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Zombie law: conjugal, annulment, and the (married) living dead

Conventional warfare is useless against these creatures, as is conventional thought. ... Ignorance is the undead's strongest ally, knowledge their deadliest enemy.

The Zombie Survival Guide (Brooks, 2003, xiii)

In a 2001 interview, Ulrich Beck complained that longstanding sociological structures were becoming archaic. Tagging them 'zombie categories', Beck described a number of institutional fields which, he said, 'govern our thinking but are not really able to capture the contemporary milieu' (Beck 2001, 262). Beck asserts that these zombie categories need to be reshaped and re-imagined—not just deconstructed and criticised. One of the examples he offers is 'the household'—a category which, he says, remains foundational despite having changed radically in recent times. Beck suggests that reimagining the household—and the family—must begin by reconceptualising 'the couple' in ways that resonate with contemporary personal and social practices (Beck and Beck-Gersheim 2002, 204; Budgeon and Roseneil 2004, 127). While it departs from Beck in many ways, this article undertakes a kind of social archaeology whose aim is broadly consistent with Beck's imperative. The subject of critique and reconstruction is, specifically, the married heterosexual couple as constructed in law. Marriage, it will be argued, is something of a zombie category.¹ This is in no way equivalent to arguing that marriage is dying out:

¹ Beck's zombie categories are somewhat different from the living dead populating Henry A. Giroux's marvellous (2010) essay. While I can see a place for Giroux's 'carnival of snarling creatures engorging elements of human anatomy' (2010, 1) here, its relevance pertains mostly to marriage promotion programs in the United States, and their specious equation of marriage with

zombies are, by definition, the *living* dead. Against Beck, my question centres less on how sociological categories might be reinvented or revived so much as what animates the sociologically undead. Everyone knows that it is notoriously difficult to dispatch a zombie (Brooks 2003). The usual advice is to attack the brain (*How to Kill a Zombie* 2009). In what follows, however, I will suggest an alternative target. My contention is that a particular kind of social-sexual magic keeps marriage from its grave: a magic I call ‘sexual performativity’.

In this article, the legal skeleton of civil annulment, or nullity of marriage (as it is also known), will be examined. In particular, the discursive bones of the requirement to consummate, and the sexual dimorphism it has both assumed and produced, will be scrutinised. Even though marriage as such has spawned a proliferation of scholarly research concerning sexualities, government, culture and justice, some elements remain markedly under-researched. The regulation of conjugality more broadly—including marriage, divorce, cohabitation, ascriptive marriage, civil unions, and so on—is the subject of widespread scholarly attention, but very few scholars attend to how conjugal relationships are brought into being. Even those that do (Clarke et al. 2013; Freeman 2002; Geller 2001; Ingraham 1999; Montemurro 2006; Otnes and Pleck 2003; Stychin 2006) tend to focus on questions of bridal culture and/or queer subversions of heteronormative wedding culture more than regulatory mechanisms and effects. Such cultural questions revolve around objects and practices associated with weddings—investigating wedding narratives, food, clothes, preparations and celebrations, for example. These studies are interesting and useful, and taken together bring the very meaning of weddings into question, such that it is no longer always or entirely self-social/moral benefits (see also Smart 2007, 13). These considerations are deferred for treatment in a future paper.

evident what a wedding is. To be clear: in this article, I use the term ‘wedding’ to refer to the establishment of a marriage relationship, a process governed through the regulation of (living) bodies.

Rules and regulations informing weddings are particularly interesting because in some places (including Australia) they stand in sum as that which distinguishes marriage from other forms of conjugality. Where cohabitation is afforded the same or very similar rights and responsibilities (or threats and promises, perhaps) as marriage, weddings and their effects loom as objects of considerable curiosity. Current scholarly and public debate is firmly centred on the justness of extending marriage to gay and lesbian couples (Marsh 2011; Browne 2011; Moskowitz et al. 2010; Rimmerman and Wilcox 2007; inter alia). This attention is warranted. My contention runs parallel rather than counter to this, and suggests that in the regulation of weddings—that is, in the rules governing the making of a valid marriage—we see more than homophobic exclusion. In the regulation of weddings, the privileging of heterosex over other modes of desire is certainly evident, but we can also see heteronormativity’s anxious demarcation of ‘men’ and ‘women’ at precisely the moment of their naturalisation (Beasley et al. 2012, ch. 2). In the same way that we might, after Foucault, examine reason by considering the asylum, or study freedom by interrogating incarceration, perhaps there is something to be gleaned about the regulatory schema of wedding by investigating annulment. The argument to be aired, here, is that while annulment (and its historical connection to the notion of consummation) may be a rotting legal creature, its footprints continue to emboss the legal palimpsest of conjugality.

Annulment

Annulment is one of three routes by which a marriage might be dissolved. Divorce can be readily conceptualised as an arterial road to dissolution; death is (these days) more of a by-way; and annulment is the road less travelled. In simple terms, while divorce declares that a valid marriage has ended, annulment affirms that a purported marriage is not truly so. Marriage entails relations of status: “[t]he annulment suit is an attempt to secure judicial recognition for the fact that the status of husband and wife has never existed between the parties” (Crane 1948, 571). Governments and churches began stipulating certain requirements for a valid wedding ceremony in the sixteenth century in Europe, and the mid-eighteenth century in England (Coontz 2005, 106).

Contemporary regulations concerning annulment have their roots in canon law, and the availability of annulment remains important in several religious traditions—including, notably, the Roman Catholic Church. In the mid-nineteenth century, however, authority to grant decrees of dissolution shifted from ecclesiastical to civil courts (Hasson 2009, 2), and it is those civil law regulations that form the focus of this article. As we will see, a range of irregularities (including mistakes and other complications) can render a wedding ceremony void.² Rules and regulations concerning annulment constitute the legal mechanisms for determining the validity of marriage, and at their heart are performative utterances.

² Purported marriages may be ‘valid, void, non-existent or presumed’ (Probert 2002, 399).

Distinctions are also made between ‘void’ and ‘voidable’ marriages, the complexities of which are not especially germane to the present discussion—suffice to note that a void marriage is deemed to have never constituted a marriage at all, while a voidable marriage is one that can be understood to have existed up until its nullification (Cretney and Masson 1997, 39-40; Goda 1967; Hall 1971; Passingham and Harmer 1985, 46).

Weddings deploy speech acts and performative utterances. Performative utterances are those speech acts which accomplish some feat: they are not descriptive; they are not subject to tests of truth (Austin 1962). Rather, performative utterances (attempt to) accomplish something, and so ‘succeed’ or ‘fail’. As linguistic philosopher John Searle puts it: ‘I can’t paint the roof by saying “I paint the roof” but I can promise to come and see you just by saying “I promise to come and see you”,’ (Searle 1989, 535). Uttering a promise brings that promise into existence. Thus, a performative utterance is a kind of discursive magic whose chief characteristic is to bring into being that which it names. Arrest, for example, is brought into being as a police officer says “You’re under arrest”. Resignation is effected as the words “I quit!” are spoken. A teenager’s social privileges are suspended as the words “You’re grounded!” are uttered (or yelled). Naming, betting, promising, declaring: all of these are classic performative utterances. Often, wedding vows—the “I do”s that turn a groom into a husband, a bride into a wife—are presented as a kind of archetypal performative utterance (Austin 1962; Rossi 2011; Parker and Sedgwick 1995). Wedding vows are no doubt one of the most frequent performative utterance, but the more telling archetype, in my view, is the magician’s “Abracadabra!” Suspending disbelief, the rabbit appears from the hat, the coin vanishes, the bisected assistant is rendered whole again—seemingly on the strength of a word. We know, however, that these magical events are effects; we know that the magician produces these transformations not by the word but by other more pedestrian means—a trick sleeve, a cunningly placed mirror, and so on. “Abracadabra” is an especially illustrative performative utterance, in my view, because it invites us to consider the circumstances of its performative production along with its apparent effects. To borrow Sara Ahmed’s apt phrase, it brings the work behind ‘the magic of arrival’ to our attention (Ahmed 2006, 555).

Like the magician's "abracadabra", all performative utterances are buttressed by conventions; for any trick to succeed, the thing must be properly set up. Flinging off one's apron and shouting "That's it, I quit!" fails as a performative utterance if it is uttered in a restaurant at which the speaker is not actually employed; parental or some similar authority is required to effect a grounding; only an attending umpire (and not a spectator, for example) can dismiss a cricketer. Performative utterances succeed or fail according to their regulatory or conventional circumstances. In the case of wedding vows, the conventions required for the performative "I do" to work are set out in law; typically, in various *Marriage Acts*. Such legislation itemises the kinds of problems or irregularities that might invalidate a wedding ceremony and void the marriage purportedly effected. Different rules apply in different times and places, and are categorised in various ways. In what follows, I consider several broad categories of grounds for annulment as they have operated in England and Wales, Australia, and (to a lesser extent) the United States. Some version of the kind of problem outlined in each category is (or was) common to virtually all jurisdictions drawing on the English tradition, but such regulations are by no means uniform. In the United States, for example, marriage is in most instances a matter for State rather than federal law, and variation thus occurs. In the United States, Australia, and in the related jurisdictions of England and Wales, the relevant contexts of marriage law more generally were similar until the mid-1970s, when divorce reforms, policy decisions, and social change began to re-shape national conjugality in somewhat different ways. Today, wedding irregularities can be grouped into several broad categories of complication: mistakes relating to the ceremony; problems pertaining to consent of the parties marrying; problems of disclosure; and prohibited pairings. Each of these categories has continuing implications

and effects relating to the regulation of contemporary marriage, and these will be identified later. Taken together, grounds for annulment can be summarised as follows.

Wedding 'Fail'

Potential for annulment arises where a wedding ceremony is improperly performed. Just as the performative utterance of sentencing would fail if anyone other than a judge in a court of law utters it, so weddings must be officiated only by those vested with the power to do so: typically, ministers of religion or civil celebrants. Whether a celebrant is properly authorised to perform a wedding is, however, less important than the bride and groom's belief that the person marrying them is qualified to do so (Masson et al. 2008, 18, 36). Thus, when it turned out that Virginian 'Father O'Brian' was in fact Father O'Fraud and not an ordained Catholic priest at all (Arlington County Public Affairs Division 2006), there was never any question concerning the validity of weddings at which he had presided, because all parties married by him believed that he was authorised to do so. If either bride or groom were aware, however, that the person marrying them was not entitled to do so, the resultant (purported) marriage might be annulled. Errors amounting to grounds for annulment might also arise if the wedding ceremony fails to comply with the marriage law of the country in which it is celebrated. Thus, when it turned out that celebrity couple Mick Jagger and Jerry Hall's 1990 Balinese wedding did not comply with Indonesian formalities, the couple had grounds for their putative marriage to be annulled (Oldham 2000; Roe 2007). Such errors are patently rare. Moreover, as Rebecca Probert points out, judicial interpretation of rules governing the existence or non-existence of marriage has been inconsistent (Probert 2002). Probert's exploration of a number of cases determining whether particular unions

were “valid, void, non-existent or presumed” concludes by marking such considerations as “the legacy of the eighteenth [century]” (Probert 2002, 419).

These days, weddings have taken on a range of meanings additional to the establishment of a lawful conjugal relationship. They are occasions of consumption and celebration; they are cultural artefacts with magnetic—even ‘magical’—narratives (Otnes and Pleck 2003; Brook 2011). Wedding culture seems to spread like a kind of social contagion, giving rise to what Suzanne Leonard calls “marriage envy” (Leonard 2006; Brook 2011). It might be argued that, given widespread social acceptance of cohabitation, weddings do not necessarily mark the change in status they once did. It is no longer so necessary to celebrate the beginning of a couple relationship by participating in a formal ceremony, let alone a ceremony whose shape and content must be endorsed and registered by the state. Nevertheless, rules pertaining to the celebration of marriage remain.³ For example, it is not permissible to marry outdoors in England (Masson et al. 2008, 30). While it is hard to imagine how flouting the rules by holding a garden wedding should constitute grounds for annulment, *any* rules concerning how a couple relationship must be launched seem faintly ridiculous where the state also makes determinations about whether or not couple relationships exist on normative or ascriptive grounds (Harder 2007). Regulations specifying that cohabiting couples must be considered ‘married’ for certain purposes—most notably relative to welfare payments—suggest that rules concerning the formalities associated with

³ At the time of writing, bona fide marriage has just been extended to gay and lesbian couples in England and Wales, and is already available in a number of the United States. In Australia, the idea that marriage might be appropriate for same-sex couples was explicitly rejected by the Howard government, but remains an issue of public and political debate (Marsh 2011).

weddings are indeed becoming archaic. Problems concerning the consent of parties to a marriage are similarly troublesome.

Consent 'fail'

A complex category of regulatory problems attaching to weddings centres on consent. If a person is forced to marry under duress, for example, the validity of their marriage might be called into question. Historically, such duress has had to be immediate and severe (*Buckland v. Buckland* 1965). It is sometimes claimed that the threat to the person claiming compromised consent must be external: the fears of the party purporting to have acted under duress cannot be a consequence of some situation of their own making (Finlay 1980, but see Masson et al. 2008, 71 for a competing view). This means that what is colloquially called a 'shotgun wedding'—in which the father of a pregnant bride marches her boyfriend into church with a metaphorical rifle behind the boy's back—has not usually been deemed to invalidate the groom's consent, because the duress in such cases is said to have been of the groom's own making, and because the 'shotgun' is merely metaphorical. If the shotgun were real, the story would be different: in an American case, *Lee v. Lee* (1928), a putative marriage in which "if there had not been a wedding there would have been a funeral" was deemed void (Cretney and Masson 1997, 63).

More recently, the issue of consent has attracted attention in relation to forced marriages. As Anne Phillips and Moira Dustin explain, in distinguishing forced and arranged marriage, consent is pivotal:

In an arranged marriage, the family takes a leading role in the selection of partner, but the potential spouse always retains the right to say no; in a forced marriage, there is no choice (Phillips and Dustin 2004, 534).

This distinction has required movement away from what they describe as an ‘over-simple dichotomy between coerced and consensual marriage’ (2004, 534) and instead invites the kind of continuum conceptualised by Sundari Anitha and Aisha Gill (2009), in which broader yet highly nuanced understandings of coercion can be considered. Coercion and consent have been crucial elements in a range of feminist scholarship, and are particularly important in relation to rape—and to heterosexual relations ‘under conditions of patriarchy’ (169) more broadly. The value of Anitha and Gill’s analysis is not just their recognition that the issue of forced marriage is as much about violence against women as it is ‘about’ ways of organising marriage, but also that they highlight the effects of presenting forced marriage as consensual marriage’s polar opposite. Such polarisation results in a white/western style of consensual marriage being idealised as liberated and progressive, while arranged and forced marriage are bundled together as the preserve of another (more patriarchal, less modern) culture.⁴ This opposition and alignment (where white-western consensual marriage is opposed to ‘other’ forced or arranged marriage) obfuscates both the space between, where consent and coercion are intertwined, and leaves the racist-colonialist axis at the centre of such oppositions undisturbed.

Complex problems relating to consent also arise where a party to a purported marriage is a person whose capacity to consent is more generally compromised. Such parties include children; some people with intellectual disabilities (Bartlett 2010; Doyle

⁴ On the significance of this move in more general terms, see Hindess (2007).

2010; Hasson 2010; Gaffney-Rhys 2006; Barker and Fox 2010); people in the grip of psychosis (Hasson 2009) and so on. Similar restrictions have extended to wards of the state or people under government 'care', resulting in contentious and sometimes racist rulings. In 1950s Australia, for example, Indigenous people were routinely declared wards of the state, and were subject to intrusive surveillance and paternalistic directives concerning whom they might marry, along with a raft of other proscriptions (Brook 1997; Riggs 2011). The complexities of these and more contemporary cases must be set aside for the time being.

Mistaken identity is another complication of consent. If Seymour believes he is marrying Patti but in fact weds her identical twin sister Selma, for example, the marriage of Seymour and Selma is voidable. Mistakes of this kind are very rare indeed. Mistakes concerning the true character, feelings, habits, or fortunes of one's spouse are undoubtedly much more common (if not the norm) but do not, in general, offer grounds for annulment. Rather, the expectation is that where a person is a willing party to a wedding ceremony, the onus is on each party to ascertain the true nature, history, and fortunes of their prospective spouse (Finlay 1980). 'Identity', here, means the person as known to the other party. Australian legal historian Henry Finlay explains that as a general rule, if a person means to marry Charles Brown, and the person they marry is the person known to them as Charles Brown, there can be no mistake of identity, regardless of how Charles Brown might have represented or misrepresented himself to

his bride.⁵ Identity, then, is firmly corporeal. A unique Australian case, *Re the Marriage of C and D* (1979), confirms this.

The petitioner in this case was a woman who had been putatively married for over ten years. In 1979 she sought a declaration of nullity on the grounds of mistaken identity (Finlay 1980; Otlowski 1990, Bailey 1979). Though the person with whom she exchanged wedding vows was indeed the person she meant to marry, she alleged that the groom was not, in fact, a man. This, she said, constituted a mistake of identity: she thought she had exchanged vows with a *man*. Evidence presented to the court showed that the husband was intersexed—or what medical experts of the day termed a ‘true hermaphrodite.’⁶ Though recorded at birth as being a boy, the husband had characteristics of both sexes: one teste, one ovary, a penis, and breasts. In order to bring his body into greater conformity to his identity as a man, he underwent several operations prior to marrying, of which the wife knew nothing. The judge ruled that their putative marriage was null and void on two grounds. One of these concerned the requirement that marriage be the union of a man and a woman—an issue to which I will return. But in the first instance, Justice Bell confirmed that this was a case of mistaken identity. The wife’s belief that she had married a man was, (according to Bell, at least), mistaken. Finlay questions this decision, arguing that the case should not have been decided as a matter of mistaken identity: after all, the wife married the person she

⁵ In the United States, ‘fraud’ has sometimes been interpreted more broadly, and offers grounds for annulling a marriage wherever a person marries in ignorance of anything which, had they known it, would have caused them to break off their engagement (Gordon 1986; Tucker 1991).

⁶ Such terminology is now usually considered offensive. See Chau and Herring (2002) for a comprehensive explanation of the range of intersex conditions, and Preves (2000) and Turner (1999) for discussion of the sociology of sex/gender and intersexuality.

meant to. However, one might counter that this ‘mistake’ did not pertain to the husband’s fortune, history, or character. The mistake, if we can call it that, was corporeal, and relied on there being some question as to the match between the husband’s body and his identity.

Marriage continues to entail various rights and responsibilities, and as such demands explicit consent (Pateman 1980). However, in England and Wales, Australia, and most of the United States, a spouse who no longer wishes to continue a matrimonial relationship is not obliged to remain married. Wherever no-fault divorce is available unilaterally, spouses are not bound by each other’s behaviour, as once they were; rather, their consent remains more or less permanently contingent (Brook 2007). While there are, of course, situations today in which couples are pressured or coerced into marrying, and this may be a deeply traumatic experience for the parties concerned, such coercion is largely extrinsic to the legal effects of marriage. Thus, the idea that a person’s consent to be married is paramount to the validity and voidability of marriage is rendered somewhat less crucial. It is, perhaps, just as significant that where states *ascribe* conjugality—for example, by making determinations as to whether a person receiving sole parent welfare payments is in a ‘marriage-like’ relationship or not—a couple can be deemed to be ‘married’ without their consent (Harder 2009, 643). Thus, while cohabiting couples may be free to end their relationship at any moment, they are not necessarily at liberty to define the terms of their relationship relative to the state for themselves. As Lois Harder observes, the state may recognise and ascribe a relationship status explicitly rejected by the parties to that relationship (Harder 2009, 644). Consent, it seems, is a technical requirement of marriage, but not conjugality more broadly.

Disclosure ‘fail’

A category of annulment closely related to mechanisms of consent concerns people who might marry validly only so long as they disclose a particular corporeal condition. A bride pregnant to someone other than her groom is required to disclose this to her prospective spouse if she wishes to avoid the risk of future annulment. (A groom who has impregnated a woman other than his bride tends not to be similarly constrained.) Similar rules of disclosure have applied to prospective spouses suffering from sexually transmitted diseases and certain other conditions. In the United States at the end of World War II, many jurisdictions required couples planning to marry to undergo a blood test for this reason, and in a handful of States this remains the case. Likewise, anyone suffering from an ‘incurable’ mental illness, and who did not disclose this to their prospective spouse, offered grounds for their putative marriage to be annulled. ‘Incurable mental illness’ seems to have included epilepsy, in some places, but the same rule seems not to have applied in relation to other chronic or terminal conditions (such as late-stage cancer, for example). These concerns with disclosure of mental illness, pregnancy, and sexually transmitted disease expose the way that marriage, as a sexual relationship, is constructed as fundamentally wholesome.⁷ In its construction as

⁷ It also speaks to the association of human reproduction and marriage, in that these provisions may be said to clear the ground for the procreation of healthy progeny. This reproductive aspect cannot be completely detached from the construction of marriage as ‘wholesome’, but neither does it stand as a simple synecdoche. If the desire for a healthy heir were sufficient explanation for these provisions, we might expect tests for fertility and requirements to disclose infertility to feature more prominently, (and perhaps we might expect to see requirements to disclose any

certifiably ‘clean’, marriage is set up in opposition to ‘perversion’, and bears the discursive weight of ‘healthy’ intimacy, whether or not health and well-being are necessary corollaries to marriage (Bernard 1972; Herdt and Kertzner 2006; Koball et al., 2010). It also suggests that in legal-discursive constructions of conjugality, the body is assumed to be capable of both concealing and revealing truths about identity.

Disclosure has continuing relevance in relation to couple formation, whether that couple is married or ‘partnered’, different- or same-sex. For Anthony Giddens (1992) and others, self-confession is a defining feature of the ‘pure relationship’—it is part of the same pattern of relationship formation that is characterised as impermanent and individualised. Disclosure, here, is usually thought to involve the establishment or enjoyment of intimacy associated with talk about deep or even secret feelings (Holmes 2010, 7). Disclosure, or ‘deep and intimate revelations about one’s most authentic, but most hidden, core’ (Smart 2009, 552) is claimed by Giddens to be the marker of an especially contemporary mode of intimacy. But, as the discussion above illustrates, disclosure is by no means a novel feature of present-day relationships, and has in fact been enduringly and explicitly articulated to marriage. As we have seen, disclosure of particular corporeal conditions is specifically connected to the establishment of a valid marriage. Moreover, the kinds of facts requiring disclosure in order to avoid the risk of nullity remain uncomfortably consistent over time, even where relevant corporeal technologies and mores have changed. It may be that there is, today, a much broader social acceptance of transgendered and transsexual people, for example, than in earlier times (Probert 2005; *Re Kevin* 2001; Sharpe 2009). However, where a transsexual person marries in their ‘new’ sex without first confessing their history of sexual identity to their

inheritable disease, as well). As it is, *inability to consummate* has been available as a ground for annulment, but *inability to conceive or impregnate* has not.

spouse, they risk contracting a voidable marriage (Sharpe 2012; Masson et al. 2008, 77; Sandland 2003).⁸ That is, having a trans history is a condition requiring conjugal disclosure in the same way that being pregnant by another or having a sexually transmitted disease must be disclosed (Sandland 2009, 255). This suggests, as does the ‘mistaken identity’ case referred to above, that the body is understood to be a repository of truth: if a corporeal condition is capable of being disclosed it is also capable of being concealed.

Some conditions and not others are subject to rules of disclosure, and these characterise conjugality in particularly sexed/gendered ways (Cowan 2004; Grenfell 2003). It is not necessary to tell a prospective spouse one’s history relative to other markers of identity—such as ethnicity, religion, class, or even sexuality.⁹ Alex Sharpe explores the requirement to disclose a trans history, noting not only how ‘gender is singled out,’ but also that only trans people are understood to even *have* a gender history (2012, 34). Sharpe’s analysis identifies the prejudices that underpin these requirements, and shows how—were similar disclosures to be required in relation to ethnicity or ‘race’—those prejudices would be immediately apparent. Moreover, Sharpe argues, grouping ‘gender history’ with being pregnant by another, or having a sexually transmitted disease confuses identity with states of affairs (2012, 43). I am not entirely convinced that embodied identity is so easily distinguishable from embodied states of

⁸ Similarly, under amendments set out in Section 12 and Schedule 5 of the Marriage (Same Sex Couples) Act, before an (already) married trans person can be issued a full gender recognition certificate, they must secure their spouse’s consent for the marriage to continue.

⁹ All of these identity categories have nonetheless featured in various ways in the regulatory history of conjugality (see Cott 2000; Brook 2007).

affairs, but Sharpe's argument is precise and compelling. In my view, sexed embodiment remains articulated to marriage not because mutual disclosure is a foundation of intimacy (Giddens 1992), but because sexual performatives continue to animate the 'zombie' category of marriage in ways that are specifically fleshed (Beasley 2012). The operation of sexual performatives is clearest in relation to requirements that marriage must be consummated—part of a fourth and final category of annulment.

Consummation 'Fail'

Prohibited pairings invalidate or void a marriage. These include proximate relatives, such as siblings, parents, and so on (Schäfer 2008), people who are already party to an existing marriage, and (until now, in England and Wales) people of the same sex.

Putting incest and bigamy prohibitions to one side, let us consider that last requirement—that parties be of different sexes—and its corollary, that the parties to a marriage must be able to consummate their marriage.¹⁰ It is useful to think of the requirement that parties be of different (or 'opposite') sexes and provisions relating to consummation as related because, whether each element stands alone or in combination, their effect is heteronormative: only a particular kind of heterosex is vested with performative potential.

Consummation is best understood within the framework of performatives set out earlier. Judith Butler's (1990) extension of the idea of performativity to gender is now a

¹⁰ Marriage can be limited to different-sex couples without requiring consummation (as in Australia, see the *Marriage Act* 1961).

commonplace of gender studies. Her argument is that gender is not a property or an expression of sex but rather is brought into being as we do it; like performative utterances, gender is not a matter of truth but rather our gender performances succeed or fail according to any number of norms and conventions. Similar sorts of operations are evident in certain sex acts: some sex acts are performative in the same way that some utterances are performative, and are subject to the same kinds of conventional support. Consummation—the first instance of particular kind of conjugal sex—is a performative sex act. Historically, consummation involves penis-in-vagina-heterosex, or *copula vera* (meaning the ‘true conjunction’ of bodies), and facilitates heteronormative effects.

One might expect that where gay and lesbian couples can marry, they too might exercise conjugal performativity. If sex acts like adultery and consummation are performative in marriage, and if marriage is extended to same-sex spouses, homosexual sex acts should take on the same performative *éclat* as *copula vera* sex. This, however, has not occurred. In the new (UK) *Marriage (Same Sex Couples) Act* 2013, sexual performatives are specifically detached from same-sex unions, but remain for ‘opposite’ sex couples. That is, provisions germane to the nullity of marriage on grounds concerning consummation *do not apply* to the marriage of a same-sex couple (Schedule 4, part 3). If rules about consummation were to be uniformly applied to same- and different-sex couples, this would require redefining *copula vera* in ways that law and policy makers are unlikely to be willing to deliver.¹¹

¹¹ For more on the ‘unspeakable’ nature of same-sex performatives, see Brook (2000).

The process of establishing a valid marriage has historically entailed two performative parts: first vows, then consummation. Consummation is a corporeal performative, a sex act whose performance brings that which it names into being. It is a kind of practical sexual test which newlyweds must pass if they want to protect their marriage from challenges to its validity. According to historian Stephanie Coontz, the practice of consummation predates its legal regulation: ‘Until the twelfth century the Church held that a marriage was valid if entered into by mutual consent and then sealed by sexual intercourse. This made non-consummation grounds for annulment’ (Coontz 2005, 106). Consummation, whether as an inferred or specific requirement, has been part of most marriage law ever since. Historically, consummation is a final step of wedding: it is, perhaps, like the handshake that seals a business deal. Handshakes, however, are not circumscribed in law (but see Hertogh, 2009). If a company executive fails to maintain a certain duration of clasp or firmness of grip, has unusually small hands, or wears gloves, the deal is not necessarily rendered void. But in relation to consummation, exactly these sorts of challenges have arisen.

The regulation of consummation has served as a field for inscribing sexual dimorphism, and for marking the boundaries of dichotomously-figured ‘sex’. In one 1963 case it was argued that a marriage was unconsummated because the wife’s vagina was ‘stunted’ or unusually short (*SY v. SY* 1963). The party arguing for annulment (the husband), repeatedly described his wife’s vagina as a ‘pouch’ or ‘cavity’—just as the husband in the notorious *Corbett* case would, several years later (Sharpe 2002). In the earlier case it was held that if the wife were willing to have an operation to extend her vagina, there would be no obstacle to consummation. She was willing to do this, so the annulment was denied. Counsel for the husband argued that the wife’s vagina after this surgery would not be a ‘natural’ vagina. He said:

Intercourse which is not within a natural vagina is not natural intercourse; it is a perversion. Penetration of the cavity in this case would be nothing but masturbation inside the wife's body (*S.Y. v. S.Y.* 1963: 48).

It is hard to understand how this statement could have been any less appalling in 1963. It speaks, clearly and precisely, to the ways that sexual dimorphism and heterosexuality have been naturalised in marriage. Ten years earlier, an Australian woman sought to annul her marriage on the ground that it had never been consummated, owing to the fact that her husband failed ever to ejaculate. Holding that *copula vera* necessitated three elements—penile erection, penetration of the wife's vagina by the husband's penis, and penile ejaculation—this case was granted (Hambly and Turner 1971, 94-96). These cases invite the inference that reproductive potential is the crucial issue in consummation, and thus in establishing a valid marriage.

The interrelationship of marriage and reproduction is complex and important. Canon law outlines the significance of consummation as follows:

A valid marriage between baptised persons is said to be merely ratified, if it is not consummated; ratified and consummated, if the spouses have in a human manner engaged together in a conjugal act in itself apt for the generation of offspring. To this act marriage is by its nature ordered and by it the spouses become one flesh (Canon 1061 [1]).

This definition underlines the reproductive potential of the conjugal sex act it endorses, but the desire or imperative to produce 'legitimate' and healthy offspring in marriage does not tell the whole story. In an earlier case from the late 1940s, a husband argued that his marriage was unconsummated because his wife refused to have sex with him unless he wore a condom—which he did, under protest (*Baxter v. Baxter* 1948; Crane

1948). This suit was denied. Moreover, neither infertility nor carrying a disease ‘likely to be transmitted to a child’ is one of the corporeal conditions a prospective spouse must disclose in order to avoid the risk of annulment (Masson et al. 2008, 49). Thus, consummation can be effected without procreative potential.

In fact, not only is consummation without procreative potential routine, it is also possible (though hardly routine) to procreate in the absence of consummation. In *L. v. L.* (1949) it was argued that even though the marriage had produced ‘legitimate’ offspring—that is, a child whose (biological) parents were the husband and wife—the marriage had never been consummated. In this case, evidence was presented to the court to the effect that the wife had artificially inseminated herself with the husband’s sperm. The story sounds improbable but stands nonetheless in a relation of discursive authority. What this and similar cases suggest is clear: it is not merely the reproductive potential of heterosex that endows it with special status in relation to conjugality. In cases of civil annulment where consummation is at issue, the question is not whether procreative capacity exists, but whether a (hetero-)sexual performative (in the form of *vera copula sex*) has succeeded.

If, even fifty or sixty years ago, the procreative aspect of heterosex was not so closely tied to provisions concerning consummation and annulment as might be expected, today that connection is arguably weaker still. That is not to say that reproduction and marriage are not related, especially for those at the conservative end of politics and policy-making, for whom ‘the family’ (singular and uniform, even as it transforms) is still frequently evoked as a foundational, self-evident entity (see, for example, Grunland 1999; Knight 1997). I would suggest, however, that conservative

appeals to the sanctity of marriage and its place as a platform for family-building constitute a kind of nostalgic memorialising—a discursive allegiance to the idea that one should not speak ill of the dead, perhaps. Indeed, given that reproduction and family formation more generally are now long departed from the ‘traditional’ marriage-then-nuclear-family sequence (Edin and Kefalas 2011), it is high time we found new ways to refer to and govern the many configurations of family relationship and organisation (Bernstein and Reimann 2001; Polikoff 2008; Roseneil et al. 2012). Similarly, ‘marriage’ – as a singular, self-evident entity – can no longer sustain its historical place at the top of a hierarchical order, but must instead be placed alongside a range of conjugal relationships.

Post-apocalyptic Conjuality? Some Tentative Conclusions

In a new conjugal order—an order that might include, for a start, queer as well as straight marriage, cohabitation, blended families, distance relationships, and polyamory—consummation has no place. Given that consent to be married and consent to sex with one’s spouse are no longer collapsed (such that rape in marriage is no longer a contradiction in terms), there is no routine need for governing bodies to enquire into people’s conjugal sex lives: all that matters is that parties consent to such activities. Indeed, in a reconstructed conjugal order, the sexual performatives that animate consummation would become obsolete. In Australia, consummation is no longer part of civil marriage law, and divorce is available unilaterally and exclusively on no-fault grounds. Where the existence of a marriage or marriage-like relationship comes into legal question, the nature of the relationship must be normatively determined (Brook

2007). In Australia, then, sexual performatives have been divested of most of their magic. I do not mean to suggest that in Australia a progressive conjugal order has been launched, or that the abolition of sexual performatives should be taken up as a blueprint for reform. I do want to suggest, however, that the conditions necessary for a better, less heteronormative conjugal order to develop might inhere in the way that conjugal sex acts have been divested of their performative power as much as in the extension of identical provisions to different-sex and same-sex couples. In their treatment of sexual performatives, provisions relating to marriage in England and Wales are not identical for same- and different-sex couples, even though bona fide marriage has been extended to gay and lesbian couples. In Australia, the situation is reversed: there is (as yet) no opportunity for same-sex couples to enter marriage (as such), but consensual conjugal hetero- sex acts carry no more performative weight than any others.

In Australia, conjugal performatives do remain figuratively and perhaps symbolically relevant, and bear a certain normative weight, but their role in infecting the flesh of zombie conjugality is weak. In England and Wales, conjugal performatives remain active, but are attached only to heterosex. Thus, although marriage remains technically (and, arguably, culturally) distinct from other forms of conjugality, in Australia its effects are virtually identical to any other kind of intimate cohabitation. In Australia, cohabitation is governed identically for different-sex and same-sex couples (Morgan 2011), and is almost indistinguishable from bona fide marriage. Even though same-sex marriage is now available in England and Wales (and not yet in Australia), *heterosexual* performatives remain protected in England and Wales, but are inconsequential (as conjugal performatives) in Australia. This is ironic, and suggests that the availability of same-sex marriage will not necessarily diminish

heteronormativity. In the conjugal zombie apocalypse, Australia may be one of the safest places to be.

As suggested above, just as Butler extends the framework of performative utterance to account for gender, so we can extend the same framework to make sense of marriage and its sexual performatives. In doing so, some interesting conclusions can be drawn. Like gender, marriage and its performatives bring into being that which they name. In the absence of sexual performativity, *copula vera* consummation would be just one sexual configuration among many—it would not have the particular consequences and effects that it does. Like gender, marriage is buttressed by various regulatory frameworks, including law and medicine. These frameworks are part of the set-up ensuring that performatives sustain their effects: they are the ‘smoke and mirrors’ of performative éclat. It is not marriage as such that provides domestic stability for families, but the economic and political frameworks that promote or punish different forms of conjugality. Further, like gender, marriage is iterated: it is repeated, over and over again, in ways that naturalise its repetition, and give rise to the fiction that there is some fundamentally true thing to which it refers. That phantasmic ‘truth’, like gender, is held to be variously concealed and revealed in the body and its sexual practices. Thus, while marriage (like gender) may be referentless, it is firmly corporeally etched. Finally, like gender, the effects of the sexual performatives fundamental to marriage have historically privileged heterosex. (In fact, they have sustained a range of hierarchical relations, but that is, perhaps, another story.)

Why should rules and processes of annulment continue to draw analytical attention? The relata of annulment may change such that we (and the law) no longer

care whether newlyweds are sexually differentiated people, or whether they consummate their vows or not (Barker 2006). As discussed above, the latter is true in Australia. The mechanism of annulment remains available, however, and this keeps marriage tethered as a practice of the state; as a matter for regulation whose conventions can be buttressed, policed, and enquired into. Here, I have presented an account of how consummation's place in nullity provisions can be seen to animate the fleshy corpse of zombie law. Consummation is the sexual performative that continues, in some places at least, to bring rules of annulment to life—it is a mechanism animating the zombie category of marriage.

The sexual performatives discussed here are those articulated to annulment, but there are others attached to divorce, and still more attached to normative schemas of conjugality.¹² These, perhaps, constitute another (horror/love) story for another time. What I have proposed is that the social magic animating zombie conjugality is sexual performativity, and particularly its incarnation as consummation. Recall that the usual advice to zombie-killers is to attack the brain. I am suggesting, here, that the body (and especially the groin) may be a more appropriate target. Killing off that which animates zombie law—sexual performativity—may open a path to a better conjugal future. So much of the flesh of conjugality is rotten that this may not be as difficult as it sounds.

¹² Consummation is not the only instance where sexual performatives operate in marriage law. Historically, sexual performatives have worked not just to help establish a marriage (through consummation) but also to maintain marriage (through the work of 'conjugal rights'), to break up marriage (through adultery and the operation of other matrimonial offences), and in repairing marriage (evident in the way that sex could 'condone' or forgive a matrimonial offence). For more on all of this, see my earlier work (Brook 2007).

Zombies are slow, after all, and with a little knowledge they are easily outrun and outwitted.

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