposition to the Bill. Opposition was based on the ground that the Marriage Bill introduced

[724] Ibid, 495.
[725] Behrman, above n 170, 494.
[726] Bennett, above n 21, 669.

two different kinds of marriage, establishing one standard of morality for the State and another for the Church.[727] During the second reading of the Bill in the House of Commons in February 1907, Lord Robert Cecil said the Bill established two distinct classes of marriage, one which would be lawful from a civic point of view and another that would be unlawful from an ecclesiastical point of view.[728] He rejected the Member for Barnard Castle, Arthur Henderson's assertion that there was a sharp distinction between the law of God and the law of Churches, and parliament was not bound by the law of the Church. Lord Cecil argued that the law of God could only be communicated through the Church.[729] A letter to the editor of the *Times* asserted that legalisation of the marriage placed the law of the State in direct conflict with the law of the Church and all of Christendom.[730] Protectors of the Church of England remained outraged by the Bill because they saw the passing of the Bill as a direct slandering of the Church of England. However they were in the minority and the House of Commons voted that the bill be read a second time 263 to 34.[731] Motion was made by Sir Brampton Gurdon that the Bill be committed to the Standing Committee on Law and the house divided 257 to 41.[732]

Nancy Cott has argued that State legislatures altering the terms of marriage have often found cover in divine mandate or the law of nature, yet they have not hesitated to exercise their own jurisdiction to alter marriage.[733] Discussion of the division between civil and ecclesiastical definitions of marriage during the 1907 debate highlighted the state's capability to define marriage. The debate revealed that the marriage institution, far from being a natural institution with essential and unchangeable attributes established by God, was a political creation. The legislature had the capacity to define marriage by reference to religious belief or perceived 'truths' expressed in the scriptures, as much as they had the capacity to define it by reference to alternative 'truths', such as those established by science or by the emergence of new familial norms.

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[727] Cries of "No, no." *Parliamentary Debate*, House of Commons, 22 Feb 1907, Vol 169 cols 1151-215, 1161 (Lord Robert Cecil).
[728] Ibid.
[729] Ibid,1164.
[730] W R W Stephens, The Deanery Winchester, Letter to the Editor, *Times*, Mon 3 Feb 1902, Issue 36681, 7, col E.
[731] *Parliamentary Debate*, House of Commons, Feb 1907, vol 169 cols 1151-215, 1208 (Division List no 16).
[732] Ibid, 1211 (Division List no 17).Gurdon was Liberal member for North Norfolk from 1899 to 1910. He was hostile to British policy during the South African War and he was identified with the 'pro-Boers'. His principal parliamentary achievement was successfully introducing the bill that legalized marriage with a deceased wife's sister in 1907. Oxford Dictionary of National Biography Entry, Sir Brampton Gurdon, at http://www.oxforddnb.com.simsrad.net.ocs.mq.edu.au/view/article/57876?docPos=2, accessed 22 October 2011.
[733] Cott, above n 18, 6.

When the Bill (as amended by the Standing Committee) was debated further in August, the discussion of the law of church and state continued. Lord R Cecil put that an amendment be inserted in the Act to confine the operation of the Act to persons who had not declared themselves members of the Church of England. He said there was no doubt in the law of the Church and that members of the Church of England would not contract the marriage regardless of civil legislation. However the Amendment did not garner much support and did not pass.[734] Mr J D White moved to insert words in the Bill which would enable a clergyman to decide for himself whether he would or would not solemnise such a marriage, and protect him from civil or ecclesiastical penalties, whatever he chose. This was the application of liberal individual choice not only to laymen but to the clergy. Lord Cecil was incensed by the suggestion because it would assert the power of parliament to legislate for members of the church as well as their leaders, being the clergy. He stated that 'the progress of the Bill made it clear...that in spite of the protests of Honourable Members this was one of the insidious attacks on the Church of England.[735] After a long debate the opponents of the Bill, admitting they were 'in a very small minority', registered their protest but the Bill was read a third time and passed.[736]

During the second reading of the Bill in the House of Lords, Lord James of Hereford advocated the separation of church and state. He argued that only parliament could legislate for the present day population. He protested against those who relied on the opinions of the early Bishops for rules as to what was right and wrong 'for the social life of today'.
He implied that the population included diversity in religious and secular persuasion and asked how 'people could accept the opinions of a Church with which they have nothing to do?' Highlighting the power of the state to construct marriage he said 'There can be no law in this matter but the law of Parliament.'[737]

By the time of the third reading of the Bill in the House of Lords, opponents of the Bill had relinquished arguments against the passing of the Bill altogether, in favour of its manipulation to leave the Church of England clergy unaffected by it. The Marquess of Salisbury urged that the clergy be left out of the new legislation and not be compelled to perform the marriage. For

[734] Mr Rawlinson seconded the amendment. Sir Brampton Gurdon rejected it, saying that it had already been fully discussed previously in Committee. *Parliamentary Debate*, House of Commons, 14 August 1907, vol 180 cols 1423-512, 1466-1469.
[735] Ibid, 1499-500.
[736] Ibid, 1512.
[737] *Parliamentary Debate*, House of Lords, 20 August 1907 vol 181 cc348-419, 367.

the first time in the history of the debate, many Church of England opponents agreed that an individual should be permitted to obtain civil sanction for the marriage if it did not conflict with his moral and religious code.[738] However, they argued that the clergy should be able to maintain the law of the Church by refusing to conduct ceremony for the union.

The Marquess of Salisbury used the colonies of Canada and South Africa as examples, suggesting that the canons in force in South Africa expressly directed the clergy not to conduct ceremony for marriages within the prohibited degrees.[739] The Marquess' clear aim was to secure the position of the Church and its clergy. However, he wished to do so by accepting the principle of the separation of church and state. He argued that people were entitled 'in a free country' to disregard the rules of the Church of England and take advantage of the civil law's permissions.[740] When the Marquess moved an amendment to exempt the clergy of the Church of England from the Bill, effectively preventing them from legally performing the marriage even though it was to be legal in a civil sense, there were many objections. Lord Tweedmouth objected on the basis that the amendment placed the Church of England clergy on a different footing to the clergy of all the other religious denominations in the Kingdom. He said that it enabled the Church of England to use civil statute to back up the laws they made for their own clergy.[741]

This sentiment is similar to that expressed in the Australian colonies thirty years earlier, where the special treatment of the Church of England over other denominations was not widely accepted. The lack of establishment in the colonies made arguments such as the Marquess of Salisbury's redundant from the outset. As explored in chapter three, the lacking association between the marriage controversy and church establishment in the Australian colonies was one of the differences that led to legalisation in the colonies. A letter to the *Times* in 1908 illustrates how marriage to a deceased wife's sister remained a symbol of disestablishment even in the year after it was legalised in England: 'If Establishment means that the living law of the Church of England only exists during the pleasure of Parliament, the movement for disestablishment would come from within and be directly linked to the difficulty of marriage laws.'[742]The minority who continued to object to the Bill in 1907 were

[738] *Parliamentary Debate*, House of Lords, 23 August 1907, vol 181, cols 1250-89, 1261.
[739] Ibid,1259.
[740] Ibid, 1261.
[741] Ibid,1276, 1263.
[742] W Digby Thurnam, Letter to the Editor, *Times,* 14 Aug 1908, Issue 38725, 11, col F.

concerned about the implications for the Established Church. By the turn of the century, non-conformist pressure and looming disestablishment called the authority of the Established Church on marriage to a deceased wife's sister into question in England. Although England had, for seventy five years, excluded in-law marriage in order to maintain marriages' true and essential form, whilst colonials and other nations strayed, by 1907 this natural 'exclusion' had become an optional feature that the state could include or exclude as they wished.

During the final reading of the successful Bill on 26 August 1907, Lord Courtney's statement demonstrates that opinions on the role of the Church and the role of the individual in the personal matter of marriage had shifted. Lord Courtney stated: 'It might have been possible to have left the Church out of the Bill, but it would have been at the serious and grave risk of leaving the nation out of the Church.' Highlighting the role of marriage as a public institution he argued that if the Church insisted on prescribing morality that did not reflect the conscience of the nation the Church would be left behind.[743] A few days earlier, a letter to the Editor of the *Times* supporting the severance of church and state and objecting to the proposal that the Bill not apply to the clergy wrote: 'If she (the Church) desires to have a voice as a society on matters to which the legislature has spoken, she ought to separate herself entirely from the State. She has no right to accept the pay and to take the advantages afforded by the nation, and at the same time to repudiate for her members the ordinary laws of the nation.[744] Seven decades earlier when the Bill was first debated there was no perception of an English national 'conscience' separate from the Church. However, the discourse of 1907 is reminiscent of the language of liberalism and religious tolerance expressed in the colonial parliamentary debates discussed in chapters three and six.

Liberal individual arguments had always been presented by pro-reformers in the English context but they had previously not been powerful enough to force reform. As discussed in chapter six, the main argument in favour of the Bill was that individuals who wished to enter such a union should be able to do so if there was no proof of spiritual, moral, or physical harm. The minority who continued to oppose the Bill in 1907 did so either on the basis of

[743] *Parliamentary Debate*, House of Lords, 26 Aug 1907, vol 182, cols 4-23, 7.
[744] T D Napier, Letter to the Editor, 22 Aug 1908, Issue 38732, 7, col E.

their objection to that premise, or on the basis of the belief that proof of spiritual and moral evil was at hand. [745]

In relation to the former, the Bishop of London rejected the premise that a man should be able to make his own decision about morality in his home because he believed human instinct was too weak to allow individuals to make such decisions.[746] As discussed in chapter eight, this was a commonly held belief in the nineteenth century that has featured prominently throughout the English debate. Like many of those who argued against marriage to a deceased wife's sister throughout the decades, he saw the law of both the state and the Church as a barrier to the wild human passions and immorality waiting in the wings. Although opponents were still presenting this argument in the final debate, there was more support for individual choice than there had been in previous years.

During the second reading speech of the Bill in the House of Lords, Lord Tweedmouth, the First Lord of the Admiralty, appealed to individual freedom of choice and religious tolerance, both of which drove the colonial Bills through their respective parliaments:

> [M]ay I assure your Lordships that in making ourselves responsible for this Bill the Government are actuated by no spirit of hostility towards any form of religious conviction, and have no desire to do violence to any conscientious scruples, however sensitive. All that we ask your Lordships to do is to permit those men and women who do not share such scruples, and who do not accept the premises on which they are based, to obtain legal sanction, the sanction of civil law, for a form of union which conflicts neither with their own moral and religious code, nor with the general feelings of Modern Europe, the United States, and our own self-governing Colonies.[747]

Lord Tweedmouth argued that 'entire freedom of conscience' should be given 'to all individuals and to all Churches to maintain their beliefs and to shape their conduct

[745] See Duke of Northumberland arguing against this at *Parliamentary Debate*, House of Lords, 20 August 1907, vol 181, cols 348-419376. No member argued on the basis of physical harm because it had been accepted that affinity marriage or sexual relations would not be physically damaging.
[746] Ibid, 386.
[747] Ibid, 353.

accordingly' and an 'equal degree of freedom' should be given to 'those who take a different view..' 'In questions of theology the civil law of the land should adopt an impartial attitude and leave full liberty of conscience to all shades of opinion...'[748] Lord James of Hereford put a similar argument to the House: 'if a law intervenes between the wishes and tendencies of mind of individual citizens in the State, good cause must be shown. You must bear the burden of proof. You have no right to control your fellow creatures unless you can give good cause for your action.' [749] The Lord Chancellor's impassioned speech described the Act of 1835 as 'a law of rigidity rather than toleration that imposed ideas of right and wrong upon other people who were not in agreeance.' He said that Conservatives and Liberals and enormous majorities in the House of Commons had favoured the Bills for centuries and it was time to 'allow people to judge for themselves in their domestic affairs...'[750] In the final reading in the House of Lords, the Duke of Northumberland criticised two of the highest judges in the land – the Lord Chancellor and the Lord James of Hereford – for suggesting that they were bound by their own consciences rather than the authority of the Church in the matter of marriage but the Lord Chancellor continued to insist 'I reserve to myself the right to judge for myself, and I shall never surrender that right to any human being'.[751] There had been a cultural shift in the public and political view of the role of the church and state in the regulation of marriage. Although marriage was to remain a public institution, it was also viewed as a private institution, and a majority were in favour of individual freedom of choice as to the moral worth of marriage to a deceased wife's sister.

Colonial Experience

Objection to the Bill on the basis of the belief that proof of spiritual and moral evil was at hand was evident in the final debate but the argument was weakened by the colonial and international experience of having legalised the marriage. As discussed in chapter eight, the legalisation of the marriage across the empire and the world made it very difficult for England to leave the prohibition in place. This was in part due to the claim that England was being left behind by her own empire and in part because the colonial experience provided proof that legalisation did not lead to great evil.

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[748] Ibid, 354.
[749] Ibid, 366.
[750] Ibid, 384.
[751] *Parliamentary Debate*, House of Lords, 26 Aug 1907, vol 182, cols 4-23, 17-18.

All of the Bill's supporters pointed out that there was pressure from the colonies and dominions for passage of remedial legislation, and they emphasised the need to prevent colonists' feeling they were being slighted or treated as second class citizens.[752] In chapter eight we saw that throughout the decades reformers referred to the colonial Acts in support of reform in England. When the *Colonial (Deceased Wife's Sister Marriage) Bill* was put to the English Parliament its purpose was said to be solely for removing the grievance of colonials, but the colonial Act featured prominently as a supportive basis for the Imperial Act the following year. The Earl of Shaftesbury sought to separate the advent of the *Colonial Marriages Act* from the debate over English legislation, rejecting the proponent's argument that the Empire could not have one law in one part and another across the seas. He said the Act for the colonies was passed without opposition with the assurance that it would not affect English law: 'Now what are we told? A new kind of Imperialism is brought forward... I submit that that is carrying the feeling of Imperialism much too far.'[753] He rejected the idea that being part of Empire meant that the mother country should adopt the laws of the daughter states, an argument that had been made in years previous and was explored in more detail in chapter seven. The Lord Bishop of Canterbury also rejected the constant reminder of legalisation in other countries and the colonies. He implied that the position and dignity of women in the German family were not equal to that in England and that in the United States the weakest part of the domestic legislation was their marriage law.[754]

Opponents were often successful in arguing that the English should not follow the colonial lead, by distancing the English from the colonial (chapter eight), but thirty years on colonial marriage law had made obsolete two of the oppositions primary arguments: first that legalising the union would lead to great evils such as the breakdown of the family; and second that there was no principle on which legalisation was based and therefore the legislature was venturing into unknown territory in an area of great significance for the stability of the nation.

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[752] Behrman, above n 170, 495.

[753] *Parliamentary Debate*, House of Lords, 20 August 1907, vol 181, cols 348-419, 354.

[754] Ibid, 363. The 'othering' process is described in chapter eight. On 22 August 1908 a letter to the editor from a Colonist was published in the *Times*. The Colonist rejects his Grace of Canterbury's statement in parliament setting the developments in marriage law in the colonies apart from Britain on the grounds that their 'home life in a sparse population was subject to conditions other than our own.' The Colonist went on to suggest that it was impertinent to 'stigmatise not only our own Colonies but the United States of America and the great German Empire as given over to sexual vice, and their clergy as blaspheming when blessing a marriage between a man and his deceased wife's sister.' Letter to the Editor, *Times*, 23 Aug 1907, Issue 38419, 10, col F.

Opponents of reform argued that legalising the union lead to the breakdown of the family and moral degeneration and therefore control of individual freedom by the legislature was justified. In chapter five the discourse of 'family' in nineteenth century England and Australia was examined. The novels, alongside the discourse of 'family' in parliamentary debates and newspapers, illustrated how marriage to a deceased wife's sister was perceived as a threat to what was believed to be natural family relationships, particularly between siblings in blood and in law. The Bishop of London said that tens of thousands in his diocese watched the parliamentary proceedings with eager anxiety because they believed that the authority of their religion and the purity and happiness of their homes was being shaken by the Bill. He quoted the Archbishop Temple who explained in 1883 how the *Marriage to a Deceased Wife's Sister Bill* would destroy the beautiful relations existing in hundreds of English homes:

> The principle begins with the consecration of the family. The purpose is to guard and defend the household – to consecrate a circle within which there shall be the warmest, strongest, deepest affection without the slightest touch or breath of passion. Then it follows immediately that when one of this consecrated family marries, he brings in the wife under the same consecration, because she is to find in her husband's father and mother, a new father and mother, and in the husband's brothers and sisters, new brothers and sisters. And she too should be a consecrated thing in their eyes, and there should be the deepest and warmest affection between them, never touched by the breath of passion.[755]

Chapter five demonstrated how the commonly employed maternal pro-reform narrative that characterised a sister-in-law wife as passionless, chaste and full of maternal motivation to care for her grieving family, attempted to re-frame the union so it would fit within the perception of marriage and family expressed in this passage. The relationship between the perceived position of the sister within family and the deceased wife's sister prohibition was described succinctly in a letter to the *Times* in September 1907: 'The idea that social relations within families would be destroyed by the *Act* came from the fact that society was said to permit

[755] *Parliamentary Debate*, House of Lords, 20 August 1907, vol 181, cols 348-419 citing the Archbishop Temple when he was the Bishop of Exeter in 1883, 387. See also Lord Bishop of Hereford at 398 who stated: the laws 'great recommendation is that in the inner circle of the home, whether on the side of consanguinity or affinity, this law puts an end to all thoughts of marriage or of sexual relationship. To my mind, that is one of the greatest benefits that can be conferred upon the inner circle of the home.' For the argument that the sister-in-law is quite different from any other woman see, the Marquess of Salisbury at 412.

much greater familiarity and intercourse between persons within the prohibited degrees than it did to those outside them; and therefore every man's position with regard to his sister-in-law would be placed on a different footing, were the restriction on their marriage to be removed.'[756] In many cases in Australia, a sister-in-law would have resided in England or elsewhere – as portrayed in Dale's novel – and the distance created both a physical and emotional barrier between in-laws. In addition, women were in high demand for much of the colonies demographically uneven history, and therefore the expression of sexuality by women in the courting game was perhaps tolerated. Colonial culture directed the debate slightly differently and enabled legalisation to occur, providing a testing ground which demonstrated that legalisation would not lead to the breakdown of the family so described.

The concern that legalisation of the union would threaten natural family relations remained in the final English debate. In the Earl of Shaftesbury's view the Bill remained 'fraught, both morally and spiritually, with endless possibilities for evil.'[757] He spoke of a grieving man being unable to ask for the help of his sister-in-law for fear of the scandal that would break regarding their relationship:[758] 'He would be forced to marry her if she was to remain in the family with him. She is his sister, and always recognised as such'. 'It is essential to the peace and purity of the English home that the husband's relations be regarded as the wife's.'[759] However fear about the affects of legalisation on the family was shared by a smaller minority in 1907 than in previous centuries. This is because of colonial and international experiences and the changing experiences of family life and relationships.

The Earl of Crewe argued that the structure of the family that anti-reformers were protecting was unrealistic and not reflective of real practice. He said that most men would not allow their daughters to reside in the same house as her widowed brother-in-law without hesitation and

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[756] Letter to the Editor, *Times*, 1 Sep1907, Issue 38444, 7, col E.
[757] *Parliamentary Debate*, House of Lords, 20 August 1907, vol 181 cols 348-419, 355.
[758] Ibid, 356.
[759] Ibid, 357. Similar views were expressed in the newspapers. In a letter to the *Times*: 'It would be a change for the sake of a minority to the hardship of the majority. The legislation would impair or destroy the relationship between sibling in-laws'. See Stephens, above n 730. In another letter to the *Times* signed Equal Justice, the author wrote that the case against the Bill was weakened by appeals to religion, establishment and church authority, which to most people are matters of opinion. He/she argued that if marriage to a deceased husband's brother was to remain illegal and that relationship be protected, then so too should the relationship between a man and his sister-in-law. 'Why disturb and poison this most natural and innocent relationship on behalf of a group of people who have deliberately broken the existing law?' See Letter to the Editor, *Times*, 23 Aug 1907, Issue 38419, 10, col F.

that it was not common practice for in-laws to live together.[760] 'The fact is...the moral sense of the people of this country does not support the existing law, simply because they do not believe that any real moral stain attaches to those who break it.'[761]

Despite this, objectors still felt that there was no principle on which to base legalisation; change engendered fear of further relaxation of the law; and the biblical passages on which the original prohibition was built, though questionable, provided some form of stability for marriage laws that were considered integral to the nation. Author, W Outram Crewe, wrote in his 1883 pamphlet: 'On most subjects to which an alteration of the law is sought, the alteration is opposed for the reason that we have no experience as to how the change will work; and sometimes we are afraid of innovation simply because they are innovations...',[762] but the colonial and international experience had stripped the new law of its innovation and provided England with adequate knowledge of the resulting experience. As the American Bishops Burgess and McIvane both stated, they knew of no social disadvantages attending these marriages; the former adding that the apprehensions expressed in England...were entirely dissipated by the experience of his countrymen.[763] In favour of this proposition, in the House of Lords, Lord Tweedmouth cited Lecky's "Liberty and Democracy" in which Lecky wrote:

> These marriages exist over a great portion of the globe without the smallest question of producing the smallest family disturbance. Experience, the one sure guide in politics, conclusively shows how quickly the best public opinion of a country accommodates itself to these marriages, how easy, natural and beneficent they prove, how little disturbance of any kind they introduce in domestic relations.[764]

The Lord Bishop of Canterbury attempted to whitewash the colonial experience of the new law by describing the Colonies as 'young and eager' with a home life subject to different

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[760] *Parliamentary Debate*, House of Lords, 20 August 1907, vol 181, cols 348-419, 417.
[761] 'We believe that there is an ever growing feeling that those who support the law as it stands and who dislike the notion of marriage with a deceased wife's sister, have no right to lay this burden upon their fellow citizens who think differently.'Ibid, 418.
[762] W Outram Crewe, 'Marriage with a deceased wife's sister – ought it to be legalised? A paper in the affirmative (James Cornish & Sons, 1883) 19.
[763] Ibid, 17.
[764] *Parliamentary Debate*, House of Lords, 23 August 1907, vol 181, cols 1250-89, 1253.

conditions. He argued that the legislation of the colonies and the relaxation of the marriage law were very recent and it was too soon to argue from experience as to the results of the change.'[765] However, it was difficult for parliament to ignore that marriage to a deceased wife's sister had been legal in the colonies for decades by colonial acts which had received royal assent; that colonial marriages were now recognised on English soil; and that there was no evidence of the evil results envisaged. In the second reading in the House of Lords, Lord Tweedmouth described the *Colonial Marriages Act* as 'a very long step towards what we are asking you to do today.'[766] Each of the steps taken in the colonies, particularly the Australian colonies, had brought the English parliament closer to legalising marriage to a deceased wife's sister at home.

As mentioned above, one of the regularly cited arguments against legalisation in the English Parliament was that the prohibition as it stood was based on a principle or a number of principles, whilst the legalisation of the marriage was not based on clear principle. During the third reading in the House of Lords in August, Lord Balfour objected to the Bill: 'there is no logical basis for the law; Leviticus was a logical basis for its existence; following the colonies in variations of law was not likely to serve England...'[767] One woman wrote in 1902 that 'All will admit that the law of marriage ought to be clear and readily understood.' The measure would make 'one law for husbands and another for wives, one law for brothers, nephews, niece's in-law, and another for sister's in-law.'[768]

Regardless of an objectors disposition there were a number of principles on which an objection to change could be based, such as the importance of tradition, the wisdom of history, the law of the Church, the law of God, the law of morality, the natural parameters of familial relations, or the need for the legislative control of human passion. Several members argued that, in contrast to retaining the law, there was no clear principle for abolishing it. There was no principle by which marriage to a deceased wife's sister should be legalised on

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[765] *Parliamentary Debate*, House of Lords, 20 August 1907, vol 181, cols 348-419, 363; For an exploration of English responses to colonial legal developments of the marriage law see chapter eight.
[766] Ibid, 349.
[767] *Parliamentary Debate*, House of Lords, 26 Aug 1907, vol 182, cols 4-23, 13. This argument did meet with some resistance in public discourse on the basis that Canon law itself had been inconsistent in the application of principle. For example, a Churchman pointed out the inconsistency of Canon law in prohibiting marriage to a deceased wife's sister, on the basis of the one flesh doctrine but not prohibiting other marriages on that basis, such as two sisters to two brothers or a woman to her deceased. R J T, Churchman, Letter to the Editor, 'Marriage Deceased Wife's Sister', *Times*, 19 Aug 1908, Issue 38729, 10, Col E.
[768] Helen Blackburn, Letter to the Editor, 5 Feb 1902, Issue 36683, 14, col F.

the one hand while other prohibitions should stand. Most of the arguments in favour of the marriage, such as the right to marriage choice, the lack of physical, moral or spiritual harm to third parties, unfairness to children of the union, or the uptake of new laws in other countries and colonies, if accepted, could be just as well applied to all the marriage regulations and this was the fear of some of the objectors.[769] In the colonies piecemeal legislation was far more common because the colonial parliaments were faced with all kinds of situations in which modification to inherited legal principles were required in order to meet immediate needs. Therefore, the staunch opposition to piecemeal legislation that did not set down a principle and precedent for future marriage legislation was more of an issue for members of parliament in England than it appears to have been for those in the colonial parliaments. In addition, the only real principle upon which the legalising Bill could be based was that which each individual could form for himself[770] and the members of the English Parliament appeared to find this more difficult to accept than those in the colonial Parliaments.[771]

The influence of scientific discourse on beliefs about marriage to a deceased wife's sister was discussed in the previous chapter. Its significance is highlighted by the relative lack of reliance on biblical passages and the 'one flesh' doctrine in the final debate. By 1907 theological arguments for prohibiting the marriage no longer held much weight and therefore the minority against reform were deprived of their principle argument that marriage to a deceased wife's sister was against the law of God.[772] Scientific understandings of hereditary and reproduction had melted commonly accepted beliefs about the marriage union, such as that the union created physical or symmetrical kinship with a husband and wife's relatives. In 1883 W Outram Crewe wrote in his pamphlet on the marriage question: 'The question cannot be discussed on physiological grounds; for it is obvious that there is no consanguinity between a man and his wife's sister. The truth of this proposition is so evident, that it is unnecessary to cite authorities.'[773] A Letter to the Editor of the *Times* in October 1907

[769] For an example see Lord Bishop of Hereford in *Parliamentary Debate*, House of Lords, 20 August 1907, vol 181, cols 348-419, 398; and Duke of Northumberland, 376.
[770] Ibid, 411.
[771] See chapter six of this thesis for a selection of arguments in the colonial parliaments in favour of freedom of choice.
[772] This was helped by the fact that the Church had dispensed with the law of God when it chose – whether it be the Catholic Church's dispensations or the Church of England's retrospective validity (by *Lord Lyndhurst's Act* 1835).
[773] Crewe, above n 762, 5.

described the conflation of consanguinity and affinity as an 'ecclesiastical fantasy'.[774] The same letter criticised the Archbishop of Canterbury for stating that men and their in-laws were one flesh, when the Chancellor of the Exchequer 'backed by the common sense of mankind' treated in-laws as strangers in blood, and discounted ten per cent of any property left to one another in the event of death. In describing the men who opposed the Bill, Sir Holman Hunt said 'these were men who demand general submission to a doctrine against which all science revolts, and which human reason repudiates'.[775] Relatively speaking, in the Australian colonies in the 1870s there was less support for the biblical basis of the marriage prohibition than there was in England. As discussed in chapter three, this was largely because of a diversity of interpretative voices and the perceived necessity of tolerating them. By 1907 the diversity of interpretive voices in England, which had been silenced over the decades by the dominance of the Established Church, were being heard but in addition to this the authority of the voice of science is likely to have influenced the passing of the Bill.

Finally, a pro-reform argument that had existed for decades became very influential at the turn of the century. This was the argument that the Bill was needed for the protection of the 'poor man' and his family. The Bill would enable a loving aunt to enter the household and look

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[774] G J O B citing Sir Frances Doyle's 'Reminiscences' in Letter to the Editor, *Times*, 8 Oct 1907, Issue 38458, 10, col E.

[775] Percy quoting Hunt in Letter to the Editor, *Times*, 11 July 1901, Issue 36540, 13, col F. It is difficult to ascertain to what extent the reduced reliance on biblical text and interpretation in the final years of public and parliamentary debate, was the result of public knowledge of the scientific facts rather than a less stringent reliance on the literal interpretation of biblical text for the maintenance of Christian salvation. There is evidence of confusion with regards to public knowledge of the physiological science of reproduction as late as 1907. For example, in a letter to the editor of the *Times* in 1907 it was penned: 'MDWS cannot be placed on the same footing as marriage to a deceased husband's brother. This is inaccurate physiologically because a woman having had a child, all her subsequent children more or less inherit the qualities of the father of that child, no matter who the father of the subsequent child may be. Hence the marriage of a woman to her deceased husband's brother partakes of a marriage between brother and sister with consequent increased liability to insanity in the offspring...For instance if a white woman has a child by a black man, her subsequent children, even if the father be a white man, will be more or less black... no such physiological objection exists in the case of marriage to a deceased wife's sister.' See Medicus, Letter to the Editor, 28 Aug 1907, Issue 38423, 6, col E.

He is asked in another's letter to the paper to provide some evidence for his assertions and on 4 September 1907 Medicus is published once more. In this letter he cites Darwin's 'Origins of the Species' and states more 'well known physiological facts' such as that a woman's children by a second husband can have the attributes of the first husband even if she never had children with the first husband. 'How this occurs is well known to medical men.' Medicus, Letter to Editor, 4 Sep1907, Issue 38429, 5, col B. This notion clearly comes from the belief that a woman becomes absolved in the flesh of her husband on marriage because her husband's attributes are then carried onto children through her, even if he is not the father of the children.

P Chalmer's Mitchell wrote to the paper to put the facts right, challenging Medicus' assertion of 'physiological facts', describing his assertion as 'a popular belief of very long standing' and then going on to cite more recent scientific evidence undermining 'acquired consanguinity' and removing any barrier to the legislation on physiological grounds. See P Chalmers Mitchell, Letter to Editor, 4 Sep 1907, Issue 38429, 5, col B.

after the widow and children who lost their wife and mother. During the second reading in the House of Lords, Lord Heneage told the story of a poor tenant of his who had been driven off his farm after marrying his sister-in-law abroad, despite it being a very good marriage for everyone involved.[776] Throughout the debate, those in favour of legalisation had argued on behalf of the poor man; they argued the poor man was worst affected by the prohibition that prevented him from marrying the ideal replacement wife and mother. Though this had been argued previously, in the late part of the nineteenth century legislative arguments in favour of protection of the poor appear more popular. Some opponents disputed the existence of the poor man who allegedly wanted to enter into such a marriage. However others conceded that the prohibition affected the poor man.[777] In a letter to the *Times* it was pointed out that legislation intended to improve the lot of the poor man was very often successful: 'There has never been a period in our history when real and actual grievances or hardships known to exist among the poor were more considered that at the present time...'[778] This argument helped to garner extra support for the passing of the Act.[779]

A majority of the arguments presented in the debate over the Bill in 1907 were not new and had been raised time and again over the past seven decades. However, over those decades significant shifts had occurred in English society. The relationship between church and state had shifted; the public perception of marriage had shifted and a majority viewed it as a contract between two individuals; there was increasing knowledge of science which was replacing the authority of the bible; there were shifts in the way that families were organised and in perceptions of relationships such as that between sibling in-laws. This thesis has shown how differing cultural conditions in the Australian colonies resulted in the legalisation of marriage to a deceased wife's sister in the 1870s. Some of these conditions came to bare themselves in England thirty years later. Others were unique to the Australian colonies and were significant enough to enable legalisation in Australia before the late nineteenth century

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[776] *Parliamentary Debate*, House of Lords, 20 August 1907, vol 181, cols 348-419, 392.
[777] Berhman, above n 170, 491.
[778] Wilfreda Biddulph, Letter to Editor, 20 Aug 1907, Issue 38416, 9.
[779] The issue of property and inheritance which was so significant in the initial debate over *Lord Lyndhurst's Act* 1835 and the debate over the *Colonial (Marriage to Deceased Wife's Sister) Act* 1906 did not feature often in the final debate of the English *Marriage Deceased Wife's Sister Act*. It was the voidable status of the marriage which had led to *Lord Lyndhurst's Act* in 1835, in part motivated by the maintenance of aristocratic property and lines of inheritance (see chapters one and four). Whether the union was legal or illegal mattered little, as long as the right to inherit could not be challenged at some late stage, therefore legalisation would protect the stability of property expectations and the Act included words to that effect. However, recognition in 1906 of the right of colonials, who had entered into the union, to inherit land in England signals a relaxation of the panic that the early debates ignited with regards to the stability of property and inheritance lines (see chapter four).

developments that came to influence English legalisation.[780] There is no doubt that the legalisation of marriage to a deceased wife's sister in the colonies was one of the forces that led to legalisation in England. The colonial experience was significant and could be used as evidence of the operation and outcome of legalisation for the English Parliament. The *Marriage to a Deceased Wife's Sister Bill* was passed into law on the 26 August 1907.

[780] For example, the increase in scientific knowledge.

CONCLUSION

This thesis has revealed that the prohibition against marrying a sister-in-law after a wife's death was introduced in 1835 to abolish the voidable status of the union that existed at the time and therefore clarify legitimacy and protect family property and succession. Though the prohibition had existed within Church law, in 1835 the legislature introduced the prohibition into civil law, making it a part of the fabric of civil marriage. The legislature used Canon law as a basis for the legislation and chose to ignore the identified social reasons for allowing the union, such as for the sake of children.[781] In other words, the legislature chose to exclude in-law marriage and shape marriage in this way because it fulfilled the paramount purpose of marriage in the 1830s, and Canon law provided a useful framework on which to rely. The abolition was removed from the marriage law of the Australian colonies in the 1870s because the colonial legislatures saw no purpose for it in colonial society. The English state maintained the prohibition for the next seventy-five years because not only had it clarified legitimacy and protected inheritance lines from challenge since 1835, but it had attempted to define the realm of cognitive possibility for the public in thinking about marriage. The norms that the prohibition reinforced, such as the pure and important nature of the brother-sister relationship, the conflation of one another's kin on marriage and, marriage as a God given institution, were part of the English consciousness.[782]

Each chapter in thesis dissertation has revealed the religious, economic, political and social forces that shaped marriage in the nineteenth century, providing insights into nineteenth century Australian colonial and Imperial culture. This thesis has demonstrated that the marriage prohibition was retained and abolished to serve political, economic, religious or social purposes chosen by the state and that such purposes change over time and differ in each society. The legalisation of deceased wife's sister marriage in England after the turn of the century is evidence of a transformed institution, one that reflected different purposes to those existing in 1835. The sister in law marriage story is an example of the power of the public aspect of marriage in transforming public understandings of love and kinship, and the power of the state in constructing models of marriage. It is one of the many historical marriage debates that reveal marriage as a political, legal and social construction capable of change.

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[781] see Frew, above n 5, chapter two.

[782] This has been illustrated by the letters to editors in support of the prohibition for religious and social reasons, in combination with the glimpses inside the consciences of fictional characters in the novels discussed in chapter five.

EPILOGUE

What can we learn from the nineteenth century debate about marriage to a deceased wife's sister? As stated, the debates and resulting legislation shaping marriage demonstrate that marriage is a public and political institution capable of great change and incapable of a static existence. In addition, marriage is a public institution and not merely a private matter. As Martha Nussbaum writes, historically the keys to the kingdom of marriage may have been held only by private citizens, religious bodies and their leaders, families, and other parts of civil society.[783] However in most modern nations, and for the nineteenth century period in which the deceased wife's sister debate took place, government held the key to marriage. Legal marriage required and requires state sanction and regardless of the private or religious ceremony that takes place between two people, they are not married for social and political purposes unless they are granted a marriage licence by the state. The public recognise and support the couple's reciprocal bond, and guarantee that this commitment, made in accord with public requirements, will be honoured as something valuable, not only to the pair but to the community at large.[784] The statement made by the marrying couple is usually seen as involving an answering statement on the part of society: we declare our love and commitment, and society, in response, recognises and dignifies that commitment.[785] It is the public aspects of legal marriage that have been the subject of this thesis. The deceased wife's sister marriage debates revealed how marriage was shaped to fulfil its public role in nineteenth century colonial and English society. The state did not recognise and dignify sister-in-law marriages in England until the turn of the century because such unions were not perceived as valuable to society; were not reflective of the values and norms the state wished to prescribe through marriage; or the perceived economic and political requirements of the day.

Law and society stand in circular relation: social demands put pressure on legal practices, whilst at the same time the law's public authority frames what people can envision for

[783] Nussbaum, above n 52, 127. This is not to ignore the hundreds of thousands of non-legal marriages which have taken place historically with the sanction of local communities. Ginger Frost has shown that many couples who were forbidden from legal marriage in the nineteenth century such as brother and sister in-law conducted some form of civil ceremony which gave some legitimacy to the couple through the acceptance of family, friends and sometimes community. See Frost, above n 21, 57. It is also common practice for same-sex couples to conduct marital ceremonies despite the lack of legal recognition.
[784] Cott, above n 18, 2.
[785] Nussbaum, above n 52,129.

themselves and can conceivably demand.[786] Public authorities set the terms of marriage and decide who will and will not be admitted because of the perceived public role of marriage. If this was not the case marriage would not be a legal institution but simply a private social affair. Therefore, excluding partnerships from marriage stigmatises the relationship, sending a message that the public do not recognise and support your bond; and that your bond is not made in accordance with public requirements that signify value. This was highlighted by the colonial campaign to have deceased wife's sister marriages legally made in the colonies, recognised by the English so as not to stigmatise those who had entered the union, if they were to return to England. In England also, those who managed to travel over the border and contract sister-in-law marriages or to find a clergyman who would solemnise the union were stigmatised in accordance with the law, or alternatively communities accepted them, in contravention of the law's message.

One must be careful in comparing historical marriage prohibitions such as that of interracial marriage, affinity marriage, polygamous marriage and the current same-sex marriage prohibition because relying on arguments made during one of these reform movements to advocate reform during another is overly simplistic. However, debates over admittance to marriage and indeed other debates about changing marriage such as divorce and married women's property debates in the 1850s and, the no-fault divorce debate in the 1970s, do have similarities. They all gave rise to a discourse of panic from those wishing to maintain the marriage law; and opponents usually refer to alterations of marriage as moving away from 'traditional marriage' and toward something that does not resemble marriage at all. In a recent article published in the *Harvard Journal of Law and Public Policy* titled 'What is Marriage' the author's argue that marriage is a natural moral institution, existing independently of religion and the state.[787] They argue that the nature of marriage (that is, its essential features, what it fundamentally is) should settle the same-sex marriage debate. According to these authors, marriage is fundamentally:

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[786] Philip Corigan and Derek Sayer, *The Great Arch: English State Formation as Cultural Revolution* (London, Basil Blackwell, 1985) in Cott, above n 18, 4.

[787] The authors argue that although the world's major religious traditions have historically understood marriage as a union of man and woman that is by nature apt for procreation and childrearing, this suggests merely that no one religion invented marriage. Instead, the demands of our common human nature have shaped (however imperfectly) all of our religious traditions to recognize this natural institution. Sherif Girgis et al, above n 17, 247.

> the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together. The spouses seal (consummate) and renew their union by conjugal acts—acts that constitute the behavioural part of the process of reproduction, thus uniting them as a reproductive unit. Marriage is valuable in itself, but its inherent orientation to the bearing and rearing of children contributes to its distinctive structure, including norms of monogamy and fidelity. This link to the welfare of children also helps explain why marriage is important to the common good and why the state should recognize and regulate it.[788]

They further suggest that marriage is the type of social practice whose basic contours can be discerned by our common human reason, whatever our religious background. Those who opposed alterations to marriage, including the admittance of sister-in-law unions in the nineteenth century and same-sex unions today, have relied on the myth that marriage is not a political creation but a natural institution.[789] During the sister-in-law marriage debate, it was argued in parliament that a sister-in-law simply could not be a wife; she could not be part of a marriage that made her both a wife and a sister in the same family because it was not natural.[790] The myth of marriage as a natural and apolitical institution is perpetuated by legislation that masquerades as enforcing the existing natural law of sexual relationships, even whilst it re-shapes marriage to reflect political and social requirements.

The Senate Legal and Constitutional Affairs Legislation Committee's Report on the *Marriage Equality Amendment Bill* (Cth) in 2009 recommended that the Bill (which would have included same-sex couples in marriage) should not be passed and that the definition of

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[788] John M Finnis, 'Law, Morality, and "Sexual Orientation"' *Notre Dame Law Review* (1994) 69, 1049, 1066; John M Finnis, 'Marriage: A Basic and Exigent Good' *The Monist* (2008) (July–Oct), 388. See also Patrick Lee and Robert P George, Bodyself Dualism in Contemporary Ethics and Politics in Sherif Girgis et al, above n 17, 246.

[789] Ibid.

[790] See (New South Wales), *Parliamentary Debate,* Legislative Council, 4 March 1874, during which Mr Charles Campbell describes such unions as repugnant and a threat to the purity of society; See also 'A Parents Appeal', above n 478. In relation to the same-sex marriage debate in Australia, see Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Marriage Equality Amendment Bill*, 2009 (Parliament of Australia, Canberra, September 2009) 2, (Australian Christian Lobby), in which it is argued that marriage reinforces the natural order and it is unsustainable to suggest that 'unnatural relationships' have an inalienable right to marriage.

marriage being between a man and a woman in the *Marriage Act 1961* (Cth) be retained.[791] However, there was no further examination of the strengths and weaknesses of arguments for and against the alteration of marriage in the committee's recommendations or conclusions. Instead, the committee's reasoning for retaining the definition of marriage was that the 'current definition is a clear and well recognised legal term which should be preserved'.[792] In labelling the definition of marriage a 'legal term' the Committee conceded that marriage is created by the legislature. However, in failing to evaluate the various arguments for different forms of marriage, the Committee in this suitably vague language fell back on the argument that the legislature should maintain 'tradition'.

In chapter nine of this thesis, it was shown that the slow progress of marriage reform in the nineteenth century was in part attributable to the clear and stable principles that tradition and religious doctrine provided in comparison with the perceived lack of principle and stability in allowing sister-in law unions and reconstructing marriage in new ways.[793] Often, as was the case for sister-in-law marriage, it is the testing of new marriage principles internationally (in that case within the empire) that removes the fear of change. Illustrations of the workings of new principles abroad can demonstrate that lack of appeals to an older morality does not prove that morality is dying but rather that a new morality is being born.[794] It seems that legislatures both historically and today appreciate their role in altering marriage in response to economic, social, religious or international pressure, yet they set about doing so 'looking behind them as though a more powerful presence were watching'.[795] It is the reluctance to treat marriage as the changeable and flexible public institution that it is which perpetuates reliance on essentialist arguments from those that oppose change. This prevents an open and

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[791] Ibid, 41.
[792] Ibid.
[793] Frew, above n 5, ch 9, 200.
[794] Graff, above n 1, 240. The Lord Bishop of London argued in 1907 'It [the Bill] contradicts the principle of which the marriage law rests; it lays down no principle whatever to take its place' *Parliamentary Debate*, House of Lords, 20 August 1907, vol 181, cols 348-419, 389. For more on this argument and the affect of colonial legalisation on the law of England see Frew, above n 5, ch 9.
[795] Cott, above n 18, 47. Having said this, the Australian judiciary more recently acknowledged that marriage is subject to change and the legislature has the power to change it. The Full Court of the Family Court stated in *Attorney-General (Cth) v Kevin and Jennifer* that: 'We think it plain that the social and legal institution of marriage as it pertains to Australia has undergone transformations that are referable to the environment and period in which the particular changes occurred. The concept of marriage therefore cannot be ... frozen in time (2003, at 87 per Nicholson CJ, Ellis and Brown JJ).'The court held that there was no reason why the meaning of marriage should be understood by reference to a particular time (*Attorney-General (Cth) v Kevin and Jennifer* at 87).

honest debate about the merits of various models for marriage; the ideal purpose for marriage; and the norms that society wishes to prescribe through marriage in 2012.

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