American family law makes two key assumptions: first, that the civil state possesses sole authority over marriage and divorce; and second, that the civil law may contain only one regulatory regime for such matters. These assumptions run counter to the multicultural and religiously plural nature of our society. They are also wrong. This book elaborates how those assumptions are descriptively incorrect, and it begins an important conversation about whether more pluralism in family law is normatively desirable. For example, may couples rely on religious tribunals (Jewish, Muslim, or otherwise) to decide family law disputes? May couples opt into stricter divorce rules, either through premarital contracts or “covenant marriages”? How should the state respond when couples purport to do these things?

Intentionally interdisciplinary and international in scope, this volume contains contributions from fourteen leading scholars. The authors address the provocative question of whether the state must consider sharing its jurisdictional authority with other groups in family law.

Joel A. Nichols is Associate Professor of Law at the University of St. Thomas (Minnesota) and a Senior Fellow at the Center for the Study of Law and Religion at Emory University. His scholarship explores the relationship of theology and religion to law – especially family law, constitutional law, and international human rights. Professor Nichols holds degrees in both law and theology.

Contributors include Brian H. Bix; Michael J. Broyde; Daniel Cere; Ann Laquer Estin; Mohammad H. Fadel; Werner Menski; Linda C. McClain; Joel A. Nichols; Stephen B. Presser; Ayelet Shachar; Katherine Shaw Spaht; Johan D. van der Vyver; Robin Fretwell Wilson; and John Witte Jr.
Marriage and Divorce in a Multicultural Context

MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION

Edited by

JOEL A. NICHOLS
University of St. Thomas School of Law (Minnesota)
Marriage and divorce in a multicultural context: multi-tiered marriage and the boundaries of civil law and religion
Edited by Joel A. Nichols
Frontmatter

More information
To Jennifer

I choose you again and again
Contents

About the Editor xi
List of Contributors xvii
Preface xix
Permissions xxiii

Introduction 1
Joel A. Nichols

1. Multi-Tiered Marriage: Reconsidering the Boundaries of Civil Law and Religion 11
   Joel A. Nichols

2. Pluralism and Decentralization in Marriage Regulation 60
   Brian H. Bix

3. Marriage and the Law: Time for a Divorce? 78
   Stephen B. Presser

4. Unofficial Family Law 92
   Ann Laquer Estin

5. Covenant Marriage Laws: A Model for Compromise 120
   Katherine Shaw Spaht

   Michael J. Broyde
## Contents

7. Political Liberalism, Islamic Family Law, and Family Law Pluralism  
   *Mohammad H. Fadel*  
   164

8. Multi-Tiered Marriages in South Africa  
   *Johan D. van der Vyver*  
   200

9. Ancient and Modern Boundary Crossings Between Personal Laws and Civil Law in Composite India  
   *Werner Menski*  
   219

10. The Perils of Privatized Marriage  
    *Robin Fretwell Wilson*  
    253

11. Canadian Conjugal Mosaic: From Multiculturalism to Multi-Conjugalism?  
    *Daniel Cere*  
    284

    *Linda C. McClain*  
    309

    *Ayelet Shachar*  
    341

14. The Frontiers of Marital Pluralism: An Afterword  
    *John Witte Jr. and Joel A. Nichols*  
    357

*Index*  
379
Detail Contents

About the Editor                                             page xv
List of Contributors                                      xvii
Preface                                                   xix
Permissions                                               xxiii

Introduction
Joel A. Nichols

1. Multi-Tiered Marriage: Reconsidering the Boundaries of Civil Law and Religion
   Joel A. Nichols
   I. Introduction                                           11
   II. A Short History of Marriage and Divorce Law Jurisdiction 15
   III. Domestic Movement Toward Multi-Tiered Marriage        19
      A. Covenant Marriage Laws (Louisiana, Arkansas, and Arizona) 20
      B. New York's Get Statutes                              23
   IV. International Models                                  32
      A. India                                                33
      B. Kenya                                                44
      C. South Africa                                        49
      D. Canada                                               55
   V. Conclusion                                            58

2. Pluralism and Decentralization in Marriage Regulation
   Brian H. Bix
   I. Current and Growing Variety and Decentralization       61
   II. Four Alternative Paths to Pluralism and Decentralization 64
### Detail Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A.</td>
<td>Delegation</td>
<td>64</td>
</tr>
<tr>
<td>B.</td>
<td>Individual Contracts</td>
<td>65</td>
</tr>
<tr>
<td>C.</td>
<td>Menus of Options</td>
<td>66</td>
</tr>
<tr>
<td>D.</td>
<td>Choice of Law</td>
<td>66</td>
</tr>
<tr>
<td>III.</td>
<td>Interests in Uniformity</td>
<td>67</td>
</tr>
<tr>
<td>IV.</td>
<td>The Nature of Marriage and the Role of the State</td>
<td>68</td>
</tr>
<tr>
<td>V.</td>
<td>Limits?</td>
<td>71</td>
</tr>
<tr>
<td>VI.</td>
<td>Government Interactions with Religion</td>
<td>73</td>
</tr>
<tr>
<td>VII.</td>
<td>Constitutional Issues</td>
<td>75</td>
</tr>
<tr>
<td>VIII.</td>
<td>Conclusion</td>
<td>76</td>
</tr>
<tr>
<td>3.</td>
<td>Marriage and the Law: Time for a Divorce?</td>
<td>78</td>
</tr>
<tr>
<td></td>
<td>Stephen B. Presser</td>
<td></td>
</tr>
<tr>
<td>3. I.</td>
<td>A Roiling Political Issue</td>
<td>78</td>
</tr>
<tr>
<td>3. II.</td>
<td>The Uneasy Relationship of the Civil Law to Marriage</td>
<td>81</td>
</tr>
<tr>
<td></td>
<td>A. The English Common Law</td>
<td>81</td>
</tr>
<tr>
<td></td>
<td>B. Colonial, Early Republican, and Nineteenth-Century America</td>
<td>82</td>
</tr>
<tr>
<td>3. III.</td>
<td>Where We Are Now</td>
<td>84</td>
</tr>
<tr>
<td></td>
<td>A. The Right to Privacy</td>
<td>84</td>
</tr>
<tr>
<td></td>
<td>B. The “Mystery Passage”</td>
<td>86</td>
</tr>
<tr>
<td></td>
<td>C. “Landmarkism?”</td>
<td>87</td>
</tr>
<tr>
<td></td>
<td>D. The Future</td>
<td>88</td>
</tr>
<tr>
<td>3. IV.</td>
<td>Conclusion</td>
<td>91</td>
</tr>
<tr>
<td>4.</td>
<td>Unofficial Family Law</td>
<td>92</td>
</tr>
<tr>
<td></td>
<td>Ann Laquer Estin</td>
<td></td>
</tr>
<tr>
<td>4. I.</td>
<td>Marriage Celebration: Convergence and Incorporation</td>
<td>98</td>
</tr>
<tr>
<td></td>
<td>A. Marriage Celebrations</td>
<td>98</td>
</tr>
<tr>
<td></td>
<td>B. The Interaction of Religious and Civil Law</td>
<td>100</td>
</tr>
<tr>
<td>4. II.</td>
<td>Divorce Law: Conflict and Accommodation</td>
<td>102</td>
</tr>
<tr>
<td></td>
<td>A. Legislative Responses to Religious Diversity</td>
<td>105</td>
</tr>
<tr>
<td></td>
<td>B. Consent, Dissent, and Exit</td>
<td>109</td>
</tr>
<tr>
<td>4. III.</td>
<td>Marriage Norms: Prohibitions and Gatekeeping</td>
<td>112</td>
</tr>
<tr>
<td></td>
<td>A. The Gatekeeping Function of Marriage Law</td>
<td>112</td>
</tr>
<tr>
<td></td>
<td>B. Families Underground</td>
<td>115</td>
</tr>
<tr>
<td>4. IV.</td>
<td>Conclusion</td>
<td>117</td>
</tr>
<tr>
<td>5.</td>
<td>Covenant Marriage Laws: A Model for Compromise</td>
<td>120</td>
</tr>
<tr>
<td></td>
<td>Katherine Shaw Spaht</td>
<td></td>
</tr>
</tbody>
</table>
**Detail Contents**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. What is Covenant Marriage?</td>
<td>120</td>
</tr>
<tr>
<td>A. Premarital Counseling</td>
<td>122</td>
</tr>
<tr>
<td>B. Declaration of Intent</td>
<td>123</td>
</tr>
<tr>
<td>C. Restricted Grounds for Divorce</td>
<td>124</td>
</tr>
<tr>
<td>2. Why Covenant Marriage Statutes?</td>
<td>126</td>
</tr>
<tr>
<td>A. Covenant Marriage Emphasizes Strengthening Marriage, Not Merely Preventing Divorce</td>
<td>126</td>
</tr>
<tr>
<td>B. Covenant Marriage Legislation Combines Components Appealing to Political Conservatives and Liberals</td>
<td>128</td>
</tr>
<tr>
<td>C. Covenant Marriage Invites Religion Back Into the Public Square to Assist in Serving a Public Whose Need is to Preserve Marriages</td>
<td>128</td>
</tr>
<tr>
<td>D. Covenant Marriage Seeks to Persuade, Not Coerce, Citizens to Elect a Stronger Commitment to Marriage</td>
<td>129</td>
</tr>
<tr>
<td>E. Covenant Marriage Offers Traditional Communities a Refuge from the Broader Postmodern Culture</td>
<td>129</td>
</tr>
<tr>
<td>F. Covenant Marriage Offers the Promise of Surviving Migratory Divorce</td>
<td>130</td>
</tr>
<tr>
<td>3. Marriage – and “Civil Marriage” and “Religious Marriage”</td>
<td>131</td>
</tr>
<tr>
<td>4. Why Not Other Options?</td>
<td>134</td>
</tr>
<tr>
<td>5. Conclusion</td>
<td>136</td>
</tr>
<tr>
<td>Michael J. Broyde</td>
<td></td>
</tr>
<tr>
<td>I. Introduction</td>
<td>138</td>
</tr>
<tr>
<td>II. Jewish Marriage Laws: Movement from Contract to Covenant</td>
<td>140</td>
</tr>
<tr>
<td>III. Jewish Marriage Contracts and American Law</td>
<td>144</td>
</tr>
<tr>
<td>A. The Enforceability of the Ketubah as a Contract</td>
<td>145</td>
</tr>
<tr>
<td>B. Rabbinic Arbitration Agreements to Construct Jewish Marriages</td>
<td>146</td>
</tr>
<tr>
<td>C. The New York State Jewish Divorce Laws</td>
<td>148</td>
</tr>
<tr>
<td>IV. Jewish Marriage and Divorce in Practice in New York</td>
<td>154</td>
</tr>
<tr>
<td>A. Prenuptial Agreements</td>
<td>156</td>
</tr>
<tr>
<td>B. New York’s Get Statutes</td>
<td>158</td>
</tr>
<tr>
<td>C. Opting Out of the Secular Legal System</td>
<td>161</td>
</tr>
<tr>
<td>V. Other Models of Jewish and Secular Marriage Law</td>
<td>161</td>
</tr>
<tr>
<td>VI. Conclusion: The Problem of Obeying Two Legal Systems</td>
<td>162</td>
</tr>
</tbody>
</table>
7. Political Liberalism, Islamic Family Law, and Family Law Pluralism

Mohammad H. Fadel

I. Family Law Pluralism and Political Liberalism

II. The Relationship of Islamic Law to Islamic Ethics

III. The Scope of Islamic Family Law and its Relationship to Islamic Ethics

IV. Islam and Family Law Pluralism

A. Intra-Islamic Legal Pluralism and Islamic Family Law

B. The Contractual Nature of Islamic Family Law

C. Religious Regulation of the Family in Islam

D. Marriages of Non-Muslims and Islamic Family Law

E. Conclusion

V. The Attractiveness of a Politically Liberal Family Law to Muslims


VII. Conclusion

8. Multi-Tiered Marriages in South Africa

Johan D. van der Vyver

I. Basic Principles of the South African Law of Husband and Wife

II. Legalization of Customary African Marriages

III. Applying Principles of Contract to Some Marriages Not Recognized Under South African Law

IV. Same-Sex Marriages

V. Imposing Principles of Equity and Justice from the Top Down

9. Ancient and Modern Boundary Crossings Between Personal Laws and Civil Law in Composite India

Werner Menski

I. Introduction: The Realities of Pluralism

II. Ancient Roots of Pluralism and Boundary Crossing

III. Hindu Family Law within Composite India

IV. The Tortuous Agenda of Legal Uniformity in Indian Law

V. Postmodern Indian and Hindu Marriage Law

VI. Post-Divorce Maintenance Laws, the Indian Constitution, and Hindu Legal Concepts

VII. Conclusion
Detail Contents

10. The Perils of Privatized Marriage 253
   Robin Fretwell Wilson
   I. Lived Experiences 257
      A. Faith-Healing Communities in the United States 258
      B. Family Law in Western Thrace 261
      C. Controversy Over Shari’a Courts in Great Britain 264
      D. Summary 268
   II. Reasons for Caution 268
      A. Domestic Violence 269
      B. Child Physical Abuse and Corporal Punishment 271
      C. Child Sexual Abuse 273
      D. Summary 273
   III. Tolerance of Family Violence 274
   IV. Does Respect for Autonomy Trump Foreseeable Inequities? 279
   V. Evaluating Possible Regulatory Responses 281
   VI. Conclusion 283

11. Canadian Conjugal Mosaic: From Multiculturalism to Multi-Conjugalism? 284
    Daniel Cere
    I. Constitutionality and Conjugality: The Civil and Religious 285
    II. From Multiculturalism to Multi-Tiered Conjugality? 293
    III. Conclusion 306

    Linda C. McClain
    I. Introduction: The Call for More Pluralism and Shared Jurisdiction in U.S. Family Law 309
    II. Whither the Demand for More Marriage Pluralism in the United States? 312
       A. An Initial Question: Should Religious and Civil Family Law Be Congruent? 312
       B. Tensions Between Civil and Religious Law: Gender Roles and Gender Equality 318
    III. Pluralism in U.S. Family Law: Jurisdiction, Location, and Citizenship 320
       A. Religious Marriage Contracts, Religious Arbitration, and the Get Statutes 322
       B. Adjudication of Islamic Marriage Contracts: The Mahr 323
## C. Resolving Conflicts Between Civil and Religious Divorce Law: Two Contrasting Cases

### IV. International Models?

- **A. Assessing Multi-Tiered Marriage Through a Gender Equality Lens**
- **B. Canada: Membership and Citizenship in Ontario’s Faith-Based Arbitration Controversy**

### V. Conclusion


*Ayelet Shachar*

- **I. Privatized Diversity**
- **II. The Predicament Facing Vulnerable Members of Religious Communities**
- **III. Forging a New Path**
- **IV. Regulated Interaction**
- **V. Conclusion**

#### 14. The Frontiers of Marital Pluralism: An Afterword

*John Witte Jr. and Joel A. Nichols*

- **I. Introduction**
- **II. The Evolution of the (Western) Law of Marriage**
- **III. Religion, Family, and the State**
  - **A. The Case for Shari’a Councils**
  - **B. The Case Against Shari’a Councils**
  - **C. Lessons and Analogies**
- **IV. First Amendment Considerations**

### Index
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The Archbishop of Canterbury, Dr. Rowan Williams, caused a substantial stir in 2008 when he called for a “plural jurisdiction” over some disputes within the United Kingdom. The Archbishop specifically proffered a system wherein Muslims could choose to resolve family law disputes (and some other civil matters) in either religious tribunals or in British courts. In July 2008, Lord Chief Justice Lord Phillips (the most senior judge in Britain) seconded the Archbishop’s sentiment and, in public remarks, signaled his approval of the application of Islamic law (shari’a) so long as divorce rulings complied with the law of the land. These strong statements came only a few short years after public discussions in Ontario, Canada, about the propriety of religious courts operating as arbitration tribunals in family law matters. Currently in South Africa, both the legislative and judicial branches continue to contemplate the interaction between civil law and religious law with respect to marriage (especially regarding “customary marriages,” polygamy, and same-sex marriage). And India and Israel lead a number of countries in delegating jurisdiction over marriage and family life to religious law or religious tribunals.

These international examples are especially interesting in light of the fact that the United States is, by all accounts, an increasingly multicultural and religiously plural society. Despite such diversity, American family law makes two key assumptions about marriage and divorce. The first is that the civil state is the sole authority for such matters, and the second is that only one regulatory regime for marriage and divorce may exist within civil law.

This book demonstrates that those common assumptions are descriptively incorrect. It also begins an important conversation about whether, normatively, more pluralism in family law is desirable and should thus be affirmatively fostered and, if so, under what conditions and qualifications.

Too often public debates about marriage and divorce overlook the dual nature of marriage for many citizens in society. That is, many citizens are bound not only to civil norms regarding marriage and divorce but also to religious norms – and often
the civil and religious norms are not exactly aligned. This book tries to take seriously the 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.

Rather than protecting hardened positions, the contributors to this volume draw upon their expertise in law, history, theology, political science, sociology, and feminist studies to explore difficult questions in an interdisciplinary fashion. The result is a book containing a rich scholarly conversation on the jurisdictional boundaries of marriage and divorce law in a liberal society.

Every book has its limits, and this one is surely no different. Most noticeable to some readers, perhaps, will be the relative inattention to same-sex marriage. That choice is intentional, because the topic not only receives the current lion’s share of attention in academic discussions about marriage but, once raised, also frequently overshadows any other topic. The book also retells the history of marriage and divorce jurisdiction only cursorily; gives shorter shrift than may be deserved to constitutional law concerns; and treats comparative international examples selectively. While all these matters are easily defensible within the contours of the project, I recognize that more work needs to be done to continue the conversation.

The wide scope of chapters that are here, though, reveals a descriptive observation that notions of exclusive state jurisdiction of a one-size-fits-all law for marriage and divorce are more hope than reality. This owes, in no small part, to the critical role that religion plays in the individual and communal lives for many people in society. The chapters undertake a conversation about the normative implications of such pluralism in marriage and divorce law: Is more pluralism in family law desirable? If so, how should it be done to ensure adequate protections for vulnerable parties? If not, will pluralism continue to occur anyway and require interaction or regulation by the state to ensure such protections? And does attempting to avoid such pluralism run counter to the state’s goals of equality and liberty?

In short, as contributor Werner Menski states, “The present volume seeks to take the debate about management of family law further than the existing literature.” The reader is invited to join a conversation about the provocative and arguably inevitable question of whether the civil state must consider sharing part of its jurisdictional authority with other groups in family law matters.

***

Collaborative projects, by definition, do not unfold independently. Although I will undoubtedly miss some people and surely understimate the relative contributions of others, it is important to acknowledge my gratitude to several people. First, thanks to the superb contributors to this volume: Brian Bix, Michael Broyde, Dan Cere, Ann Estin, Mohammad Fadel, Linda McClain, Werner Menski, Stephen Presser, Ayelet
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Joel A. Nichols

University of St. Thomas School of Law (Minnesota)
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Ann Laquer Estin. An earlier version of this chapter appeared as Ann Laquer Estin, “Unofficial Family Law,” *Iowa Law Review* 94 (2009): 449–480, although it was commissioned as part of this project. It is reprinted here, with minor modifications, with the permission of the *Iowa Law Review*.


Stephen B. Presser. An earlier and much shorter version of this chapter appeared as Stephen B. Presser, “Marriage and the Law: Time for a Divorce?” *Chronicles: A Magazine of American Culture* (March 2004): 20–22. Portions of that article have been incorporated into this longer essay, with the kind permission of the Rockford Institute, the publisher of Chronicles.


