Introduction

Joel A. Nichols

How should the civil state relate to marriage and divorce in modern society? Some, from both the left and right ends of the political spectrum, are calling for the state to extract itself from the marriage business.[1] For many proponents of this position, this presumably would leave the label of "marriage" entirely to religious or other organizations, because the state would only handle legal benefits under some sort of civil registration regime. Others pronounce that the state should be ever more involved in regulating marriage, including extending it to same-sex couples.[2] Still others contend that the state not only must remain involved in the regulation of marriage and divorce law but should adhere to a more traditional role concerning marriage and divorce.[3] This is not merely a culture-wars skirmish about same-sex marriage, though, for there are serious questions about the role of the federal government versus state governments in marriage and divorce law; there is a greater diversity in various state marriage laws than has often been the case historically; there are heightened questions about the role of premarital agreements and the ability of autonomous parties to enter such agreements; and there is continued ambiguity about extraterritorial recognition of marriage and marriage-like relationships between states as a conflict-of-laws matter.[4]

[1] See, e.g., Martha Albertson Fineman, "The Meaning of Marriage" in *Marriage Proposals: Questioning a Legal Status*, ed. Anita Bernstein (New York: New York University Press, 2006), 29–69; Martha C. Nussbaum, "A Right to Marry?" *California Law Review* 98 (2010): 667–696; Edward A. Zelinsky, "Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage," *Cardozo Law Review* 27 (2006): 1161–1220; Stephen B. Presser, "Marriage and the Law: Time for a Divorce?" (in this volume).

[2] E.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); Pamela S. Karlan, "Let's Call the Whole Thing Off: Can States Abolish the Institution of Marriage?" *California Law Review* 98 (2010): 697–707.

[3] See, e.g., Charles J. Reid Jr., "And the State Makes Three: Should the State Retain a Role in Recognizing Marriage?" *Cardozo Law Review* 27 (2006): 1277–1309.

[4] See, e.g., Brian H. Bix, "Pluralism and Decentralization in Marriage Regulation" (in this volume).

Why this fervent public discussion about marriage and the role of the civil state? There are a host of reasons, of course, not least of which are the many state benefits that flow from a legal marriage relationship. But even the word "marriage" itself is freighted with meaning – historically, religiously, culturally, and socially – and advocates on all sides remain eager for society and the law to embrace their preferred definition and understanding of marriage. The public discussion and disagreement about marriage also derive from the increasingly diverse and multicultural society in which we live. Even if there was a time historically when common understandings of marriage and divorce were shared in the United States, that time has passed.

The discussions about marriage and divorce are complicated by the fact that marriage is critically important to people on several levels, including access to state benefits, expression, and religion.[5] Marriage is not merely a private law contract between two individuals, but often an important familial and community event. It is not merely an avenue by which the state confers status benefits on a couple, but often serves as an entrance marker into various forms of adulthood and community. It is not merely an act to which compliance with state procedural forms of adequate notice and consent are sufficient, but often acts as the marker of union between two families requiring a religious ceremony, a qualified officiant, and capable and willing parties. Indeed, for many people marriage is more important as a religious matter than a civil matter. For them, a marriage is not valid unless it is between two similarly religious individuals who have received appropriate solemnization by qualified religious authorities. And a marital dissolution is not valid unless granted by competent religious authorities on adequate grounds via appropriate procedures. A statement by a civil authority – regarding either marriage or divorce – is simply not a conclusive statement.

This is partly because, as Ayelet Shachar and others have detailed at length, individuals exercise complex "citizenships," whereby they are simultaneously members of multiple communities at the same time.[6] Individuals frequently possess strong citizenship affiliations to a religious group at the same time that they possess a citizenship affiliation to the civil state. If those two communities lack alignment on a critical matter (such as marriage or divorce), individuals may feel competing normative pulls – and it is not a given that the civil state's normative stance will control. Instead, sometimes the "unofficial law" of the community (to use Ann Estin's phrase) has a stronger hold on individuals and communities than the sanctioned official civil law of the polity.[7]

[5] Cf. Nussbaum, "A Right to Marry?" 669.

[6] Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001). See also Ayelet Shachar, "Faith in Law? Diffusing Tensions Between Diversity and Equality" (in this volume).

[7] Ann Laquer Estin, "Unofficial Family Law" (in this volume).

The most famous recent iterations of these jurisdictional conflicts are the "*shari'a* arbitration controversy" in Ontario, Canada, in 2003–2005 and a prominent speech by Anglican Archbishop Rowan Williams in 2008, wherein he suggested that some sort of "accommodation" of *shari'a* by British common law was "inevitable." In Ontario, Canada, many Christians, Jews, and Muslims had been submitting their personal disputes to religious arbitration for years. When news broke, though, that an outspoken imam was publicly advocating a more formal procedure to promote the application of *shari'a* to Canadian Muslims in family law matters, citizens and citizens' groups complained loudly to the government. Despite a long report by the former attorney general, which recommended continued allowance of religious arbitrations if certain safeguards were followed, political leaders removed the legal option of applying any religious principles and insisted that there would be "one law for all Ontarians." One unsurprising consequence of that move is that religious arbitrations continue, but without state sanction; thus parties who are adversely affected by such proceedings do not have an appeal and further recourse in the courts.[8]

In the United Kingdom, when Archbishop Williams called for some sort of "plural jurisdiction" in the United Kingdom according to which Muslims could resolve family law disputes (and some other civil matters) in religious tribunals or in British courts, he was roundly denounced in the press.[9] Despite the cries of many critics, however, the Archbishop was not advocating a wholesale abdication of the state role in marriage and divorce jurisdiction, but rather was calling for a constructive conversation about the complex citizenships exercised by Muslim believers. Again, though, rather than engaging in productive dialogue about difficult issues, many in the popular press swiftly aired concerns about the wholesale takeover of British law (at least for some British citizens) by *shari'a* law. A few voices soon surfaced that sought a healthier discussion about how to recognize the "complex ways in which Muslims engage with sharia in the UK," and recent academic discussion has taken up the Archbishop's questions about the role of *shari'a* in the West in thoughtful and challenging ways.[10]

Such issues of jurisdictional conflict are not confined to minority Muslim communities. Jews, for example, have long struggled with the relationship between

[8] See Marion Boyd, Office of Canadian Attorney General, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, (2004), available at http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf [hereinafter *Boyd Report*]; see also discussion and sources in Joel A. Nichols, "Multi-Tiered Marriage: Reconsidering the Boundaries of Civil Law and Religion" (in this volume).

[9] Dr. Rowan Williams, "Archbishop's Lecture – Civil and Religious Law in England: A Religious Perspective," Feb. 7, 2008, available at http://www.archbishopofcanterbury.org/1575#.

[10] Samia Bano, "In Pursuit of Religious and Legal Diversity: A Response to the Archbishop of Canterbury and the 'Sharia Debate' in Britain," *Ecclesiastical Law Journal* 10 (2008): 283–309, 288; *Shari'a in the West*, eds. Rex Ahdar and Nicholas Aroney (Oxford: Oxford University Press, 2010).

civil law and religious law and how to live under more than one governing regime. Centuries ago they developed the important legal concept of *dina d'malkhuta dina* ("the law of the community is the law"), which meant that the minority diaspora community accepted the law of the legitimate and peaceful secular ruler who hosted them as the law of their own Jewish community, to the extent that it did not conflict with core Jewish laws.[11] But Jewish communities in Western Europe also became accustomed, over the years, to exercising a degree of autonomy over certain family law matters. This allowed them to comply with general secular law norms but also to apply their stricter, slightly different religious norms surrounding marriage and divorce.[12] Lately, however, civil law has been unwilling to accord legal effect to Jewish religious divorces, raising the need for an observant Orthodox Jew to obtain both a civil divorce *and* a religious divorce. New York has tried to ameliorate potential inequities toward Jewish women that arise from the lack of congruity between religious law and civil law by passing legislation (the *get* statutes); other states have not followed this route legislatively.[13]

But the issue of competing allegiances to the civil system and a religious system is not even confined to minority religious groups. Protestant Christians have long sought (and had the political clout) to enact their preferred definitions of marriage and divorce into the civil law in the United States. Their political power has waned in recent decades, and the attendant consonance between traditional Protestant Christian theological norms and civil marriage/divorce law has dwindled. For example, divorce was available only in cases of hard fault, if at all, for many years. But every state now has some variation of no-fault divorce – and a number of states have removed any discussion of fault even in property distribution or maintenance. One response by some Christian groups was to reinstate a more traditional understanding of marriage and divorce into the civil law itself, in the form of a "covenant marriage statute" in Louisiana and two other states. Through those statutes, couples could choose between two different legal regimes for marriage and divorce: one was easy-in and easy-out and the other was a covenant marriage, with additional premarital formalities and counseling on one end and more stringent requirements for fault grounds on the other end.[14]

This volume discusses such conflicts between civil law and religious norms in the arena of family law. Specifically, in the words of Werner Menski, "The present

[11] See Rabbi Dr. Dov Bressler, "Arbitration and the Courts in Jewish Law," *Journal of Halacha and Contemporary Society* 9 (1985): 105–117.

[12] See, e.g., Benjamin Braude and Bernard Lewis, eds., *Christians and Jews in the Ottoman Empire* (New York: Holmes & Meier Publishers, Inc., 1982).

[13] See Michael J. Broyde, "New York's Regulation of Jewish Marriage: Covenant, Contract, or Statute?" (in this volume).

[14] See Katherine Shaw Spaht, "Covenant Marriage Laws: A Model for Compromise" (in this volume).

volume seeks to take the debate about management of family law further than the existing literature. The main question [is] whether delegating authority to religious authorities would be a feasible method of meeting the challenges of increased socio-cultural pluralization and of new forms of family arrangement."[15]

Put another way, the volume lifts up examples from Islam, Judaism, and Christianity to debunk two key assumptions that lie deep within family law. The first assumption is that the civil state possesses exclusive jurisdiction over family law matters. The second is that there is a singular model that applies equally to all couples, and no deviation from that model is permitted. These two assumptions are simply incorrect, because not only do they fail to accord with the lived reality for many individuals but they also fail to recognize the decentralization and pluralism that already exists in marriage and divorce law. Instead of furthering such faulty assumptions, this book invites a conversation about whether such models of "multi-tiered marriage" provide a useful way forward. The phrase "multi-tiered marriage" is used here:

1. To describe systems whereby jurisdiction over marriage and divorce matters is shared between different authorities (such as that proposed in Canada and England); or
2. Alternatively, to refer to systems that have more than one possibility of marriage and divorce within their civil law (such as that of New York or Louisiana).

Either way, such systems are multi-tiered because they inherently recognize and explicitly reify the fact that there is more than one possible understanding of marriage.[16]

This volume strongly contends that accounts of exclusive state jurisdiction and a one-size-fits-all model are *descriptively* incorrect and simply do not accord with history, current practice, comparative law, or the lived experience of many individuals. More than that, though, the book seeks to begin a conversation about whether, *normatively*, more pluralism in family law is desirable and should be affirmatively fostered – and, if so, under what conditions and qualifications. Because conversations are not monologues, this book includes chapters by several leading scholars rather than presenting only one voice. And instead of entrenching in hardened positions, the contributors draw upon their expertise in law, history, theology, sociology, political science, and feminist studies to mine the depths of these important issues in interdisciplinary fashion. The end result is a rich discussion about the jurisdictional boundaries of marriage and divorce law in a liberal society. An explicit part of

[15] Werner Menski, "Ancient and Modern Boundary Crossings Between Personal Laws and Civil Law in Composite India" (in this volume).
[16] Nichols, "Reconsidering the Boundaries" (in this volume).

that discussion is whether "the civil government [should] consider ceding some of its jurisdictional authority over marriage and divorce law to religious communities that are competent and capable of adjudicating the marital rites and rights of their respective adherents."[17] The contributors recognize the dual nature of marriage for many citizens in society, whereby they are bound not only to civil norms regarding marriage and divorce but also to religious norms. This volume takes seriously those dual allegiances of many citizens in society while also hewing to the overarching norms of equality and protection for vulnerable parties that are part of the fabric of the larger civil society itself.

* * *

Although the chapters that follow are not formally broken into specific "sections" within the volume, they do follow a progression that mirrors the shape of the opening chapter. That chapter, my own initial contribution to the volume, establishes the scaffolding for the conversation by challenging the assumptions that exclusive jurisdiction for marriage and divorce must lie with the civil state and that a one-size-fits-all model must apply even within the civil law. Chapter 1 argues that those assumptions are untrue historically, untrue in modern American law, and untrue in comparative law examples. That kind of descriptive overview leads naturally to normative questions about whether such deep pluralism is desirable and should be affirmatively pursued.

Chapters 2 through 14, accordingly, elaborate (and at times challenge) various pieces of the opening chapter. Those remaining chapters have been organized so that the reader may anticipate their overall content by progressing through (a) current and past pluralism in American family law; (b) present overlap and interaction between religious and civil content in American marriage and divorce law; (c) international examples of pluralist jurisdictional regimes; (d) theoretical reflections on the potential and perils of moving toward more intentionally plural legal regimes; and (e) concluding reflections on future questions. The chapters quite intentionally do not speak with one voice on the subject, but rather enter a dialectical conversation with one another – at times reinforcing, at times challenging, and at times questioning.

Chapter 1, described previously, is an essential cornerstone of the book, because the remaining chapters all respond to it in some key fashion. It not only delineates an overview of the project but also provides an entrée into many of the overarching questions about marital jurisdiction.

Chapter 2, by Brian Bix, provides a high-level overview of the many kinds of legal pluralism that already exist in the United States. By looking at the "de facto

[17] Joel A. Nichols, "Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community," *Vanderbilt Journal of Transnational Law* 40 (2007): 135–196. See also Nichols, "Reconsidering the Boundaries" (in this volume).

pluralism and decentralization" that already exists, he sets the stage for discussing whether intentionally increasing pluralism would be advantageous. Although he tends to think the pluralism and decentralization is generally a good thing, he concludes with a recognition of the need for appropriate limits.

In Chapter 3, Stephen Presser continues the overview, but he does so by drawing the reader's attention to the historical interaction between marriage and the civil law. Presser surveys the historical landscape and compares it with the modern landscape of debates about same-sex marriage and appropriate roles for courts, individuals, and religious institutions. He concludes that the concept of marriage should be reserved (or restored) to religious institutions and the state should regulate only civil unions.

In Chapter 4, Ann Estin cautions both against further privatization and against formal pluralization of marriage, but she promptly turns the reader's attention to the "legal pluralism that already flourishes in the United States." Whereas Bix's chapter addresses the pluralism embedded in various positive laws, Estin instead focuses on the dynamic interaction between social and religious norms and positive law norms. She does so by elucidating a number of touchpoints between the two at present. Her description of the "unofficial family law" that is already operating highlights the complexity of norm interaction, and she also provides some caveats that moving toward more intentional pluralism would likely increase such complexity.

The next trio of chapters provides a set of religious overviews that differ but are all connected to specific civil laws. In Chapter 5, Katherine Spaht provides a host of details on the motivations for and the functioning of the "covenant marriage statutes" in the United States. She is well positioned to do this, as she authored the law in Louisiana and has been a prime proponent and advocate elsewhere. Implicit, if not explicit, in her chapter is an emphasis on the connection between the messages conveyed by the civil law about marriage and the need to embody strong traditional (Christian) notions of marriage within the law. She expresses discomfort about even adopting the bifurcated terminology of "civil marriage" and "religious marriage," and she cautions against using Louisiana's example as a first step toward *more* pluralism because of her perspective of the ongoing need for a strong state role in marriage.

Chapter 6 offers quite a contrast to this perspective as Michael Broyde, an Orthodox Jewish rabbi, provides a nuanced introduction to the framework of Jewish law on marriage and divorce. He is quite comfortable in differentiating between civil marriage and religious marriage, and he clearly describes the strong private contractual elements of marriage at Jewish law. Broyde also details the interplay between civil and religious marriage law for Jews, especially in New York, and then traces the history of the *get* statutes in New York – calling them the first covenant marriage laws in the United States. He is pleased with the continued interaction of civil and

religious authorities in New York because, in his view, the "dance" between these two is a good model for future interactions of religious groups and civil law.

In Chapter 7, Mohammad Fadel turns the reader to Islamic law but does so from the vantage point of liberalism. Fadel makes the case that in a religiously heterogeneous polity a "liberal family law" that allows space for "private ordering" is the "preferred means for the recognition of family law pluralism" – rather than a form of pluralism that grants greater power directly to religious bodies to administer family law. Fadel provides a helpful description of intra-Islamic pluralism to dispel notions of uniformity even within religious traditions, and he concludes that a true Rawlsian liberal family law – one that is even *more* "neutral" than current law – is the preferred model.

While Fadel lifts up the New York *get* statute as a case study, he also begins to turn the book's discussion to an international perspective as he draws upon the controversy over *shari'a* councils in Ontario, Canada. Chapters 8 and 9 turn even more sharply to comparative law. In Chapter 8, Johan van der Vyver draws upon his deep knowledge of South African law to discuss the interaction of religious and cultural practice with positive law in South Africa. Van der Vyver describes the ongoing tension in South Africa as it strives to implement the equality and nondiscrimination norms of its recent constitution with its strong concerns for group rights, both of religion and culture.

In Chapter 9, British scholar Werner Menski explores the relationship between personal (religious) law and civil law in India. Menski writes as a realist rather than a positivist, and he expresses near amusement at the "surprise" expressed by many that "supposedly strong states are not fully in control of family law regulation," as evidenced by the Ontario controversy and by Archbishop Williams's speech. He provides an introduction to Hindu law and to the legal system of India, and he also seeks to convince the reader that we must be "active, conscious pluralists, whether we like it or not." He believes that neither abandoning the state role nor ignoring the role of "the other inputs and players" is feasible in a multicultural milieu.

The next group of three chapters continues Menski's move toward the normative nature of pluralism. Although Menski advocates embracing pluralism, both as a realist and for its own inherent good of respecting different cultures and religions, others are not nearly so convinced. In Chapter 10, Robin Wilson proffers that efforts to accommodate religious minorities in family law matters are "well intentioned but naïve." She recounts the "lived experiences" of women and children in certain religious communities, highlights the family violence that occurs within religious communities (as elsewhere), and questions how notions of true voluntary consent would apply to a plural system of religious deference.

Daniel Cere, in Chapter 11, focuses on Canada and its commitment to multicultural diversity. Cere explores the Ontario controversy and usefully introduces the

reader to multicultural theory via the "Canadian school." He laments that arguments about multiculturalism often seem to extend group rights and freedoms to certain national and aboriginal communities but stop short when claims are made by religious communities. Cere views the resolution of the Ontario debate (of precluding legal application of Islamic law by willing participants) as confirming that Canada's commitment in matters of marriage and divorce is not an embrace of multiculturalism but rather a move toward comprehensive liberalism that excludes minority religious views.

In Chapter 12, Linda McClain "train[s] a gender lens on the question of jurisdictional pluralism." She concedes the descriptive claim of legal pluralism, but she resists the normative claim that there should be more pluralism in American family law because she is skeptical that such pluralism could continue to protect women's equal citizenship. McClain reexplores specific cases from the United States and then turns again to the Ontario example, remaining focused on questions of gender equality throughout. McClain concludes, however, by suggesting that what is needed is not an all-or-nothing approach but rather a model of legal pluralism "that holds fast both to the value of religious membership and to the rights and duties of equal citizenship."

McClain's suggestion is a natural lead-in to Chapter 13, which provides the reader with a snapshot into the writings of Ayelet Shachar. Shachar's prior work and ideas featured prominently in Archbishop Williams's lecture about Islamic law in England, wherein he contended for a more accommodationist stance. In this chapter, Shachar continues to explore the idea of "regulated interaction" between religious and civil authorities and focuses on women as "both culture bearers and rights bearers." Rather than seeking to disentangle civil and religious marriage bonds (which would be futile), Shachar pursues a way to allow devout women to benefit from the protections of the liberal state while also holding onto their deep religious beliefs. She explicitly grounds her analysis both in multicultural theory and in recent legal developments in Canada.

In Chapter 14, John Witte and I conclude the book by describing possible ways forward. We focus especially on the intersection of Muslim family law and liberal democracies, investigating the claims for a different kind of interaction between religious and civil laws of marriage and divorce. We also look to the topic of education in the United States – an analogous interaction in which the state has set minimum standards but has not claimed exclusive jurisdiction – as a possible starting point for compromise. We also glance briefly at U.S. Constitutional law questions raised by proposals of marital pluralism and conclude that the involvement of religion in some aspects of family law is not as problematic as critics might suggest. Our chapter is also an afterword to the book, serving to consolidate a number of the questions raised by earlier chapters and to project avenues for further research and discussion.

This volume, in short, raises questions about the jurisdictional authority of the civil state regarding marriage and divorce. It specifically raises questions about the relationship of that state authority to any residual authority in individuals and groups, especially religious groups. From its initial chapter, the book seeks to begin rather than end such a conversation, and it does so by posing nearly as many questions as it answers. It therefore is apt to conclude this Introduction by detailing some of the "hard questions" raised by the book, as John Witte and I frame them in Chapter 14:

> What forms of marriage should citizens be able to choose, and what forums of religious marriage law should state governments be required to respect? How should … religious groups with distinctive family norms and cultural practices that vary from those espoused by the liberal state be accommodated in a society dedicated to religious liberty and equality, to self-determination and nondiscrimination? Are legal pluralism and even "personal federalism" necessary to protect … religious believers who are conscientiously opposed to the liberal values that inform modern state laws on sex, marriage, and family? Or must there instead be "legal universalism" with its attendant "exclusionary consequences"? Are these really the only options – or instead is something more akin to a "dance" between religious and civil law more appropriate and necessary?[18]

[18] John Witte Jr. and Joel A. Nichols, "The Frontiers of Marital Pluralism: An Afterword" (in this volume) (citations omitted).