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Without Religion W(h)ither Family Law?

Anita Bernstein

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INTRODUCTION

Most fields of law in the United States appear to be heeding the exhortation of a big-selling song, *Imagine no religion*, in that they manifest a commitment to secular rather than religious authority.[1] Within the Articles of the nation's founding document, before any amendments were ratified, framers of the new American design provisioned that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[2] The first—and to some observers the foremost—amendment added to the United States Constitution announced an official separation between religion and government.[3] In the 7,591 words that fill its articles and amendments, the Constitution says nothing about a deity.[4] Important expressions of national priorities—including the Declaration of Independence, the official motto of the United States, pronouncements of ostensible fact printed on American currency, and state constitutions (all of them)—do mention God by name,[5] but they all rank below the Constitution.

Following the Constitution in this respect and proceeding consistent with a directive stated in Supreme Court decisional law that "the government must pursue a course of complete neutrality

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1. John Lennon released "Imagine" under a sole byline in 1971; long after his death, in 2017, Yoko Ono received co-author credit. *See* Jude Rogers, *Not the Only One: How Yoko Ono Helped Create John Lennon's* Imagine, GUARDIAN (Oct. 6, 2018), https://www.theguardian.com/culture/2018/oct/06/how-yoko-ono-helped-create-john-lennon-imagine [https://perma.cc/V7BP-N3GS].

2. *See* U.S. CONST. art. VI, cl. 2.

3. Poll numbers attest to this prominence for the lay public. Peter Moore, *The First Amendment is the Most Widely Known Amendment in the Bill of Rights, and the Most Appreciated*, YOUGOV (Apr. 12, 2016), https://today.yougov.com/topics/politics/articles-reports/2016/04/12/bill-rights [https://perma.cc/FV62-PBKW]; *see also* David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1700 (1991) (arguing against a "clause-bound interpretation" of the First Amendment, whose narrowness blocks understanding that this amendment "reinforce[s] and implement[s] the core constitutional structures of separated powers and federalism").

4. *See Fascinating Facts About the Constitution*, CONST. FACTS, https://www.constitutionfacts.com/us-constitution-amendments/fascinating-facts/ [https://perma.cc/AUK2-V2BG].

5. *See* Dalia Fahmy, *8 Facts About Religion and Government in the United States*, PEW RSCH. CTR. (July 16, 2020), https://www.pewresearch.org/fact-tank/2020/07/16/8-facts-about-religion-and-government-in-the-united-states/ [https://perma.cc/H8ST-4XQX]. Congress reaffirmed "In God We Trust" as the nation's motto in 2013. 112 H.R. Res. 11247 (2013).

toward religion,"[6] American legislatures and courts "imagine there's no heaven"[7] when they make and interpret laws of general application. They bolster and encourage individual decisions to engage in religious observance, to be sure. Maybe more than is desirable.[8] But the rule that any obligation that the law imposes must rest on a secular purpose remains in place.[9]

Family law, understood for a few generations to be a field, defies the generalization.[10] It is replete with premises, rules, doctrines, and policies that align with and give legal power to ideas found in a subset of world religions, the Bronze Age 'Abrahamic' trio of Judaism, Christianity, and Islam. What I call "five teachings from creeds" come together for our consideration first in Part I, which sites the beliefs in the three religions,[11] and second in Part II, which argues that the beliefs persist in and influence American family law.[12] Part III, the Conclusion, extends the teachings to sum up the wither-and-whither claim of my title.

Here are the teachings. First, men rule over women. Second, parents, especially fathers, rule over children. Third, it is right for children to suffer when their parents lapse. Fourth, sexual intercourse between persons of the same sex, especially two men, is forbidden.

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6. Wallace v. Jaffree, 472 U.S. 38, 60 (1985); *see also* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (holding that the Establishment Clause of the First Amendment requires that a law must (1) have a secular purpose, (2) have a principal effect that neither advances nor inhibits religion, and (3) not foster an excessive entanglement of government and religion).

7. JOHN LENNON, *Imagine*, *on* IMAGINE, at 00:15 (Apple Records 1971).

8. *See generally* BRIAN LEITER, WHY TOLERATE RELIGION? (2012).

9. *See generally* Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002) (describing this constitutional doctrine and expressing concern about its future).

10. A history of this development starts in Janet Halley, *What is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMANS. 1 (2011) and continues in Janet Halley, *What is Family Law?: A Genealogy Part II*, 23 YALE J.L. & HUMANS. 189 (2011). My mother, who graduated in 1949 from the school where I teach, studied a version of this material under the rubric of Domestic Relations Law, a label favored in New York statutes. On what family law as a law school course now covers see *infra* Section III.B.

11. Other Abrahamic religions, including Druzism and the Baha'i Faith, exist, but, measured by their numbers of adherents, they are much smaller in the United States than the three that occupy this Article.

12. *Cf.* Laura T. Kessler, *Family Law by the Numbers: The Story That Casebooks Tell*, 62 ARIZ. L. REV. 903, 904 (2020) ("*In the beginning* the Law created the patriarch; he was master, husband, and father. The treatise writers saw the legal order and said it was good.") (emphasis in original).

Fifth, tribal memberships derived from or assigned at birth outrank individuals' choices and life plans.

Associating the five ideas with religious antecedents raises concerns about under- and over-inclusiveness that I want to acknowledge up front. The ideas are espoused away from religious institutions and traditions: Societies accept and enforce them without purporting to defer to clerical authority.[13] Ideologies embraced in religion certainly could be effects, consequences, or byproducts rather than original causes that reached the world ex nihilo. None of the five ideas, as best as I can tell, exists as a tenet that a person must believe or profess to remain in good standing within any of the three religions. Self-identified atheists and skeptics have found items on the list attractive;[14] self-identified adherents of these religions have taken pains to distance themselves from some of the five.[15]

The just-so nature of the teachings, however—their foundation in unfalsifiable assertion, their rendering from a narrow order-giver class on top to a wide tier of order-takers below, the unchecked prerogative assigned to clergy who interpret and enforce them[16]—puts one in mind of dogma rather than reason; in the contemporary United States dogma unsupported by reason enjoys signal-boosting privilege when dogmatists characterize what they assert as religion.[17] Trying to mitigate what might be prejudice or unjustified antipathy on my part, I bring primary sources to Part I—quotations from texts

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13. *See, e.g.*, Richard A. Pacia & Raymond A. Pacia, *Roman Contributions to American Civil Jurisprudence*, 49 R.I. BAR J. 5 (2001) (examining ancient Rome); Judith Stacey, *When Patriarchy Kowtows: The Significance of the Chinese Family Revolution for Feminist Theory*, 2 FEMINIST STUD. 64, 65 (1975) ("Few family systems can compete with the Confucian for degradation and brutality toward women.").

14. *See* Adam Lee, *Richard Dawkins Has Lost It: Ignorant Sexism Gives Atheists a Bad Name*, GUARDIAN (Sept. 18, 2014), https://www.theguardian.com/commentisfree/2014/sep/18/richard-dawkins-sexist-atheists-bad-name [https://perma.cc/QFY4-3NHB]; *cf.* Shadi Hamid, *America Without God*, ATLANTIC (Apr. 2021), https://www.theatlantic.com/magazine/archive/2021/04/america-politics-religion/618072/ [https://perma.cc/T8MY-YU98] (arguing that a bright line between secular and religious discourse no longer exists).

15. *See* Angela C. Carmella, *Progressive Religion and Free Exercise Exemptions*, 68 U. KAN. L. REV. 535, 569 (2020) (describing the "religious left").

16. On "just-so" as meaning authoritarian and untethered to empirical reality, see Anthony Gottlieb, *It Ain't Necessarily So*, NEW YORKER (Sept. 10, 2012) (recalling the origin of the phrase Just So Stories: when Rudolph Kipling made up fables to explain "how the camel got his hump and the rhinoceros his wrinkly folds of skin," his young daughter could be lulled to sleep by them only if Kipling repeated his fiction to her in the same words at every retelling).

17. *See* LEITER, *supra* note 8, at 68–70.

that have official theological heft[18]—along with scholarship that links the five ideas to the three religions that occupy this Article.

Present in all five of the ideas is *status*. The English jurist Henry Maine famously examined this condition as a signature trait of family law more than 150 years ago and deemed it obsolete.[19] For Maine the progressive contrast to Status was Contract. What Maine called the "ancient law" of older societies assigned individuals rigid roles and prohibitions that flowed from their identity.[20] Contract, by which Maine meant access to undertakings that originate in human will and are given effect by voluntary conduct, sets them free.

Status, for Maine's purposes (which are shared by this Article), means membership in a group that an individual did not volunteer to join.[21] When you live under the Five Ideas scheme of this Article, characteristics of yours that landed on you by ascription might give you benefits: I tend to take more interest in detriments.[22] Status thwarts freedom. You are ruled by a man or men when the status of woman is ascribed to you. When you are a child, you are ruled by your parents, and steered to accept rather than resist punishment in consequence of wrongs done by them rather than by you. And so on. Status imposes marching orders you might prefer not to obey and prohibitions that forbid you from doing what you want. The teachings instruct individuals to heed their social place by submitting

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18. All sources in this category are translations from various languages, of which the only one I can read is Hebrew (and that not well). I cite to multiple English versions of these books.

19. *See* HENRY SUMNER MAINE, ANCIENT LAW 165 (2d ed. 1864).

20. *See* Coel Kirkby, *Law Evolves: The Uses of Primitive Law in Anglo-American Concepts of Modern Law, 1861-1961*, 58 AM. J. LEGAL HIST. 535, 539 (2018) (attributing to Maine a conclusion that "legal rights in a primitive patriarchal family were not derived from a social contract or natural law, but rather flowed from the kinship group and one's status within it").

21. In Maine's view, being married did not count as Status because individuals choose to marry. Maine preferred a narrow understanding of Status that included only conditions derived from birth. *See* Libby Adler, *Inconceivable: Status, Contract, and the Search for a Legal Basis for Gay & Lesbian Parenthood*, 123 PENN ST. L. REV. 1, 25–26 (2018). In understanding "from Status to Contract" somewhat more capaciously than its author intended, I am joined by many other readers of Maine. *See id.* (citations omitted).

22. *See* ANITA BERNSTEIN, THE COMMON LAW INSIDE THE FEMALE BODY 7 (2019) [hereinafter BERNSTEIN, COMMON LAW] (announcing a focus on negative liberty); Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 486 (2009) (advocating an "accentuate-the-negative" approach to professional responsibility).

to constraints that derive not from the choices they made but who they are.

Arraying religion at its foreground, this Article examines the state of Status in the field of family law. Just now, referring to teachings from creeds, I mentioned "sexual intercourse between persons of the same sex, especially two men, is forbidden" as among the five. Abrahamic religions said so, but the United States Supreme Court has rejected this belief.[23] It started its path of rejection by ruling in 2003 that American governments may not criminalize acts of same-sex sexual intimacy.[24] This development moved to family law when the Court invalidated Section 3 of the Defense of Marriage Act, which had directed the federal government to refuse recognition of same-sex marriages,[25] and then with a decision that same-sex couples have a constitutional right to marry.[26] *Obergefell v. Hodges* is in my opinion one of the greatest rulings in the history of this Court. Anthony Kennedy's mawkish, gratuitous paean to matrimony aside, the result in *Obergefell* instantly made the country a better place.[27]

It also made family law dwindle. I noticed the phenomenon in 2016 when a publisher sent an alarmingly slender new edition of the family law casebook I've taught from since 2000. The judiciary of yore had so much work to do when it stretched doctrines about marriage, Procrustean fashion, to deal with legal problems involving same-sex relationships. The majority of American legislatures, Congress among them, generated more work for courts when they

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23. *See infra* Section II.D. Not only these three religions. For a historically older example, see *Ancient History Sourcebook: The Code of the Assura, c. 1075 BCE*, FORDHAM UNIV. (Paul Halsall ed. 1998), https://sourcebooks.fordham.edu/ancient/1075assyriancode.asp [https://perma.cc/SEJ5-SAM4] (quoting the Code of the Assyrians: "If a man have intercourse with his brother-in-arms, they shall turn him into a eunuch").

24. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).

25. *See generally* United States v. Windsor, 570 U.S. 744 (2013).

26. *See generally* Obergefell v. Hodges 576 U.S. 644 (2015).

27. *See id.* at 720 n.22 (Scalia, J., dissenting) ("The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."); Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1213–14 (2016) ("If this rose-colored vision of marriage is at odds with the experiences of those who are divorced, in marriage counseling, or in abusive marriages or families, Justice Kennedy and the majority stubbornly refuse to admit the disjunction."); Gregg Strauss, *What's Wrong with* Obergefell, 40 CARDOZO L. REV. 631, 636 (2018) ("*Obergefell*'s glorification of marriage violates the ideal of public reason . . . . ").

created legal problems involving same-sex relationships: Statutes codified at the turn of the twenty-first century went out of their way to say that every marriage must include one man and one woman.

Postures and maneuvers of the inegalitarian pre-*Obergefell* era are gone. Zapped. Couples now occupy the same formal classification independent of the genders present or absent within them. Here family law exemplifies a tendency found generally in American law. Bigots in the public sphere sometimes resist equality in law and politics,[28] but the war over homosexuality as a legal status is almost over.[29] Family law has lost weight, or withered, in consequence.[30]

To address the whither-and-wither of this Article, I site *Sexual intercourse between persons of the same sex, especially two men, is forbidden* in a larger context that includes the other five ideas, whose undoing has not been put quite so explicitly into writing. Religion, or so I claim, is family law's semi-hidden buttress.[31] Its oft-preached and -repeated decrees enter the consciousness of most people in the United States when they are too young to frame or express resistance. By the time we at the receiving end of this dogma are able

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28. *See, e.g.*, Steven J. Heyman, *A Struggle for Recognition: The Controversy over Religious Liberty, Civil Rights, and Same-Sex Marriage*, 14 FIRST AMEND. L. REV. 1, 12 (2015) (identifying Kentucky county clerk Kim Davis as an offender); Catie Edmonson, *G.O.P. Congressman Is Ousted from Right After Officiating at Same-Sex Wedding*, N.Y. TIMES (June 14, 2020), https://www.nytimes.com/2020/06/14/us/politics/denver-riggleman-virginia-primary-bob-good.html [https://perma.cc/SX5N-DDC9].

29. *See infra* Section II.B (reviewing this generalization and its exceptions); Susan J. Becker, *Many Are Chilled, but Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 J. GENDER SOC. POL'Y & L. 177, 179 (2006) (suggesting that "legally sanctioned discrimination against sexual minorities" is now "on its deathbed").

30. Family law covers more than marriage, of course. *See infra* Part III. Nevertheless, Supreme Court decisional law covering all fields has for decades hewed almost entirely to this egalitarian commitment. Its sole departure in recent years is *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1732 (2018). *See infra* text accompanying notes 153–159. Though confined to employment discrimination, the Title VII decision of *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020), continues the Court's egalitarianism on this issue as it pertains to the intersection of family law and employment. *See* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 248–90 (6th ed. 2016) (offering casebook coverage of this intersection).

31. *Cf.* Anita Bernstein, *The Communities That Make Standards of Care Possible*, 77 CHI.-KENT L. REV. 735, 736 (2002) (arguing that "communities" hold up negligence law).

to question its truth or desirability, it is pervasively familiar; having reached many of us before we think about liberality, equality, tyranny, axes of oppression, or public reason, it holds the strength of an occupier. Teachings from creeds assembled in Part I of this Article persist in the larger secular society and culture.

This position of strength for religion is a rock on which American law has built durable constraints. The three religions looked at in this Article probably did not invent doctrines of contemporary family law that impinge on liberty, but courts and legislatures that want to deploy the legal category of family to tighten restrictions on individuals have plenty of scripture to quote. Because status constraints cannot be justified by anything other than arbitrary assertion, a relation between an important instance of arbitrary assertion and those status constraints seems likely. Or at least plausible. That's "whither."

As for "wither," this Article applies that word not just to the legal field that religion supports but also the supporter. No coincidence, I think, that interest in signing up for family law's quintessential chosen status and self-identification as an adherent of a religion continue to sag at about the same rate and are following a similar generational decline.[32] Eleven years ago in this journal I explored *Because we said so*, my phrase for an ideological stance that pervades the judge-made law of marriage.[33] Underexamined generalizations about Status, that article argued, lie below the so-called essentials of marriage that without good reason obstruct the terms that individuals favor to govern their dyadic relationships.[34] Status constraints still feel and sound familiar, but they probably made more sense to our great-grandparents than to us.[35] *Because we said so* as an explanation of legal oppression wobbles when God's will as an explanation of adversity breaks down.

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32. *See infra* Part III.

33. *See* Anita Bernstein, *Toward More Parsimony and Transparency in the "Essentials of Marriage,"* 2011 MICH. STATE L. REV. 81, 84–85.

34. *See id.* at 136.

35. On the decline of status nouns in the law, see Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 131–32 (2003); Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 565 (2018); *cf.* Anita Bernstein, *Working Sex Words*, 24 MICH. J. GENDER & L. 221, 224 (2017) (arguing that the absence of coherence in status nouns used in regulation of the sale of sex suggests incoherence in the law).

I. FIVE TEACHINGS FROM CREEDS

A. Men Rule over Women

Abrahamic religions did not install the crops-and-livestock political economy that began in the Bronze Age—it was in place before anyone ever wrote a word about monotheism—but they built on it as a foundation for patriarchy. Most teachings of theirs announce the association between patriarchy and agrarianism more diffusely than the blunt scripture-verse "Your women are your fields, so go into your fields whichever way you like."[36] Thomas Aquinas, for example, sounds more moderate when he observes that "the human male and female are united, not only for generation, as with other animals, but also for the purpose of domestic life, in which each has his or her particular duty, and in which man is the head of the woman."[37] A man learns from his experience of having united male mammals with heifers and ewes "for generation."[38] Animal couplings, says Aquinas, have only one "purpose;" human households share this goal while also pursuing the "purpose of domestic life."[39]

Domestic life has particular duties for everyone, of which the duty of women to submit to male command is especially conspicuous within the agrarian political economy. Just as homes and storage sheds stand up best when they don't need the expenditure of constant human effort to sustain them, the making of more food and animals whose cultivator–controllers know where this renewal comes from continues best without the exhausting need to hold up an argument. Telling a woman that the men she knows as fallible individuals—fathers, husbands, others—rule over her because they are men and she is a woman invites her to respond with resentful skepticism. When the message instead says that she is ruled remotely by an invisible ineffable god who makes demands on men too—demands that somehow never include ordering men to obey women but do call for some toil and deference—she has fewer human targets to resist. Patriarchy's next move, phrased in one source as "Wives, submit to your husbands as you do to the Lord.

36. *Qur'an* 2:223.
37. *Summa Theologiae* I, q. 92, a 2.
38. *Id.*
39. *Id.*

For the husband is the head of the wife as Christ is the head of the church . . .," leverages an authoritarian stance already in place.[40]

Judaism has telling nouns for a man and a woman united in the same marriage, a state that installs ownership. He is her *ba'al*, Hebrew for owner-bearer-master-controller. Following a pattern found in other languages and cultures, Hebrew uses the same word, *isha*, for both wife and woman. This doubling-up regards women as possessions of men and ascribes the identity of wife to every woman.[41]

The possessed object may not abandon her owner at her election. For all three religions, divorce has historically meant repudiation of a woman by a possessor who had enough of her. "Suppose a man marries a woman but she does not please him. Having discovered something wrong with her, he writes a document of divorce, hands it to her, and sends her away from his house"[42] comes from a newer translation of a book that holds authority in all three religions.[43] To this day halacha, or Jewish law, holds (with only very rare exceptions) that a married couple remains married until its man voluntarily furnishes his woman with a divorce.[44] One scholar of comparative family law identifies a similar approach to divorce in Islam:

> A Muslim husband telling his wife in the presence of witnesses that he divorces her (*talaq*), is a legitimate act according to *Shari'a*. There are several ways to dissolve a marriage under domestic Muslim law. One of them is *talaq*, which allows the husband to end a marriage unilaterally, by telling his wife three times that she is repudiated. The repudiation is usually accomplished when a man utters an unequivocal phrase, such as

40. *Ephesians* 5:22.

41. John Updike made the point by writing "wife" in his novel *A Month of Sundays* and appending a footnote: "The word, by the way, is just the Anglo-Saxon wif, for 'woman.' My wife, ma femme, this cunt indentured to me. Sad to say, lib-lubbers." WILLIAM H. PRITCHARD, UPDIKE: AMERICA'S MAN OF LETTERS 170–71 (2000).

42. *Deuteronomy* 24:1 (New Living Translation).

43. *See also* Imam Jawad Rasul, *Do Muslims Believe in the Torah and the Bible?*, AUGUSTA CHRON. (May 11, 2018), https://www.augustachronicle.com/lifestyle/20180511/imam-jawad-rasul-do-muslims-believe-in-torah-and-bible [https://perma.cc/B2M9-ZZW9] (identifying among "the prequels of the Quran" earlier sources, "the Torah and the Bible as revealed by God"). *See generally* Eben Scheffler, *The Historical Jesus as Peacemaker Between Judaism, Christianity and Islam*, 49 NEOTESTAMENTICA 261 (2015).

44. *See* Irving Breitowitz, *The Plight of the* Agunah*: A Study in* Halacha*, Contract, and the First Amendment*, 51 MD. L. REV. 312, 322 (1992).

> "You are divorced," "My wife is divorced," "I divorce thee [name of the wife]," or simply says the word "*talaq*."[45]

Muslim women who seek divorce enjoy much less prerogative than that.[46] As for Christianity, its tolerance for divorce has varied among geographic places, periods of time, and denominations,[47] but even liberal Christian interpretations of this tradition recognized no wifely entitlement to leave "marriages in which wives have been battered, abused, sexually harassed or deserted."[48]

Commanding women to submit to their husbands on the issue of whether a marriage will end or continue is a subset of the larger commandment to obey men that Judaism, Christianity, and Islam impose. Of the three, Christianity does so most overtly. "Now as the church submits to Christ," declares the book of Ephesians, "so also wives should submit to their husbands in everything."[49] Adds the book of Colossians, "Wives, submit yourselves to your husbands, as is fitting in the Lord."[50] The Qur'an, in addition to declaring that "your women are your fields,"[51] says that "righteous women" are "devoutly obedient"—obedient to their menfolk implied—in contrast to wives who need husbandly discipline.[52] A curse on women published in a book holy to Judaism connected only female heterosexual libido, not the male kind, with subjugation when God

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45. Benjamin Shmueli, *Tax, Don't Ban: A Comparative Look at Harmful but Legitimate Islamic Family Practices Actionable Under Tort Law*, 49 VAND. J. TRANSNAT'L L. 989, 996–97 (2016) (alterations in original) (citations omitted).

46. One scholar reviewed divergent sources of Islamic law in search of consensus on this issue and found agreement about the weaker position of wives in contrast to husbands:

> All the jurists agree on the position that the husband has the right to *talaq*, what in U.S. legal discourse is called no-fault divorce. When it comes to women, they unanimously agree on two things. First of all, women do not have an equivalent right to no-fault divorce, and second, women *can* enter into a consensual agreement with their husbands to "buy" their divorce against a particular consideration (the *khul* divorce).

Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043, 1072 (2004) (emphasis in original) (citations omitted).

47. *See* Hannah Chen, *On Divorce: A Feminist Christian Perspective*, 11 FEMINIST THEOLOGY 244, 245–46 (2003).

48. *Id.* at 246.

49. *Ephesians* 5:24. *See also supra* note 33 & accompanying text.

50. *Colossians* 3:18.

51. *Qur'an* 2:223.

52. *Id.* 4:34 ("And if you sense ill-conduct from your women, advise them first, if they persist, do not share their beds, but if they still persist, then discipline them gently.").

told Eve that "thy desire shall be to thy husband, and he shall rule over thee."[53]

B. Parents, Especially Fathers, Rule over Children

Numerous passages in the Old and New Testaments order children to obey their parents.[54] Some descriptions of this duty take a benevolent tone. "Fathers, do not provoke your children to anger, but bring them up in the discipline and instruction of the Lord," for example, implies that a gentle father can deliver "discipline and instruction" without enraging his children.[55] The book of Genesis associates filial obedience with receipt of divine blessing.[56] Benevolence here extends beyond tone: Religious pronouncements tell parents very specifically to protect and support their children.[57] When push comes to shove, so to speak, however, a child must submit to parental authority.

Children condemned in the Bible include "[w]hoever reviles father or mother,"[58] and "[w]hoever strikes his father or mother,"[59] with both reviling and striking eligible for a death penalty. A book of the Old Testament warns children that "[t]he eye that mocks a father and scorns to obey a mother will be picked out by the ravens of the valley and eaten by the vultures."[60] Deuteronomy decrees an especially violent punishment for chronic disobedience by a child:

> If a man have a stubborn and rebellious son, that will not hearken to the voice of his father, or the voice of his mother, and though they chasten him, will not hearken unto them; then shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the

53. *Genesis* 3:16.

54. *See, e.g.*, *Ephesians* 6:1–3; *Colossians* 3:20. While the Old Testament favors an order to "honor" one's parents rather than obey them, see *Exodus* 20:12; *Deuteronomy* 5:16, it also spells out a severe punishment for chronic disobedience. *See infra* notes 61–62 and accompanying text.

55. *Ephesians* 6:4 (ESV).

56. *See Genesis* 18:19 (NIV) ("For I have chosen him, so that he will direct his children and his household after him to keep the way of the LORD by doing what is right and just, so that the LORD will bring about for Abraham what he has promised him.").

57. *See* John Witte, Jr. & Don S. Browning, *Christianity's Mixed Contributions to Children's Rights: Traditional Teachings, Modern Doubts*, 61 EMORY L.J. 991, 1004 (2012) (linking contemporary understandings of children's rights with teachings from Christianity and other ancient belief systems).

58. *Matthew* 15:4 (ESV).

59. *Exodus* 21:15 (ESV).

60. *Proverbs* 30:17 (ESV).

> gate of his place; and they shall say unto the elders of his city: "This our son is stubborn and rebellious, he doth not hearken to our voice; he is a glutton, and a drunkard."
>
> And all the men of his city shall stone him with stones, that he die; so shalt thou put away the evil from the midst of thee; and all Israel shall hear, and fear.[61]

American legal scholarship has located in the Hebrew term for "stubborn and rebellious son," *ben sorer umoreh*, parallels to contemporary debates about criminal responsibility.[62] The Deuteronomy passage is vague on what exactly the stubborn and rebellious son does that warrants his being put to death. Although the enumerated deficiencies of a *ben sorer umoreh* are relatively anodyne omissions, failures, and status-label conclusions ("glutton" and "drunkard" in addition to "stubborn and rebellious son") rather than aggressions, his parents are at least entitled, if not obliged, to order him killed.[63]

Corporal punishment is endorsed by "Spare the rod, and spoil the child," which paraphrases a verse in the biblical book Proverbs.[64] Strange to relate, perhaps, in my youth I read this sentence as an affirmative guidance rather than a warning about the importance of domineering over young children through the imposition of pain on them. To "spoil" a person in my reading meant to humor or indulge benevolently rather than to wreck anyone. Soon enough I stood corrected. The Bible urges parents to use "the rod" to hit their kids.

Of the three religions, Islam appears the least committed to filial obedience as a prescription. Children are to treat their parents kindly, even deferentially, but their obligation to "[w]orship Allah,

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61. *Deuteronomy* 21:18–21. For an echo of this condemnation in American law, see Brian D. Gallagher, *A Brief Legal History of Institutionalized Child Abuse*, 17 B.C. THIRD WORLD L.J. 1, 11 (1997) (quoting an old Massachusetts statute that invited parents to bring their son to "be put to death" by a court when he "is stubborn and rebellious and will not obey their bound and chastisement, but lives in sundry notorious crimes").

62. *See* Irene Merker Rosenberg et al., *Return of the Stubborn and Rebellious Son: An Independent Sequel on the Prediction of Future Criminality*, 37 BRANDEIS L.J. 511, 523–24 (1998–99); Jane Rutherford, *Juvenile Justice Caught Between* The Exorcist *and* A Clockwork Orange, 51 DEPAUL L. REV. 715, 724 (2002).

63. On the tendentious nature of aggression as a legal concept, see generally Anita Bernstein, *Reciprocity, Utility, and the Law of Aggression*, 54 VAND. L. REV. 1 (2001).

64. *Proverbs* 13:24 (ESV) ("Whoever spares the rod hates his son, but he who loves him is diligent to discipline him."); SAMUEL BUTLER, HUDIBRAS, 126 (A.R. Waller ed., 1905) (coining the better-known paraphrase).

associate nothing with Him, and be good to your parents," is a directive that stops short of commanding obedience in the sense of submission.[65] Mindful, I think, that some parents of converts to Islam receive the conversion news with dismay or hostility, the Qur'an continues this balanced view of obedience in a later verse: "We have enjoined upon man goodness to parents. But if they endeavor to make you associate with Me that of which you have no knowledge, do not obey them."[66] Yet even Islam directs children to give their parents what the parents want and need, with no entitlement to receive anything in return.[67]

C. It Is Right for Children to Suffer When Their Parents Lapse

Paralleling in this respect the idea that parents rule over their children, "sins of the fathers" as a justification for suffering for children is espoused overtly more by Christianity and Judaism than Islam. Primary source material in both of the older two religions asserts that culpability travels forward from a wrongdoing ancestor to offspring not even yet born.[68] Some of this rhetoric might be only hortatory, but real consequences to children do occasionally ensue.

Both Judaism and Christianity contain the category of a bastard or illegitimate child, a person stigmatized before birth as eligible for officially rendered detrimental treatment. "A bastard shall not enter into the congregation of the Lord," says the Old Testament, adding that this penalty extends "even to the tenth generation."[69] Derived from born to a Jewish woman who did not receive a divorce from her husband before becoming inseminated by another Jewish man, the status of mamzer ("a halakhically illegitimate child") resembles the Christian notion of original sin in that it cannot be expiated.[70] A mamzer may marry only another mamzer and children born to

65. *Qur'an* 4:36.

66. *Qur'an* 29:8.

67. *See* Rahimjon Abdugafurov & Beverly Moran, *Islamic Law and Elder Care in the Central Asian* Edgen *System*, 31 J.L. & RELIGION 197, 201 (2016) (observing that "several Qur'ānic verses place respect and care for parents directly after obedience to God").

68. *See* J.E. Cullens, Jr., *Should the Legitimate Child Be Forced to Pay for the Sins of Her Father?:* Sudwischer v. Estate of Hoffpauir, 53 LA. L. REV. 1675, 1676–77 n.8 (1993).

69. *Deuteronomy* 23:2.

70. *See* Benjamin Porat, *Lethal Self-Defense Against a Rapist and the Challenge of Proportionality: Jewish Law Perspective*, 26 COLUM. J. GENDER & L. 123, 150 (2013).

parents who are mamzerim pass the stigma forward.[71] Bastardy in Christianity has gentler impacts, but the law and religion scholar John Witte reports that medieval canon law ranked "five classes of illegitimates," all of whom the Church punished to varying degrees based (only) on "the severity of the sexual sin of their parents."[72]

More generally, the book of Exodus thunders in two places that God ascribes the guilt of parents to children.[73] In the first mention, parental culpability rolls down on the third and fourth generation.[74] The second iteration speaks of "fathers" rather than "parents" as sources of punishment for children who did nothing wrong.[75]

Again, of the three religions the youngest comes closest to familiar modern liberality. The Qur'an contains no decrees that a child suffer in consequence of parental misbehavior. "Every soul draws the meed [i.e. the deserved reward] of its acts on none but itself," says the text: "no bearer of burdens can bear the burden of another."[76] This stance extends to condemning the punishment of children for sins of their parents.[77] Liberality in Islam goes only so far, however, in that children born out of wedlock may inherit only from their mothers, not their fathers.[78] Further, a father of children born out of wedlock has no duty to give them the financial support they need.[79]

D. Sexual Intercourse Shared by Persons of the Same Sex, Especially Two Men, Is Forbidden

Two verses in the Old Testament book of Leviticus appear to proscribe sexual intercourse between men. "Thou shalt not lie with mankind, as with womankind: it is abomination," is the first of

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71. *See id.* at 150–51 n.122.

72. JOHN WITTE, JR., THE SINS OF THE FATHERS: THE LAW AND THEOLOGY OF ILLEGITIMACY RECONSIDERED 89 (2009).

73. Rabbi Zeb Farber, *Punishing Children for the Sins of Their Parents*, TORAH, https://www.thetorah.com/article/punishing-children-for-the-sins-of-their-parents [https://perma.cc/3K27-5XK2] (last visited Feb. 14, 2022).

74. *Exodus* 20:5 (King James).

75. *Exodus* 34:7 (King James).

76. *Qur'an* 6:164.

77. *See* Laura M. Thomason, *On the Steps of the Mosque: The Legal Rights of Non-Marital Children in Egypt*, 19 HASTINGS WOMEN'S L.J. 121, 138 (2008).

78. *See id.* at 140–41.

79. *See* Sayed Sikandar Shah Haneef, *The Status of an Illegitimate Child in Islamic Law: A Critical Analysis of DNA Paternity Test*, 16 GLOB. JURIST 159, 161 (2016).

them.[80] The passage follows with more biblical talk of capital punishment: "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them."[81] A book subtitled Homosexuality in the Jewish Tradition puts those passages together to conclude that "the Levitical prohibition against sex between men has the full weight of divine authority."[82]

Christianity has concurred. An analysis by a student author concludes that the contemporary Bible "serves as the primary justification for Christians who discriminate against homosexuals."[83] No reasonable reading of the Leviticus verses suggests that secular law ought to agree that homosexuality "is an abomination"[84]—after all, the same Old Testament book contains prohibitions of cutting hair, eating pork and rabbit flesh, and wearing two kinds of fabric mixed together, none of which any Christian leader has tried to impose in American law—and yet the Roman Catholic Church of the 1960s contended that criminal codes ought to punish same-sex intimacy in order to "eradicate [homosexuality]" and in 1992 explained its opposition to antidiscrimination legislation by saying that civil rights protections could "encourage a person with a homosexual orientation to declare his homosexuality or even to seek a partner."[85] Moving to another branch of Christianity, this analysis contends that when the pop singer Anita Bryant told listeners that homosexual persons "must freshen their ranks with our children" because they cannot reproduce, she was "driven by her Baptist faith."[86]

Condemnations of homosexuality in Islam, though prevalent, are stated less directly in scripture than the Leviticus verses. The Qur'an expresses disapproval of what it calls Lot's Tribe, the errant denizens of the biblical cities Sodom and Gomorrah, but does not say

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80. *Leviticus* 18:22 (King James).

81. *Leviticus* 20:13 (King James).

82. STEVEN GREENBERG, WRESTLING WITH GOD AND MEN: HOMOSEXUALITY IN THE JEWISH TRADITION 3 (2004).

83. *See* Anthony M. Lise, *Bringing Down the Establishment: Faith-Based and Community Initiative Funding, Christianity, and Same-Sex Equality*, 12 CUNY L. REV. 129, 133 (2008).

84. *Leviticus* 18:22.

85. Lise, *supra* note 83, at 134–35 (citations omitted); *see also Leviticus* 18:22; Becker, *supra* note 29, at 222 n.29 (noting Levitical precepts on not eating certain foods, not wearing clothing made from more than one fabric, and other prohibitions).

86. Lise, *supra* note 83, at 135 (citations omitted).

explicitly how these people sinned.[87] Muslim jurists identify the Lot's Tribe offense as "anal intercourse" between men; the Arabic word for it, *liwat*, means approximately the same thing as the Old Testament referent "sodomy."[88] Sharia, the legal system that derives from four Islamic sources—the Qur'an; hadiths, or statements about practices of the prophet Mohammad; scholars' interpretations of the Qur'an and hadiths; and community consensus—identifies homosexuality as a crime whose punishment is flexible, left to the discretion of leaders.[89]

E. Tribal Memberships Derived from Birth Outrank What Individuals Want for Themselves

Like the first of the five teachings that occupy this Article, which preaches that men rule over women, the idea that tribal memberships derived from birth outrank what individuals want for themselves is conspicuous away from monotheism too. One need not be Jewish or Christian or Muslim to live in communities and societies around the world that emphasize the collective over the individual.[90] Abrahamic religions add nothing unique on this front except insofar as they endure in Western liberal democracies. This belief is not alien because it is familiar, and it pushes effectively against rights and liberties that the state purports to secure.

For one example of the phenomenon, a minority of male Jews are *kohanim*, members of a priestly class whose singular noun form is *kohen*. Halacha provides that whereas identity as a Jew derives from the Jewishness of one's mother, identity as a *kohen* comes from the father of a boy or a man. No woman can be a *kohen* and only sons, not daughters, of *kohanim* pass their fathers' priestly identity to the next generation. A man cannot become a *kohen* by an undertaking or initiative—or indeed any conduct; the classification is ascribed (only) at birth.

In recent centuries *kohanim* have had little ritual work to do but this tribal identity continues, imposing both privileges and constraints on members by ascription. As mentioned, I take a greater

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87. *See* SCOTT SIRAJ AL-HAQQ KUGLE, HOMOSEXUALITY IN ISLAM: CRITICAL REFLECTION ON GAY, LESBIAN, AND TRANSGENDER MUSLIMS 50 (2010).

88. *See id.*

89. *See* Shaqifa Ahmadi, *Islam and Homosexuality: Religious Dogma, Colonial Rule, and the Quest for Belonging*, 26 J. C.R. & ECON. DEV. 537, 554 (2012).

90. I thank Brian Lee for his thoughts on this point.

interest in downsides.[91] Consistent with this focus, I note the exclusion of all non-*kohanim* from privileged priestly work that they might be well qualified to do. This exclusion is a detriment derived from having born into the non-*kohen* majority.

Perhaps most significant of detriments imposed on *kohanim* is that a *kohen* may not marry a woman who was ever previously married. Contemporary Orthodox Jews hew to this prohibition, and it remains law in the state of Israel.[92] The rule that *kohanim* must avoid contact with corpses is interpreted to limit their attendance at funerals.[93] This deprivation is significant.[94]

Priestly identity is tribal also for the Roman Catholic Church, whose understanding of apostolic succession identifies one group of Catholics as ineligible for this role and deems another eligible.[95] Members of the excluded cohort lack a key commonality with followers present at the Last Supper, goes the notion. Only one identity thwarts what individuals want: while the maleness of Jesus and some members of his circle forecloses opportunities for women, other traits of the Apostles of antiquity—their ethnic origin, the color of their eyes, their height and weight, the languages they knew or did

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91. *See supra* p. 3 ("I tend to take more interest in detriments.").

92. *See* Saul Lubetski, Note, *Religion and State: Does the State of Israel Provide the Forum for the Revival of the Jewish Legal System?*, 26 N.Y.U. J. INT'L L. & POL. 331, 369–70, 370 n.160 (1994) (citing HCJ 143/62 Funk-Schlesinger v. Minister of the Interior, 17 PD 225 (1963) (Isr.)); *see also* Adam S. Kramarow, Comment, *Synagogue and State: Bringing Balance to the Role of Religion in Israeli Law*, 23 J. TRANSNAT'L L. & POL'Y 157, 175 (2014) (reviewing other barriers to marriage enforced on kohanim in Israel).

93. *See* Ruth Zafran, *Non-Medical Sex Selection by Preimplantation Genetic Diagnosis: Reflections on Israeli Law and Practice*, 9 N.C. J.L. & TECH. 187, 215 n.97 (2008) (citing *High Priest, or Kohen Gadol (Judaism)*, ENCYCLOPAEDIA BRITANNICA ONLINE, https://www.britannica.com/topic/high-priest [https://perma.cc/THW9-EW8Z] (last visited Feb. 14, 2022)).

94. American courts rarely grant redress for negligent infliction of emotional distress, but they do so for family members when negligence makes it impossible for them to attend a relative's funeral. *See, e.g.*, W. Union Tel. Co. v. McMullin, 135 S.W. 909, 910–11 (Ark. 1911) (upholding a judgment of negligence); W. Union. Tel. Co. v. Hinson, 222 S.W.2d 636, 638 (Tex. Civ. App. 1949) (recognizing, in a tort action seeking redress for emotional distress, the injury of the plaintiff's not being able to have present his son's two "war buddies" at the son's funeral).

95. VATICAN, CATECHISM OF THE CATHOLIC CHURCH ¶ 1577, https://www.vatican.va/archive/ENG0015/__P4X.HTM [https://perma.cc/54MQ-QF3P] ("The Lord Jesus chose men (viri) to form the college of the twelve apostles, and the apostles did the same when they chose collaborators to succeed them in their ministry. . . . [T]he Church recognizes herself to be bound by this choice made by the Lord himself. For this reason the ordination of women is not possible.").

not know—impose no constraint or deprivation on men who want to become priests. Or bishops, or cardinals. The white-smoke machine that announces *habemus papum* cannot be turned on to proclaim a female Pope. His reputation for liberality notwithstanding, the current Pope supports keeping women out of the priesthood.[96] Thwarted individuals include not only female candidates, but members of the Church who prefer a woman to fill a clerical vacancy.

Tribal memberships also divide subgroups within Christianity. The Reformation that chopped the Church into Catholics and Protestants was also an occasion of literal chopping: Victims of the 1572 Saint Bartholomew's massacre in France included "men, women, and children whose bodies were mutilated and left to rot; and some were thrown into the Seine river. Arms, legs, and heads of the innocent all littered the streets of Paris."[97] At least the children of this group, and probably some of the adults too, did not choose the Protestant identity that proved fatal for them. Millions of other Christians died by disease, battle, famine, and overt genocide attributed to Christians on the other side of a theological divide. Away from the western Church, the Eastern Orthodox religion observes boundaries that make reference to nation-states. Greek, Russian, Bulgarian, and other national divisions of the Orthodox Church do not differ much on doctrine or even ceremony, but in the United States these separations thwart mergers that parishioners favor to sustain their places of worship.[98]

All three religions examined in this Article accept converts, and this posture at one level provides that tribal memberships acquired at birth do *not* outrank what individuals want for themselves. When a person who is not yet Jewish, Christian, or Muslim wishes to gain this religious identity, Judaism, Christianity, and Islam all make it possible for her or him to transition into membership. At the same

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96. *See* John L. Allen, Jr., *Why Pope Francis Won't Let Women Become Priests*, TIME (Mar. 6, 2015), https://time.com/3729904/francis-women/ [https://perma.cc/A3MC-6RCK] ("Despite his talk of expanded roles for women in the Church, Francis is still firmly against ordaining women as priests or, for that matter, as clergy of any kind.").

97. Maria Esquivel, *Assassination on the Innocent: The St. Bartholomew's Day Massacre of 1572*, STMU RSCH. SCHOLARS (Feb. 28, 2018), https://stmuhistorymedia.org/assassination-on-the-innocent-the-st-bartholomews-day-massacre-of-1572/ [https://perma.cc/7UZL-2XEV].

98. *See* Mary R. Jensen, *Crisis or Planning: Inter-Jurisdictional Merger of Orthodox Christian Parishes*, 10 DUQ. BUS. L.J. 19, 20 (2008).

time, the religions' rules and conditions related to conversion also frustrate what individuals want.

Inbound and outbound conversions to and from the religions manifest the problem of ascribed tribal entity as constraint. On the inbound side, newer arrivals to the religion are welcome in theory but have been regarded as unequal to members of longer standing.[99] Outbound conversions, where individuals born into one religion abandon it for another, generate reliable displeasure within the religion left behind.[100]

Within a larger context of condemning apostasy, Islam—the religion whose holiest book famously proclaims that there can be no compulsion in religion[101]—prohibits in very strong terms the embrace of any other faith by a Muslim.[102] Critics of conversion from Hinduism to Islam in Pakistan have complained that this instance of exit is best explained by the duress of severe anti-Hindu discrimination rather than what individual converts into Islam want for themselves.[103] To the extent that this complaint has merit, ascribed tribal memberships constrain individuals in a nation-state that identifies as Islamic.[104]

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99. *See* Jason Ordene, Note, *Who Is a Jew? An Analytical Examination of the Supreme Court of the United Kingdom's JFS Case: Why the Matrilineal Test for Jewish Identity Is Not in Violation of the Race Relations Act of 1976*, 13 RUTGERS J.L. & RELIGION 479, 486–87 (2012) (describing skepticism within Judaism about the sincerity of converts); Ken Chitwood, *Refugee Converts Aren't 'Fraudsters,' German Pastors Say*, CHRISTIANITY TODAY (June 22, 2020), https://www.christianitytoday.com/ct/2020/july-august/germany-refugee-muslim-christian-convert-asylum-claims.html [https://perma.cc/Z8TE-C98X] (reporting on suspicions that Muslims living outside Germany claim insincerely to have converted to Christianity because they want to exit their home countries using asylum as ingress).

100. *See, e.g.*, SpearIt, *Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment*, 82 MISS. L.J. 1, 44 n.265 (2013) (noting that "Israel was forbidden to have gods other than Yahweh or to worship their images; [and] to sacrifice to another god for fear of the death penalty") (citations to verses in *Exodus* and *Deuteronomy* omitted).

101. *See Qur'an* 2:256.

102. Lionel Beehner, *Religious Conversion and Sharia Law, Council on Foreign Relations*, COUNCIL ON FOREIGN RELS. (June 6, 2007), https://www.cfr.org/backgrounder/religious-conversion-and-sharia-law [https://perma.cc/65FC-ZSNF].

103. Maria Abi-Habib & Zia ur-Rehman, *Poor and Desperate, Pakistani Hindus Accept Islam to Get By*, N.Y. TIMES (Aug. 4, 2020), https://www.nytimes.com/2020/08/04/world/asia/pakistan-hindu-conversion.html [https://perma.cc/W4R4-UVAZ].

104. *See* Peter Takács, *On the Names of States: Naming System of States Based on the Country Names and on the Public Law Components of State Titles*, 21

II. THE FIVE IDEAS IN NOT ENTIRELY SUPERSEDED FAMILY LAW DOCTRINES

The five ideas just reviewed appear defiant of formal equality, the jurisprudential stance that regards discrimination against a group as presumptively unlawful.[105] Formal equality has long pervaded statutes and judicial decisions that fall under the family law umbrella; legislatures and judges do not omit that consideration when they write primary materials in this field. Though occasionally questioned by family law scholars,[106] the posture has been in place for decades.[107] Constraints on persons derived from statuses they did not choose conflict with the ostensibly uncontroversial value that the law ought to treat people the same unless a transparent and articulable reason supports treating them differently.

Revisiting the five ideas, this Part reorders them in proportion to their current vitality. *Parents rule over their children* remains very strong in American family law while *Men rule over women* is now attenuated. None are entirely gone. In recognition of the difference between instances of the five ideas in the Abrahamic religions and secular law, I modify my subheadings in this second pass.

GERMAN L.J. 1257, 1278 (2020) (noting that Pakistan is one of four countries that call themselves Islamic republics).

105. Katie Eyer, Brown, *Not* Loving*:* Obergefell *and the Unfinished Business of Formal Equality*, 125 YALE L.J. F. 1, 1–2 (2015).

106. *See, e.g.*, Katharine B. Silbaugh, Miller v. Albright*: Problems of Constitutionalization in Family Law*, 79 B.U. L. REV. 1139, 1142 (1999) (arguing that equal protection doctrine, which "relies upon the comparison of similarly situated individuals," fits poorly with the child-parent relationship); Lynn D. Wardle, *Reflections on Equality in Family Law*, 2013 MICH. ST. L. REV. 1385, 1403 (2013) ("The concept of equality in general of all sexual relations and of equality in law of all intimate associations is not only unsustainable but also ultimately self-destructive.").

107. Dissenting opinions in the early formal-equality landmark *Orr v. Orr*, a decision that read the Equal Protection Clause to make alimony available to husbands as well as wives, differed with the egalitarian majority only on the issue of standing. 440 U.S. 268, 277, 283, 289 (1979) (Powell, J., dissenting). *But see* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 830 (2004) (arguing that considerable formal inequality persists).

A. Parents Rule over Their Children

Children are not the same as adults, I willingly stipulate, and the state cannot give them adult-level rights in all respects.[108] That said, American family law grants parents prerogatives that conflict with the interests of the children they control. Here are a half-dozen examples.[109]

First, control over the education of children is a constitutional right held by parents for reasons unexplained. Only rarely do constitutional rights extend powers to manage other people's lives; this one does. The family law scholar Barbara Woodhouse has argued that this right amounts to parental ownership of children.[110] When Justice William Douglas, writing separately in the landmark *Wisconsin v. Yoder*, expressed sympathy for Amish children who might find public school more attractive than unlettered toil on their parents' farm, he veered from the judicial consensus that parental might makes educational judgments right, and his view did not prevail.[111] An estimated 32,000 boys in the city where I live learn little if any math, science, history, or geography because "they are attending ultra-Orthodox and Hasidic yeshivas, private religious schools where the primary focus is on Judaic studies, almost to the exclusion of non-Judaic studies."[112] The scant secular schooling they receive stops when they turn fourteen.[113]

Second, numerous state laws allow parents to force a child to remain pregnant against her will by withholding permission for an abortion, even though adults are no more competent than their teen

108. JOHN STUART MILL, ON LIBERTY 6, 14 (Batoche Books 2001) (1859) (asserting that liberty is available "only to human beings in the maturity of their faculties" and that children do not qualify for it because they are "still in a state to require being taken care of by others . . .").

109. For a seventh example omitted here because it is no longer in effect, see *supra* note 61 and accompanying text (quoting a Massachusetts statute that permitted parents to have their sons put to death by the courts for being "stubborn and rebellious").

110. *See* Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1001 (1992).

111. *See* Wisconsin v. Yoder, 406 U.S. 205, 245–46 (Douglas, J., dissenting in part).

112. Naftuli Moster, *Thousands of Ill-Educated Yeshiva Boys*, DAILY NEWS (Feb. 7, 2016, 4:25 AM), https://www.nydailynews.com/opinion/naftuli-moster-thousands-ill-educated-yeshiva-boys-article-1.2521951.

113. *See id.*

daughters to make the termination-or-not decision.[114] Testimony from judges heard by the Supreme Court has recounted that the judicial bypass route to abortion causes stress and shame to minors, some of whom are mature.[115] Judges may recuse themselves from bypass proceedings when they are opposed to abortion, an option for them that correlatively reduces options for vulnerable teenagers with hostile parents.[116]

Third, when a dispute between a parent and her children's grandparents over visitation by the grandparents reached the Supreme Court, the Court sided with the parent.[117] *Troxel v. Granville* announced no rigid rule but did invalidate a state statute that permitted third parties to petition for visitation undesired by parents. The decision enables parents to cut their children off from friends and relatives to whom a child may be devoted.[118]

Fourth, American common law, along with statutory law in some states, provisions a privilege to "discipline" (i.e., hit) one's kids. The Model Penal Code agrees.[119] Some versions of the privilege empower teachers and stepparents too, not just parents,[120] even though these people lack criminal and tort liability for the children's

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114. Some versions of these laws require only parental notification, but consent requirements are common. *See Parental Involvement in Minors' Abortions*, GUTTMACHER INST. (Jan. 1, 2022), https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions [https://perma.cc/LA2K-2LRH] (providing a state-by-state chart). Psychological research shows that once a person turns fourteen her cognitive abilities are just as good as that of an adult. *See* J. SHOSHANA EHRLICH, WHO DECIDES? THE ABORTION RIGHTS OF TEENS 73 (2006). I refer to these pregnant persons as "teen daughters" aware that this gendered term is problematic; calling these persons "children" would emphasize their immaturity and I have the opposite goal in mind.

115. *See* Hodgson v. Minnesota, 497 U.S. 417, 441–42 (1990).

116. Lauren Treadwell, *Informal Closing of the Bypass: Minors' Petitions to Bypass Parental Consent for Abortion in an Age of Increasing Judicial Refusals*, 58 HASTINGS L.J. 869, 869–71 (2007).

117. *See* Troxel v. Granville, 530 U.S. 57, 57 (2000).

118. *See* Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865, 908–10 (2003) (addressing decision's alignment with white, in contrast to African American and Latino, familial predilections).

119. *See* MODEL PENAL CODE § 3.08(2) (Am. L. Inst. 1962).

120. *See* Cynthia Godsoe, *Redrawing the Boundaries of Relational Crime*, 69 ALA. L. REV. 169 app. A at 228 (2017).

wrongdoing and so are free to walk away from it. Their authority derives from beliefs about what parents may do to their children.[121]

A fifth example overlaps with the previous Part of this Article: here religion functions as an instrument of parental infliction of harm. The Child Abuse Prevention and Treatment Act, the only federal law that addresses child abuse and neglect,[122] expressly declines to protect children from the harm of faith-healing dogmas that their parents espouse.[123] In several states, parents who fail to obtain medical care can use their religion as a defense when charged with child neglect, child abuse, involuntary manslaughter, and negligent homicide.[124] Similar to Justice Douglas's posited Amish youngster who wants to go to school,[125] a child of parents who have chosen prayer or passivity in response to her acute illness might desire medical treatment for herself: too bad.[126]

Sixth, parents can coerce their minor child into a marriage by purporting to approve it. Only about a half-dozen states currently set a minimum age of eighteen that includes no parental-permission loophole.[127] Nine states have no minimum at all, making very young

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121. *See* Kathleen K. Bach, *The Exclusionary Rule in the Public School Administrative Disciplinary Proceeding: Answering the Question After* New Jersey v. T.L.O., 37 HASTINGS L. J. 1133, 1138 (1986).

122. Annamaria Del Buono, *Living on A Prayer: Faith Healers Escaping Criminal Liability for Child Abuse Through Religious Affirmative Defenses & Exemption Laws*, 17 RUTGERS J.L. & RELIGION 449, 481, n.248 (2016) (citing Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974), *amended by* CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, 124 Stat. 3459 (2012)).

123. *See* 42 U.S.C. § 5106i(a) (2010) (mandating neutrality on state recognition of religious defenses to crimes involving child maltreatment).

124. Del Buono, *supra* note 122, at 457.

125. *See* Woodhouse, *supra* note 110, at 1042, and accompanying text.

126. Rejecting allopathic medicine in the name of religious faith is a parental choice that kills children. "According to one study, between 1975 and 1995, an estimated one hundred seventy-two (172) children died after their parents rejected medical care on religious grounds. Of these children, one hundred forty (140) suffered conditions for which survival rates exceeded ninety percent, if there had been timely medical intervention; and eighteen more could have survived at a rate exceeding fifty percent." Richard A. Hughes, *The Death of Children by Faith-Based Medical Neglect*, 20 J.L. & RELIGION 247, 247 (2005); *see also* Paul A. Offit, *Bad Faith: When Religious Belief Undermines Modern Medicine*, 181 (2015) (observing that attributions of child deaths to religious refusals of parents to obtain treatment likely undercount the total). I thank Shaakirrah Sanders for alerting me to this issue.

127. Nicholas Kristof, *A 14-Year-Old Bride, Wed to Her Rapist, Playing on a Jungle Gym*, N.Y. TIMES (June 19, 2021), https://www.nytimes.com/2021/06/19/opinion/sunday/child-marriage-rape.html [https://perma.cc/SMU3-8E9S] (reporting a slow-moving trend to ban these marriages).

girls eligible for wifehood at the election of their parents.[128] During 2000–2018, five girls in the United States entered into marriage at age ten—a tiny cohort compared to the millions of adult brides whose married life started in those years, but their number is not zero.[129]

B. Tribal Memberships Outrank What Individuals Want for Themselves

Both judge-written and statutory family law have ranked tribal, or group-based, memberships not derived from voluntary conduct as more important than what individuals pursue. The judge-made category starts with the "biology plus" test that the Supreme Court crafted to assess claims of parenthood made on behalf of biological fathers unmarried to children's mothers. Biology plus provides that these men may gain recognition of their parental status over the objection of mothers or adoptive parents, but not automatically as a result only of sex and genetics.[130] The "plus" of "biology plus" demands that the man have displayed his acceptance of the responsibilities of parenthood.[131] That tribal memberships derived from birth outrank what individuals want for themselves generated a result contrary to the biology plus test in *Adoptive Couple v. Baby Girl*,[132] a Supreme Court decision I consider here with focus on the opinion for the Court; I put to one side a large secondary literature.[133]

This riven 5–4 dispute struggled over whether a Native American biological father of a baby—who the Court said had not been a partner of the child's biological mother, just an inseminator, and had told the biological mother by text message that he wanted to

128. *See id.*

129. *See id.* (reporting results from a study by the nonprofit Unchained at Last).

130. *See* Caban v. Mohammed, 441 U.S. 380, 388 (1979); Quilloin v. Walcott, 434 U.S. 246, 254 (1978); Lehr v. Robertson, 463 U.S. 248, 262 (1983).

131. *See* Weisberg & Appleton, *supra* note 30, at 462–64.

132. 570 U.S. 637 (2013).

133. *See, e.g.*, Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295 (2015) (offering a trenchant critique); Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 588–92 (2014) (citing the decision at the center of an Epilogue about race within family law).

relinquish his parental rights[134]—could be deemed the baby's parent under the Indian Child Welfare Act. The majority opinion settled on "assuming for the sake of argument" that this biological father, Dusten Brown, was a parent.[135] What I think can fairly (if perhaps shockingly) be called Indian sperm sufficed to generate a parental relationship even though the Court has held consistently that sperm other than the Indian kind lacks this power.

It may be necessary to say that what I am talking about here is not the choice of Congress to provide that in "any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[136] This preference seems defensible to me.[137] And sound or unsound, Section 1915 is not an example of tribal memberships overriding what individuals want for themselves. Its preference does that kind of overriding only if it is read to support an adoption placement that a child does not want, and adoption law does not concern itself with the preferences of infants like Baby Girl. Rather it is the Court that made the choice to rank the tribe over the individual, the individual here being Dusten Brown.

By focusing on Brown's tribal (in this case literally so) membership rather than his conduct as a putative parent, the Court strayed from an important commitment. Conduct, not a born-into group, is the reason to recognize the paternal rights of an inseminator. Ascribing parenthood to a man with attention only to his identity rather than his behavior undermines the achievement of biology plus. The detriment of this legal stance harms any person injured by this ascription of a family relation.

Whereas *Adoptive Couple v. Baby Girl* interprets a statute but is also intelligible as an instance of judge-made favoring of tribal memberships over what individuals want, a second illustration comes entirely from statutory law. Legislation enacted in New York forces spouses to go through a religious tollbooth to obtain a secular

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134. *See Adoptive Couple*, 570 U.S. at 643. *But see* Berger, *supra* note 133, at 301–09 (summarizing, with citations to testimony credited by the trial court, this biological father's expressions of interest in the child and her mother).

135. *Adoptive Couple*, 570 U.S. at 646–47.

136. *See* 25 U.S.C. § 1915(a).

137. *Accord* Brackeen v. Haaland, 994 F.3d 249, 304 (5th Cir. 2021) (adverting to the "arbitrary and abusive child removal and assimilation practices that led Congress to conclude that it was necessary and proper for it to enact ICWA").

dissolution of their marriage. To obtain a divorce, says the Domestic Relations Law, a married person "must allege, in his or her verified complaint: (i) that, to the best of his or her knowledge, that he or she has taken or that he or she will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce," unless the defendant waives this entitlement.[138] A "barrier to remarriage," continues the statute, means "any religious or conscientious restraint or inhibition, of which the party required to make the verified statement is aware, that is imposed on a party to a marriage, under the principles held by the clergyman or minister who has solemnized the marriage, by reason of the other party's commission or withholding of any voluntary act."[139]

This statutory condition assigns legal power in a divorce to "principles held by the clergyman or minister" who happened to have led a religious ritual in the past. His or her principles, which may or may not meet criteria for public reason, outrank principles to the contrary that a person who seeks a secular divorce might now hold. Spouses who regarded themselves as adherents of a religion when they married but during the marriage abandoned their old religious identity or belief are dragged back to the clergy they repudiated for one last obligatory observance. Although "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States," a large American jurisdiction imposes a religious test as a qualification to become divorced.[140]

Burdening individuals with detriments derived from group memberships not acquired through voluntary conduct is not an entirely wrongheaded path. Both recognition of Indian sperm as a legal concept—that's my characterization of what seems to unite the fractious Justices who participated in *Adoptive Couple v. Baby Girl*—and forcing individuals to accept religious dogma even if they find it abhorrent just because the clergyman or minister who performed their wedding ceremony espouses it have good effects. I am in no hurry, as a general matter, to abolish or repeal efforts to make life better for hurt populations, and bring up these two efforts mainly to question whether the thinking in them would fly in any

138. N.Y. DOM. REL. LAW § 253(2) (McKinney 2021).
139. *Id.* at § 253(6).
140. U.S. Const. art. VI, cl. 2.

legal field other than family law.[141] State actors do not tell corporations, investors, high-status professions, or fellow state actors that they must accept the downsides of statuses they find unwelcome.

C. It Is Acceptable for Children to Suffer in Consequence of Their Parents' Lapses

Children born to unmarried parents inherit less easily from those parents than do children who were born to persons married at the time of their birth. Although nonmarital children may inherit from their fathers under the law of intestacy, they must establish paternity before they can collect a share of the father's intestate estate, whereas marital children inherit automatically by virtue of their status.[142] Intestacy law could, for the sake of treating like cases alike unless individuals have done something to deserve disfavored treatment, force marital children to go through the same chore; it has never done so.

Away from intestacy, nonmarital children suffer more detriments that family law spares marital children. The Immigration and Naturalization Act requires the foreign-born child of an unmarried U.S. citizen father who seeks citizenship through this father to have been "legitimated" (the term Congress wrote into the statute) before the age of eighteen; again, marital children gain a benefit automatically.[143] The Supreme Court has upheld this provision, ruling against children born out of wedlock whose fathers had duly complied with the demands of legitimization but too late, after the children's eighteenth birthdays.[144] Solangel Maldonado, writing from expertise in these disparities, includes unequal treatment with respect to child support as another example of the problem.[145] Disadvantage there flows mostly from inaction in the

141. *Cf.* Maria Rosaria Marella, *Critical Family Law*, 19 AM. U. J. GENDER SOC. POL'Y. & L. 721, 723 (2011) (adverting to "family law exceptionalism" that declines to enforce commitments present in private law).

142. *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 357 (2011).

143. *See id.* at 360 (citing 8 U.S.C. § 1409)).

144. *See id.* at 360–62 (citing Miller v. Albright, 523 U.S. 420 (1998) and Nguyen v. INS, 533 U.S. 53 (2001)).

145. *See id.* at 363–68.

form of adequate mechanisms to deliver this money to nonmarital children. Facially discriminatory state laws do persist, however.[146]

Also persisting—and harming marital and nonmarital children alike—is tort immunity, which enriches parents whose children could otherwise complain in court about their omissions and affirmative wrongs. A forty-year-old law review article reports that although this immunity, like others, is on the wane,[147] courts in recent years have also "reaffirmed" and "revitalized" it.[148] Subtitled "a doctrine in search of justification," this article gathers a few rationales that judges have given for denying redress child plaintiffs.[149] The rationales look dubious. They include the historically supported existence of interspousal immunity (even though a child is different from a wife or husband in that the common law never imposed merged identity on children), a worry that parent–defendants could recoup the judgment money they paid by outliving child–plaintiffs and inheriting through intestacy (as if that money would not have been spent; as if parents can expect to outlive a minor child), and concern that this transfer would take money away from the child–plaintiff's siblings, a consequence that parents merrily and routinely inflict on their children by not stopping at one.[150]

That family law permits parents to apply "the rod" as an instrument of battery belongs here as well as above, where I placed it next to other examples of children as objects of property owned by their parents.[151] Tort immunity increases the encouragement of parental battery delivered by criminal law in the Model Penal Code and elsewhere to adults with a taste for hitting smaller and weaker people.[152] Even though courts generally understand this immunity as not applicable to intentional wrongs,[153] any durable free pass for

146. *See id.* at 364 (observing that an Iowa statute upheld by the Iowa Supreme Court allows judges to order a divorced parent to pay college tuition but does not authorize the same order when the child's parents were never married).

147. On tort immunities as simultaneously dying and clinging to life, see Anita Bernstein, *Tort as Yet Another Locus of Gender Injustice in the Distribution of Money*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 303, 316 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020).

148. Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489 (1982).

149. *Id.*

150. *Id.* at 495–500.

151. *See infra* Section II.B.

152. *See supra* notes 118–121 and accompanying text.

153. Hollister, *supra* note 148, at 498.

parents who harm their children strengthens the authoritarian fiction of so-called family harmony.[154]

D. Same-Sex Intimacy and Relationships Are Less Worthy of Approval than Their Heterosexual Counterparts

Of all the Five Ideas that religions teach, this one has experienced the most overt repudiation in contemporary American law.[155] It persists, however. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court identified two First Amendment values, free speech and religious liberty, as "sites of refuge" from the belief that equality ought to exist for sexual-orientation minority populations.[156] Two years later, in *Bostock v. Clayton County, Georgia*, the Court told readers that the progressive holding of this decision notwithstanding, religious liberty to reject equality for gay and transgender workers will in the future sometimes "supersede Title VII's commands."[157] Continuing the theme that religious liberty is more important than equality, the Court in a 2021 decision concluded that the First Amendment prevents a city from cutting off a religious agency from a foster care contract based on its objection to the agency's refusal to certify same-sex couples as foster parents.[158] Four opinions were filed, none of them dissenting from a result that in application could harm vulnerable children.

The egalitarianism announced in *Bostock* extends only to employment. Other sectors regulated by current federal civil rights law remain free to discriminate on the basis of sexual orientation, unless they are located in jurisdictions that have chosen more progressive enactments.[159] Equal access to marriage and to the

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154. *Cf.* Jilani v. Jilani, 767 S.W.2d 671, 674 (Tex. 1988) (Mauzy, J., concurring) ("A disruption to the family peace is far more likely to occur as a result of the tortious conduct itself, rather than as a result of allowing a redress of the wrongful action which led to the injury.").

155. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Windsor, 570 U.S. 744 (2013); Obergefell v. Hodges, 576 U.S. 644 (2015).

156. 138 S. Ct. 1719, 1723 (2018); Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 ARIZ. L. REV. 341, 343 (2021).

157. 140 S. Ct. 1731, 1754 (2020); *see also* Boso, *supra* note 156, at 343.

158. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021).

159. *See* Stephen Stromberg, *LGBTQ Discrimination is Still Legal. Here's the Quickest Way to End It*, WASH. POST (June 16, 2020), https://www.washingtonpost.com/opinions/2020/06/16/lgbtq-discrimination-is-still-legal-heres-quickest-way-end-it/ [https://perma.cc/AX8G-V8J2] (noting that the

protections of statutory employment law, in other words, do not of themselves deliver full equality.[160] "In 25 states," according to a Washington Post editorial writer, "landlords can still refuse to rent to gay people. In 26 states, a baker or florist may turn away a same-sex couple. In 35 states, a banker can deny a loan based on an applicant's sexual orientation."[161]

Although these examples of continuing inequality fall outside family law, scholars who work in this field observe that *Obergefell* did not augur full equal treatment there either. "With biological connection continuing to anchor nonmarital parenthood, unmarried gays and lesbians face barriers to parental recognition," writes Douglas NeJaime in a much-cited article about the law of parenthood.[162] "With the gender-differentiated, heterosexual family continuing to structure marital parenthood, the law organizes the legal family around a biological mother."[163] Susan Hazeldean has argued that recognition of only biological or adoptive parents as parents, a choice manifested in the law of several states, is sexual-orientation discrimination.[164]

E. Men Outrank Women

Notwithstanding the belief that formal equality, defined in this Article as the jurisprudential stance that regards discrimination against a group as presumptively unlawful, is fully installed and not controversial, family law treats men and women differently.[165] Jill Elaine Hasday's assessment of materials that this field includes and excludes provides ample evidence for a conclusion that in

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House of Representatives has passed "the Equality Act, which would extend to LGBTQ people existing anti-discrimination protections that other minorities enjoy in housing, public accommodations, public education, credit and other areas.").

160. *See* Eyer, *supra* note 105, at 6 (noting the absence of "a generally applicable constitutional rule that automatically renders most instances of anti-gay government discrimination unlawful").

161. *See* Stromberg, *supra* note 159.

162. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017).

163. *Id.*; *accord* Douglas NeJaime, *Biology and Illegitimacy*, 74 SMU L. REV. 259 (2021).

164. Susan Hazeldean, *Illegitimate Parents*, 55 U.C. DAVIS L. REV. 1583, 1628 (2022).

165. *See supra* notes 105–106 and accompanying text.

contemporary American family law, just as in the Abrahamic religious tradition reviewed in the last Part, men outrank women.[166]

The attention Hasday pays to the current state of formal equality is important because of an infirmity that I have already noted and to which I will return at the conclusion of this Article: Family law puts excessive trust in the benevolence of courts and judges.[167] A familiar dichotomy between law and something more flexible—norms, morality, custom, tradition, emotion, even lawlessness—assures individuals that although the alternative condition or state of affairs advantages some of them at a material level, law protects everyone with rigidity. Rigidity is present also in "the rule of law," a phrase that adverts to something a person can count on. Neither the individual nor the state needs to do anyone any favors.

Elsewhere I have written about the threat to liberty in mandatory benevolence. Forcing a person to nurture an embryo growing inside her delivers to the occupant an extraordinary support at the price of violating important rules of law, I've argued, including a prerogative to kill an intruder that threatens life or health and a tort rule about no affirmative duty to rescue.[168] I have also defended the decision to refuse sexual penetration for a reason or motive of which the refuser "might be or ought to be ashamed," including "snobbery, prejudice, distraction, laziness, meanness, [or] baseless resentment."[169] Accepting penetration that is undesired for good reasons could be kinder than refusal. No matter. The law does not compel kindness.

Because rigidity is a characteristic of law, claims about what the law does or how it functions need relatively rigid support when they are contested. That "men rule over women" in family law is quite the contested claim: Voluble online commentary says the opposite, insisting that family courts and family law are prejudiced against men.[170] Who's right? Not necessarily the disputant who

166. Hasday, *supra* note 107, at 833.

167. A recent study adverts to this theme of benevolence by observing that unlike most courts, family courts focus on "intimate and sustained relationships." Tricia N. Stephens et al., *The View from the Other Side: How Parents and Their Representatives View Family Court*, 59 FAM. CT. REV. 491, 496 (2021).

168. *See generally* BERNSTEIN, COMMON LAW, *supra* note 22, at 142–60.

169. *Id.* at 115.

170. Typing phrases like "gender family law" into the Google search engine box on my machines draws a first page of hits filled with male grievance and no complaints about injustice from the other half of the binary. The harvest must be

shouts loudest. Jill Hasday supports Men Rule Over Women (my phrase, not hers) with examples from doctrine—law that can be looked up, a factual record—rather than tendentious characterization.

More examples than these three from Hasday exist, but hers will suffice. First, intraspousal contracts. Family law "continues to protect a husband's right to his wife's domestic services" by refusing to enforce contracts where one spouse pays the other for "unusually demanding and time-consuming work, such as the full-time care of an invalid spouse."[171] The leading modern decision that denied payment to a caregiving wife who performed her part of the deal expressed awareness that this doctrinal prohibition advantages husbands at the expense of wives.[172]

Second, marital rape. Exceptions that benefit assailants who are married to the persons they attack "treat rape more leniently if it occurs in marriage," Hasday observes.[173] These exceptions, which exist in some form in most states, "recognize a smaller range of conduct as criminal, place less severe sanctions on the marital rape they do criminalize, and/or impose additional procedural hurdles on marital rape prosecutions."[174]

Third, the doctrine of necessaries, a judge-made rule that like exceptional treatment of marital rape is law in a majority of states. The doctrine of necessaries originally held that if a husband failed to provide food, clothing, shelter, or medical services to his wife, he was liable to third parties who provided these needed items.[175] Hasday objects to the roundabout nature of the doctrine in its original form, noting that a wife cannot demand what she is entitled to herself but must await rescue from some creditor.[176] Updating of the necessaries doctrine has not fixed this problem of intramarital powerlessness. Instead, wives too are obliged to support their husbands and can be liable to creditors who deliver these goods or services for a price. Thomas Simmons, writing from a base of

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even more one-sided for searchers whose browser history is less 'feminist' than mine.

171. Hasday, *supra* note 107, at 846.

172. More in the dissent, see Borelli v. Brusseau, 12 Cal. App. 4th 647, 657 (1993) (Poché, J., dissenting) ("For better or worse, we have to a great extent left behind the comfortable and familiar gender-based roles evoked by Norman Rockwell paintings."), but also in the opinion for the court. *See id.* at 652–53.

173. Hasday, *supra* note 107, at 837.

174. *Id.* at 838.

175. Mary Elizabeth Borja, Comment, *Functions of Womanhood: The Doctrine of Necessaries in Florida*, 47 U. MIA. L. REV. 397, 398 (1992).

176. Hasday, *supra* note 107, at 846–48.

representing clients faced with the burden of paying for the costliest of necessaries, medical expenses, coined the phrase Medicaid as Coverture to express his conclusion that spousal liability harms women more than men.[177]

III. CONCLUSION: WHITHER AND WITHER

A. The Source for the Five Ideas Declines . . .

In 2020, 47% of respondents to a national poll said that they belonged to a church, mosque, or synagogue.[178] This number marked a drop from 50% in 2018 and a level that Gallup research on religious belonging in the United States had never before counted: less than half.[179] Poll data gathered in 2021 indicated that QAnon, a rightwing affinity group, had adherents equal in number to "all white evangelical Protestants, or all white mainline Protestants."[180] Although this pattern of religious decline continues throughout the world, since 2007 the drop in the United States has been especially steep.[181]

The decline is extra sharp among younger persons,[182] and what is especially pertinent to the generational nature of the trend is that along with the drop in identification with a particular religion, attendance at religious services is also declining.[183] This one-two punch suggests that religious participation is not being renewed in

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177. Thomas E. Simmons, *Medicaid as Coverture*, 26 HASTINGS WOMEN'S L.J. 275, 283 (2015).

178. Jeffrey M. Jones, *U.S. Church Membership Falls Below Majority for First Time*, GALLUP (Mar. 29, 2021), https://news.gallup.com/poll/341963/church-membership-falls-below-majority-first-time.aspx [https://perma.cc/LQ43-39LZ].

179. *Id.*

180. Giovanni Russonello, *QAnon Now as Popular in U.S. as Some Major Religions, Poll Suggests*, N.Y. TIMES (May 27, 2021), https://www.nytimes.com/2021/05/27/us/politics/qanon-republicans-trump.html [https://perma.cc/J9A4-8MWY].

181. Ronald F. Inglehart, *Why is Religion Suddenly Declining?*, OUP BLOG (Dec. 7, 2020), https://blog.oup.com/2020/12/why-is-religion-suddenly-declining/ [https://perma.cc/5G54-ELXA].

182. *See In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RSCH. CTR. (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/ [https://perma.cc/J8XL-45E9] (including a section titled "Large generation gap in American religion").

183. *Id.* (finding that in contrast to 2009, when regular attenders outnumbered those who attend services "occasionally or not at all," the 2019 proportions are reversed).

the next generation at either the level of joining a house of worship or partaking frequently à la carte of its offerings. The à la carte option, sometimes recommended as a pitch to lure cohorts reluctant to choose joining, presumably can have only limited impacts on a population that rejects unaffiliated as well as affiliated participation in religion.[184]

It is possible that the downward-sloping trend line for American religions will pivot. Membership in the congregation of a church, synagogue, or mosque need not remain unattractive forever just because it has turned off growing numbers of persons in recent years.[185] If the political scientist Ronald Inglehart assesses the phenomenon correctly, however, reversal is unlikely. Inglehart's recent book argues that the three religions have shared a commitment to "pro-fertility norms."[186] All of them needed this commitment to succeed at their formation, a time of high infant mortality and low life expectancy; now that costly baby making and childrearing are less necessary for human survival, pro-fertility norms have yielded to what Inglehart calls individual choice.[187]

Religion's Sudden Decline does not expect pro-fertility ideology—a rubric under which all five ideas of this Article fit[188]—to please future generations more than it pleases current ones. Content other than "be fruitful and multiply"[189] could be generated for lay

184. *See* Rabbi Evan Schultz, *Reaching Out to the Next Generation in the Synagogue*, JEWISH EXPONENT (May 31, 2019), https://www.jewishexponent.com/2019/05/31/synagogue-membership-young-adults/ [https://perma.cc/J44M-NMDJ] (addressing reluctance to join synagogues). *See generally* Ben Bromley, *Shrinking Service Clubs Try to Reach Out to Millennials*, WISC. NEWS (May 10, 2019), https://www.wiscnews.com/baraboonewsrepublic/news/local/in-depth-shrinking-service-clubs-try-to-reach-millennials/article_99763e68-f425-5253-875c-d6603a0c9dd9.html [https://perma.cc/54UR-DY6B] (reporting struggles to recruit a new generation of members not only in service clubs like Kiwanis but also religious organizations and country clubs).

185. I thank Adam Kolber for making this point.

186. *See* RONALD F. INGLEHART, RELIGION'S SUDDEN DECLINE: WHAT'S CAUSING IT, AND WHAT COMES NEXT? 1 (2021).

187. *See id.*

188. On the alignment between the two: While I can imagine pro-fertility ideology minus the patriarchy and hierarchy of the Abrahamic religions, see generally Max Dashù, *Knocking Down Straw Dolls: A Critique of Cynthia Eller's "The Myth of Matriarchal Prehistory,"* 13 FEMINIST THEOLOGY 185, 185 (2005), to do so I would have to assume, very much contrary to fact, that the market for wage labor is not precarious. Individuals—and not just female individuals—need control over their fertility to complete their education, earn a living, and support their children.

189. *Genesis* 1:28.

members to consume: but so far the departures from their old pro-fertility line that Judaism, Christianity, and Islam have manifested haven't been anything novel, just concessions from their liberal wings to the individual-choice alternative.[190]

B. . . . and, in a Related Development, Family Law Struggles to Cohere

In an examination of the eighty-six family law casebooks published in the United States between 1960 and 2019, the family law scholar Laura Kessler divided their topics into "core" and "noncore" categories.[191] Occupying the "core" of these casebooks are marriage, divorce, child custody, and child support; the "noncore" category houses twelve categories related to family law that, unlike the core four, are only rarely included in a test that most law students will need to pass after graduation, the Multistate Essay Exam.[192] From the start of the study period to the 2010s, Kessler found, "[t]he percentage of casebook pages dedicated to marriage and divorce almost halved."[193]

That family law as a field now manifestly cares less about entry into and exit from marriage seems to me surprising, as if the law of evidence decided to drop hearsay as one of its core topics or civil procedure lost interest in whether parties to litigation receive notice. Here I make no claim that the law of marriage is inherently

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190. To be clear, liberalism and leftist politics are amply espoused in the name of all three religions. *See supra* note 15 and accompanying text; *see also* Casey Cep, *Is There a Religious Left?*, NEW YORKER (June 11, 2020), https://www.newyorker.com/books/under-review/is-there-a-religious-left [https://perma.cc/Q393-WV2Q] (reviewing instances of American activism). I am speaking here only about the religions' pro-fertility/Five Teachings heritage. Shifts from that heritage in a progressive direction that I know about have been relinquishments or diluting of older beliefs rather than replacements with new thought.

191. *See* Kessler, *supra* note 12, at 922–24.

192. Kessler's noncore topics are adoption, alternative dispute resolution, assisted reproduction, cohabitation, family violence, foster care/child welfare, juvenile justice, lawyers' role in family law disputes, LGBT issues, parent/child/state, race and family law, and reproductive rights. *Id.* at 922. On their exclusion from the bar exam, see *id.* at 937–38.

193. *Id.* at 925. In Kessler's view, this development has not gone far enough: casebooks are still over-covering marriage and divorce. *See id.* at 959. Child support and child custody have gained space. *Id.* at 931. Some of the noncore topics now take up pages vacated by the exit of marriage and divorce; others, including reproductive rights and juvenile justice, lost space in the family law casebook while migrating to books of their own. *Id.* at 932.

important. It might not be. I just don't see much abandonment of longstanding mainstays elsewhere in the law school curriculum.[194] Law teachers prefer the familiar to the new, and as employees they are disinclined to take direction from managers.[195] That coverage of marriage has lessened in recent decades suggests that instructors have encountered resistance to it in their classroom.[196]

Demographic change, I think, is central among the reasons for this change in the curriculum. Among the cohort born in the 1980s and 1990s, marriage now languishes in "sharp decline."[197] Team Millennial is not averse to marriage in principle: A majority of survey respondents among them say they want to get married.[198] They haven't walked the walk, however. "If the current trend continues," writes one of the authors of the "sharp decline" conclusion, "more than 30% of Millennial women won't be married by 40, almost twice the number of Generation X women."[199]

Some members of the cohort younger than millennials, Generation Z, are as of this writing old enough to marry.[200] This generation may go on to manifest more enthusiasm for marrying than millennials. It has not yet done so. According to the most recent United States Census Bureau report, published in 2021, the median age of first marriage continues to rise.[201]

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194. Take for example the business curriculum, which I am informed still puts the formally incorporated entity front and center even though limited-liability companies and limited partnerships have been more popular choices for a long time. Donald F. Parsons, Jr. et al., *The Business Lawyer—Seventy-Five Years Covering the Rise of Alternative Entities*, 75 BUS. LAW. 2467, 2478 (2020).

195. *See* Binny Miller, *Herding Cats: Role Ambiguity, Governance, and Law School Clinical Programs*, 41 U. BALT. L. REV. 523, 523–24 (2012).

196. While it is possible that material gets added to or dropped from teaching materials at the whim of authors or publishers, from my experiences as both a customer and author I believe that creators of this content wish to please their readers.

197. Kathleen E. Akers & Lynne Marie Kohm, *Solving Millennial Marriage Evolution*, 48 U. BALT. L. REV. 1, 10 (2018).

198. *Id.* at 6, 11.

199. Lynne Marie Kohm, *A Prospective Analysis of Family Fragmentation: Baby Mama Drama Meets Jane Austen*, 29 BYU J. PUB. L. 327, 330 (2015).

200. Robert Minarcin, *Ok Boomer—the Approaching DiZruption of Legal Education by Generation Z*, 39 QUINNIPIAC L. REV. 29, 43 (2020) (listing 1995–2010 as the years of birth for this group).

201. U.S. CENSUS BUREAU, *Number, Timing, and Duration of Marriages and Divorces*, (Apr. 21, 2021), https://www.census.gov/newsroom/press-releases/2021/marriages-and-divorces.html [https://perma.cc/2BVY-SYZ5] ("Between 2008 and 2016, the median age at first marriage rose approximately two full years to 30 for men and 28 for women.").

Recall the "pro-fertility norms" enlisted to support hierarchical authority, which I have argued align approximately with the ideas or teachings expounded in Parts I and II of this Article.[202] This content appeals to traditionalists but alienates a growing fraction of members and prospective members of religions, especially younger people. Progressives who object to it have not come up with coherent alternatives to take its place.

Marriage plays an analogous role within family law. Say what one will about rules about entry into and exit from this legal status as a foundation of family law, this content has clarity and unity absent in the material that has replaced it.[203] Like pro-fertility norms, marriage and divorce sound familiar; they feel comfortable because they don't disrupt. And so, for example, the casebook I've taught from for two decades (and continue to admire) clings as of 2016 to its coverage of fault-based defenses to divorce actions,[204] even though family law teachers have been able to proceed for many years knowing that as practicing lawyers their students will not encounter recrimination, condonation, connivance, or collusion as an impediment to any client's divorce.[205] Those polysyllabic labels may not actually do anything in the current century but they look soothingly like doctrine.

Newer noncore inclusions that now occupy some of the marriage-and-divorce casebook space look very different. When the sixth edition of *Modern Family Law* brought in battery and rape of teenage girls and expanded its treatment of stalking, my students seemed to find this material exceptionally upsetting to read; up at the podium, I found it difficult to manage.[206] Other noncore family law material is blander but equally elusive. Advances in technology—a broad category in which I would place assisted reproduction, genetic testing to prove a parental relation, recordkeeping to help enforce child support obligations, and cross-border controls to guard against

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202. *See supra* note 186 and accompanying text.

203. For a thorough review of what's wrong with this emphasis, see Kessler, *supra* note 12, at 942–49.

204. Weisberg & Appleton, *supra* note 30, at 499–503.

205. Both principal cases were losses for defendant spouses who tried to fend off divorce. *See id.*

206. My practice has been to call on nonvolunteering students but allow individuals to opt out by sending a note before class starts. They need not give a reason but are expected to use this opportunity sparingly. Only a small number have availed themselves of the opt-out for each class . . . except when we covered stalking, teen battery, and teen rape. That material generated the highest "nope" numbers of any content in any course I've ever taught.

the unlawful transport of children—have generated no shifts in doctrine and no deeper thoughts that I can educe, just more judicial ad-hockery. Post-*Obergefell* legislation on a variety of family law issues manifests few unifying themes.

This curricular turn from the stiff rigor of marriage and divorce toward more flexibility and inclusion, a very desirable move in many respects, worsens family law's preexisting condition of too much faith in vaguely delineated, inadequately cabined, and untrustworthy judicial discretion. Its two most comprehensive postures (I hesitate to call them doctrines)—equitable division of marital assets at divorce and the best interests of the child as an approach to disputes that adults bring to court—put excessive trust in the good intentions of judges.[207] Lawyers who represent clients vulnerable to this caprice have always stood before little Yahwehs whose favor they need to win. In response to its longstanding problem, family law ought to have sought more rigidity rather than—or at least in addition to—more diffusion and dispersal.[208]

Contemporary developments that now proceed in one direction will, I predict, continue the trajectory wherein marriage, the old core of family law, becomes less central to adult lives.[209] Social change threatens the durability of not only marriage but religion-rooted patriarchy. Unmoored from these two large bulwarks that have kept individuals in their status-place, and unlikely to find other supports that hold together, family law as a field will continue to disintegrate.

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207. *See* James R. Ratner, *Distribution of Marital Assets in Community Property Jurisdictions: Equitable Doesn't Equal Equal*, 72 LA. L. REV. 21, 50 (2011) (lamenting a lack of coherence in equitable division); Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 295 (2019) ("Legal scholars and commentators have long criticized the best interests of the child standard as unjust and unpredictable due to the largely unfettered discretion it provides judges.").

208. *See* Kessler, *supra* note 12, at 918 (noting that "tax, health insurance, real estate, education, bankruptcy, business associations, social security and government benefits, and inheritance law . . . impact families, sometimes even fundamentally structuring a family's economic circumstances" yet are mostly neglected in the family law curriculum). In addition to supplying doctrinal rigor, some of these subjects would bring diversity and inclusion to a field whose casebooks over-focus on "problems of middle-class, white families." *See id.* at 949.

209. I have in mind improvements in contraception and determinations of genetic parenthood, well established for decades; and, looking ahead, the separation of health insurance from marital status, expanded financing of childcare, and the narrowing wage gap between men and women.

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Forthcoming Articles

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Paul Campos

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Daniel J. Durst

Non-Competes and Other Contracts of Dispossession
Sandeep Vaheesan & Mathew Jinoo Buck

Contextualizing (Children's) Immigration in Law, History, Theory, and Politics
Shani M. King

Comments

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Lauren Legner