The *Steinfeld* Effect: Equal Civil Partnerships and the Construction of the Cohabitant

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The Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 places the Secretary of State under an obligation to reform the currently same-sex only Civil Partnership Act 2004 so as to enable access by different-sex couples. It was introduced in the wake of multiple Private Members Bills, public petitions and a recent Supreme Court decision in Steinfeld and Keidan*. A key element underpinning this campaign for reform is the assertion that opening such status to different-sex couples will offer beneficial legal protections to cohabitants. Clearly motivated by the exponential rise in cohabitation, this prominent narrative in the parliamentary debates, government reports and media coverage has positioned civil partnerships as a solution to the absence of comprehensive statutory cohabitation reform, which is widely viewed as a pressing issue yet one that to date no political party has tackled. This article interrogates the assumptions underpinning this narrative and reveals that conceptualising civil partnerships as a means of giving more comprehensive legal protections to cohabitants is not a recent phenomenon in England and Wales. However, through tracing the depiction of cohabitation to the present day, this article argues that caution should be exercised in terms of precisely how far civil partnerships can combat relationship-generated disadvantage. Moreover, this article questions whether the modern construction of 'the cohabitant' beneficiary used in the equal civil partnerships narrative adequately acknowledges the myriad of cohabiting relationships or, instead, entrenches even further a monolithic understanding of interpersonal relationships premised on a marital model.*

Introduction

Civil partnership reform is a pressing issue for England and Wales. Following the recent enactment of the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 (CPMDA), the Secretary of State is now under an obligation to introduce regulations so that

two persons who are not of the same sex become eligible to form a civil partnership.[1] This Act seeks to amend the clearly anomalous position whereby, following the introduction of same-sex marriage in 2014, same-sex couples are able to enter either a civil partnership or marriage whereas different-sex couples are limited to marriage. It is also the culmination of several attempts at reform that included the introduction of multiple Private Members Bills in both Houses of Parliament[2] and a recent Supreme Court decision in *Steinfeld and Keidan v Secretary of State for International Development*.[3]

Supported by Equal Civil Partnerships and the Peter Tatchell Foundation, a noticeable campaign strategy has been to emphasise the benefits that cohabitants and their children would receive through extension of the civil partnership regime. Tim Loughton MP, who introduced the CPMDA into the House of Commons, explained his support for this reform referencing those exact terms stating that 'for me it is very simple: there are now 3.3 million unmarried couples in the UK, living together with shared financial responsibilities and over half of them with children. They need protection'.[4] Similarly, after the successful Supreme Court decision in *Steinfeld* that declared the current ban on different-sex civil partnerships incompatible with Articles 8 and 14 of the European Convention on Human Rights, the appellants stated: '[w]e did it for Britain's 3.3 million cohabiting couples'.[5] More recently, the Government announced in July 2019 that their plan to extend civil partnerships was motivated by the need to 'give long-term, cohabiting, opposite-sex couples who do not want to marry the opportunity to gain rights, protections and recognition, encouraging stable family relationships'.[6]

To date, much of the academic literature on this topic has either focussed on the human rights and discrimination arguments associated with the current structure of the Civil Partnership Act

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[1] The Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019, s 2(1).
[2] See e.g. the Civil Partnership Act 2004 (Amendment) (Mixed Sex Couples) Bill 2017-2019 introduced into the House of Lords in July 2017 by Baroness Burt and the Civil Partnership Act 2004 (Amendment) Bill 2016-17 introduced by Tim Loughton MP in July 2016.
[3] *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary)* [2018] UKSC 32, [2018] 3 WLR 415.
[4] T Loughton, 'Are we serious about protecting children?', *Bright Blue*, 17 January 2018 at http://brightblue.org.uk/tim-loughton-civil-partnerships/ (last accessed 17 September 2019).
[5] K French, 'We did it for Britain's 3.3m cohabiting couples!': Heterosexual pair WIN right to enter a civil partnership rather than get married after landmark Supreme Court ruling' *Daily Mail*, 27 June 2018.
[6] Government Equalities Office, *Implementing Opposite-Sex Civil Partnerships: Next Steps* (July 2019) 5.

2004[7] or queried the continued relevance of civil partnerships for same-sex couples in an era of same-sex marriage.[8] However, this article interrogates the more overlooked issue of precisely how equal civil partnerships are capable of addressing the well-documented disadvantages faced by cohabitants following death or relationship breakdown.[9] Whilst claims linking the two issues are perhaps motivated by the need to use the momentum for cohabitation reform as a means of galvanising support for equal civil partnerships, this article argues that the public and parliamentary debates evidence confusion with many of the reform implications misunderstood. Central to such confusion, it will be argued, is the use of a highly politicised construction of a 'cohabitant', who is often placed on a continuum reflecting their degree of perceived vulnerability or autonomy. The use of such a figurehead behind a reform movement is certainly not new in family law, however, as this article will argue its modern use plays into a problematic tendency to homogenise cohabitants thereby overlooking the different expressions of that particular relationship form. This article calls for a much clearer delineation of the precise consequences of introducing equal civil partnerships believing that, without such clarification, broader opt-out cohabitation reform proposals will be viewed as unnecessary and, as a result, pushed off the political agenda.[10]

This article is comprised of three Parts. The first Part provides a historical analysis of the conceptualisation of civil partnerships as a remedy for cohabitants. Exploring the pre-Civil Partnership Act 2004 position, this Part notes a decline in the use of marriage being proffered as a simple solution to the 'problem' of cohabitation and, centring on opt-out regimes as the preferred reform model, sees the cohabitant constructed as largely unaware of legal protections and vulnerable following relationship breakdown. It concludes by emphasising that the Civil Partnership Act 2004 created a status that in terms of legal consequences was 'marriage in all

[7] See R Wintemute, 'Civil partnership and discrimination in *R (Steinfeld) v Secretary of State for Education*' [2016] CFLQ 365, C Draghici, 'Equal marriage, unequal civil partnership: a bizarre case of discrimination in Europe' [2017] 29(4) CFLQ 313 and A Hayward, 'Equal Civil Partnerships, Discrimination and the Indulgence of Time: *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development*' [2019] 82(5) *Modern Law Review* 922.

[8] See JM Scherpe, 'The Past, Present and Future of Registered Partnerships' in JM Scherpe and A Hayward, *The Future of Registered Partnerships – Family Recognition beyond Marriage?* (Intersentia, 2017) 561.

[9] See e.g. G Douglas, J Pearce and H Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72(1) *Modern Law Review* 24 and G Fraser, 'Cohabitation reform: what recent statistics mean for the cause' [2019] Fam Law 717. Note, however, the countervailing view that marriage protections are more limited, and property law protections more extensive, than is claimed by many authors in R Auchmuty, 'The limits of marriage protection in property allocation when a relationship ends' [2016] 28(4) CFLQ 303.

[10] See e.g. the Cohabitation Rights Bill [2017-2019] introduced by Lord Marks.

but name'.[11] Drawing upon the legal landscape after the introduction of same-sex marriage and the *Steinfeld* litigation, Part II discerns a shift towards favouring an opt-in registration regime accessible by cohabitants who, as beneficiaries of reform, are characterised differently than before, with particular emphasis placed on their legal rationality, desire to exercise choice and an ideological opposition to marriage. In particular, this Part analyses key claims in the modern discourse that relate to the potential uptake of equal civil partnerships, access to legal protections, relationship stability and need for an institution that is perceived by couples to be fundamentally different from marriage. Part III critiques the implications of this construction for cohabitation reform. Noting greater reference being made in the parliamentary debates as to how the relationship functions, it argues that the campaign has necessitated some individuals seeking equal civil partnerships to emulate precisely the institution they ideologically reject: a companionate marriage. Whilst supportive of the introduction of equal civil partnerships, this article ultimately argues for a much more nuanced understanding of the claims made in relation to cohabitation along with the need to confront whether cohabitants require a status, a system of protections, or both. Without such appreciation, reform efforts in this area run the risk of homogenising cohabitants and presenting an incomplete solution to a complex problem.

I. The Early Campaign for Different-Sex Civil Partnerships

Consideration of the use of civil partnerships as a means to protect the non-marital family predates the Civil Partnership Act 2004. Property ownership cases heard during the 1980s highlighted much of the deficiencies of the law at the time with outcomes juxtaposed against the 'complete revolution'[12] in social attitudes regarding the stigma historically associated with cohabitation.[13] By 1984 the detrimental consequences that could flow from the breakdown of a cohabitating relationship were acknowledged by some members of the judiciary[14] and, from that point onwards, judicial comments often referenced the fact that cohabitants were unable to access the structured discretion available to spouses upon divorce.[15] It was a period characterised by *Burns v Burns*, the archetypal 'hard-case', that left Valerie Burns with no

[11] N Bamforth, 'The benefits of Marriage in all but name: Same-sex couples and the Civil Partnership Act 2004' [2007] 19 CFLQ 133.
[12] *Dyson Holdings Ltd v Fox* [1976] QB 503, [1975] 3 WLR 744 at 512 (Bridge LJ).
[13] See, for example, *Gamman v Ekins* [1950] 2 KB 328, [1950] 2 All ER 140 at 331, where Asquith LJ believed it was 'anomalous that a person can acquire a "status of irremovability" by living or having lived in sin'.
[14] See *Burns v Burns* [1984] Ch 317, [1984] 2 WLR 582, analysed in J Mee, '*Burns v Burns*: The Villain of the Piece' in S Gilmore, J Herring and R Probert, *Landmark Cases in Family Law* (Hart Publishing, 2010).
[15] See, for example, *Lissimore v Downing* [2003] 3 WLUK 873, [2003] 2 FLR 308 [56] (HHJ Nourse QC).

beneficial interest in the family home (owing to her failure to contribute directly to its acquisition) despite 19 years of living together with Mr Burns and caring for the couple's two children.[16] Indeed, the somewhat apocryphal 'figure of Mrs Burns' became a rallying cry for proponents of cohabitation reform[17] in spite of the fact that academics later questioned how far her predicament was typical or likely to be replicated today.[18]

Although sympathy was expressed by the judges for Mrs Burns and, quite radically in 1984, was combined with a call for legislative reform, there was no clear solution being proffered at that time to resolve relationship-generated disadvantage that could flow from what was later termed the 'antiquated and unwieldy' law of trusts.[19] Opt-in relationship registration schemes, like civil partnerships, were certainly not meaningfully countenanced in this jurisdiction until at least the end of the 1990s. Clearly, at this time, the dominance of marriage meant that either a registration scheme competing with that more established status or an opt-out regime triggered by the fact of cohabitation were simply out of the question. One point frequently made, and reiterated by the government at the time, was the need for couples to marry if they desired legal protections.[20] Thus, the construction of the cohabitant during this period, marked by more liberal societal attitudes, was of an individual that, in certain contexts, faced vulnerability but it was a vulnerability that was almost self-inflicted; it could readily be avoided by simply marrying.

Cohabitation by same-sex couples was also taking place, albeit it was a phenomenon much less reported in the case law.[21] The growing visibility of same-sex couples and their engagement with the legal system through litigation undoubtedly revealed the aforementioned vulnerability of cohabitation but, unlike their different-sex counterparts, it was a vulnerability exacerbated by homophobia and social opprobrium. Of course, attitudes towards homosexuality were changing and gradually became more tolerant during this period, but crucially the 'can marry' argument routinely invoked against different-sex couples was unable to be used against same-

[16] *Burns v Burns* [1984] Ch 317, [1984] 2 WLR 582.
[17] A Bottomley, 'From Mrs Burns to Mrs Oxley: Do Co-habiting Women (Still) Need Marriage Law?' (2006) 14 Fem LS 181, 183. See also J Miles, 'Cohabitation: Lessons for the South from North of the Border?' (2012) 71 *Cambridge Law Journal* 492.
[18] For example, R Probert, 'Trusts and the Modern Woman' [2001] 13(3) CFLQ 275 and Auchmuty, n 9 above.
[19] *Hansard, Lords Debates*, vol 757, col 2069 (12 December 2014) (Lord Marks).
[20] See Home Office, *Supporting Families* (1998) noting, at 4, that 'marriage is still the surest foundation for raising children and remains the choice of the majority of people in Britain. We want to strengthen the institution of marriage to help more marriages succeed'.
[21] J Mee, *The Property Rights of Cohabitees* (Hart, 1999) 11-13.

sex couples. Despite some important judicial developments that offered ad hoc protections,[22] there was no formalised relationship status available to them offering a pre-determined package of legal protections.

Developments foreshadowing the Civil Partnership Act 2004 linking these types of couples together were the publication of two Reports by the Cohabitation Committee of the Solicitors' Family Law Association, now Resolution, in 1999, subsequently followed in 2000. The latter Report, *Fairness for Families*, defined cohabitation as something that was different to marriage but capable of offering commitment to both different and same-sex couples. The Report recommended the possibility for cohabitants to apply to court for an order granting financial relief provided certain eligibility criteria were satisfied. Here, an opt-out regime was being proposed and, despite some support, it gained little traction. It is arguable that granting rights to some that neither had desire for them nor inclination to use them was seen as overly intrusive. Instead, the strategy of reorienting the debate towards opt-in registration regimes was adopted, which was perhaps motivated by a desire to proffer a solution that was politically more palatable, respected party autonomy and could be justified by the fact other jurisdictions had, at that time, introduced similar registration schemes.[23]

Two Private Members Bills were pre-cursors to the Civil Partnership Act 2004 and both provide insight into the changing construction of the cohabitant alongside the limitations of Bills seeking to combine general cohabitation reform with the creation of a legal status for same-sex couples. In October 2001 Jane Griffiths MP introduced the Relationships (Civil Registration) Bill into the House of Commons offering couples in an intimate relationship, whether different-sex or same-sex, the ability to register a declaration of partnership.[24] When introducing the Bill, Jane Griffiths MP focussed largely on the erroneous belief that cohabitation alone produces entitlements akin to those received by spouses; the so-called 'common law marriage myth'.[25] Interestingly, the depiction of the cohabitant developed from that used previously in the family property cases as whilst the cohabitant was viewed as

[22] See the domestic violence protections in Part IV of the Family Law Act 1996 and protections in relation to tenancy succession developed in *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27, [1999] 3 WLR 1113 and *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

[23] For early comparative analysis of this trend see R Wintemute and M Andenaes, *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart Publishing, 2001).

[24] See the House of Common's Research Briefing Paper, *The Relationships (Civil Registration) Bill and the Civil Partnerships Bill (Bill 36 of 2001–02 and HL Bill 41 of 2001–02)*, London 2002.

[25] See R Probert, 'Common-Law Marriage: Myths and Misunderstandings' [2008] 20(1) CFLQ 1, R Probert, 'Why Couples Still Believe in Common-Law Marriage' [2007] 37 Fam Law 403 and Fraser, n 9 above.

economically vulnerable, they also were searching for a status. In one poignant example, Griffiths referred to a letter from a constituent who had lived with her partner for twelve years prior to his death and their observation that:

> '[i]t was as though I didn't exist…I have no status. There's no word in the English language to describe what I am to John [her former partner]'.[26]

As the Bill involved an opt-in regime, a strong emphasis was placed on party choice and an autonomous decision to obtain a status. Perhaps anticipating opposition, the discussion of the same-sex coverage of the Bill was strikingly minimal, which had the effect of framing this registration scheme as a method to protect different-sex cohabitants. The Bill passed its second reading with 179 votes in favour and 59 against but did not proceed any further owing to insufficient parliamentary time.

In January 2002, Lord Lester of Herne Hill introduced into the House of Lords a more comprehensive proposal for civil partnerships, the Civil Partnerships Bill, offering both different and same-sex couples the opportunity register a civil partnership. To register a relationship, both parties had to be over 18, not already married or in a civil partnership and not closely related. Unlike the Griffiths Bill, there was an additional requirement for both partners to have lived together in the same household for six months prior to registration. When introducing the Bill, the vulnerability of cohabiting couples was again emphasised with Lord Lester noting that their 'legal position is either inferior or not recognised as a family status at all'.[27] Interestingly, the different-sex cohabitant was seen, yet again, as vulnerable but, at the same time, an individual that had chosen to reject marriage and now sought an alternative status. Indeed, Lord Lester emphasised the choice argument believing that it was 'unjust to continue to penalise opposite sex couples for not choosing to marry'.[28] Whereas the much more recent *Steinfeld* litigation saw a developed and forceful articulation of the reasons *why* some couples were choosing not to marry, these are left largely unexplored in these parliamentary debates.[29]

[26] *Hansard*, HC Deb, vol 373, col 321 (24 October 2001).
[27] *Hansard, Lords Debates*, vol 630, col 1692 (25 January 2002).
[28] Ibid, col 1695.
[29] *Steinfeld and Keidan v Secretary of State for Education* [2017] EWCA Civ 81, [2017] 3 WLR 1237.

The same-sex coverage proved a particularly controversial aspect of the Bill. Pre-empting the change in policy later seen in the Civil Partnership Act 2004, the detrimental impact of the current law affecting same-sex couples was viewed as something more acutely felt and pervasive than the detriments experienced by different-sex couples. Lord Lester observed that 'gay and lesbian couples suffer especially'[30] from the current law which 'continues to ignore the cohabitation relationship, as is nearly always the case with gay couples'.[31] The Bill was withdrawn in February 2002 after Lord Lester received assurance that the Government would investigate the potentially significant financial and administrative implications of civil partnerships in a cross-departmental review.

Several observations can be made that, as will be shown below, resonate with later debates and reveal the foundations for the ensuing confusion as to the identity of the beneficiaries of reform and the relationship between a formalised status and the introduction of default, opt-out protections. First, a key contradiction began to emerge as proponents, in an attempt to combat the view that reform would undermine the institution of marriage, believed that civil partnerships might even promote that institution by couples subsequently moving to civil or religious marriage.[32] Whilst likely to be an attempt to placate opposition, this is interesting in that it conceptualises civil partnerships as a status that can flow into marriage, as opposed to one that is repelled by it.[33] The difficulty with this argument, however, is that such transition to marriage would be unlikely to occur owing to the virtual equivalence between the rights obtained. It also evidences the origins of a persistent confusion that civil partnerships may provide a 'looser' or 'lighter' form of legal commitment for couples.

Second, another source of confusion is the inclusion of conduct-based elements typically seen in opt-out registration regimes. For example, in Lord Lester's Bill there is a curious additional requirement of six months cohabitation before a civil partnership can be registered. It is suspected that this requirement was inserted to demonstrate commitment and to create differentiation with marriage (that clearly possesses no comparable condition), but it does echo

[30] *Hansard, Lords Debates,* vol 630, col 1692 (25 January 2002).
[31] Ibid, col 1693.
[32] Ibid, col 1734 where Lord Goodhart noted that civil partnerships offered '[a] simpler and more private form of commitment'.
[33] O Letwin, 'Marriage works, so what is the point of a pale imitation?' *Daily Telegraph* 25 January 2002.

the eligibility requirements normally seen in an opt-out regime, albeit one that is considerably shorter.[34]

Cumulatively these developments reveal early misunderstandings as to the precise effects of implementing a second formalised status and the problems of exaggerating the number of potential beneficiaries of reform. Moreover, in a similar vein to the current debates, there were divided opinions as to the most effective vehicle for reform or, put differently, whether a status as opposed to a framework of protections was required.

a. The Civil Partnership Act 2004 and the Campaign for Cohabitation Reform

The Bill that ultimately became the Civil Partnership Act 2004 excluded different-sex couples as their position was viewed as 'significantly different from that of same-sex couples who wish to formalise their relationships but currently are unable to do so'.[35] Unsurprisingly, the parliamentary debates focussed on achieving that sole objective. Nevertheless, references to different-sex cohabitation, and the need for some form of regulation, endured. Before analysing this aspect, it is important to briefly delineate what the 2004 regime created and what civil partnerships actually offered in terms of legal protections.[36]

Civil partnerships are statutorily defined as 'a relationship between two people of the same sex…which is formed when they register as civil partners of each other'.[37] They were conceived as 'marriage in all but name' and, with few exceptions, intended to confer upon same-sex couples equivalent rights to those enjoyed by spouses.[38] In relation to formalities for creation, civil partnerships largely mirror civil marriage but have a stronger focus on the act of relationship registration. Those wishing to register a civil partnership must not be within the prohibited degrees, must be over the age of 16 and cannot already be married or in a pre-

[34] See e.g. Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, 2007).
[35] Department of Trade and Industry, *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples*, London 2003, 8.
[36] The legal framework is analysed in A Hayward, 'Registered Partnerships in England and Wales' in Scherpe and Hayward, n 8 above. See also see M Harper, M Downs, K Landells and G Wilson, *Civil Partnerships: The New Law* (Family Law, 2005).
[37] Civil Partnership Act 2004, s. 1(1).
[38] *Wilkinson v Kitzinger* [2006] EWHC 2022, [2007] 1 FLR 296 [88] (Potter P). See also B Hale, 'Homosexual Rights' [2004] 16 CFLQ 125, 132.

existing civil partnership.[39] As to legal protections, Baroness Hale referred to civil partnerships as 'a formal status with virtually identical legal consequences to those of marriage'.[40] One minor difference is that upon relationship breakdown, civil partners are unable to petition for dissolution on the basis of adultery[41] or obtain a decree of nullity on the grounds that either party is incapable of consummation, the respondent wilfully refuses to consummate or the respondent has a communicable venereal disease at the time of marriage.[42] However, the ability to seek financial remedy orders from a court is identical and the court has shown that its exercise of judicial discretion is no different to that used under the Matrimonial Causes Act 1973 for spouses.[43]

Despite the positive step taken by the enactment of the Civil Partnership Act 2004, the appetite for statutory cohabitation reform remained. Lord Goodhart called for 'better legal rights between cohabitees' as the current rights were 'plainly inadequate',[44] and Baroness Gould sought an undertaking from the Department for Constitutional Affairs to review the area as evidence indicated that cohabitants were 'extremely vulnerable'.[45] Baroness Buscombe noted '[t]here is an important job to be done…in educating and informing the ever-growing number of heterosexual couples who choose not to marry and who think that they have "common law rights".'[46] What is noticeable here is a much more prominently articulated need to combat the widespread misunderstandings generated by the common law marriage myth and this effort undoubtedly prompted deliberations by the Law Commission[47] and the Law Society.[48]

The need for reform can also be evidenced through examination of the case law. Echoing the pre-2004 judicial observations, the vulnerability of cohabitants was highlighted with judges noting the absence of a coherent regime offering protection upon relationship breakdown. In *Fowler v Barron,* for example, Toulson LJ commented that the law in relation to establishing a beneficial interest in the family home was 'complex, not well understood and prone to

[39] As mandated by the Civil Partnership Act 2004, s. 3(1)(a)-(d).
[40] *M v SSWP* [2006] UKHL 11 [99] (Baroness Hale).
[41] Civil Partnership Act 2004, s. 44(3).
[42] Ibid, s. 50.
[43] See *Lawrence v Gallagher* [2012] EWCA Civ 394, [2012] 2 FLR 643.
[44] *Hansard, Lords Debates,* vol 660 col 396 (22 April 2004).
[45] Ibid *Hansard,* col 412.
[46] Ibid, col 412.
[47] See Law Commission, *Sharing Homes A Discussion Paper* (Law Com No 278, 2002).
[48] See Law Society, *Cohabitation: The Case for Clear Law,* London 2002.

produce unfair results',[49] later reiterating those opinions in *Curran v Collins* believing that the 'law of property can be harsh on people, usually women'.[50] While the House of Lords decision in *Stack v Dowden*[51] and Supreme Court decision in *Jones v Kernott*[52] prompted calls to mitigate the perceived harshness of property law through a process of 'familialisation',[53] no ameliorating modifications to the trust regime have taken place.[54] Much more recent litigation has, however, seen the Supreme Court highlight the enduring vulnerability of cohabitants and, drawing upon Article 8 of the European Convention on Human Rights, in some instances equalise the legal treatment between spouses/civil partners and cohabitants.[55]

These judicial observations and innovations provide the backdrop for continued cohabitation law reform efforts. There has been a comprehensive proposal for reform produced by the Law Commission in 2007,[56] legislative schemes introduced in Scotland[57] and Ireland,[58] and several Private Members Bills before Parliament,[59] the most recent of which is Lord Marks' Cohabitation Rights Bill.[60] Crucially for this article, a common strategy among all recent proposals has been to reject conceptualising civil partnerships as a cohabitation measure and instead the favouring of opt-out regimes that are accessible once eligibility criteria are

[49] *Fowler v Barron* 2008] EWCA Civ 377, [2008] 2 FLR 1 [50].
[50] *Curran v Collins* (Permission to Appeal) [2013] EWCA Civ 382.
[51] [2007] UKHL 17, [2007] 1 FLR 1858. For discussion of this case, see A Hayward, 'Finding a Home for 'Family Property'' in N Gravells, *Landmark Cases in Land Law* (Hart, 2013).
[52] [2011] UKSC 53, [2012] 1 FLR 45.
[53] J Dewar, 'Land, Law, and the Family Home' in S Bright and J Dewar, *Land Law: Themes and Perspectives* (OUP 1998) 327 and A Hayward, 'Family Property and the Process of Familialization of Property Law' [2012] 23(3) CFLQ 284.
[54] See B Sloan, 'Keeping up with the Jones case: establishing constructive trusts in "sole legal owner" scenarios' (2015) 35 *Legal Studies* 226. Note, however, that *Stack* and *Jones* were joint legal title disputes and thus their ability, as a matter of precedent, to overturn the more restrictive principles applicable to sole-legal title disputes created by *Lloyds Bank v Rosset* [1990] UKHL 14, [1991] 1 AC 107 was limited.
[55] See *Brewster v Northern Ireland Local Government Officers' Superannuation Committee* [2017] UKSC 8, [2017] 1 WLR 519 (eligibility for a survivor's pension) and *Re McLaughlin's Application for Judicial Review* [2018] UKSC 48; [2018] 1 WLR 4250 (entitlement to widowed parent's allowance). See also *Smith v Lancashire Teaching Hospitals NHS Foundation* Trust [2017] EWCA Civ 1916, [2018] 2 WLR 1063 (entitlement to bereavement damages) and *Langford v The Secretary of State for Defence* [2019] EWCA Civ 1271 (entitlement to Armed Forces Pension Scheme).
[56] Law Commission, n 34 above.
[57] See Family Law (Scotland) Act 2006, s. 28 analysed in F Wasoff, J Miles and E Mordaunt, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (2009-2010).
[58] See Certain Rights and Obligations of Cohabitants Act 2010, Part 15, and analysis by B Tobin, 'The regulation of cohabitation in Ireland: achieving equilibrium between protection and paternalism?' [2013] 35(3) *Journal of Social Welfare and Family Law* 279.
[59] See Lord Lester's Cohabitation Bill [2008-09] and the Cohabitation (No. 2) Bill [2008-09] introduced into the House of Commons by Mary Creagh MP.
[60] The Cohabitation Rights Bill [2017-2019].

satisfied.[61] Rationales for the selection of this latter model can be seen in the responses to the Law Commission proposal.[62] For example, Rebecca Probert noted that an opt-in regime would not respond to the economic vulnerability faced by cohabitants as 'the vast majority of couples have the possibility of opting in to either marriage or civil partnership' and that comparative research, such as the experience of the Netherlands suggested 'that the demand for an alternative to marriage is relatively low'.[63]

More importantly, Probert's contribution uncouples cohabitation reform from a desire to create an alternative to marriage, arguing that 'an opt-in regime might be seen as controversial – being perceived as a direct competitor to marriage – and so jeopardize the much-needed reform of the law relating to cohabitants'.[64] Here, it is arguable that the construction of the cohabitant is of an individual that needs default protections falling short of those accessible through marriage and, when viewed as a group, are seen, in the view of the Law Commission, as 'economically vulnerable people facing unjustified hardship on separation'.[65] Whilst this viewpoint from an organisation tasked with the aim of law reform is hardly surprising, the premise of the proposal was to create a bespoke regime for cohabitants that was distinct from marriage. For example, the somewhat easier reform strategy of simply extending the Matrimonial Causes Act 1973 applicable to the granting of financial remedies orders following divorce was rejected. By focussing on relationship-generated economic disadvantage as opposed to catering for future party need, endeavours were made to recognise the fact that the myriad of different cohabitating relationships necessitated a different remedial response by the courts. Thus, there was a clear focus on the vulnerability of cohabiting couples, with the Law Commission concluding that 'while some cohabiting couples might welcome an alternative status, it is the position of those who do not realize that they need to opt in that poses the far more pressing problem'.[66]

Part I of this article has revealed that despite early attempts to use relationship registration as a mechanism to simultaneously protect same-sex couples and different-sex cohabitants, the advent of the Civil Partnership Act 2004 saw these issues uncoupled. While civil partnerships

[61] For an exception to this trend see the call for an opt-in regime by D Hughes, M Davis and L Jacklin, '"Come Live with me and Be my Love" – A Consideration of the 2007 Law Commission Proposals on Cohabitation Breakdown' (2008) *Conveyancer and Property Lawyer* 197.
[62] See S Bridge, 'Cohabitation: Why Legislative Reform is Necessary' [2007] 37 Fam Law 911.
[63] Law Commission, n 34 above, para 2.83.
[64] Ibid.
[65] Ibid, para 2.91.
[66] Ibid, para 2.85.

were becoming established as an important status for same-sex couples, the campaign for cohabitation reform not only developed in a separate sphere but also was premised on requiring a bespoke and fundamentally different opt-out legislative response to relationship-generated disadvantage. The narrative visible in reform campaigns was one that placed a greater emphasis on the vulnerability of couples, as exacerbated by the common law marriage myth, rather than on their legal rationality or autonomous choice to reject marriage. More recent developments, however, have seen the consideration of the issue of civil partnerships and cohabitation reform reunite and it is to this narrative that the article now turns.

II. The *Steinfeld* Effect - Elements of the Modern Campaign for Equal Civil Partnerships and their Relationship to Cohabitation Reform

As the preceding Part has demonstrated inclusion of different-sex couples within the civil partnership regime has been an issue explored in both the courts and in Parliament. In relation to court proceedings, the *Steinfeld and Keidan* litigation was, in part, motivated by the need to offer greater legal protections to cohabitants. The case involved a claim by a different-sex couple for the registration of a civil partnership currently prohibited by sections 1 and 3 of the Civil Partnership Act 2004. Whilst unsuccessful in the High Court and Court of Appeal,[67] the Supreme Court unanimously declared those provisions incompatible with Articles 8 and 14 of the European Convention on Human Rights.[68] The case has been comprehensively analysed in the academic literature, but for present purposes, this article will analyse how that case alongside its discussion in the parliamentary debates and the media has contributed to a new narrative positioning civil partnerships as a solution to the absence of comprehensive protections for cohabitants. In terms of activity in Parliament, since the availability of same-sex marriage in March 2014, several Private Members Bills have been introduced seeking to create different-sex civil partnerships.[69] Introduced by Tim Loughton MP, the Civil Partnerships, Marriages and Deaths (Registration Etc.) Act 2019 now places the Secretary of State under an obligation to extend the Civil Partnership Act 2004 so as to permit access by different-sex couples. Drawing upon these developments, the most recent discussion of the

[67] See A Hayward, 'Justifiable Discrimination – The Case of Opposite-Sex Civil Partnerships' (2017) 76 *Cambridge Law Journal* 243 and Wintemute, n 7 above.
[68] See A Hayward, 'Taking the Time to Discriminate' [2019] 41(1) *Journal of Social Welfare and Family Law* 92 and Hayward, n 7 above.
[69] Tim Loughton MP proposed a similar amendment during the Report stage of the Marriage (Same Sex Couples) Bill 2013.

relationship between cohabitation and equal civil partnerships will now be deconstructed into four strands. It will be argued that cumulatively they all contribute to the construction of a cohabitant that departs from earlier narratives which, problematically, is likely to create obstacles for future law reform, analysed in Part III.

(a) Statistical Data and Equal Civil Partnerships as a Response to the Rise in Cohabitation

A prominent aspect of the equal civil partnership reform campaign has been to emphasise the increase in cohabitation and to conceptualise equal civil partnerships as a mechanism that can respond to such change. In 2017, there were 12.9 million married or civil partner couple families in the UK which constitutes the most common family form.[70] Interestingly, though, recently released data reveal that different-sex marriages in England and Wales were at their lowest on record following their gradual decline since the 1970s.[71] Whilst some years have seen an increase in the marriage rate, marriage is generally losing popularity.[72] Contrastingly, cohabitation has become the second largest family type, standing at currently 3.3 million families, and also represents the fastest growing.[73] References to these statistics were repeatedly made when Tim Loughton MP presented an earlier iteration of his Bill in 2017. In particular, he noted that 3.2 million cohabiting different-sex couples represent 'more than 4,900 couples per parliamentary constituency' and constitute 'about double the figure that was reported just 15 years ago'.[74] More importantly for this article, attempts were made in later parliamentary debates to link the availability of civil partnerships to this demographic and view them as a beneficial response:

> 'If just one in 10 cohabiting opposite-sex couples entered into a civil partnership, that would amount to more than 300,000 couples and their children. The extension of civil partnerships would offer the prospect of greater security and stability, lower likelihood of family breakdown, and better social and financial outcomes.'[75]

[70] Office for National Statistics, *Families and Households 2017: Statistical Bulletin* (8 November 2017).
[71] Office for National Statistics, *Marriages in England and Wales: 2015* (28 February 2018).
[72] Office for National Statistics, *Marriages in England and Wales: 2016* (28 March 2019).
[73] Office for National Statistics, n 70 above.
[74] *Hansard,* HC Deb vol 635, col 1098 (2 February 2018).
[75] Ibid, col 1099.

Obviously, mere citation of numbers is not, by itself, enough to prompt legislative reform, particularly as the dramatic increase in cohabitation has been a fact commented upon for decades and no legislative action has taken place. Indeed, back in 2002 when debating the Civil Partnership Bill, Baroness Ludford remarked that introducing civil partnerships would have the effect of extending 'the law's dominion over unprotected thousands'.[76] Thus, it is unsurprising that references to the numerical increase in cohabitation are being linked to the need for Parliament to align the law's treatment with the statistical reality of family forms. What is striking though is the confident assumption of registration and its uptake; in particular, the belief that civil partnerships 'will enable millions of people across the country to enter into legally binding and protected arrangements'.[77]

(b) Beyond Access to Legal Protections – Symbolism and the Intrinsic Value of Civil Partnerships

The campaign for equal civil partnerships has often focused on the absence of a comprehensive framework of legal protections for cohabiting families. In *Steinfeld,* Arden LJ referenced a witness statement that articulated this point where the respondent noted that: 'I believe that many young cohabitees with children, where the property rights are not as clearly set out as they might be, are being left without the chance of protection at a time when their children are most vulnerable.'[78] Campaigners have also proffered more specific examples of vulnerability. One campaigner, Martin Loat, who with his partner, Claire Beale, entered a civil partnership on the Isle of Man and thus became one of the first couples to enter such union in the British Isles, quoted the example of him attempting to renew his child's passport which was declined.[79] As his child was born before the reforms of 2003 in relation to the acquisition of parental responsibility, the official processing the application remarked, "where is the mother?", clearly referring again the invisibility of his status, discussed further below.[80]

[76] *Hansard, Lords Debates,* vol 630 col 1712 (25 January 2002).
[77] *Hansard,* HC Deb, col 18 (18 July 2018) (Andy Slaughter MP).
[78] [2017] EWCA Civ 81, [2017] 3 WLR 1237 [6].
[79] M Loat, 'I got a heterosexual civil partnership on the Isle of Man – now bring them to the whole UK', *iNews,* 12 February 2018.
[80] See the Adoption and Children Act 2002 s 111 that amended the Children Act 1989 so as to permit an unmarried father to acquire parental responsibility provided they are registered as the child's father on or after 1 December 2003.

As to protections between the couple *inter se*, references were made in the parliamentary debates to the power of a court to divide assets upon relationship breakdown alongside the inability of couples to benefit from exemptions from such as those in relation to inheritance tax.[81] Interestingly, these protections were again linked back to children with Tim Loughton MP presenting relief from inheritance tax as a pressing issue that was 'about the future maintenance of children'.[82]

Of course, in most parliamentary debates, there will be posturing and political grandstanding by Members of Parliament when presenting the virtues of a particular Bill. But opposition can be found, and it is this issue of legal protections that many opponents challenged. A key objection to the Bill was to question whether the inability to access such protections was a conscience-based barrier or, put differently, a self-induced detriment, because couples with concerns as to traditional marriage could simply enter a civil marriage to obtain protections. What is revealing here, though, is that whilst access to legal protections was important, individuals wanted the status for more ephemeral, symbolic reasons, believing that it would better reflect their ideological beliefs. This perspective echoes the search for status narrative present when civil partnerships were first countenanced and the fact that, when introduced in 2005, civil partnerships possessed an important signalling function representing society's acceptance of same-sex couples after decades of exclusion.[83] Moreover, through drawing a distinction between status and legal effects, this perspective also echoes the Strasbourg jurisprudence on the value of relationship registration. For example, the European Court of Human Rights in *Oliari v Italy*, a case concerning access to a registered partnership by same-sex couples, stated that such schemes possess 'an intrinsic value…irrespective of the legal effects, however narrow or extensive, that they would introduce'.[84]

(c) Relationship and Family Stability

[81] See the Civil Partnership Act (2004) (Amendment) (Sibling Couples) Bill [2017-19] seeking to allow two siblings to become civil partners, provided that they both are over 30 and have been living together for 12 continuous years immediately prior to the date of registration.
[82] *Hansard*, HC Deb, vol 619, col 641 (13 January 2017).
[83] See M Mitchell, S Dickens and W O'Connor, *Same Sex Couples and the Impact of Legislative Changes*, National Centre for Social Research, 2009.
[84] [2015] 65 EHRR 957, [174]. See A Hayward, 'Same-sex Registered Partnerships – A Right to be Recognised?' (2016) 75 *Cambridge Law Journal* 27.

A further narrative permeating these debates is the belief that equal civil partnerships offer stability not only for the couple concerned but also society more generally. For example, Ben Wallace MP noted '[s]tability in our relationships is incredibly important. We all aspire to that as a good basis for our society. Strong personal relationships will lead to a strong society'.[85] This feature is interesting and had considerably less visibility in earlier debates. One explanation for this is the fact that the Civil Partnership Act 2004 was a Labour-initiative and more recent developments in this area have been led by the Conservative Party or a Conservative-led coalition. Whilst valuing family stability crosses party-political lines, championing personal responsibility, privatising care and diminishing the role played by the state in the private sphere has long been recognised as a distinctive Conservative ideal.[86] Indeed, Tim Loughton MP, presented his Bill as an initiative that actually exemplified Conservative values[87] and that family breakdown was 'a big problem, a growing problem, and a costly problem' to society.'[88]

Support for relationship stability was also present in the media coverage. For example, the Marriage Foundation welcomed the prospect of equal civil partnerships believing that they would 'provide a new, formal basis for those who want to make a solid and legally backed commitment'.[89] Whilst not going so far as promoting exclusively marriage, the parliamentary debates and Government reports updating the public on progress in extending the regime to different-sex couples[90] also reveal a view that formalisation is the primary mechanism through which stability can be achieved. This is often juxtaposed against the supposed fragility of cohabitation and its inherent definitional issues.[91]

(d) An Ideological Opposition to Marriage, Party Autonomy and the Exercise of Choice

[85] *Hansard*, HC Deb, vol 656, col 693 (15 March 2019).
[86] See E van Acker, 'Disconnected Relationship Values and Marriage Policies in England' [2016] 38(1) *Journal of Social Welfare and Family Law* 36 and A Gilbert, 'From 'pretended family relationship' to 'ultimate affirmation': British conservatism and the legal recognition of same-sex relationships' (2014) 26 CFLQ 463.
[87] T Loughton, 'Are we serious about protecting children?', *Bright Blue*, 17 January 2018 at http://brightblue.org.uk/tim-loughton-civil-partnerships/ (last accessed 17 September 2019).
[88] *Hansard*, HC Deb, col 961 (21 October 2015).
[89] F Gibb, 'Hopes raised for straight form of civil partnership', *The Times*, 29 January 2018.
[90] Government Equalities Office, n 6 above.
[91] See *Kimber v Kimber* [2000] 1 WLUK 439; [2000] 1 FLR 383 producing a test for determining the existence of cohabitation.

A final trend relates to the discussion of the type of cohabitant that would benefit from civil partnerships. David Drew MP referred to the widespread lack of knowledge among cohabitants as to legal rights and to Resolution's Cohabitation Awareness Week, remarking that '[h]opefully this change in the law will put that right'.[92] Recent research undertaken by Anne Barlow was cited to further emphasise the worrying extent, and persistence, of the common law marriage myth.[93] However, more important for this article, is the presence of a much more dominant counter-narrative centring on a 'conscious choice' to shun marriage that did not feature as prominently in previous parliamentary debates.[94] Tim Loughton MP provided a clear articulation of why many couples campaigning for equal civil partnerships reject marriage:

> 'People *choose* not to get involved in the paraphernalia of formal marriage for a variety of reasons: it is too much of an establishment thing to do; it is identified as an innately religious institution for many, and even if done in a register office, it has religious connotations; some see it as having a patriarchal side, so it is seen as some form of social control. Those are not my own views, but are certainly the way many see it. There are a whole lot of complex motives as to why many of our constituents do not go down the formal marriage route' (emphasis added).[95]

Clearly responding to the gradual decline in the marriage rate, this observation recognises some of the motivations for rejecting marriage and echoes those advanced by the Equal Civil Partnerships campaign and the *Steinfeld* litigants.[96] Although choice featured when Parliament was debating Lord Lester's Bill, the current availability of same-sex marriage (that was obviously not present at that time) certainly changes the parameters of the more recent debate. Choice and the exercise of party autonomy have become more central. For example, the fact that some same-sex civil partners have decided not to convert their civil partnerships into marriages indicates that they have *chosen* a particular family form, a choice presently denied

[92] *Hansard*, HC Deb, vol 635, col 1101 (2 February 2018).
[93] NatCen Social Research, 'Almost half of us mistakenly believe that common law marriage exists', 22 January 2019.
[94] *Hansard*, HC Deb, vol 635, col 1101 (2 February 2018) (Tim Loughton MP). This sentiment was echoed by James Cartlidge noting that 'the Bill provides a chance to have a choice': *Hansard*, HC Deb, vol 656, col 676 (15 March 2019).
[95] *Hansard*, HC Deb, col 960 (21 October 2015).
[96] See Equal Civil Partnerships, 'Why Does it Matter?' available at http://equalcivilpartnerships.org.uk/why-does-it-matter/ (last accessed 17 September 2019).

to different-sex couples.[97] The rejection of civil partnership by some of these couples, which is facilitated by the unique context that England and Wales created post-marriage equality, further channels the modern debate towards formalisation and the attaining of status as the preferred mechanisms to tackle vulnerability generated by relationship breakdown.

III. Interrogating the Protections offered to Cohabitants through the Introduction of Equal Civil Partnerships

As the preceding section has demonstrated, various narratives present in the parliamentary debates and *Steinfeld* litigation have had the effect of constructing the cohabitant in a manner that differs from that envisaged by the Law Commission in 2007 and academic scholarship favouring opt-out regimes. What appears more prominently today is a focus on couple autonomy, legal rationality and respect for a rejection of marriage coupled with a simultaneous desire for what is perceived to be an alternative formalised status.[98] The following section further interrogates these assumptions and presents the case for reorientation of the debate.

(a) The Beneficiaries of Reform

An important preliminary issue is to explore what types of couple will actually seek a civil partnership once the regime is extended. In answering this question, it should be appreciated that, like marriage, the act of cohabitation is infinitely variable with the qualities of a relationship difficult to classify. Despite definitional limitations, a useful typology to discern the potential beneficiaries of reform is presented by Anne Barlow and Janet Smithson.[99] Through their empirical research, they identified four different types of cohabitant. The 'Ideologues' were in long-term, committed relationships but one or both of the partners held an ideological objection to marriage. Contrastingly, another group, the 'Romantics', saw marriage as a final goal, expressive of their commitment to one another, with cohabitation acting as a pre-cursor. 'Pragmatists' represented the third group who were motivated by legal or financial reasons for either marriage or cohabitation that stood in contrast to 'Uneven

[97] See J Haskey, 'Civil Partnerships and same-sex marriages in England and Wales: A Social and Demographic Perspective' [2016] Fam Law 44 and, for the latest statistics, Government Equalities Office, n 6 above, 27.
[98] See A Barlow, 'Solidarity, autonomy and equality: mixed messages for the family?' [2015] CFLQ 223.
[99] A Barlow and J Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform' [2010] 22(3) CFLQ 328. An earlier and related typology is provided in M Freeman and C Lyon, *Cohabitation without Marriage* (Gower Publishing, 1983) 50.

Couples', where one party was more committed than the other, leaving one partner in a potentially vulnerable position. Barlow and Smithson recognised the overlap between these categorisations but viewed them as an analytical tool for expressing the spectrum of cohabiting relationships and the motivations of individuals.

All four of these categories of cohabitant are alluded to in the parliamentary debates. What is most noticeable, however, is the dominant construction of the cohabitant as an 'Ideologue'. It is conceded that this characterisation is perhaps to be expected for a variety of reasons. First, it is arguable that the *Steinfeld* litigation and the activism of the Equal Civil Partnerships campaign played an important role in creating an archetypal cohabiting couple. Whilst the litigants themselves preferred to argue that marriage simply did not feel right for them as opposed to constructing their objection as an ideological one, it is clear that they exemplified the Ideologue couple and this image was perpetuated through the associated media coverage.[100] Although the *Steinfeld* litigants support cohabitation reform *in addition to* equal civil partnerships, it is scrutiny of their ideological objection to marriage that has become the primary focus of often-heated debate within the national press.[101] Second, and linked to the former reasons, once cohabitation is predominantly framed in the aforementioned manner, it is not surprising that an opt-in registration regime would be viewed as appealing. Indeed, Barlow and Smithson predicted that extension of civil partnerships would be attractive to 'the legal and psychological needs of this very committed and legally rational group (Ideologues)'.[102]

It follows that if the Ideologue couple is constructed as the main beneficiary of reform, introducing different-sex civil partnerships would clearly cater for this particular form of couple. In particular, they would cater for the cohabitant that is autonomous, empowered and, on the whole, acutely aware of legal entitlements. However, reform premised on this basis runs the risk of homogenising cohabitants thereby overlooking the diversity in the nature of

[100] See e.g. A Hern, 'The civil partnerships ruling means we can move on from marriage', *The Guardian*, 27 June 2018, M Parris, 'The term 'marriage' needs to be untangled', *The Spectator*, 7 July 2018 and H Betts, 'Finally I can say I don't to marriage - and I have a law to back me up', *The Telegraph*, 16 March 2019.

[101] See e.g. T Utley, 'A straight couple whining because they can't have a civil partnership? Give me strength!', *The Daily Mail*, 5 December 2014, P Hitchens, 'A fight for equality? No, it's a plot to wipe out marriage', *The Daily Mail*, 26 February 2017, O Utley, 'Heterosexual couples don't need civil partnerships, but siblings like my mum and her sister do', *The Telegraph*, 3 October 2018 and S Silas, 'Why I won't be raising a glass to mixed-sex civil partnerships', *The Guardian*, 3 October 2018.

[102] Barlow and Smithson, n 99 above, at 337. Civil partnerships might also assist the Romantics who may conceptualise them as a stepping stone to marriage.

cohabiting relationships.[103] It is true that many Ideologue couples would wish to access a formalised status that they view less value-laden and something that they believe would give better expression to their interpersonal relationship. But that cohort would represent a significant statistical minority when compared to the other classes of cohabitant within the Barlow and Smithson typology. Moreover, the Ideologue couples are perhaps not those presenting the greatest concern for family law or exemplify the type of couple whose predicament has motivated reform campaigns in the past. After all, such legally rational couples could easily take advantage of a variety of legal mechanisms to protect themselves such as executing express declarations of trust in relation to the shared home, creating cohabitation agreements or drawing up wills.[104] Conversely, short relationships with stark economic disparity or relationships where one party wishes to formalise whilst the other does not are arguably those more deserving of legal protection but are much less likely to be caught by civil partnership reform.[105]

(b) Potential Demand for Equal Civil Partnerships

The claim that equal civil partnerships would effectively protect a significant proportion of the cohabiting population also requires further analysis.[106] There is considerable public support for the introduction of equal civil partnerships[107] and, if introduced, there is likely to be an initial surge owing to demand.[108] In the parliamentary debates, reference was made to the fact that 61 per cent of the 214,320 respondents to a specific question in the Equal Civil marriage consultation regarding the introduction of different-sex civil partnerships supported the move.[109] This consultation received the largest ever public response but that percentage may need to be approached cautiously as some respondents valued civil partnerships owing to their

[103] C Smart and P Stevens, *Cohabitation Breakdown* (Family Policy Studies Centre, 2000).
[104] See Auchmuty, n 9 above.
[105] See e.g. G Douglas, J Pearce and H Woodward, 'Money, Property, Cohabitation and Separation: Patterns and Indications' in R Probert and J Miles, *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart, 2009).
[106] A point not just present in the equal civil partnership debates but also those relating to Lord Marks' Cohabitation Rights Bill. See, for example, Baroness Vere's observation that the availability of civil partnerships will have 'a profound impact on the number of people who still choose to cohabit rather than having a formal legal relationship': *Hansard, Lords Debates,* vol 796, col 1272 (15 March 2019).
[107] The Change.org petition, *Open Civil Partnerships to all*, is currently standing at 152,000 signatures in September 2019.
[108] As alluded to in the Government Equalities Office, *Legislative requirement to extend civil partnerships to opposite-sex couples: Impact Assessment* (July 2019).
[109] HM Government, *Equal Marriage: The Government's Response*, London 2012, 42.

objection to same-sex marriage.[110] That scepticism may be further justified by the later 2014 Department for Culture, Media and Sport consultation. When asked whether civil partnerships should be extended to different-sex couples, of the 10,634 responses, 76 per cent of respondents were against, with 22 per cent in favour.[111] Therefore, the full extent of their impact on *all* cohabitants needs to be appreciated. It can also be questioned whether couples would in fact avail themselves of this opportunity. In 2007, the Law Commission appreciated this fact when justifying the opt-out nature of their own proposal stating that owing to 'the tendency of people not to get around to things, an opt-in scheme, just like the current law, would leave many unprotected'.[112]

Some potential to offset this confident assumption of uptake is provided by a Government Equalities Office Research Brief released in July 2019.[113] Noting that '[p]revious consultations on civil partnerships had not estimated this demand systematically', the exercise surveyed relationship intentions of different-sex couples in 'serious' relationships.[114] Interestingly, the findings revealed that 50% of the sample stated that they would not be interested in registering a civil partnership.[115] Within that group of respondents, the reasons proffered are informative with 44% stating that they saw no benefit in entering a civil partnership over marriage.[116] Underlining the need for opt-out legal protections for cohabitants, 24% of that group stated that they were not at all interested in legally recognising their relationship whether through marriage or an alternative.[117] This Research Brief, offering somewhat lukewarm support for different-sex civil partnerships, curiously did not feature at all in the main *Implementing Opposite-Sex Civil Partnerships: Next Steps* document. Instead, that document proceeded on the basis of linking different-sex civil partnerships with the high level of cohabitation in the UK. This, it is argued, shows that pushing forward with reform appears to be motivated more by a belief in the virtue of relationship formalisation, as an inherent good offering stability to

[110] This idea of supporting civil partnerships so as to not be perceived as anti-equality is explored further in K Browne and C Nash, 'Opposing same-sex marriage by supporting civil partnerships: Resistance to LGBT Equalities' in N Barker and D Monk, *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections* (Routledge, 2015).
[111] Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): Report on Conclusions*, London 2014, 11, para 2.12.
[112] Law Commission, n 34 above, para 2.87.
[113] Government Equalities Office, *Exploring the Potential Uptake of Opposite-Sex Civil Partnership* (July 2019).
[114] Ibid, 4.
[115] Ibid, 6.
[116] Ibid, 11.
[117] Ibid, 11.

the couple and their family, than a desire to confront the statistical reality that, at least in the immediate future, uptake will be relatively low.

(c) The 'Deserving' Cohabitant – Seeking Status over Protections

Alongside placing emphasis on an ideological opposition to marriage, campaigners for reform have frequently pointed to the invisibility of cohabiting couples. Tim Loughton MP, for example, said that cohabitants 'simply want their families to be recognised in the eyes of the state'.[118] This narrative, again, has the ability to distort the debate and requires further analysis. By conceptualising cohabitants as strangers or individuals absent from the law's consciousness, it can be argued that the campaign for equal civil partnerships is manifesting what has been termed by Bainham, in the parent-child context, as 'status anxiety'.[119] What is fuelling the desire for legal recognition is not merely the need for legal protections, discussed above, but instead access to a status. Such status not only regulates affairs and offers stability to the parties and dependent children, but also, more importantly, offers the 'imprimatur of the law'.[120]

Problematically, framing this move as a search for status creates hierarchies of relationships and reveals the types of unions that are viewed as desirable. For example, the law reform process of giving recognition to relationships in the past has often deployed a functionality analysis. This approach, which emphasises the fact that certain unregulated relationships are functioning in a similar manner to or even identically with recognised ones, was particularly noticeable in the campaign for same-sex relationship recognition as evidenced in *Fitzpatrick v Sterling Housing Association*[121] and *Ghaidan v Godin-Mendoza.*[122] In those cases the House of Lords emphasised, in particular, the loving, committed, longstanding and also monogamous nature of the parties' relationships when determining whether a survivor can accede to the deceased partner's tenancy. The modern parliamentary debates in relation to equal civil partnerships are replete with similar functionality observations mentioning, in particular, the dependency and commitment of the couples or, put differently, the 'deservingness' of

[118] *Hansard,* HC Deb, col 962, (21 October 2015). Tim Loughton MP reiterates in a later parliamentary debate the desire for couples to have their 'relationship recognised by the state': *Hansard,* HC Deb, vol 635, col 1097, (2 February 2018).
[119] A Bainham, 'Status Anxiety? The Rush for Family Recognition' in F Ebtehaj, B Lindley and M Richards, *Kinship Matters* (Hart Publishing, 2006) 43.
[120] Ibid, 48.
[121] [2001] 1 AC 27, [1999] 3 WLR 1113.
[122] [2004] UKHL 30, [2004] 2 AC 557.

couples.[123] Members of Parliament routinely used examples of injustice supplied through correspondence from their constituents and referenced relationship qualities. In the 2016 debates, Tim Loughton MP used two case studies of cohabitants that had been together for 25 years and 38 years.[124] Similarly, in the 2017 Second Reading of the Loughton Bill, Sandy Martin MP referred to a couple with children that had been living together for 40 years.[125]

This narrative is important for a variety of reasons. First, this strategy evidences much of the criticism and deficiencies levelled against using functionality analysis as it adopts an intrusive dissection of a couple's relationship dynamics (one that clearly does not take place when couples marry) and depicts interpersonal commitment as capable of expression, but only in a particular way.[126] Assumptions are made about the relationship and expectations generated. This, it is argued, creates a paradox because for Ideologue couples that seemingly reject the institution of marriage, functionality operates in practice on the basis of how far a relationship *mimics* marriage. When a quest for status and emphasis on fostering family stability are combined, it can be questioned how far the campaign for civil partnerships is really about an attempt to attain 'the desirable', albeit one with a different name to 'marriage'. Useful in understanding this movement is research by Elizabeth van Acker, who coined the term the 'conception of the desirable', and used it to explain frameworks underpinning relationship values.[127] Marriage was, of course, the classic example of the gold standard relationship status and its promotion through Government policy reveals a hope to 'embed and propagate…preferred values'.[128] Whilst van Acker noted that any Government attempt to steer social behaviour through law has rarely been successful, the 'conception of the desirable' certainly resonates with the civil partnership debates owing to the repeated references to stability, commitment and personal responsibility. Ultimately, it is argued, that a focus on obtaining a status reinforces the view of the 'deserving cohabitant' as essentially quasi-marital and is an approach that is capable of marginalising couples that fail to emulate these qualities.

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[123] See F Wasoff, J Miles and E Mordaunt, *Legal Practitioners' Perspectives on the Cohabitation Provisions of the Family Law (Scotland) Act 2006* (Nuffield Foundation Report, October 2010) 90-92 for their discussion of the 'notion of the deserving cohabitant'.
[124] *Hansard*, HC Deb, vol 619, col 644-45 (13 January 2017).
[125] *Hansard*, HC Deb, vol 635, col 1126 (2 February 2018).
[126] See Notes, 'Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family' (1990-1991) 104 *Harvard Law Review* 1640 and K Griffiths, 'From 'form' to function and back again: a new conceptual basis for developing frameworks for the legal recognition of adult relationships' [2019] 31(3) CFLQ 227.
[127] See van Acker, n 86 above.
[128] Ibid, 37.

Second, a fixation with status as the means to obtaining legal protections has other reform implications. For balance, it should be noted that it is a mischaracterisation of the law to say that cohabitants are largely ignored as they are recognised in some legal contexts.[129] Dependent cohabitants are better protected upon the death of their partner than following relationship breakdown as they challenge a will or intestacy.[130] Similarly, there is clearly scope for couples to regulate their affairs through contract. However, the searching for status narrative in the equal civil partnership debates not only oversimplifies the issue but also creates a false dichotomy between protections (formalisation) and absence of protections (non-formalisation). Tim Loughton, in the Committee stage of his Bill, presented reform in this manner noting that if couples desire protection 'the only option for them, and everyone else, is to extend civil partnerships to all'.[131] Thus, by imbuing this 'status' with notions of deservingness and an exercise of party choice, the parliamentary debates appear to suggest that opt-out regimes simply do not go far enough.

Third, if the construction of the cohabitant is premised on respect for party autonomy and their decision to access a status if they desire, it follows that opt-out regimes will invariably be viewed as inferior.[132] As, perhaps strategically, no opt-out reform proposal to date has sought equalisation between cohabitation and marriage, it is easy to see why limited protections appear less attractive than a status that has been termed 'marriage in all but name'.[133] Moreover, these opt-out regimes are frequently criticised for invading privacy and intruding upon the 'corner of freedom' available to couples wanting their relationship not to be regulated by the State.[134] The implication of the parliamentary debates appears to be empowerment of the cohabitant by taking ownership of their affairs. In a Resolution speech Lady Hale rebuffed the argument that equal civil partnerships might negatively impact upon the marriage rate stating that, whether marriage or civil partnership is chosen, 'why should we mind which they do, as long as they do something?'[135] Proactivity, again, featured prominently in former Prime Minister Theresa May's announcement in October 2018 that different-sex civil partnerships were to be

[129] See Auchmuty, n 9 above.
[130] See the Inheritance (Provision for Family and Dependants) Act 1975.
[131] *Hansard*, HC Deb, col 12 (18 July 2018).
[132] See Barlow, n 98 above.
[133] *Wilkinson*, n 38 above, at [88] (Potter P). See also Hale, n 38 above, at 132.
[134] R Deech, 'The Case Against the Legal Recognition of Cohabitation' [1980] 29 ICLQ 480, 483 and R Deech, 'Cohabitation' [2010] Fam Law 39
[135] B Hale, 'Private Family Law Reform' (2018) Fam Law 810, 814.

introduced to 'protect the interests of opposite-sex couples who want to commit, want to formalise their relationship but don't necessarily want to get married' thereby ensuring that 'all couples, be they same-sex or opposite-sex, are given the same choices in life'.[136] What this reveals is the troubling positioning of equal civil partnerships as a solution to the current law's deficiencies. By constructing the cohabitant in a particular manner, the regulation of interpersonal relationships is being channelled towards a solution that would be accessible and attractive to only a relatively small proportion of cohabitants.

(d) Wider Implications for Reform

It is crucial that the wider implications of reform are considered. Several members of Parliament appeared to support that particular viewpoint and acknowledged the role of information campaigns to raise public awareness.[137] The debates themselves were also viewed as opportunities to get the 'message out there'.[138] Whilst the need for greater legal awareness is hard to disagree with and has been attempted in the past,[139] the message transmitted must be accurate and framed with a clear understanding of the nature of cohabiting relationships and how they can be protected. Thus, what is needed here is a reorientation of the debate and correction of the prevailing narrative.

It needs to be understood that equal civil partnerships are not a panacea capable of directly tackling all forms of relationship-generated disadvantage. It is clear that they will offer a desired option for formalisation for a significant minority of cohabiting couples, but it is statistically more likely that the majority will not formalise their relationship. Similarly, whilst it is certainly arguable that equal civil partnerships can develop into a 'modern alternative to marriage',[140] they will not offer a 'lighter' form of commitment where couples can 'effectively grant each other greater rights'.[141] It should be remembered that the legal protections are virtually identical to marriage and unlike, for example the French *pacte civil de solidarité*, are incapable of being comprehensively varied by the parties. Kevin Foster MP is correct in

[136] J Murphy, 'Straight couples to be allowed to enter civil partnerships, Theresa May reveals', *Evening Standard*, 2 October 2018.
[137] See observations made by Sandy Martin MP: *Hansard*, HC Deb, vol 656 col 684 (15 March 2019).
[138] *Hansard*, HC Deb, vol 656 col 685 (15 March 2019) (Kevin Foster MP).
[139] See A Barlow, C Burgoyne and J Smithson, 'The Living Together Campaign – The Impact on Cohabitants' [2007] *Family Law* 165.
[140] Equal Civil Partnerships, n 96 above.
[141] A point made by Kevin Hollinrake MP: *Hansard*, HC Deb, vol 656, col 682 (15 March 2019).

asserting that equal civil partnerships are 'about giving people a choice' but that choice should be firmly viewed as between two formal relationship statuses and not as to a flexible form of 'registered cohabitation'.[142] Similarly, the belief that couples might use civil partnership as a precursor to marriage should be approached cautiously.

Other inaccuracies are present in the debates. The belief, for example, that equal civil partnerships will create 'an option for people who want to have a legal relationship but not necessarily a religious one'[143] overlooks the fact that, whilst the act of registration of a civil partnership must be secular, such registrations on religious premises have been permitted since December 2011.[144] Moreover the view that registration enables an individual to become a 'statute law partner rather than a common law partner' not only lacks accuracy but runs the risk of promoting the erroneous view that a 'common law partner' exists in England and Wales.[145]

These observations underline the need to appreciate that legal protections are not only capable of being conferred through a status and that a multi-faceted approach is required. Barlow and Smithson neatly encapsulated this point when they noted that owing to the changing, fluctuating nature of commitment within the life span of an interpersonal relationship the law should 'adopt a pluralistic approach capable of balancing relationship autonomy with protection for the vulnerable'.[146] Therefore, it should be possible for equal civil partnerships to operate as a relationship form for couples wishing to formalise *alongside* an opt-out regime offering basic protections for all qualifying cohabitants. This more comprehensive framework better responds to the myriad of cohabiting relationships and would capture the different expressions of relationship commitment detailed above. However, the narrative present in the recent equal civil partnership debates unfortunately overlooks that nuance and appears to be premised on bluntly securing a quick fix through transposing a pre-existing statutory regime in the hope it may tackle these different forms of cohabiting relationship.

This confident belief in equal civil partnerships has already had an influence outside the debates relating to the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019. For

[142] *Hansard*, HC Deb, vol 619 col 648 (13 January 2017).
[143] *Hansard*, HC Deb, vol 656 col 685 (15 March 2019) (Kevin Foster MP).
[144] Marriage and Civil Partnerships (Approved Premises) (Amendment) Regulations 2011 SI 2011/2661.
[145] *Hansard*, HC Deb, vol 656 col 685 (15 March 2019) (Kevin Foster MP).
[146] Barlow and Smithson, n 99 above, at 346.

example, in the Second Reading of Lord Marks' Cohabitation Rights Bill Baroness Deech rejected the need for wider cohabitation reform believing that '[n]ow that civil partnerships for heterosexuals will soon be available, there is no necessity for this law at all'.[147] Moreover, a heightened focus on respecting autonomy present in the equal civil partnerships debates may have carried over to those relating to cohabitation reform. For example, the imposition of legal protections on cohabitants envisaged by the Marks Bill was criticised as overly intrusive as it 'places obligations on people who did not choose them'[148] and would remove a 'fundamental freedom to be in a relationship with someone for whatever length without the state imposing obligations on them'.[149] Similarly, in stark contrast to the minor textual amendments needed to extend civil partnerships to different-sex couples, concern was expressed as to the complexity of Lord Mark's bespoke regime for cohabitants. Indeed, that aspect was used as an argument *against* reform with Baroness Chakrabarti stating that it was:

> '…very easy, in this wonderful and otherworldly place, to salve our consciences and signal virtue by creating more and more intricate, byzantine rights and obligations which applications to the courts will sort out, but the courts are under strain'.[150]

It is certainly true that the creation of an opt-out cohabitation regime operating alongside equal civil partnerships would create further work and require additional political will. But if tackling relationship-generated disadvantage is to be taken seriously, selecting what may appear the attractive and simple option may not be, in the long-term, either pragmatic or sensible. For example, James Cartlidge MP's observation downplaying the effort involved in extending civil partnerships on the basis that 'the whole point is that we are giving a new right, not taking any away from people' overlooks the fact that political expediency may now result in Members of Parliament presenting the 'problem' of cohabitation as an issue that should, at best, be considered some years in the future and, at worst, be viewed as now resolved.[151] The consequences of this strategy will not only be the stalling of comprehensive cohabitation reform, as suggested by the Lord Marks' Bill, but also the perpetuation of a top-heavy structure of adult interpersonal relationships with protections reserved for those that formalise. It would involve the transmission of a message that only certain relationships performed in a particular

[147] Ibid, col 1263.
[148] *Hansard, Lords Debates*, vol 796, col 1268 (15 March 2019) (Baroness Chakrabarti).
[149] Ibid, col 1270 (Baroness Vere).
[150] Ibid, col 1269.
[151] Ibid, col 683.

manner and in conformity with a particular relationship ideal should receive the protections and benefits of family law.

Conclusions

Reform of civil partnerships is now inevitable, and extension of the civil partnership regime to different-sex couples will take place imminently. As this article has demonstrated, during the lengthy process of lobbying claims have been made that extension would offer beneficial protections to cohabitants. Indeed, the Ministerial Foreword by Penny Mordaunt MP announcing plans to introduce equal civil partnerships stated that 'this government wants to see more people formalise their relationships in the way they want, with the person they love' because '[g]reater commitment leads to greater family stability, and greater security within relationships will help to protect children's interests'.[152]

This article has interrogated those claims and, through drawing upon early developments in the campaign for different-sex civil partnerships, argued that the construction of the cohabitant has changed with an initial focus on vulnerability but with critics proffering the easy solution of marriage in response. Following the introduction of same-sex marriage and galvanised by the effect of the *Steinfeld* litigation, the dominant depiction in the media coverage and parliamentary debates today is one of individuals cognisant of potential vulnerability but who possess more coherent, articulated objections to marriage and a desire to exercise autonomy and choice. This article has argued that the dominance of this construction runs the risk of homogenising cohabitants and goes towards framing their expectations in a manner consistent only with Barlow and Smithson's 'Ideologue' couples.

Of course, the availability of different-sex civil partnerships will be an attractive option to many couples currently cohabiting. However, as this article has asserted, that group represents only part of a much larger cohort of cohabitants that require legal protections upon relationship breakdown. Reorienting the debate so as to more meaningfully acknowledge the myriad of cohabiting relationships will mean that the prize of different-sex civil partnerships will hopefully not come at the cost of general cohabitation reform and is not inaccurately presented as the 'silver bullet' capable of adequately resolving the complex issues generated by the rise

[152] Government Equalities Office, n 6 above, 2.

in cohabitation.[153] Equal civil partnerships should, instead, be viewed as a response *distinct* from cohabitation reform and, within that space, valued as a modernising, additional relationship status.

[153] *Hansard*, HC Deb, vol 635, col 1131 (2 February 2018).