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2019

The Contested Place of Religion in Family Law (ed., Robin Fretwell Wilson, Cambridge Univ. Press 2018)

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Publication Information

2019 University of Illinois Law Review Online 59

Repository Citation

Failingner, Marie, "The Contested Place of Religion in Family Law (ed., Robin Fretwell Wilson, Cambridge Univ. Press 2018)" (2019). *Faculty Scholarship*. 617.

<https://open.mitchellhamline.edu/facsch/617>

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The Contested Place of Religion in Family Law (ed., Robin Fretwell Wilson, Cambridge Univ. Press 2018)

Abstract

The uniformity question and the trust question are two of the difficult questions most perennially at the intersection of law, religion, and family; and many of the essays in *The Contested Place of Religion in Family Law*, edited by Robin Fretwell Wilson, engage them in some way. Wilson has brought together law and religion scholars and practitioners from a variety of academic disciplines, philosophical and religious perspectives to, essentially, debate some of these most fiercely contested and stubbornly unresolved issues. While there is a variation in style and tone of these essays, for the most part, there seems to be a common commitment by authors to accurately report the complexity of facts in these situations, and most try to give respect to contrary arguments and conclusions—a welcome difference from many articles on these issues that rehearse the same old arguments, pro and con. Many of the essays also provide fresh theoretical insights or relatively unknown empirical evidence in support of their claims.

Disciplines

Religion Law

THE CONTESTED PLACE OF RELIGION IN
FAMILY LAW (ED., ROBIN FRETWELL
WILSON, CAMBRIDGE UNIV. PRESS, 2018)
(706 PP.)

Marie A. Failing*

Two of the most important legal news stories of summer 2018 exposed an age-old and perhaps necessary philosophical fault line in the way that American lawmakers think about the family, the state, and in some cases, religion. To borrow from the language of *Employment Division v. Smith*,¹ these cases, seemingly so different, both ask two of the same stock questions perennially troubling any Constitutional (indeed, any Western legal) thinkers. The first, the “uniformity question” is this: does the law more effectively achieve true justice through “neutral and generally applicable” laws that admit of no exception,² or by contextual analysis that grants legal exceptions to rights and prohibitions when the situation warrants? Behind this question almost always follows a second and more basic anthropological and theological question that has troubled the Framers and courts ever since: the “trust question.” Should we trust the motives and actions of individuals more than those of the government and use our constitution and human rights laws to save them from the government’s overreaching or oppression; or should we assume that individuals will take advantage of the government if government officials trust that they are proceeding in good faith and grant them room for deviant behavior?

The now ubiquitous photos of migrant children penned in cages and housed in military tent detention centers³ ask the “uniformity question” in this way: are we willing to sacrifice the psychological well-being of even the youngest children entering with parents through unauthorized and illegal border crossings to send a signal to others, especially those with questionable criminal intentions,

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1. 494 U.S. 872 (1990).

2. *Id.* at 879 (holding that “[s]ubsequent decisions [of the Court since *Sherbert*] have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)’” (quoting *United States v. Lee*, 455 U.S. 252 (1982))).

3. See, e.g., Rosie Perper, *Side-by-side photos show migrant children locked up in cages under both Trump and Obama*, BUSINESS INSIDER (June 20, 2018), <https://www.businessinsider.com/photos-migrant-children-policy-under-trump-obama-2018-6>.

not to attempt entry to the U.S.? What is more important—the prevention of future harm to the community through deterrent and retributive immigration policies, or the protection of these specific family units for the sake of these specific children? As of this writing, children are being returned to their parents under court order,⁴ however, the government’s answer to these questions is confusing and fractured.

The Supreme Court gives a quite different answer to the uniformity question in *Masterpiece Cakeshop*.⁵ The majority opinion eschews the opportunity either to re-make Free Exercise jurisprudence or even to create bright-line exceptions to existing law, in favor of a deeply contextual review of Colorado’s response to Phillips’ refusal to bake. Notably, the Court once again borrows equal protection caselaw from the only occasionally employed *Arlington Heights* “rule,”⁶ which is actually a searching contextual “factor” approach, to decide whether lawmakers evidenced illegitimate intent under the Free Exercise Clause.⁷ Here too, the answer to the “trust question” is the reverse of the President’s in the migrant controversy. The Supreme Court concludes that it cannot trust the government, attributing religious animosity to the Colorado Human Rights Commission,⁸ while signaling its trust that Jack Phillips was sincerely trying to live out his religious beliefs in refusing to make a wedding cake, rather than acting out of animosity to gay men.⁹

The uniformity question and the trust question are two of the difficult questions most perennially at the intersection of law, religion, and family; and many of the essays in *The Contested Place of Religion in Family Law*, edited by Robin Fretwell Wilson, engage them in some way. Wilson has brought together law and religion scholars and practitioners from a variety of academic disciplines, philosophical and religious perspectives to, essentially, debate some of these most fiercely contested and stubbornly unresolved issues. While there is a variation in style and tone of these essays, for the most part, there seems to be a common commitment by authors to accurately report the complexity of facts in these situations, and most try to give respect to contrary arguments and conclusions—a welcome difference from many articles on these issues that rehearse the same old arguments, pro and con. Many of the essays also provide fresh theoretical insights or relatively unknown empirical evidence in support of their claims.

4. Scott Neuman, *Judge Bars Migrant Family Separations, Orders Return Of Children Within 30 Days*, NATIONAL PUBLIC RADIO (June 27, 2018), <https://www.npr.org/2018/06/27/623763875/judge-bars-migrant-family-separations-orders-return-of-children-within-30-days>.

5. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018).

6. *Id.* at 1729. The Court cites to *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540 (1993), which in turn quotes *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977) (“Factors relevant to the assessment of governmental neutrality include “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.”).

7. U.S. CONST. amend. I.

8. *Masterpiece Cakeshop*, 138 S. Ct. at 1729–31.

9. *Id.* at 1729, 1732.

Part One of *The Contested Place of Religion in Family Law* raises the general question of whether the proper balance between religious liberty and harm-preventing government legislation has been achieved by federal and state Religious Freedom Restoration Acts (“RFRA”). Like some others in this text who sound alarms about the ominous social results of religious freedom developments, Elizabeth Sepper answers the “trust question” for the government and against the religious plaintiffs, at least the corporate ones, in RFRA cases. She suggests that current RFRA interpretations like *Hobby Lobby*¹⁰ not only depart from previous religious liberty emphases on “individual minority faiths;” they also constitute another example of American corporate interests winning out against vulnerable individuals on very important life choices such as whether to bear children, how to die, or how to educate their children.¹¹ Sepper warns us to expect even more RFRA challenges by religious majorities flexing their muscles.¹² By contrast, Michael Helfand argues that cases such as *Hobby Lobby* and the wedding vendor cases have made members of the general public *more* skeptical of religious liberty and courts more willing to impose unnecessary threshold requirements on sincere religious liberty claimants that prevent them being judged truly by the strict scrutiny standard set up by the courts.¹³ This debate ends in a tie: both authors make good points.

The contraceptive controversy that gave rise to *Hobby Lobby* is the subject of four different essays by Michelle Goodwin, Mike Rienzi, Gregory Lipper, and Michael Helfand on how to read the future of conscience claims of employers, pharmacists, and others. Like Sepper, Goodwin distrusts contemporary religious claimants, arguing that aggressive religious exceptionalism has resulted in significant harms to the marginalized, including women, people of color, sexual minorities, and even children.¹⁴ For Goodwin, contraceptive conscientious objectors have used bad science to justify serious injuries to women¹⁵ and neglected the agonizing and unjust stories she tells in her chapter; thus, there should be no religious exemption in the delivery of health care.¹⁶

Lipper broadens the scope of Goodwin’s and Sepper’s claims, suggesting that the contraceptive cases are part of a more universal political attack by the powerful religious right against the Obama administration, one in which the government conceded too much to religious claimants.¹⁷ From a legal perspective, Lipper’s attack questions the sincerity of religious objectors in the *Hobby Lobby*

10. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

11. Elizabeth Sepper, *The Risky Business of RFRA After Hobby Lobby*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 17, 19–20 (Robin Fretwell Wilson ed., 2018).

12. *Id.* at 36.

13. Michael A. Helfand, *Religion and the Family in the Wake of Hobby Lobby*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 40, 46, 50 (Robin Fretwell Wilson ed., 2018).

14. Michele Goodwin, *Religious Exceptionalism and Religiously Motivated Harm*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 61 (Robin Fretwell Wilson ed., 2018).

15. *Id.* at 71–77.

16. *Id.* at 85.

17. Gregory M. Lipper, *The Contraceptive Coverage Cases and the Problem of Politicized Free Exercise Lawsuits*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 110, 110–11, 116–19 (Robin Fretwell Wilson ed., 2018).

wars, especially entities like the University of Notre Dame, which he claims used stall tactics to secure political advantage.¹⁸ On the other side, legal realist Rienzi cautions that the empirical evidence shows that the no-exceptions “uniformity” solution, which forces objecting medical providers, pharmacists, and employers to provide contraceptive care, will simply dry up the number of health care providers for everybody, thus defeating the purpose of overriding religious objections.¹⁹

Helfand and Sepper suggest possible fixes to the problem of applying *Sherbert*-like²⁰ rules to these public debates, both providing glosses on the “substantial burden” part of the analysis. Absent the Court’s refusal to allow corporate entities to make religious freedom claims, Sepper wants a strong version of the attenuation thesis Justice Ginsburg argued in her *Hobby Lobby* dissent—there is no free exercise claim if the owners’ actions in offering health care were too far removed from the possible abortion they objected to assisting, an act too speculative to attribute to them.²¹ Helfand similarly wants the courts’ “substantial burden” analysis to be probing, not deferential, but limited to substantial secular burdens (such as large fines or criminalization) to avoid the possibility that courts might explore claimants’ theology to see whether their burdens were indeed religiously “substantial.”²²

As the Supreme Court seems to tacitly acknowledge in *Hobby Lobby*, however, if the purpose for granting an exemption is to avoid placing religious believers in a no-win situation, where they must choose between their consciences and obedience to secular law, attempting to judge either “sincere belief” or “substantial burden” from a purely secular perspective elides the main problem.²³ This dilemma is especially problematical for justices who come from Catholic or similar traditions, which are instructed by St. Thomas Aquinas that one is obliged to follow his conscience, even when it is actually mistaken in assessing the facts or the right thing to do in the circumstance.²⁴

It is also especially problematical for a constitutional tradition that has given much lip service protecting marginalized and unpopular religious minorities from the majority. As Justice Jackson pointed out in *United States v. Ballard*, it is difficult to know how decision-makers can judge sincerity, *i.e.*, whether a

18. *Id.* at 122–23. Lipper also takes the religious right to task for, essentially, hypocrisy in supporting the Nazi/Klan-supported Donald Trump as a means of protecting religious freedom, castigating non-Christian groups as too willing to stay silent to get their own exemptions. *Id.* at 134–37.

19. Mark L. Rienzi, *Contraceptive Access and Religious Liberty: Can We Afford to Protect Both?*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 88, 89 (Robin Fretwell Wilson ed., 2018).

20. *Sherbert v. Verner*, 374 U.S. 398 (1963), applied the strict scrutiny approach to religious freedom questions, requiring “that any incidental burden on the free exercise of appellant’s religion may be justified by a ‘compelling state interest in the regulation of a subject within the State’s constitutional power to regulate.’” *Id.* at 403 (quoting *NAACP v. Burton*, 371 U.S. 415, 438 (1963)).

21. Sepper, *supra* note 11, at 25–26.

22. Helfand, *supra* note 13, at 53–55.

23. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 699 n.8 (2014).

24. See TIMOTHY E. O’CONNELL, *PRINCIPLES FOR A CATHOLIC MORALITY* 88–93 (1976) (arguing for the infallibility of conscience and noting Aquinas’s view that a person should be willing to be excommunicated rather than violating his conscience if he is faced with an ecclesiastical order to disobey his conscience).

state of facts is believed by the religious adherent, without resorting to judging a belief by whether it is rationally believable.²⁵ If the Hobby Lobby owners believe they are helping to cause an abortion as dictated by their religion or their consciences, imposing secular standards such as whether their science is wrong or they have made bad causal predictions about their contribution to an evil act makes their own religious belief irrelevant, when it is the most relevant matter at hand under the Free Exercise Clause, even if it is not dispositive. Helfand indeed acknowledges this problem in responding to Sepper's "attenuation" solution; but he continues to assert that the real question for judges is not whether the religious conscience understands itself to be engaged in evil, but whether claimants are punished with a secular "substantial burden" if they do not follow the law.²⁶ But he doesn't fully answer this question: even given the difficulty of judging her religious burden, if a believer's religious burden is actually nonexistent or light or the believer is misguided in her understanding of what her faith tradition requires, particularly for those traditions that make authoritative pronouncements about what is morally required, why should we not expect her to commit a "minor" or non-existent violation of her religion by obeying the law?

If the Court chooses to unquestioningly trust the claimant's sincerity and completely defer to her evaluation of substantial burden, the law indeed can and does become a tool of the powerful against the marginalized, as Sepper and Goodwin argue.²⁷ Yet conversely, as the *Ballard* court points out, if "unbelievable" mainstream religious beliefs were subject to sincerity examinations, then believers who affirmed "the miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer" might be subject to the same prosecution as Guy Ballard who claimed, among other things, that he had also been Saint Germain, Jesus, and George Washington at different times in history, and that he had the power to cure the sick.²⁸ As the Court notes, "If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom."²⁹

This leaves jurisprudential thinkers to hard choices, an important theme of this book. In another important topic the book takes up, marriage and divorce, a particularly compelling example of this difficult choice between uniformity and contextuality is evidenced in the discussion between Maura Strassberg and John Witte, Jr. about whether polygamy should be criminalized. This issue has accompanied many of the same-sex marriage cases up to the Supreme Court,³⁰ and *Obergefell's* paean to the importance of human dignity and autonomy in the selection of marriage partners makes it ever more relevant.³¹

25. See, e.g., *United States v. Ballard*, 322 U.S. 78, 92 (1944) (Jackson, J., dissenting).

26. Helfand, *supra* note 13, at 52–55.

27. See Goodwin, *supra* note 14; Sepper, *supra* note 11.

28. *United States v. Ballard*, 322 U.S. at 79, 83.

29. *Id.* at 83.

30. See, e.g., *Kitchen v. Herbert*, 755 F.3d 1193, 1219–20 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352, 392 (4th Cir. 2014).

31. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–98 (2015).

Once again, both Strassberg and Witte acknowledge empirical support for state recognition that polygamy can cause grave social harms, such sexual abuse, undereducation, and taught subservience of girls, as well as expulsion of excess boys, harms which can be present in monogamous families as well.³² Both also acknowledge that in some polygamous families, there can be found familial goods; Strassberg denominates them as “‘camaraderie and bond, a richness of people, an ‘unloneliness,’ . . . ‘[r]ich relationships among sister wives, [g]reater autonomy . . . [and] [e]xpanded support networks’” with more opportunities for higher education for women.³³

Witte and Strassberg each answer the “trust question” differently, however. Witte argues that we should mistrust individual men, for “polygamy is and always has been primarily about a small group of men seeking the social, moral and legal imprimatur to have and to hold sundry females at once,” while most men and women are “repulsed and angered” by such deviance from the natural pair-bonding that 2500 years of civilization has protected.³⁴

Strassberg, even conceding the evidence against polygamy and recognizing that legalization might exacerbate the incidence of polygamy,³⁵ argues that it is difficult to tell how many of these harms are caused by the response of polygamous communities to go “off the grid,” creating insularity that is ripe for abuse, and how many are caused by polygamy itself. For her, though she seems unsure, a balance between the reality of these harms and respect for the conscience of religious polygamists might be better achieved by “the least restrictive means” of decriminalizing polygamy but not recognizing polygamous marriages, though not if, she concedes, decriminalization “will likely lead to legal recognition” as it did with same-sex marriage.³⁶ Once again, Witte speaks in favor of uniformity necessary to deter evil behavior, while Strassberg essentially argues for some “play in the joints” that respects the good will and good outcomes achieved by some polygamous families, even if not most.

We might look at yet a third example of this debate about the uniformity and trust questions by examining the essays by James Dwyer, Paul Offit, Robin Fretwell Wilson, and Shaakirrah Sanders about how the law should respond to

32. Witte traces the historical arguments about harm beginning in Jewish law and the early Church Fathers until the present time while Strassberg focuses on modern studies. John Witte, Jr., *Why No Polygamy*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 446, 458–63 (Robin Fretwell Wilson ed., 2018); Maura Irene Strassberg, *Scrutinizing Polygamy Under Religious Freedom Restoration Acts*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 467, 482–87 (Robin Fretwell Wilson ed., 2018).

33. Strassberg, *supra* note 32, at 491.

34. Witte, *supra* note 32, at 466.

35. Strassberg relies heavily on extensive evidence compiled by the British Columbia Supreme Court in support of its conclusion that the harms of polygamy “were sufficient to justify criminalization, despite the resulting infringement on liberty and freedom of religion guaranteed by the Canadian Charter of Rights and Freedoms.” Strassberg, *supra* note 32, at 482. She also accepts the British Columbia Court’s acknowledgement that decriminalization of polygamy might significantly expand the practice among persons born into fundamentalist communities, mainstream LDS members who might return to this founding doctrine, Muslims, and even some Christians who argue that polygamy is ordained by God and secularists who might pursue it as an alternative lifestyle. *Id.* at 493–96.

36. *Id.* at 497.

parents who seem to neglect their most basic responsibilities to their children, to save their lives and educate them, in favor of alternative medicine and home-schooling.

Dwyer and Offit take a hard line against those who would grant religious parents exemptions from secular law's obligations to provide medical care and standard education for their children. Dwyer argues that giving parents the choice to deny their children a standard secular education "cannot possibly be justified on child welfare grounds, neither can empowering parents to deny children necessary medical care . . ." because our society owes children their autonomy, "an open future" and treatment "with equal respect."³⁷ He terms religious accommodation "an invention of the Warren Court in the 1960s."³⁸

Offit, a physician, reprises this theme in decrying the willingness of states to include exemptions for faith-healing parents and those who objected to vaccination, citing gruesome anecdotes about faith communities who lost their children to death because they refused standard medical care. Arguing that a religious exemption to child abuse and neglect laws for faith healing is "a contradiction in terms" because religion teaches adults to keep their children from harm, he closes with the story of Rita Swan, a former Christian Scientist, whose child's death turned her into a crusader against religious exemptions.³⁹ For her, as for Offit, "no god would ask a parent to let a child die in his name."⁴⁰

Here, it is difficult not to question the equivalence that Dwyer wants to draw between the refusal to provide the equivalent of K-12 public education and the choice of parents to use faith healing on their children. One is literally terminal—without medical care, some of these children who are "healed by faith" will die. Dwyer is certainly right that illiterate and undereducated adults have very constrained life choices in modern America. Yet, he neglects to point out how the American education system has adapted to this challenge, providing adult education to both native-born Americans who drop out or are denied adequate education, and to immigrants, many of whom start from scratch in terms of American workforce standards.⁴¹ This system is certainly not comprehensive, but it is hard to accept a claim that a child deprived of education by his religious parents is "fatally" marked by ignorance for the rest of his life if he chooses a different path than his parents planned for him.

Wilson and Sanders, surveying state laws on parental discipline and faith healing, provide a compelling amount of statistical and anecdotal evidence about the harms that result from taking a "hands off" approach to religious parents who insist on these practices. Yet, echoing Rienzi's and Strassberg's suggestions that coercion of religious objectors might exacerbate rather than solve the problem,

37. James G. Dwyer, *The Easiest Accommodation: Abandoning Other People's Children to Their Parents' Religious Views*, in THE CONTESTED PLACE OF RELIGION IN FAMILY LAW 193, 216 (Robin Fretwell Wilson ed., 2018).

38. *Id.* at 193.

39. Paul A. Offit, *Bad Faith: When Religious Beliefs Imperil Children*, in THE CONTESTED PLACE OF RELIGION IN FAMILY LAW 285, 305–07 (Robin Fretwell Wilson ed., 2018).

40. *Id.* at 307.

41. See Dwyer, *supra* note 37.

Wilson and Sanders acknowledge that criminalizing faith healing may simply cause religious adherents to retreat to insular communities where they are out of sight of community guardians who can act before these children die.⁴²

Once again arguing for a compromising solution, Wilson and Sanders suggest that a judicial bypass system, which permits judges to order the state to seek treatment without ordering the parents to make that choice themselves, might more effectively save lives as well as accommodate a parent's conscience.⁴³ Wilson and Sanders want us to trust that both parents and the state will seek their children's good according to their best lights, while Dwyer and Offit answer the "trust question" in favor of uniformity following majority standards, even when the fate facing a child is not as dire as death or permanent disability.

We might also consider a final example of the uniformity and trust questions to be the debate over how the state should enforce private agreements in marriage and divorce. Brian Bix focuses on the complexities of civil court enforcement of private agreements implicating religion, such as custody agreements specifying children's religious training and divorce agreements based on religious law. His essay rightly raises the problem of multiculturalism, whether and when "law and society do and should work to accommodate different normative systems" acknowledging the world's "pluralism and party autonomy," and when the state should step in to safeguard the interests of vulnerable third parties.⁴⁴ Any number of stories can be told about the ways in which parents abuse religious training agreements, treating their children as weapons in battles against their ex-spouses, and Jewish and Muslim husbands use their religious divorce prerogatives to extort their wives into giving up just settlement demands in divorce.

Indeed, Margaret Brinig's empirical study of how traditional Christians respond in states' shared parenting schemes illuminates the complexity of designing a "one scheme fits all" post-divorce regime. She documents that divorcing religious parents are both more likely to seek a lot of parenting time at the outset, and yet custodial parents are more likely to ask that the non-custodial parent's time be reduced in years farther out from the divorce, a seemingly paradoxical situation for any uniform scheme of shared custody.⁴⁵

The "hard cases" in these areas challenge lawmakers to think hard about whether the secular state should have a uniform policy about enforcing religiously inflected private agreements or taking religion into consideration in making divorce decisions, either to avoid Establishment Clause problems, or to ensure that the rights of vulnerable women and children in religious communities are protected equally with majorities. If religious minorities can generally be

42. Robin Fretwell Wilson & Shaakirrah R. Sanders, *By Faith Alone: When Religious Beliefs and Child Welfare Collide*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 308, 330 (Robin Fretwell Wilson ed., 2018).

43. *Id.* at 330–33.

44. Brian H. Bix, *Marriage Agreements and Religious Family Life*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 218, 231–32 (Robin Fretwell Wilson ed., 2018).

45. Margaret F. Brinig, *Religious Parents Who Divorce*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 234, 250–51, 257 (Robin Fretwell Wilson ed., 2018).

trusted to “do the right thing” from a secular perspective (once again, by whose standards?), then accommodationist policies can be created to respect multicultural difference.⁴⁶ Such an approach can still permit court intervention in the starkest cases of human rights violations and courts can use highly contextual reasoning that respects religious difference to decide these cases. If religious minorities cannot be trusted, the secular courts will necessarily resort to uniform solutions for all. These uniform solutions, however, risk running roughshod over arrangements that may seem peculiar or even harmful to the secular or religious majoritarian mind, but that reflects the values and community context of those who are disputing these issues.

A significant theme of several essays in this text is whether marriage as we know it needs to be re-conceptualized, particularly in light of post-*Obergefell* proposals to untangle the relationship between religion and the state in the marriage license and ceremony. In the past, these proposals have ranged from arguments to eliminate marriage altogether in favor of legal recognition only of the parent-child dyad,⁴⁷ to arguments for private contractual relationships between intimate partners,⁴⁸ to marriage as a purely religious institution,⁴⁹ or to civil marriage or domestic partnership regimes that have no links with religious communities.⁵⁰

Kari Hong and Robin Kar both ask whether there is something special about marriage that justifies giving it legal recognition. They argue that there is a transcendent (Hong) or transformational (Kar) aspect to marriage that justifies state recognition. Probing three cases where the typical marriage relationship is absent,⁵¹ Hong claims that marriage currently has a resonance as a singular, lifelong commitment not replicable in other relationships even though it is hard to explain in objective terms why.⁵² Kar argues that biblical interpretations against same-sex marriage need to be re-thought in light of the historical rise of transformational marriage as a social institution “that serves as a vehicle for the maturation

46. For example, if religious tribunals can be trusted to enforce human rights standards when they are asked to arbitrate cases, then the state may be able to award them more jurisdiction over private law matters and grant them more deference on appeals.

47. See, e.g., Martha Fineman, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 123 (2004) (concluding that marriage should be abolished as a legal category and its perquisites and privileges transferred to the caretaker-dependent relationship).

48. For a comprehensive discussion of the historical movement of family law from status to contract, see Jill E. Hasday, *The Canon of Family Law*, 57 *STANFORD L. REV.* 825, 835–38 (2004).

49. See generally Sean Lauer, *The Deinstitutionalization of Marriage Revisited: A New Institutional Approach to Marriage*, 2 *J. FAM. THEORY & REV.* 58 (2010).

50. See generally Hilel Y. Levin, *Resolving Interstate Conflicts over Same-Sex Non-Marriage*, 63 *FLA. L. REV.* 47 (2011).

51. These cases are *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002), where a prisoner filed a civil rights claim to be permitted to send his wife sperm through the mail so that she could become pregnant; *Matter of Peterson*, 12 I. & N. Dec. 663 (BIA 1968), where an Iranian woman who married an American man who wanted just a housekeeper was denied a green card based on fraud; and *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), where an immigrant wife was denied admission to the U.S. because her American husband died during the petition process for her immigration.

52. Kari E. Hong, *After Obergefell: Locating the Contemporary State Interest in Marriage*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 349, 350, 361–62 (Robin Fretwell Wilson ed., 2018).

of early romantic desire into the psychological capabilities needed to break free from the bondage of self and attain greater personal communion with the totality of life,” to “live joyfully and well come what may . . . and to identify and contribute better to the common good.”⁵³

In terms of the current debate disentangling religious and civil marriage, Wilson cautions against a too-eager embrace by conservatives of a religious-only marriage regime, cataloging both the legal protections and benefits that would likely be lost to individual couples, as well as the social costs of losing recognition of religious marriage because of the stability such marriages bring to society.⁵⁴ Her thesis is supported by Barzilay’s and Yefet’s essay on Israeli’s confusing dual civil-religious system, which provides more than fourteen different jurisdictional and substantive regimes for marriage, divorce and legal cohabitation, depending on the religious status of each partner, his prior marital status, whether he was born a “bastard,” his sexual orientation, and a host of other factors.⁵⁵ Barzilay and Yefet conclude that “the attempt to give religion a monopoly over marriage and divorce . . . paradoxically yields a fragmented-but-intertwined” scheme that “undermines not only religious marriage but the need to marry at all.”⁵⁶

Patrick Parkinson’s survey of legal wedding practices in Amsterdam, Melbourne, Edinburgh, London, and Washington D.C. documents the confusing practices over the celebration of marriage (particularly civil marriage) in secularized societies. Claiming that the secular state has been unable to “provide any convincing narrative about what marriage is,” he proposes that marriage will “develop its own identity . . .,” speculating that religious marriage founded on “culture, custom and faith” will be the only coherent marriage practice that survives.⁵⁷

This text also contributes important social and legislative history that illustrates the complexity of the legal and social dynamic forces behind changes in the law of the family, especially when religion is involved. As one example, William Eskridge provides a significant history of efforts by the Church of Latter Day Saints (“LDS”) to resist changes in marriage law, such as same-sex marriage, that are inconsistent with LDS theology. Senator J. Stuart Adams details the legislative and social history that resulted in the Utah Compromise, ensuring both non-discrimination protections for gay, lesbian, and (most notably) transgender individuals as well as robust protections for religious individuals who conscientiously object to same-sex marriage. Anthony Michael Kreis offers

53. Robin Bradley Kar, *Transformational Marriage: The Religious Case for Supporting Same-Sex Marriage*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 375, 377 (Robin Fretwell Wilson ed., 2018).

54. Robin Fretwell Wilson, *Divorcing Marriage and the State Post-Obergefell*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 413, 423–35 (Robin Fretwell Wilson ed., 2018).

55. Arianne Renan Barzilay & Karin Carmit Yefet, *A Tale of Fragmentation and Intertwinement: The Sacred and the Secular Systems for Forming and Dissolving Marriages in Israel*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 641, 644–45, 661 (Robin Fretwell Wilson ed., 2018).

56. *Id.* at 661.

57. Patrick N. Parkinson, *The Future of Marriage in Secular Societies*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 617, 638–40 (Robin Fretwell Wilson ed., 2018).

a fascinating history of the parallel ways in which court cases stimulated state legislative action in abolishing anti-miscegenation statutes as well as anti-same-sex marriage statutes.

Finally, there are a number of chapters that do not fit into the major themes of the text but do take up controversial issues on the margins of family law. Essays by Richard Kaplan, Naomi Cahn, and Amy Zietlow describe difficulties in end-of-life decisions when religious beliefs of both the dying person and his or her family members may clash on issues such as terminating life support and designating a decision-maker for an incompetent patient. Eric Rassbach discusses the recent controversy over American and European attempts to ban male circumcision over the protest of religious leaders who understand circumcision as a central religious ritual of their faith and ponders how these laws are intertwined with anti-immigrant politics in these countries. Asma Uddin compares the history of French attempts to ban women's modesty dress, often referred to as the hijab and the burkini controversies, with American responses to these issues.

All in all, this volume provides a lot of important evidence and argument for those who are re-thinking specific controversies in family law or attempting to re-imagine the basic concepts of family law such as the nature of marriage. Prof. Wilson's attempt to balance views on some of these contested issues and the mix of theoretical, historical, and empirical work that the authors bring to bear is a welcome addition to the literature in this field.