

The Modern “World” of Families Sure Is Flat and Noisy:¹ A Book Review: Ann Laquer Estin, *International Family Law Desk Book*

by
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Professor Ann Laquer Estin has written an excellent book for practitioners that combines comprehensive scholarship, clear writing, and useful citations.² As a decades-long consumer of law books designed and marketed as *desk books*, I have developed a mental checklist (or bias) by which I assess value: (1) Does the table of contents and index allow me to find a particular topic without having to read through the whole book or guess at terms

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¹ This comment is derived from the bestseller by THOMAS L. FREIDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 8 (2006) (“The global competitive field was being leveled. The world was being flattened.”). Friedman, of course, draws his metaphor from the story of Christopher Columbus who thought that the world was round. The irony of citing Columbus in the context of multiculturalism and the law was not intended in Friedman’s book. *See id.* at 4 (“Columbus was happy to make the Indians he met his slaves, a pool of free manual labor.”). The metaphor may do justice to the technological world but not to the judicial world of families and courts. From my perspective, the intersection of international family litigation and international judicial systems (forms, structures, and functions of people and government) also implicates the delivery and absorption of information; more aptly described as *noise*. *See* MARK C. TAYLOR, *THE MOMENT OF COMPLEXITY: EMERGING NETWORK CULTURE* 100-01 (2001) (“Adrift in the noisy sea of information, more and more people suffer a feeling of nausea that brings them close to what seems to be the edge of chaos. “*Noise*, it is instructive to note, derives from the Latin *nausea*, which originally meant seasickness. When information becomes the noise that engenders nausea, distinctions, differences, and oppositions that once seemed to fix the world and make it secure become unstable.”).

² ANN LAQUER ESTIN, *INTERNATIONAL FAMILY LAW DESK BOOK* (American Bar Association 2012) (301 pages).

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of art; (2) Does the book protect me from trips and traps if I stumble into a new area where I may only have bits of knowledge; (3) Does the text and its citations cohesively and conveniently sort information as a starting point for a brief due in a few days or with a potential client on the phone; and (4) Will I keep this handbook within arm's length or toss it into the office "library" where thousands of dollars of law books, like old lawyers, gather dust and become brittle?³

A flaw in my criteria is that price point does occasionally cause me to look much less closely at a particular book; despite the impressive marketing literature lawyers receive daily. The *International Desk Book* is priced by the ABA at \$149.95. In the interests of candor, I suspect that I would have made that mistake, to my regret, if I had not received a copy for this review.⁴ Although this book is designed to "serve as a compact and useful resource and reference tool,"⁵ it provides much more value for the dollar than many other family law treatises and belongs near the elbow of any family law practitioner.

The chapter headings reveal the breath of coverage, with detailed sub-headings in dark type and italicized sub-sections under each chapter: Transnational Family Litigation (ch.1), Marriage, Partnership, and Cohabitation (ch.2), Divorce and Separation (ch.3), Financial Aspects of Marriage and Divorce (ch.4), Parental Responsibility (ch.5), International Child Abduction (ch.6), Child Support (ch.7), and Adoption (ch.8). In each chapter, the specific legal criteria (treaty or statute or both) required for personal and subject matter jurisdiction, as well as mechanisms for proper notice, service, and discovery, are concise and well-organ-

³ One of the best examples of a text which easily surpasses all these criteria is written by an AAML icon: MELVIN FRUMKES, *FRUMKES ON DIVORCE TAXATION* (2010). Mel's handbook has saved me immense amounts of time over the years and his energy gives hope to the rest of us.

⁴ The book was given to me free for purposes of the review so this benefit is now revealed in the interests of transparency. I preferred to keep that news to myself so I would get other free books to review. I suppose that if I did not like a book I would pay for it before publishing the review as a function of equity and fairness. I am grateful to Professor Mary Kay Kisthardt for giving me the opportunity to write these book reviews.

⁵ ESTIN, *supra* note 2, at xv.

ized.⁶ When appropriate, tables list the contracting states to various Conventions for quick reference.⁷ In many sections, supplemental resources are posted for the reader who may seek more detailed information. The ability to move between a clear and precise table of contents to an index containing sufficient key words makes it remarkably easy to isolate the point sought by the reader.

In addition, the footnotes are located at the end of each chapter. I find this especially convenient as compared with the trend of locating all the footnotes at the end of a book in serial order by chapter. My own practice is to move back and forth from text to citations so I can find cases in various databases applicable to my need at the moment. My own non-scientific test sample is that the citations are on point, current, and relate to the proposition in the text. I know this may seem like a subtle criticism of writers who work long and hard to publish, but I suspect we have all bought law books that have citations which, when tracked down, have only a tangential (at best) relationship to the proposition in the text or, sometimes even more annoying, the cite is out-of-date.

I did find myself occasionally daunted for the moment by the language and the law required to comport with procedural requirements, such as “[u]nder the Convention, the foreign document is certified by an apostille completed by the appropriate authority according to the terms of the Convention.”⁸ I knew what an apostille was supposed to mean but knowing when federal or state governments have exclusive authority to issue that formal document as competent authorities and then integrating that knowledge with the various Conventions required more detailed study. Fortunately, this is not the fault of the author who provides a roadmap of definitions and sources so that the reader can engage best practices and avoid potential hazards.

I did, however, also learn much that was new to me, including the International Marriage Broker Registration Act.⁹ My first

⁶ For a discussion of some of these issues and waiver for failure to timely object, see *Bakala v. Bakala*, 576 S.E.2d 156 (S.C. 2003).

⁷ See, e.g., *id.* at 17 (Hague Service Convention Contracting States (as of Nov. 15, 2011)).

⁸ *Id.* at 12.

⁹ 8 U.S.C. § 1375a (2010).

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reaction was one of “really, we need that law?” since it seemed odd and vaguely amusing. But I then went back to the paragraph preceding where the author discussed the 1986 Immigration Marriage Fraud Amendments [IMFA].¹⁰ Under the IMFA, “an immigrant spouse is in a vulnerable position during the period of conditional residence [2 years]” though the IMFA and subsequent legislation “have enacted protections including the possibility of a waiver of the joint petition requirement, particularly in circumstances of domestic violence.”¹¹ This context reminded me, in flashback form which haunts lawyers at night, of my “mail order” bride cases (which romanticizes a disgraceful act) and issues like passport control and interpersonal violence.

In each chapter, the critical issue of how a court gains jurisdiction over both parties is clearly outlined. The admixture of subject matter jurisdiction, often defined by statute or treaty, and personal jurisdiction, a “more complicated problem,” define the parameters of “transnational family litigation.”¹² A useful warning is that the complex procedural and conflict-of-laws issues which exist *intranationally* become “even more pronounced in cases that reach across national borders. International litigation has many unique aspects and traps for the unwary.”¹³ From the exercise and validity of “tag”¹⁴ jurisdiction, the constraints of diversity of citizenship, the abstention doctrine, and the “domestic relations exception” in the federal courts, international family litigation challenges the creativity, acumen, and resources of lawyers and the state courts. After all, there are a few exceptions to “federal question jurisdiction” mandated by federal law, like ICARA (I knew that one) or the Alien Tort Act (I did not know that one).¹⁵ And this analysis occurs even before we arrive at the gates of *forum non conveniens*, a “common law doctrine that allows the court to dismiss or stay the proceeding.”¹⁶

¹⁰ 8 U.S.C. § 1186a (2010).

¹¹ ESTIN, *supra* note 2, at 40.

¹² *Id.* at 1.

¹³ *Id.*

¹⁴ I argued in a case many years ago for the variation of “freeze tag” played in school yards (when children could compete and burn off energy). I lost the argument.

¹⁵ ESTIN, *supra* note 2, at 2.

¹⁶ *Id.* at 3.

All of this discussion follows the comment in Professor Estin’s introduction that only twenty years ago “it was hardly possible to discuss ‘international family law’ as a field of legal practice.”¹⁷ Indeed, international family law has emerged today as a crucial subject for lawyers of all specialties not just family law. In an ever-flattening, interconnected, and noisy world, international law intrudes upon the daily life of lawyers from city to rural communities and suburbia in between. We may not always recognize that reality at first blush, but ignoring it is how errors are made that may be difficult to fix later, such as immigration status.¹⁸

As revealed in the articles contained in this issue of the AAML Journal, modern American lawyers face a demographic shift over the next generation which will re-define majorities and minorities and, with such a shift, will come policy and political change.¹⁹ In fairly short order (if not already), the profession of law will require more lawyers with multi-language skills and a much more refined knowledge of other cultures. The key point is that such a transformation of the legal profession will require a deeper examination of the traditions, skills, and knowledge needed to serve clients.²⁰ We are, in reality, a professional service business and the capacity to provide those services effectively

¹⁷ *Id.* at xv.

¹⁸ *Id.* at 39 (“Immigration laws in the United States make special provision for marriages formed across international borders.”).

¹⁹ Professor Cynthia Mabry makes this point in a manner which reminds attorneys and policy makers in the United States to avoid too much sense of superiority: “Although international laws require decision-makers to give due consideration to the child’s cultural background, many jurisdictions in the United States have not included express provisions in statutes that would require courts to consider culture among the criteria for deciding custody.” Cynthia R. Mabry, *The Browning of America-Multicultural and Bicultural Families in Conflict: Making Culture a Customary Factor for Consideration in Child Custody Disputes*, 16 WASH. & L. J. CIV. R. & SOC. JUST. 413, 415 (2010).

²⁰ Professor Ayelet Shachar’s legal ethics approach schematizes six prototypical legal conflicts which arise at a multi-cultural legal system: Individual vs. Individuals; individual versus states; identity group vs. identity groups; identity group vs. state (the most-often discussed legal conflict on the multiculturalism); non-member (outsider vs. identity group) as, for example, in affirmative action cases); an individual member (or insider vs. identity group). See Ayelet Shachar, *Group Identity and Women’s Rights to Family Law: The Perils of Multicultural Accommodation*, 36 J. POL. PHIL. 285, 286-87 (1998).

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and economically changes in the market with each generation. Nothing new there.

What is new is that family law practice is no longer a local trade but one that continues to churn complex emotions with complex laws with even more complex cultural nuances. The capacity of lawyers to counsel requires more than technical skill when helping those persons whose life experience lacks the same set of social or cultural references.²¹ This point is true because the world is increasingly globalized and interconnected for adults and children who, because of the choice to partner and procreate, immigrate, and separate, thereby may enter courts in “parallel proceedings.”²²

The reasons are not complicated. Like any interstate case in the United States, strategic and geographic advantages may translate into procedural and substantive gain. For example, Professor Estin’s discussion of “grave risk” or an “intolerable situation” concerning children under Article 13b of ICARA highlights the inevitable tension between Western notions of “best interests” and the reality that no indoor plumbing, no climate control [presumably heat and air conditioning], no refrigeration, and very little furniture, is a grave risk of harm preventing return of custody to a mother in Panama.²³ As the Ninth Circuit aptly noted, if economic advantage was a determinative custody factor “that amounted to a grave risk of harm, parents in more developed countries would have unchecked power to abduct children from countries with a lower standard of living.”²⁴ This is certainly not a factor family law courts in the United States would explicitly endorse as a factor for granting or denying custody between parents.

²¹ The famous trial lawyer, Louis Nizer wrote that litigation “between husbands and wives exceed in bitterness and hatred those of any other relationship.” LOUIS NIZER, *MY LIFE IN COURT* 153 (1944). As he wisely wrote: “Not infrequently the lawyer must win the battle inside his own client before he can cope with his adversary.” *Id.* at 215.

²² ESTIN, *supra* note 2 at 57-58.

²³ *See id.* at 191 (citing *Cuellar v. Joyce*, 596 F.3d 505, 509 (9th Cir. 2010)); *see also* *Wigley v. Hares*, 82 So.3d 932, 946 (Fla. Dist. Ct. App. 2011) (providing a thorough review of the exceptions to ICARA and affirming the refusal to return based upon grave risk exception).

²⁴ *Id.* at 212 n.109 (quoting *Cuellar*, 596 F.3d at 509).

Other cases, involving Israel and Argentina, for another example, raised the “war zone” defense.²⁵ Still there is the inherent problem of corruption and conventional notions of due process, including timely and meaningful access to a remedy in foreign courts, which will continue to pose dilemmas for lawyers and judges as the noise increases. As Professor Estin outlines, these cases are a stark reminder to lawyers that this fallible humanly-organized system must, in real time, comprehend the effects of adoption, surrogacy, parentage, modification of custody and support orders (families merely taking a breath), same-sex marriage, pre- and post-marital agreements, and non-married partnerships. Moreover, what is written today as the “law” for international clients may fail to account for changes in the relations of government, politics, war, poverty, insurrection, and social disruption far above our rank as lawyers-on-the-ground. We then must start anew.

What becomes particularly complex in the international arena is when social norms and laws concerning interpersonal violence or abuse or neglect or sexual preference are different from one nation state to another.²⁶ Courts, as adjudicators of future rights generated by past choices, must find a way to balance nativist preferences and traditions with noise that is awfully screechy and overwhelming. In this manner, the various blends of each aspect of the human condition meander into court, including the federal courts.²⁷ As I have argued elsewhere, the American system of *state* family courts is already a social service agency rather than a conventional adjudicator of facts within the construct of statutory or common law.²⁸ In the realm of tort, the

²⁵ See Andrew A. Zashin, *Bus Bombings and A Baby’s Custody Case: Insidious Victories for Terrorism in the Context of International Custody Disputes*, 21 J. AM. ACAD. MAT. LAW. 121, 139 (2008) (“One common thread binding all civilized societies is an independent judiciary. Allowing terrorist actions to effect a decision as fundamental as where one can raise a family would be both devastating and cowardly, that strikes at the heart of civilized society.”).

²⁶ ESTIN, *supra* note 2 at 60 (“Spousal and partner violence pose particularly difficult legal and financial issues in cross-border divorce cases.”).

²⁷ Jeremy Morley, Esq., from New York, sent an email to IAML Fellows concerning the ICARA and recent cases dividing the circuits. See *Ozaltin v. Ozaltin*, ___ F. 3d ___, 2013 WL 490834 (2nd Cir. Feb. 11, 2013).

²⁸ The cite to that source may be found in Dana E. Prescott, *Judicial Decision Making, Personality Theory, and Child Custody Conflict: Can Heuris-*

law may adjust and there may be massive document discovery and incredible technological feats like PPT PowerPoint but the great trial lawyers of decades ago could recognize and conduct a civil or criminal trial in form and substance.²⁹ Not so much in the realm of family law. Few lawyers and judges of thirty years ago would recognize a family court trial today: the law and its requirements of mediation and equity, implications of therapeutic and distributive justice, shared parental rights and responsibilities, grandparents' rights, de facto parenting, and so on.

For leaders of the profession, like the AAML, this shift in the structure and function of courts profoundly alters the role of lawyers and judges. For American courts, the delivery of knowledge as judicial decision-making is already hampered by the structure of litigation, the rules of evidence, the skill of advocacy, and the resources of the clients. At least, however, there is a common language among the licensed professionals (sort of). As Professor Estin suggests, international comity itself begins with the *knowledge* that terms like the "best interests of children" are construed and understood "differently" in different legal systems, with all the attendant consequences when litigation ensues.³⁰ *Knowledge* within the legal system, therefore, must acquire elements of the empirical and the legal concerning multicultural families or there is a risk that outcomes will remain random acts of bias and privilege by courts and policy makers.

Perhaps an example from my experience will help. I will adjust the facts to protect the privacy of the party but she was an Eastern African woman whom the husband set up for domestic violence charges during a divorce. She had three young children but he controlled the family and the money. The district attorney was willing to let her plead to a later dismissal on the condition

tics Better Predict a Difference Between Parents Who and Those Who Don't?, 11 WHITTIER J. CHILD CUST. 185, 204 n.50 (2012).

²⁹ See JOHN A. FARRELL, CLARENCE DARROW: ATTORNEY FOR THE DAMNED 7 (2011) ("In the days before radio and motion pictures, the era's courthouse clashes and public debates played the role of mass entertainment."). Among his more notable "misfit" clients was the scorned woman Emma Simpson, "the socialite who smuggled a handgun into court and shot her philandering husband in the midst of their divorce proceeding. 'You've killed him!' said a shocked clerk. 'I hope so,' said Emma. Meeting the classic definition of chutzpah, Darrow convinced the jury to have mercy on the widow." *Id.* at 10.

³⁰ See ESTIN, *supra* note 2 at 117.

that she takes a psychological evaluation to determine her future capacity for intrapersonal violence. The guardian ad litem, all the lawyers in the divorce and criminal case thought this was fair enough.

Leaving aside the empirical problem of the validity of a “magic bullet” test to determine risks of violence or the ethics of trying to do so, when she came to see me I set about suggesting that such tests did not exist, let alone translate to non-Western cultures. (I know someone in the profession may make a different argument but I remain skeptical knowing actual clients from non-Western traditions). I even sent the lawyers articles I gathered from my regular foray into Google Scholar. No go at all. I eventually asked a talented and insightful psychologist I know, who also serves as a guardian ad litem, to meet the client and write a letter explaining the problem but sufficient to meet the condition for dismissal. The case then ended with no formal testing and the client free from the risk of punishment for failure to comply with testing. I do hope some lessons were learned by all of us in the case. Past experience suggests, however, that the judicial system tends to repeat non-evidence based practices because the overwhelming volume and intensity of litigation requires a convenient solution irrespective of diversity.

What this story implies, however, is that a deeper understanding of the tenets of a culture is a prerequisite to understanding how legal rules and the contortions of Western science (non-physical) in the family courts should be applied across the noisy frontier of international borders. Despite the wistfulness of legal realists, there really is no universal “Law” which neutralizes the human capacity to generate novel forms of chaos. As Professor Estin suggests, the system of international family law already “proceeds from a conviction that *family relationships matter*, in all their diversity, and should be sustained and supported whenever possible. International family law also reflects the traditional view that family law serves *protective purposes*, prioritizing the best interests of children and other family members, and working within the larger framework of protection for international human rights.”³¹

³¹ *Id.* at xvi (emphasis in original). Interestingly enough, mediation is available in international cases and there seems to be trend in that direction as in other forms of child custody cases. *See id.* at 200-01.

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These values are implicitly part of most family law practices in the United States. On that point there is no difference of consequence. Unfortunately, the American legal profession has not yet considered culturally-sensitive practices to the community as an explicit part of the ethical paradigm of the profession, from law school to the ethics exam to continuing education.³² For anyone who obtained a license more than thirty years ago, divorce and paternity had fairly rigid rules, often governed by laws or social norms that were gender or class-status driven. When I was a young lawyer, family law practice was a loss leader to keep personal injury cases or other collateral business flowing or as a favor for someone in the community. It was not a specialty that warranted much respect by the rest of our profession. Now beyond pensions, taxation, child development, psychological testing, business valuations, esoteric stock options, trial strategy, electronic and social media, and variegated family demographics, Academy Fellows must acquire multidisciplinary knowledge concerning immigration, evidence-based practices, and culturally sensitive values and ethical best practices for diverse populations.³³

³² I am not suggesting the topic has been ignored among some scholars, but it is not yet mainstream in law schools or CLEs. See RICHARD DELGADO & JEAN STEFANIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 27 (2001) (“As a thought exercise, the reader is invited to consider how many of the terms and ideas, mentioned in this book and highly relevant to the work of progressive lawyers and activists, are apt to be found in standard legal reference works: intersectionality, interest convergence, anti-essentialism, hegemony, language rights, black-white binary, jury nullification. How long will it take before these concepts enter the official vocabulary of law?”); Jane H. Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J.L. & POL’Y 63, 66 (2003) (“Except in law school clinical programs, lawyers typically do not receive instruction in the skills of interacting with clients, particularly those from different economic, social, racial, ethnic, or religious backgrounds. There is no professional expectation or ethical rule that requires a lawyer to learn these professional skills, other than the general rule requiring lawyers to be ‘competent.’”).

³³ The differences for lawyers may be described, as follows: “Whereas gentlemen, or honest men, necessarily agree as to things moral, they legitimately disagree in regard to such things as Gothic architecture, private property, monogamy, democracy, and so on.” LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 43 (1953). Justice Cardozo wrote that the “great ideals of liberty and equity are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in con-

This expansion of professional knowledge is not just the responsibility of practicing lawyers but rests with the courts and policy makers across all three branches of government. For much too long, court systems have failed to engage evidence-based or evidence-informed methods for designing and implementing interventions *before* those interventions are imposed on the public. Whether the intervention is a guardian ad litem, parent coordinator, brief parent education, psychological testing, co-parenting therapy, or other court-ordered intervention, there are serious ethical flaws when the court system imposes these authoritative powers without any outcome-based research that is generalizable.³⁴ Speed, lack of resources, desperation, or good faith does not cure the unethical nature of experimenting on humans without well-developed oversight and culturally sensitive informed consent. Of critical concern, the legal profession needs to adjust its paradigm to one in which *family relationships* and *protective purposes* are not cookie-cut methodologies and assumptions intended for and developed by a very narrow bandwidth of the population for people who should be like us.

The diversity of a flat and noisy society, coupled with the evolution of relationships that dilute national and international boundaries, make current parochial court models rather antiquated, much less resolvable on more than a case-by-case basis in a family court.³⁵ I know this statement is like tossing chum in the

stitutions, and consecrating to the task of their protection a body of defenders.” BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 92-93 (1921).

³⁴ For a helpful summary of research methods, see JOHN W. CRESWELL, *RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES* (3d ed. 2009).

³⁵ See Eric M. Fish, *The Uniform Interstate Family Support Act (UIFSA) 2008: Enforcing International Obligations Through Cooperative Federalism*, 24 J. AM. ACAD. MAT. LAW. 33, 34 (2011) (“Just as UIFSA harmonized the domestic system, the newest amendments will maximize enforcement and recognition that has emerged along with the idea of a global family—all while respecting the traditional authority of state law within the federal system.”). In a different discipline with potential application to these conundrums, Elinor Ostrom has written that “as long as analysts presume that individuals cannot change such situations themselves, they do not ask what internal and external variables can enhance or impede the efforts of communities of individuals to deal creatively and constructively with perverse problems such as the tragedy of the commons. . . . Policy analysts who would recommend a single prescription for commons problems have paid little attention to how diverse institutional

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water to those who will attack any intellectual discussion that may imply concession to a one-world government. This is not my point, in either case.

What I did not learn in the classroom but have learned from many outstanding professionals across disciplines is that the trade-offs between values, ethics, and legal form and structure are messy, yet we muddle through.³⁶ Although Professor Estin rejects the position, modestly or because the ABA legal department required her to include it, the book really is “designed to serve as a practice manual or a source of legal advice.”³⁷ Rather wisely, Professor Estin warns at the outset lawyers and judges “working in family law face complex procedural and conflicts-of-law issues, and these issues are even more pronounced in cases that reach across national borders.”³⁸ What makes Professor Estin’s *Desk Book* especially important, therefore, is her effort to educate practitioners to the differences between international law and those cultural circumstances which may make the imposition of the law on the facts value-laden.³⁹

arrangements operate in practice.” ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 21-22 (1991).

³⁶ From an historical perspective, the difference between social work and law, for example, is that legal ethics are unitary in that duty to vigorous advocacy for a client renders secondary *any* duty to the community. See FREDERIC G. REAMER, *SOCIAL WORK VALUES AND ETHICS* 61 (2nd ed. 1999) (Social justice under the Code of Ethics may include “promoting conditions that encourage respect for the diversity of cultures and social diversity; acting to prevent and eliminate domination, exploitation, and discrimination against any person, group, or class of people.”). In fact, until incivility overwhelms the duty of advocacy, a lawyer is protected from ethical violations for protecting the individual and subject to sanctions for disclosures which may protect the community. *But see* SUNNY HARRIS ROME, *SOCIAL WORK AND LAW: JUDICIAL POLICY AND FORENSIC PRACTICE* 1 (2013) (“The gist of the law is justice, and its purpose is the common good. The content of social work is the correction and prevention of injurious relations, and its aim, in common with that of the law, is the public well-being.”).

³⁷ ESTIN, *supra* note 2, at xvi.

³⁸ *Id.* at 1.

³⁹ *Id.* at 194 (describing the scope of Article 13b of ICARA as not intended to “encompass return to a home where money is in short supply, or educational and other opportunities are more limited than in the requested State.”) (citation omitted).

By itself, of course, the “Law” as a formal structure for constitutional rules, statutory rules, and standards in the United States is complex enough. Professor Estin states early on that much of this area of jurisprudence depends upon a “*commitment to international comity*.”⁴⁰ Given that notions of federalism and separation of powers are but quaint relics today for many American citizens, such a commitment will engage quite a struggle if nativism and bias run amuck. Ironically, it is the issue of same-sex marriage that has raised the profile of comity within the United States and which, soon enough, may determine its efficacy.⁴¹

On July 26, 2012, the Massachusetts Supreme Judicial Court confronted the following question on a report from the Probate and Family Court: “Whether or not a Vermont civil union must be dissolved before either party to that civil union can enter into a valid marriage in Massachusetts to a third party.”⁴² The court held that the Vermont civil union statute was the equivalent of marriage in the Commonwealth such that the reported question would be answered in the affirmative.

The facts were not in dispute but do prove the axiom among family law attorneys and judges that the reality of people’s lives cannot be matched by the most imaginative fiction. Todd, the plaintiff in the appeal, entered into a civil union in Vermont in 2003, but that union was never dissolved by any civil authority. Todd and Richard then married in Massachusetts in 2005 and Todd filed for divorce in 2010. Richard discovered that Todd had an undissolved civil union and moved to dismiss on the grounds that his Massachusetts marriage was void.

The court’s analysis began with the application of the traditional doctrine of comity, which refers to a state giving respect and deference to the legislative enactments and public policy pronouncements of other jurisdiction provided no wrong or in-

⁴⁰ *Id.* at xvi (emphasis in original).

⁴¹ For those involved in the debate over DOMA, see Geoffrey C. Hazard, Jr., *May v. Anderson: Preamble to Family Law Chaos*, 45 V.A. L. REV. 379, 380 n.5 (1959) (“Congress has never attempted to regulate matters of family law. Even if a constitutional basis for congressional action exists, the controversial character of many aspects of family law, such as grounds for divorce, makes it improbable that Congress will undertake to act.”).

⁴² *Elia-Warnken v. Elia*, 972 N.E. 2d 17, 18 (Mass. 2012).

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jury is “thereby done to its citizens, and that the policy of its own law is in no way contravened or impaired.”⁴³ For more than a century this principle was guided by the general rule that the “validity of a marriage is governed by the law of the State where the marriage is contracted.”⁴⁴ Although the court recognized that civil unions have a *status* less than that accorded Massachusetts’ citizens under its prior law, civil unions are still the “voluntary union of two persons as spouses, to the exclusion of all others,” such that the doctrine of “comity” required recognition of the Vermont civil union as the equivalent of marriage in Massachusetts.⁴⁵

The Massachusetts Supreme Court also suggested that there is a “compelling reason” to recognize same-sex marriage by all states. Interstate and international systems are “better served” by a single clear answer to the validity of marriage because non-recognition could harm other parties and children and impair a wide variety of rights and responsibilities, including support, health insurance, and inheritance rights.⁴⁶ Professor Estin, however, reminds lawyers that the “central distinction is that while divorce or separation decrees from other states are entitled to full faith and credit, foreign judgments are given effect only on the basis of comity.”⁴⁷

As Alexis de Tocqueville long ago observed, “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.”⁴⁸ In the realm of multiculturalism and pluralism, comity requires family courts in the United States to find equilibrium between sensitivity and respect for diversity and the obligation of the judicial system to enter legal judgments about parents and children, marital status, abuse

⁴³ *Id.* at 19 (citation omitted).

⁴⁴ *Id.* at 20 (citation omitted).

⁴⁵ *Id.* at 21. In a plurality opinion, the Massachusetts Court had held that prohibitions against non-residents obtaining marriage licenses in Massachusetts if their home-state held such marriages void were constitutional. *See Cote-Whiteacre v. Department of Pub. Health*, 844 N.E.2d 623, 624 (Mass. 2006).

⁴⁶ *See Elia-Warnken*, 972 N.E. 2d at 21.

⁴⁷ ESTIN, *supra* note 2, at 53.

⁴⁸ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J. P. Mayer ed., 2001).

and neglect, property and support.⁴⁹ Of course, the human capacity to create new and unique justifications for conflict means that policy makers must adapt the law as best they can in real time and in the midst of conflict.

Trying to explain to clients that we Americans inherited a complex but supple constitutional framework which respects the sovereignty of all fifty states frequently falls with a thud. Besides the lack of shared civic knowledge concerning the basic rudiments of their government, the typical response is “That’s not fair. No one told me if I moved here I would have to stay in Maine and not Daytona. What about spring break?” or “But a lawyer on the Internet said I could just leave the state whenever I want because I am the mother” or “I knew I should have stayed in Chicopee and not moved to Waterboro.”⁵⁰ Knowledge that constrains human preferences and choice is not much of an answer to those who want a “do-over” and expect the law to accommodate only their wants and needs. What many Americans may find surprising is that federalism was and is deeply intertwined with the constructs of *their* freedom and equality as a component of the original social contract.⁵¹ With the passage of time, this construct implicated the doctrines of conflict of laws and comity, as well as the Full Faith and Credit and Privileges and Immunities Clauses.⁵² None of these doctrines was intended to be convenient or fungible.

⁴⁹ See *ESTIN*, *supra* note 2, at 146 (“Courts apply the doctrine of comity to child-custody cases, particularly in circumstances where one parent has acted in defiance of a foreign-country custody decree, considering the child’s best interests as one aspect of a comity decision.”).

⁵⁰ I am really not being cynical. These are shortened and revised versions of actual conversations of the past decades.

⁵¹ See IAN SHAPIRO, *THE MORAL FOUNDATIONS OF POLITICS* 3 (2003) (“For social contract theorists, the state’s legitimacy is rooted in the idea of agreement.”).

⁵² See U.S. CONST. Art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”); U.S. CONST. Art. IV, § 2 (The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Law Analysis*, 153 U. PENN. L. REV. 2195, 2195 (2005) (“To be objective about the role of conflict of laws in the treatment of same-sex marriage, it is helpful to start with tolerance for the views of both sides in the substantive debate over whether to permit same-sex marriage.”).

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Professor Estin organizes her book so as to explain to lawyers and judges the murky connections between international treaties which, of course, expose an evolving form, as yet unresolved, of international federalism applicable to state courts.⁵³ In practice, it is difficult enough to explain to clients who marry a Japanese citizen while in the service of their country and then move to North Carolina and then decide to return to her home country with their four-year-old child that personal and subject matter jurisdiction is in Japan.⁵⁴ This mobile flatness for families is not so much one that alters geography and biology but is one in which information sharing has created a world where people can meet at a much faster pace and move and relocate across cultural and economic boundaries at an even faster pace. The result is an incredibly complex application of “Law.” Yet Professor Estin brings to this discussion a conviction that family relations and law, in all its rich diversity, should seek “*pragmatic solutions*”⁵⁵ which are accessible and efficient.

The core of this discussion, however, is particularly complex if you examine international law in the context of our perceptions of the equal rights of women in opposition to the perception that there is an inalienable right, based upon tract or canon, to harm by virtue of superior property or possessory rights over another human. The test that divides moral relativism and multi-

⁵³ For an interesting discussion of this topic in other arenas, see Julian G. Ku, *Customary International Law*, 42 VA. J. INT'L. L. 265, 268 (2001) (“Since national scholars believe that state courts have not played a significant role in the development of CIL [customary international law], they have asserted that leaving questions of CIL to parochial state courts invites chaos; state courts would develop conflicting rules of CIL and impermissible interfere in matters of foreign relations.”).

⁵⁴ See ESTIN, *supra* note 2, at 133 (“Many international disputes force courts to determine whether a parent’s trip abroad with a child has established a new home state, or whether the trip should be treated as a ‘period of temporary absence’ under the UCCJEA.”); see also *Ogawa v. Ogawa*, 221 P.3d 699, 704 (Nev. 2009) (“Shinichi argues that because the children did not reside in Nevada at any time during the six months before Yoko filed her complaint, the Nevada family court lacked jurisdiction to enter any custody orders. In response, Yoko asserts that, although she filed her complaint eight months after the children left Nevada, their absence from Nevada was intended to be a temporary vacation, which was wrongfully extended by Shinichi, and thus, that time should not count in determining home state jurisdiction.”).

⁵⁵ See ESTIN, *supra* note 2, at xvi (emphasis in original).

cultural respect cannot sacrifice the safety and well-being of vulnerable persons irrespective of gender, race, culture, or religion.⁵⁶ Cultural relativism “is a doctrine that holds that (at least some) such variations are exempt from . . . criticism by outsiders, adopted and strongly supported by notions of communal autonomy and self-determination.”⁵⁷ At the extreme ends of cultural relativism are radical cultural relativism, which holds that culture is the source of the validity of a moral right or rule, and radical universalism, which holds that culture is irrelevant to the validity of moral rights and rules because such rights and rules are universally valid.⁵⁸

When a right to believe something on faith or individual authority meets violence or abuse, courts and lawyers must wrestle with values and ethics. The “conflict experienced in American courts as they tried to steer courts between respecting cultural differences and protecting women’s rights has international legal dimensions.”⁵⁹ As one reads Professor Estin’s *Desk Book* it is important to keep this difference in mind:

The connections between culturally rooted concepts of honor, shame, patriarchy, the treatment of women as property, and gender violence pose a dilemma for American courts which find themselves having to mediate the contradictions between serving justice in a culturally diverse society inherent to the requirements of a single standard of law. Cultural sensitivity is reasonable, and even necessary, in a multi-cultural society like our own, and yet these sensitivities are sometimes clearly at odds with other powerful necessities, for example, the need to protect women from violence.⁶⁰

⁵⁶ See Robin Fretwell Wilson, *The Overlooked Costs of Religious Deference*, 64 WASH. & LEE L. REV. 1363, 1369 (2007) (“Deference to religious understandings would not be troubling if society could predict with confidence that the safety and welfare of traditionally vulnerable groups—women and children—would not be impaired.”).

⁵⁷ Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUMAN RTS. Q. 400, 400 (1984).

⁵⁸ See *id.* The draft of this paper was written before the terrorist bombings at the Boston Marathon. The nature of those minds which perceive an absolutist right to punish others randomly and violently reflects the co-existence of intellectual and personal impotence and rigidity. The twisting of culture and history may provide an excuse for violence or oppression toward others but it is not a cause. Violence is a choice within the boundaries of free will.

⁵⁹ JILL NORGREN & SERENA NANDA, *AMERICAN CULTURAL PLURALISM AND THE LAW* 178 (2006).

⁶⁰ *Id.*

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In this churning matrix of rights and values, the current debate in the United States over immigration policy profoundly affects future litigation in the family courts. The complexity of integrating laws and court procedures foreign to others, particularly when humanitarian concerns implicate care, mental illness, or judgments about the capacity of the family to care for itself, is unlikely to abate soon.⁶¹ This is not a trivial point. Ordinary family law litigation invokes complex traits of trustworthiness, honesty, transparency, and safety. When cultural sensitivity countenances violence or abuse of the vulnerable, these human values require institutional reflection. The “Law,” in the sense of some superior external force, imposes itself through human agents when individual autonomy and self-determination are forfeited by a preference for coercion or control, violence or abuse.

This point is much less obvious than it seems even in the absence of violence or abuse. Practitioners have enough difficulty explaining to clients what it means to move from state-to-state and the subsequent effect to their property rights, fault divorce, spousal support, child custody, and marital agreements (oral or written). What does matter is that with “divorce now widely available around the world in on various no-fault grounds, forum shopping and divorce litigation centers on marital property and support rights.”⁶² Divorce may well be divisible in the context of granting or litigating marital status in some states or countries, ex parte or not, but the legal and ethical problems for lawyers and courts are fraught with frustration and ambiguity.⁶³

⁶¹ See Timothy P. Fadgen & Guy Charlton, *Humanitarian Concerns and Deportation Orders Under the Immigration Act 2009: International Obligations Enough Protection for the Immigrant with Mental Illness?*, 43 VICTORIA U. WELLINGTON L. REV. 1, 8 (2012) (“However, where the impact on a potential deportee goes beyond the relatively narrow compass of a ‘well-founded’ fear of physical harm or persecution, the humanitarian nature of the particular factor or status within a particular content is difficult to ascertain, and cannot be a legal issue of semantics rather than a legal standard of principle.”).

⁶² ESTIN, *supra* note 2, at 84.

⁶³ *Id.* at 86-87; see also *Von Schack v. Von Schack*, 893 A.2d 1004, 1011 (Me. 2006) (“Because Maine has a unique interest in assuring that its citizens are not compelled to remain in such personal relationships against their wills and because no personal or real property interests would be determined in the proceeding, we conclude that Maine courts have jurisdiction to enter a divorce judgment without personal jurisdiction over the defendant.”).

Litigants who have already obtained financial orders through foreign proceedings cannot get “another bite of the cherry.”⁶⁴ With the globalization and digital nature of business, of course, lawyers will have to acquire an even greater range of skills to force financial disclosure, determine sources of income and underpayment, value business interests (such as web-based business), and variations on marriage and cohabitation and the rules that govern each as between nations.⁶⁵

What is extraordinary, reading the cases cited in the book and perusing the footnotes, is the variety of human choices that result in international litigation. Changes in the demographics of a flatter, noisier world in which humans seek partners are likely to increase the variation of conflicts applied to recognition of judgments and modification of parental rights and responsibilities and child and spousal support orders.⁶⁶ Application of the UCCJEA to foreign custody and access orders already provides that the court need not enforce foreign child custody determinations “if the child custody law of a foreign country violates fundamental principles of human rights.”⁶⁷ Some states legislatures and courts have also “incorporated an explicit best interests requirement into the analysis of foreign custody orders.”⁶⁸ What I found particularly interesting, and had not really read before reading the *Desk Book*, was the Convention of the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women, which contains a rather sound list of standards:

- Courts and agencies must treat the best interests of the child as a primary consideration on all actions concerning children.
- A child has a right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interest.

⁶⁴ ESTIN, *supra* note 2, at 87. Just to be clear: any thoughts of punning were in the text and not of my own invention.

⁶⁵ See TAYLOR, *supra* note 1, at 66 (“The shift from a productive society marks the transition from a manufacturing to an information economy governed by new media.”).

⁶⁶ See ESTIN, *supra* note 2 at 94.

⁶⁷ *Id.* at 147.

⁶⁸ *Id.*

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- The child who is capable of forming his or her own views must be afforded the opportunity to be heard, either directly or through a representative, in any judicial proceeding affecting the child.
- Children should be protected from all forms of physical or mental abuse, neglect or exploitation including sexual abuse.
- Women and men have common responsibility for the upbringing of their children, and equal rights responsibilities as parents irrespective of their marital status.⁶⁹

In fact, this list might be a good substitute for the long lists that have legislatively evolved for decades in many states and, to my happiness, implements a functional/structural approach to families consistent with a more precise (less homogenous) set of variables for judicial decision making. Indeed, the bent to reject moral variations on violence and abuse in these Conventions suggests that there is a common ground for protecting an international form of civil rights without permitting politically-correct sensitivities to justify harm to another.⁷⁰ While it is true that “international law involves, inevitably, choices and compromise that take place against the background of cultural difference,”⁷¹ it is equally true that traditional systems are incredibly complex when it comes to the autonomy and safety of women and children. I do not want to leave this point floundering on gender alone. The international acceptance of the forced slavery of men in militias, murder and assault from genocide, and the death of mind that permits suicide bombers to accept that fate, has itself devalued men and justified repellent forms of violence.

Thus, conventions on human rights and other complex and multi-dimensional international instruments encourage a form of normative universality, “such as the rights of a child, on the pre-

⁶⁹ *Id.* at 148.

⁷⁰ See Ericka A. Schnitzer-Reese, *International Child Abduction to Non-Hague Convention Countries: The Need for an International Family Court*, 2 *Nw. J. INT'L. HUM. RTS.* 1, 2 (2004) (“When cultures clash, the legal ramifications are serious-and seriously difficult to navigate: when a child is abducted or crossing international borders, the countries and parties involved often have significantly divergent legal systems and religious and cultural mores”).

⁷¹ Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 *BERKELEY J. INT'L. L.* 213, 214 (2003).

mise of the assumption of universal moment of consensus on who as a human being what is due to a human person by virtue of his or her humanity, without distinction on grounds of race, gender, religion, etc."⁷² These notions and assumptions are certainly very attractive and comforting but translating and transforming the human capacity for conflict across national borders into the funnel of court systems is the very definition of complexity.⁷³ What we know is that *humanity* needs an institutional means for conflict resolution which an international *polis* will accept at the "street level" or violence and self-help are likely outcomes.

Yet there is humbleness to this discussion because the flatter flatness of the world may mean a more rapid shift in paradigms about family and parents and children and marriage and divorce and adoption, biology and non-biology, and, eventually, the creation of human life such as in vitro fertilization or means unforeseen today.⁷⁴ Law has always played catch-up with science. And this does not even begin to address the complex and emotional consequences of transracial identity and identity rights on a global scale.⁷⁵ As one scholar wisely wrote, culture:

to us seems the great determinate of how human beings conduct themselves; in the relentless academic debate single 'nature and nurture', it is the "nurture" school which commands greater support from bystanders. We are cultural animals and it is the richness of our culture which allows us to accept our undoubted potentiality for violence but to believe, nevertheless, that its expression is a cultural aberration. History lessons remind us that the states in which we live, their institutions, even their laws, have come to us with conflict, often of the most bloody sort.⁷⁶

⁷² Abdullahi An-Na'Im, *Cultural Transformation and Normative Consensus on the Best Interests of the Child*, 8 INT'L. J.L. & FAM. 62, 64-65 (1994).

⁷³ See TAYLOR, *supra* note 1, at 141 ("Like general systems theory, complexity theory attempts to identify common characteristics of diverse complex systems and to determine the principles and laws by which they operate.").

⁷⁴ See ESTIN, *supra* note 2, at 122 ("Internationally, the citizenship and immigration status of children born from surrogacy arrangements can be quite problematic.").

⁷⁵ For a reminder, see Barbara Bennett Woodhouse, "Are You My Mother?": *Conceptualizing Children's Identity Rights in Transracial Adoptions*, 107 DUKE J. GENDER L. & POL'Y 107, 108 (1995) ("These clashes of rights highlight the tensions between claims of blood and nurture, biological and social connection, and individual and communal definitions of self.").

⁷⁶ JOHN KEEGAN, *HISTORY OF WARFARE: THE FACE OF BATTLE* 4 (1993).

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Adjudication of these disputes is an attempt to create order through law and institutions so as to avoid violence in the form of uncivilized and random warfare. Although Professor Estin did not offer a conclusion to her text, she wisely proposes pragmatic solutions that take “families into account and are accessible and efficient enough to assist children and families in all parts of the world.”⁷⁷ It is indicative of a legal hand book written for that purpose, with an undercurrent which reminds lawyers and court systems not to forget that our value system is not a function of a closed society.⁷⁸

As Thomas Friedman and Mark Taylor, cited in the first footnote, would both attest, flat and noisy worlds are transforming families: “global migrations of capital and the vast migrations of labor that have accompanied it have torn families apart, created new families, and radically changed the meaning of family.”⁷⁹ In the midst of this global evolution, “lawyers increasingly draw on a wide range of international treaties, national laws, religious laws, and local traditions.”⁸⁰ Of course, the peril of “accommodation” when entering the judicial system has numerous emotional and legal dilemmas, not unlike the unpleasant verbiage present in the same-sex marriage debate in America today.⁸¹

Each chapter of the book does especially well to blend judicial systems with the legal hurdles that are unique to each variant practice, but with the reality that “couples embarking on international marriage or divorce often discover substantial diversity

⁷⁷ ESTIN, *supra* note 2, at xvi.

⁷⁸ See Joseph Heath, *Immigration, Multiculturalism, and Social Contract*, CAN. J. L. & JURIS. 343, 343 (1997) (“Not only do cultural value systems provide the central legitimations for social institutions, but the internalization of these values through socialization processes provides agents with their primary motivation for conforming to institutional expectations.”).

⁷⁹ Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*, 39 VAND. J. TRANSNAT’L. L. 1551, 1554 (2006); see also Ann Laquer Estin, *Unofficial Family*, 94 IOWA L. REV. 449, 451 (2009) (“Over the past generation, new migration patterns have brought these questions of multiculturalism and legal pluralism from the periphery to the centers of colonial power, where the debate provokes profound uneasiness among the mainstream of majority society.”).

⁸⁰ *Id.* at 1555.

⁸¹ See William N. Eskridge, *A History of Same Sex Marriage*, 79 VA. L. REV. 1419, 1420 (1993) (“This cultural and legal consensus denying the legitimacy of same-sex marriages has been under siege for over twenty years.”).

and uncertainty in the laws that shaped the financial consequences of their relationship.”⁸² The fact that some of these variants have barriers to contact in court systems is similar to the permutations of human-choice-in-partner: “With love’s light wings did I o’er perch these walls,/For stony limits cannot hold love out:/And what love can do, that dares love attempt;/ Therefore thy kinsman are no let to me.”⁸³ Professor Estin wisely understands that walls can provide safety or barricade others even if romance began with the best of intentions. Knowledge of the limits of authority, as she notes, is a common bond among societies even if practice and interpretation fail to secure that safety and security: “International human rights law recognizes the central position of marriage and family in human societies.”⁸⁴ Professor Estin’s *Desk Book* thereby encourages good lawyering, culturally-competent practices, and thoughtful insights.

At this point, however, I ask for a brief personal point of privilege before concluding. For thirty years, I have participated as a lawyer in family court systems that seek to resolve, literally, tens of thousands of chaotic and complex family (however defined) transactions and disputes between parents and children, including the scourges of interpersonal violence, abuse, and neglect. I remind my American clients daily that they had the freedom to make personal choices about partners or procreation before entering the judicial portal. *Their* legal system does its best, with many good people getting up each morning to try and help within the structural and functional constraints of *their* democracy.

Even on a global scale, the authority of the judiciary, in a flat and noisy world, is a function of public faith, not cannon.⁸⁵ Thus, we do well, as a privileged profession, to remember the

⁸² ESTIN, *supra* note 2, at 77.

⁸³ WILLIAM SHAKESPEARE, *ROMEO & JULIET*, Act II, Scene II, Lines 70-74 (Wilbert J. Levy, ed., 1974).

⁸⁴ ESTIN, *supra* note 2, at 27.

⁸⁵ *See e.g.* Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (“It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”).

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consequences of intemperate or dyspeptic judicial and law professional voices. From trial to appellate courts, the alternative to public acceptance of judicial review and judgment is the human propensity for vigilantism or force by mob.⁸⁶ Labeling and name-calling, as we enter a new era of Supreme Court federalism in the realm of family, requires a respect and dignity lest others perceive a right to violence and oppression. A civilized *international* society, with any hope of *international* comity, must reinforce the sense that transjudicial resolution adds value to societies' security and equity. My personal point of privilege becomes an immodest diversion if, as in the past, international rights and remedies becomes a means to expand value-laden privilege rather than equal opportunity.

⁸⁶ For anyone who needs a brief but powerful reminder in the United States itself before turning elsewhere, see Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 *YALE J. L. & FEMINISM* 31, 35 (1996) quoting "Strange Fruit" by jazz singer Billy Holiday: "*Southern trees bear a strange fruit,/Blood on the leaves and blood at the root;/Black body swinging in the Southern breeze,/Strange fruit hanging from the poplar trees.*"