

2006

When Globalization Hits Home: International Family Law Comes of Age

Barbara Stark

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*, 39 Vand. J. Transnat'l L. 1551 (2006)
Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/123

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

When Globalization Hits Home: International Family Law Comes of Age

Barbara Stark*

ABSTRACT

Not that long ago, international family law (IFL) referred to a series of multilateral conventions basically concerned with conflicts of law questions. It could be studied as part of a course on family law or as part of a course on conflicts of law. But IFL, or family law in which more than one State has an interest, has grown up and become a subject of its own.

This is not merely a curricular development. Rather, it reflects and reinforces two of the most powerful trends of the last fifteen years: globalization and the spread of human rights. Globalization is transforming families. The 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. Borders have become more porous, allowing adoptees and mail order brides to join new families and women fleeing domestic violence to escape from old ones. People of different nationalities marry, have children, and divorce, not necessarily in that order.

There are powerful trends and countertrends everywhere, and competing norms of IFL are at the core of each. International human rights law plays a growing role in mediating these competing norms. Many States have outlawed

* Professor of Law, Hofstra Law School. B.A. Cornell, J.D. NYU, LL.M. Columbia. The ideas set out in this Article were first presented at the Workshop on the ALI Principles at Harvard Law School; the Louisiana Law Review Symposium on the Protection of Children; the Feminist Legal Theory Workshop at Emory Law School; the European Society of International Law Forum in Geneva; the Northeastern Law School Conference on Economic, Social, and Cultural Rights; and the International Society of Family Law Annual Meeting in Salt Lake City. Warm thanks to the organizers and participants, especially Brian Bix, Peg Brinig, June Carbone, Martha Fineman, Marsha Garrison, Mary Ann Glendon, Joanna Grossman, Leslie Harris, Martti Koskenniemi, Hope Lewis, Linda McClain, Lucy McGough, Margo Melli, Elizabeth Scott, Thomas Skouteris, Lynn Wardle, and Robin Fretwell Wilson for their helpful comments. I am also deeply grateful to Patricia Kasting, research librarian at Hofstra, for her invaluable assistance and to Betty Black and Maureen E. Quinn for their expert preparation of the manuscript.

polygamy and child marriage, for example, at least in part to show the rest of the world they are “modern.” IFL is where the enormous abstract forces of globalization and human rights become real, immediate, and personal. IFL, in short, is where globalization hits home.

“Above all, relationships are changing.”
- Kwame Anthony Appiah¹

TABLE OF CONTENTS

I.	INTRODUCTION—WHEN GLOBALIZATION HITS HOME.....	1553
II.	HOW GLOBALIZATION AFFECTS IFL.....	1558
	A. <i>How Mobility Reconfigures Families</i>	1559
	B. <i>How Income Shifts Power</i>	1561
	1. The Transformation of Women’s Roles.....	1563
	2. Transnational Support	1566
	C. <i>How Culture Changes Everything</i>	1568
III.	HOW HUMAN RIGHTS LAW AFFECTS IFL.....	1572
	A. <i>How Human Rights Norms Apply in General</i> ..	1572
	1. In Theory	1572
	a. Human Rights of the Family	1573
	b. Human Rights Within the Family	1574
	2. In Practice	1576
	B. <i>Two Crucial Norms</i>	1581
	1. Gender Equality.....	1581
	2. Economic Rights.....	1583
IV.	INTERNATIONAL FAMILY LAW COMES OF AGE	1586
	A. <i>Why IFL Matters</i>	1586
	B. <i>Substantive Laws and How They Function</i>	1589
	1. Family Law.....	1591
	2. International Law	1592
	3. Comparative Law	1593
	C. <i>The Impact of IFL</i>	1594
	1. On Globalization	1595
	2. On Human Rights.....	1596

1. Kwame Anthony Appiah, *Toward a New Cosmopolitanism*, N.Y. TIMES MAGAZINE, Jan, 1, 2006, at 30, 33. For an extended and thoughtful discussion of cosmopolitanism, see KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS (2006). For a brief comment on the relationship between cosmopolitanism and international family law, see *infra* Part IV.B.

a.	Changing the Laws Defining Families	1597
b.	Changing the Normative Landscape....	1600
V.	CONCLUSION.....	1603

I. INTRODUCTION—WHEN GLOBALIZATION HITS HOME

Not that long ago, international family law (IFL) referred to a series of multilateral conventions basically concerned with conflicts of law questions.² It could be studied as part of a course on family law or as part of a course on conflicts of law. But IFL, or family law in which more than one State³ has an interest,⁴ has grown up and become a subject of its own. Within the past few years, there have been panels on the topic at the Annual Meetings of the Association of American Law Schools,⁵ the American Society of International Law,⁶

2. See, e.g., Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=24; Convention on Celebration and Recognition of the Validity of Marriages, Mar. 14, 1978, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=88; Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, Oct. 2, 1973, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=85; Convention on the Recognition of Divorces and Legal Separations, Jun. 1, 1970, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=80.

Comparative family law, in contrast to IFL, has been a subject of academic interest for some time. For noteworthy global surveys, see FAMILY, STATE, AND INDIVIDUAL ECONOMIC SECURITY (Marie-Therese Meulders-Klein & John Eekelaar eds., 1988), THE RESOLUTION OF FAMILY CONFLICT: COMPARATIVE LEGAL PERSPECTIVES (John M. Eekelaar & Sanford N. Katz eds., 1984), MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES (John M. Eekelaar & Sanford N. Katz eds., 1980), and FAMILY VIOLENCE: AN INTERNATIONAL AND INTERDISCIPLINARY STUDY (John M. Eekelaar & Sanford N. Katz eds., 1978).

3. In international law, "State" refers to a nation-State. This Article adopts this nomenclature, using "state" to refer to a constituent unit of a nation-State as well.

4. This includes family law matters in which the parties are domiciled in different States, where marital property is in a different State, or the validity of the law of one State is challenged in another. The infusion of human rights norms in family law has exponentially multiplied the number of such cases since well over one hundred States have ratified most major human rights instruments. Thus, these States have an interest in family law cases raising human rights issues, even if their nationals are not directly involved. See *infra* Part III.B. The late human rights scholar Richard Lillich, appropriately, edited one of the earliest treatments of the topic. THE FAMILY IN INTERNATIONAL LAW: SOME EMERGING PROBLEMS (Richard B. Lillich ed., 1981).

5. See, e.g., Sections on Family and Juvenile Law and International Law, Association of American Law Schools, Annual Meeting, Atlanta, GA (Jan. 5, 2004); Barbara Stark, Discussion Issues: Concurrent Session on Family Law, Workshop on Shifting Boundaries: Globalization and Its Discontents, Association of American Law Schools, Annual Meeting, San Francisco, CA (Jan. 6, 2001).

6. American Society of International Law, Annual Meeting, Washington, D.C. (Mar. 2002).

and the International Law Association, American Branch.⁷ A major text was published in 2003,⁸ and the Family Law Quarterly published a symposium on the subject in 2004.⁹ An *Introduction* appeared in 2005.¹⁰

This is not merely a curricular development. Rather, it reflects and reinforces two of the most powerful trends of the last fifteen years: globalization and the spread of human rights. Globalization is transforming families. The 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. Borders have become more porous, allowing adoptees¹¹ and mail order brides¹² to join new families and women fleeing domestic violence¹³ to escape from old ones. People of different nationalities

7. International Law Weekend 2003: International Law In Crisis – And In Business, *Transnational Maintenance Obligations: The Costs of International Relations*, New York, NY (Oct. 25, 2003). The International Society of Family Law, established in 1973, now has over 500 members in sixty States. The International Society of Family Law, <http://www.law2.byu.edu/ISFL> (last visited Sept. 30, 2006).

8. MARIANNE BLAIR & MERYL WEINER, *FAMILY LAW IN THE WORLD COMMUNITY* (2003).

9. Barbara Stark, *Introduction: Practical Applications and Critical Perspectives in International Family Law*, 38 FAM. L.Q. 475 (2004). The Family Law Quarterly has also previously addressed the topic. See, e.g., Symposium, *Comparative Custody Law*, 39 FAM. L.Q. 247 (2005) (describing and comparing custody law in seventeen States); Symposium, *Selected Topics in International Family Law for the Family Practitioner*, 32 FAMILY L.Q. 521 (1998).

10. BARBARA STARK, *INTERNATIONAL FAMILY LAW: AN INTRODUCTION* (2005).

11. ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 143 (1993). Some view, or accuse others of viewing, babies as exports. See Robert S. Gordon, *The New Chinese Export: Orphaned Children – An Overview of Adoption Children from China*, 10 TRANSNAT'L LAW 121, 129 (1997). Others view babies as the most vulnerable refugees. See Howard Altstein & Rita J. Simon, *Introduction to INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE* 13 (Howard Altstein & Rita J. Simon eds., 1991). This is an ongoing problem in part because of the enormous economic disparities between some sending and receiving countries. See, e.g., Sara Corbett, *Where Do Babies Come From?*, N.Y. TIMES MAGAZINE, June 16, 2002, at 42, 47 (describing coercive economics of adoption in Cambodia, where a woman sold her baby to stranger for \$50); see also *What's News—World Wide*, WALL ST. J., Mar. 24, 2003, at 1 (reporting that ten people were arrested in China for a scheme to sell and smuggle babies, "28 of which were found in gym bags, possibly sedated, on a Guangxi bus").

12. See, e.g., Nora Demleitner, *In Good Times and Bad: The Obligation to Protect 'Mail Order Brides'*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 613 (Kelly D. Askin & Doreen M. Koenig eds., 2000); ROBERT J. SCHOLES, APPENDIX A: THE "MAIL-ORDER BRIDE" INDUSTRY AND ITS IMPACT ON U.S. IMMIGRATION, in INTERNATIONAL MATCHMAKING ORGANIZATIONS: A REPORT TO CONGRESS (1999), available at <http://www.uscis.gov/graphics/aboutus/repstudies/Mobappa.htm>. For a sharp comparison of adoptees and mail order brides, see Ryiah Lilith, Comment, *Buying a Wife But Saving a Child: A Deconstruction of Popular Rhetoric and Legal Analysis of Mail-Order Brides and Intercountry Adoption*, 9 BUFF. WOMEN'S L.J. 225, 225–26 (2000–2001).

13. Through its *Gender Guidelines for Asylum Adjudications*, originally issued in March 1993 and reissued in 1996, "Canada became the first government to recognize

marry, have children, and divorce, not necessarily in that order.¹⁴ They file suits in their respective home States or third States, demanding support, custody, and property. Otherwise law-abiding parents risk jail when they try to abduct their children from foreign ex-spouses.¹⁵ Local laws alone cannot resolve these matters. Rather, lawyers increasingly draw on a wide range of international treaties, national laws, religious laws, and local traditions.

Even as ties to such traditions become increasingly attenuated, their appeal may become stronger for some. Local leaders may insist on even stricter adherence to local customs, especially those related to marriage, divorce, and children, as their authority is challenged by international norms.¹⁶ In some States, such as Israel, family law has historically been left to religious authorities.¹⁷ In others, such as

formally that a woman fleeing persecution on gender-specific grounds can claim to 'fear persecution on account of her membership in a particular social group.'" U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the programme and methods of Work of the Commission, Report of the Special Rapporteur on Violence Against Women*, at 29, U.N. Doc. E/CN.4/1998/54 (Jan. 26, 1998) (prepared by Radhika Coomaraswamy). The United States' *Gender Guidelines for Overseas Refugee Processing*, drafted in 2000, explicitly recognizes domestic violence as a form of gender-related persecution. STARK, *supra* note 10, at 241. See In the Matter of M. K. (granting asylum to a woman from Sierra Leone on the grounds of persecution based on domestic violence.) *Id.*; see also Erin Bergeson Hull, Note, *When is the Unmarried Partner of an Alien Who Has Been Forcibly Subjected to Abortion or Sterilization a "Spouse" for the Purpose of Asylum Eligibility? The Diverging Opinions of Ma v. Ashcroft and Chen v. Ashcroft*, 2005 UTAH L. REV. 1021, 1027-29 (2005).

14. Nonmarital births vary enormously among States. In 1986, for example, 23.4% of children born in the United States were to unmarried parents, compared to 1% in Japan, 5.6% in Italy, 44% in Denmark, and 48% in Sweden. IRA ELLMAN ET AL., *FAMILY LAW* 1035 (3d ed. 1998) (citing Constance Sorrentino, *Changing Family in International Perspective*, 113 MONTHLY LAB. REV. 41, 45 (1990)).

15. The Author first learned this in practice by counseling clients who would not dream of breaking the law or even breaching a contract but who would not hesitate to violate a court order if they believed their child's well-being was at stake. This is nothing new domestically. See, e.g., ELIZABETH MORGAN, *CUSTODY: A TRUE STORY* (1986) (doctor goes underground and is eventually jailed for refusing to disclose the location of her daughter to her allegedly abusive former spouse). In the international context, there is an even greater risk that foreign law will be perceived, often accurately, as hostile and unresponsive to the concerns of the non-national parent and the norms of another State. This has become part of popular culture. See, e.g., BETTY MAHMOODY WITH WILLIAM HOFFER, *NOT WITHOUT MY DAUGHTER* (1991) (American mother escapes with her daughter from Saudi Arabia).

16. The notion that family law should be "local" is not limited to less developed States. As Justice William Rehnquist observed in *Sosna v. Iowa*, "domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact." 419 U.S. 393, 404 (1974).

17. See, e.g., Frances Raday, *Israel - The Incorporation of Religious Patriarchy in a Modern State*, in *GENDER BIAS AND FAMILY LAW: COMPARATIVE PERSPECTIVES*, 4 INT'L REV. OF COMPARATIVE PUBLIC POLICY 209, 209 (Nicholas Mercuro & Barbara Stark eds., 1992); Joel A. Nichols, Comment, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY

Nigeria, the authority of religious courts over family law matters is relatively recent.¹⁸ The relegation of family law to religious authorities reflects both its relatively low importance to national governments (compared to foreign investment, for example) and its paradoxically high importance to those who seek to shape the national identity.¹⁹ There are powerful trends and countertrends everywhere, and competing norms of IFL are at the core of each.

International human rights law plays a growing role in mediating these competing norms. The spread of human rights law is both a function of globalization and a counterweight to it. On one hand, the promotion of free market democracy opens both markets and cultures to the powerful appeal of free expression, political participation, and the promise of gender equality. States are also under increasing pressure from their global trading partners to assure basic human rights.²⁰ Many States have outlawed polygamy and child marriage, for example, at least in part to show the rest of the world that they are "modern."²¹ At the same time, human rights

L.J. 929, 989 (1998) (noting that South Africa, India, Egypt, Great Britain, and Israel all allow religious laws to govern marriage).

18. Since the end of military rule in 1999, twelve Nigerian states have adopted Sharia law in criminal matters. AYESHA IMAM, *WORKING WITHIN NIGERIA'S SHARIA COURTS*, CARNEGIE COUNCIL ON ETHICS AND INTERNATIONAL AFFAIRS (2003), available at http://www.cceia.org/resources/publications/dialogue/2_10/articles/1053.html.

19. As Martha Minow noted in an influential article:

Family law is in two senses "underneath" other areas of the law. Its low status within the profession is well-known. But it is also 'underneath' other legal fields in the sense that its rules about roles and duties between men and women, parents and children, families and strangers historically and conceptually underlie other rules about employment and commerce, education and welfare, and perhaps the governance of the State.

Martha Minow, *"Forming Underneath Everything That Grows:" Toward a History of Family Law*, 1985 WISC. L. REV. 819, 819 (1985). Although Professor Minow was referring to domestic law, the observation is equally apt in the international context, with the critical caveat that it is not necessarily "apt" in the same way nor for the same reasons. *Id.*

20. See, e.g., Bruno Simma et al., *Human Rights Considerations in the Development of Co-operation Activities of the EC*, in *THE EU AND HUMAN RIGHTS* 571 (Philip Alston ed., 1999); see also Peter Edidin, *China Gives America a 'D'*, N.Y. TIMES, Mar. 27, 2005, at 4.7 (describing China's attempt to play the same game).

21. See, e.g., The Revised Family Code, 2000, art. 7, No. 213 (Eth.) (setting eighteen as the age of marriage in Ethiopia). There are other reasons for setting a high legal minimum age for marriage. In Uganda and Zambia, for example, a legal minimum age of twenty-one has been established in response to the high rates of HIV/AIDS in both countries. UNICEF INNOCENTI RESEARCH CENTRE, *EARLY MARRIAGE: CHILD SPOUSES*, Mar. 2001, at 7, available at [http://www.unicef-icdc.org/publications/pdf/digest7e.pdf#search=%22 early%20marriage%20unicef%22](http://www.unicef-icdc.org/publications/pdf/digest7e.pdf#search=%22%20early%20marriage%20unicef%22). Kwame Anthony Appiah, *Toward a New Cosmopolitanism*, N.Y. TIMES MAGAZINE, Jan. 1, 2006, at 30, 33. For an extended and thoughtful discussion of cosmopolitanism, see KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006). For a

law may soften some of the harsher effects of globalization. Even as the International Monetary Fund pressures States to slash social safety nets to be more competitive in global markets,²² for example, the International Covenant on Economic, Social, and Cultural Rights²³ (Economic Covenant) imposes affirmative obligations on States to support families.²⁴

IFL is where the enormous abstract forces of globalization and human rights become real, immediate, and personal. A New York Times reporter went to Ethiopia to cover the AIDS crisis and came home with an AIDS orphan.²⁵ Elian Gonzalez's mother tried to escape from Cuba with her six-year-old son.²⁶ After she drowned, his

brief comment on the relationship between cosmopolitanism and international family law, see *infra* Part IV.B.

22. See, e.g., HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 164–65 (2000) (noting the burden imposed on women by structural adjustment programs during the 1980s).

23. International Covenant on Economic, Social, and Cultural Rights art. 10, Dec. 16, 1966, 993 U.N.T.S. 4, available at <http://www.ohchr.org/english/law/cescr.htm> [hereinafter Economic Covenant].

24. Article 10, for example, requires States to assure maternal protection before and after the birth of a child. *Id.* In addition, a wide range of actors, including international organizations (IOs) such as UNICEF, and nongovernmental organizations (NGOs), such as women's groups and fathers' rights groups, increasingly draw on human rights law to shape family law for a similarly wide range of purposes. STARK, *supra* note 10, at 9–10. In a distinct but related initiative, the United Nations calls on the global North to support the Millennium Development Goals, the ambitious project to halve global poverty by 2015. UN Millennium Development Goals, <http://www.un.org/millenniumgoals/> (last visited Oct. 1, 2006); see, e.g., JEFFREY SACHS, THE END OF POVERTY 210–25 (2005). The relationship between the Millennium Development Goals and human rights law is complicated, although both aim to alleviate human misery. See Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755, 759–62 (2005).

25. See, e.g., Melissa Fay Greene, *What Will Become of Africa's AIDS Orphans?*, N.Y. TIMES MAGAZINE, Dec. 22, 2002, at 49 (describing orphanages filled with AIDS orphans, a reporter explains how she “found that there was one small thing she could do”). Others have been able to adopt AIDS orphans, in part, because of a groundbreaking decision of the South African constitutional court, striking a law prohibiting inter-country adoption. Minister for Welfare & Population Dev. v. Fitzpatrick & Others 2000 (3) SA 422 (CC) at 26 (S. Afr.) (striking section 18(4)(f) of the Child Care Act 1983 prohibiting the adoption of a South African child by non-South Africans as inconsistent with the South African Constitution (sec. 28(2)) which requires that the best interest of a child are paramount in every matter concerning the child). Historically, African States have discouraged adoption of African children by foreigners, especially non-Africans, as set out in the African Charter on the Welfare of the Child. See generally Altstein & Simon, *supra* note 11, at 3 (noting that “though the Nigerian civil war of the 1960s resulted in thousands of children being made orphans, Nigeria spurned all foreign adoption offers. African countries have not generally sanctioned the adoption of their children by foreigners.”).

26. Joshua Cooper Ramo, *A Big Battle For A Little Boy: A Six-Year-Old is Caught Between Two Countries. Where Does He Belong?*, TIME, Jan. 17, 2000, at 58; see also *The Elian Gonzalez Case: An Online News Hour Focus*, <http://www.pbs.org/newshour/bb/law/elian> (last visited Oct. 1, 2006); U.S. Citizenship & Naturalization

Miami relatives sought to prevent his return to Cuba and to the father who had joint custody of the boy.²⁷ His return, some claim, cost Al Gore Miami.²⁸ IFL, in short, is where globalization hits home.

Part II of this Article explains how globalization affects IFL. Part III explains how human rights law affects IFL. Part IV explains how, in response, IFL has come of age and how it is affecting globalization and human rights law.

II. HOW GLOBALIZATION AFFECTS IFL

Globalization is the “constant revolutionizing of production” and the “endless disturbance of all social conditions.”²⁹ It is “everlasting uncertainty.”³⁰ Everything “fixed and frozen is swept away,” and “all that is solid melts into air.”³¹ As these quotes from *The Communist Manifesto* (written 150 years ago) indicate, globalization is nothing new. For most of Western history, capital has flowed freely.³²

But the end of the Cold War, developments in finance, and developments in technology combined to qualitatively change the game during the past fifteen years. The failure of Soviet communism became the triumph of free market democracy³³ as formerly closed markets opened, and capital poured in at a previously unimaginable rate. “In a typical day, \$1.5 trillion changes hands, an eight-fold increase since 1986, an almost incomprehensible sum, equivalent to total world trade for four months.”³⁴ But globalization refers to more than the flow of capital. As economist Joseph Stiglitz defines it:

Fundamentally, it is the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction

Servs., Elian Gonzalez, <http://USCIS.gov/graphics/publicaffairs/ElianG.htm> (last visited Oct. 1, 2006).

27. Ramo, *supra* note 26, at 60–61.

28. See, e.g., Jennifer Ludden, *Shifting Strategies Mark Fight for Latino Vote* (Nat'l Public Radio broadcast Sept. 11, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=3913831>.

29. Josef Joffe, *One Dollar, One Vote: The Lexus and The Olive Tree*, N.Y. TIMES BOOK REV., Apr. 25, 1999, at 14 (citing KARL MARX & FREDERICK ENGELS, *THE COMMUNIST MANIFESTO* (Samuel Moore trans., Pluto Press 1848)).

30. *Id.*

31. *Id.* See also Boaventura de Sousa Santos, *Oppositional Postmodernism and Globalizations*, 23 L. & SOC. INQUIRY 121, 135 (1998).

32. Joffe, *supra* note 29, at 14.

33. For an insightful analysis, see Jeffrey D. Sachs, Galen L. Stone Professor of Int'l Trade at Harvard Univ. & Director of the Harvard Inst. for Int'l Development, Remarks at Yale Law School, *Globalization and the Rule of Law* (Oct. 16, 1998).

34. Nicholas D. Kristof with David E. Sanger, *How U.S. Wooded Asia to Let Cash Flow In*, N.Y. TIMES, Feb. 16, 1999, at A1. As a fund manager in Hong Kong observed, “[i]t's no longer the real economy driving the financial markets, but the financial markets driving the real economy.” Nicholas D. Kristof with Edward Wyatt, *Who Went Under in the World's Sea of Cash*, N.Y. TIMES, Feb. 15, 1999, at A1, A10.

of costs of transportation and communication, and the breaking down of artificial barriers to the flows of goods, services, capital, knowledge, and (to a lesser extent) people across borders.³⁵

Globalization transforms families in three major ways. First, the increased mobility of families, or of some family members, reconfigures families. Second, income shifts among different families, and among the individuals within families, alters social relations. Third, globalization transforms culture, and culture changes everything. The transformation of families, in turn, places new demands on IFL. The following Sections briefly explain how each of these three factors—mobility, income shifts, and the transformation of culture—affects a discrete aspect of IFL—divorce, support, and custody claims. These are not the only areas of IFL affected, nor are they necessarily the most important.³⁶ These three areas are targeted here because they suggest the range of issues affected by IFL, from marital status to the transnational flow of currency to the mundane details of children's lives. Each of these areas is a contested site of legal reform and counter-reform. Thus, they are useful, albeit problematic, contexts in which to analyze the ways in which globalization affects families and IFL.

A. *How Mobility Reconfigures Families*

As Stiglitz notes, globalization facilitates the mobility of people across borders.³⁷ This is supported by official data regarding global migration and by the best available data regarding illegal migration.³⁸ While there is little data disaggregated by family relationships, anecdotal evidence indicates that many of these migrants leave spouses and partners behind.³⁹ People migrate from

35. JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 9 (2002). The topic of globalization has generated a voluminous literature. See, e.g., JAGDISH BHAGWATI, *IN DEFENSE OF GLOBALIZATION* (2004); AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2002); THOMAS FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005); MICHAEL HART & ANTONIO NEGRI, *EMPIRE* (2000); WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* (2000).

36. "Most important" is inevitably a subjective determination in the IFL context. See, e.g., Barbara Stark, *Baby Girls From China in New York: A Thrice-Told Tale*, 2003 UTAH L. REV. 1231, 1241–42 (describing how China's one-child policy changed lives in the United States).

37. STIGLITZ, *supra* note 35, at 9.

38. See, e.g., DEPT OF HOMELAND SEC., *FISCAL YEAR 2002 YEARBOOK OF IMMIGRATION STATISTICS*, available at <http://www.uscis.gov/graphics/shared/statistics/yearbook/2002/yearbook2002.pdf> (last visited Oct. 2, 2006).

39. Demographics do not tell about family structures unless those structures are a specific category. Even data disaggregated by gender and age is inconclusive, indicating merely that migrants might be of child-bearing (or child-rearing) age or dependent children themselves. See *id.* at tbl. 25 (including a breakdown of spouses and children).

poor, labor-exporting States to wealthy, labor-importing States to support themselves and their families.⁴⁰ This includes women in the global South who leave their own husbands and children to take care of other women's families in the global North.⁴¹ It includes men from less developed States who risk their lives crossing borders, seeking work that Europeans and those in the United States are unwilling to do. Some of these migrants return to their families, and some of their families join them.⁴² But migrants are often alone in a new country, sometimes for years.⁴³

Distance strains relationships.⁴⁴ Even when families are together, adjusting to a new culture strains relationships. Traditional supports, such as the church or mosque, which may have inhibited extramarital relationships at home, may not be as readily available or may not serve the same functions.⁴⁵ At the same time, temptations are greater, especially, perhaps, for those migrating from more conservative cultures.⁴⁶ Sex is not only commodified in the West; it is a growth industry.⁴⁷

Divorce, moreover, is increasingly available and increasingly accepted. In Europe and the United States, no-fault divorce is available almost everywhere.⁴⁸ Westernization, the pressure to

40. See generally Ratna Kapur, *Travel Plans: Border Crossings and the Rights of Transnational Migrants*, 18 HARV. HUM. RTS. J. 107 (2005) (describing the paths of transnational migrants).

41. See, e.g., *Fresh Air from WHYY* (Nat'l Public Radio broadcast Feb. 20, 2006), available at <http://www.npr.org/templates/story/story.php?storyid=5225180> (interviewing Pulitzer prize-winning journalist Sonia Nazario about the 48,000 children from Latin America who try to find their mothers in the United States every year); see also *Maid in America* (PBS television broadcast 2005) (documenting the lives of three immigrant women taking care of other women's families and worrying about their own).

42. See, e.g., SONIA NAZARIO, *ENRIQUE'S JOURNEY* (2006) (book about a fifteen year-old boy who left Ecuador to look for his mother in the United States).

43. They get lonely. See Corey Kilgannon, *At \$2 a Dance, a Remedy for Loneliness*, N.Y. TIMES, Feb 20, 2006, at B4 (describing dance clubs in Queens where lonely immigrant men from Mexico or Ecuador pay two dollars a dance to dance with young women).

44. *Id.*

45. See Peter Schneider, *The New Berlin Wall*, N. Y. TIMES MAGAZINE, Dec. 4, 2005, at 66 (describing the important role of the mosques in Germany in political organizing).

46. *Id.* at 68 (describing young Muslim women who want to dress and behave like Germans).

47. Sex workers, including trafficked women and girls, are another major group of migrants. This, too, has become part of popular culture. See, e.g., *Human Trafficking* (Lifetime television broadcast 2005). This is related to, and not always distinct from, the mail-order bride industry. See, e.g., Erin Elizabeth Chafin, Comment, *Regulation or Proscription? Comparing American and Philippine Proposals to Solve Problems Related to the International Marriage Broker Industry*, 23 PENN ST. INT'L. L. REV. 701, 701 (2005); see also Demleitner, *supra* note 12.

48. New York is the only state in the United States where no-fault divorce is not available. Joanna Grossman, *Will New York Finally Adopt True No-Fault Divorce?*,

become "modern," increases popular demand for divorce and increases the pressure on States to respond to that demand.⁴⁹ In some Muslim States, divorce has become an option for women as well as men. In Egypt, for example, recent reforms have made it possible for women to file for divorce.⁵⁰ Increased mobility facilitates divorce, in short, by straining marriages and, at the same time, by making divorce an increasingly available and acceptable option.⁵¹

B. How Income Shifts Power

Globalization has dramatically increased world income.⁵² It is widely credited with bringing India and China out of hopeless poverty and into an era of high growth and a promise of a middle class life, at least for some.⁵³ But globalization has also increased the polarization between the haves and the have-nots.⁵⁴ This is part of a long-term

Oct. 20, 2004, <http://writ.findlaw.com/grossman/20041020.html> (describing 2004 proposals to amend the state's archaic divorce law); Danny Hakim, *Panel Asks New York to Join the Era of No-Fault Divorce*, N.Y. TIMES, Feb. 7, 2006, at A1 (noting that New York is the only state where ending a marriage cannot be done by mutual consent); Marcia Pappas, Op-Ed., *Divorce New York Style*, N.Y. TIMES, Feb. 19, 2006, § 14, at 13 (explaining why no-fault divorce laws are bad for women). Once no-fault is accepted in a region, it is difficult to contain, since parties can easily cross state or E.U. borders even if divorce is restricted in their own place of residence. In the United States, for example, courts routinely adjudicate divorce as an issue of personal status when they have jurisdiction over the party seeking the divorce. The financial consequences of divorce, in contrast, cannot be adjudicated unless the court has jurisdiction over the other spouse. Whether the courts' adjudication of personal status will be recognized by foreign courts is a separate matter. See, e.g., Convention on the Recognition of Divorces, *supra* note 2.

49. See, e.g., Larry Rohter, *Divorce Ties Chile in Knots*, N.Y. TIMES, Jan. 30, 2005, § 4, at 18 (describing uproar regarding Chilean legalization of divorce).

50. STARK, *supra* note 10, at 18.

51. For a description of the "counterrevolutionary legal proposals" that have sprung up in response to no-fault divorce, see Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607 (1997).

52. As former Deputy Treasury Secretary, Lawrence H. Summers noted:

When history books are written 200 years from now about the last two decades of the twentieth century, I am convinced that the end of the Cold War will be the second story. The first story will be about the appearance of emerging markets—about the fact that developing countries where more than three billion people live have moved toward the market and seen rapid growth in incomes.

Nicholas D. Kristof with Edward Wyatt, *Who Went Under In the World's Sea of Cash*, N.Y. TIMES, Feb. 15, 1999, at A1.

53. See, e.g., Pete Engardio, *A New World Economy: Simultaneous Takeoffs*, BUSINESSWEEK, Aug. 22, 2005, at 52 (describing how China has "tripled per capita income in a generation" and how India is similarly experiencing impressive economic growth).

54. See, e.g., Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L. L. & POL.

trend, beginning after World War II. As the United Nations Development Program (UNDP) summarizes:

During the past five decades, world income has increased sevenfold (in real GDP) and income per person more than tripled (in per capita GDP) but this gain has been spread very unequally—nationally and internationally—and the inequality is increasing. Between 1960 and 1991, the share of world income for the richest 20% of the global population rose from 70% to 85%. Over the same period, all but the richest quintile saw their share of world income fall—and the meager share to the poorest 20% declined from 2.3% to 1.4%.⁵⁵

Globalization affects family income in complex ways. It may increase the income of all wage earners within the family,⁵⁶ or it may enable those who were not wage earners to earn income, often through the burgeoning informal sector.⁵⁷ It may increase the income of one family member and put another out of work. It may simultaneously increase income and devalue currency so that the family has more money but less purchasing capacity.⁵⁸ It may do all of this, and more, to one family within a breathtakingly brief period of time. Thus, the transformation of the global economy transforms economic and social relations within the family. Two changes are particularly pertinent for IFL purposes. First, the transformation of the global economy has transformed women's roles in the market and in the home. Second, in conjunction with the mobility described above,⁵⁹ support has become transnational.

243, 246 (2000); Chantal Thomas, *Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 1, 4 (1999) (noting how transformation of colonized states' economies into "satellites" of colonizing states' economies led to large scale transfer of resources). But see, e.g., NIALL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* 358–64 (2003) (challenging conventional wisdom that all empires are bad and noting that the British Empire spread wealth and technology and encouraged free movement of capital and labor).

55. HOLLY SKLAR, *CHAOS OR COMMUNITY: SEEKING SOLUTIONS, NOT SCAPEGOATS FOR BAD ECONOMICS* 162 (1995).

56. This may strain a marriage, especially when new roles within the family conflict with traditions. Often there are no positive cultural models. See, e.g., Rohter, *supra* note 49 (describing government's problems in convincing Chileans to use new divorce law). Efforts at scripting range from the earnest egalitarianism of MARLO THOMAS, *FREE TO BE YOU AND ME* (Francine Klagsburn ed., 1974), to the non-negotiable mandates of the Cultural Revolution described in HA JIN, *WAITING* (2000). When marriages between high earners do fall apart, moreover, there is more income and property at stake and thus a greater need for lawyers. *Id.*

57. Barbara Stark, *Women, Globalization and Law: A Change of World*, 16 PACE INT'L L. REV. 333, 350 (2004).

58. As when both partners are earning less, this is likely to strain relationships, especially as global marketing campaigns urge everyone to consume more. See, e.g., Somini Sengupta, *In India, Going Global Means Flaunting It*, N.Y. TIMES, Feb. 26, 2006, at 5 (arguing that "an extravagant ethos of bling" has arrived in India).

59. See *supra* Part II.A.

1. The Transformation of Women's Roles

The income shifts described in the preceding Section affect families because families function as economic units, although the details vary.⁶⁰ In general, women do most of the unpaid nurturing work, including reproductive work, within the family.⁶¹ While the specific division of labor varies from State to State, women everywhere do more cooking, cleaning, childrearing, and eldercare than men.⁶² In many States, moreover, women do not have the same opportunities to earn money⁶³ or own property⁶⁴ that men enjoy. Compared to men, women are dramatically disadvantaged economically. This is shown starkly and redundantly in U.N. data. As Noeleen Heyzer, Executive Director of the United Nations Development Fund for Women (UNIFEM), observed at the Beijing Conference on Women in 1995, "women constitute 70 percent of the world's 1.3 billion absolute poor. [They] work two-thirds of the world's working hours, but earn only one-tenth of the world's income and own less than one-tenth of the world's property."⁶⁵ As a corollary, women remain economically dependent on men.

60. This has been understood since there have been economists. See, e.g., FREDERICK ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* (Ernest Unterman trans., Charles H. Kerr & Co. 5th ed., 1902) (1884) (discussing the relation between the family, private property, and the state).

61. For a historical analysis, see JULIET MITCHELL, *WOMEN'S ESTATE* (1971). For a political analysis, see SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* (1989). For an economic analysis, see VICTOR FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* (1988). For an international analysis, see MARILYN WARING, *IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS* (1988).

62. See, e.g., JOAN WILLIAMS, *UNBENDING GENDER* 2 (2000).

63. Not only do women work an uncompensated "second shift," but also they work within a market structure that refuses to recognize other demands on women's time and that limits women's access to better paying, higher-status jobs. See FUCHS, *supra* note 61, at 4; ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 8 (1989); see generally ALICE KESSLER-HARRIS, *A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES* (1990) (providing a historical account of women's struggle for economic independence and a "real" wage).

64. For example, customary laws give married men exclusive control over their wives' property in Kenya, which effectively denies married women economic independence. Section on Africa: Gender and the Law in Sub-Saharan Africa: Envisioning the Future, Annual Meeting, Washington, DC (Jan. 6, 2006), available at <http://www.aals.org/am2006/program/friday.html>. See also CYNTHIA GRANT BOWMAN & AKUA KUENYEHIA, *WOMEN AND LAW IN SUB-SAHARAN AFRICA* 3–63 (2000), for a discussion of marriage in Sub-Saharan Africa.

65. Noeleen Heyzer, Executive Director of U.N. Dev. Fund for Women (U.N.I.F.E.M.), Statement at Fourth World Conference on Women, Beijing, China (Sept. 8, 1995), available at <http://www.un.org/esa/gopher-data/conf/fwcw/conf/unaf/950910180402.txt>; see also Bill Moyers, *Rich World, Poor Women, Now with Bill Moyers* (PBS television broadcast Sept. 5, 2003), available at <http://www.pbs.org/.now/politics/womenpoverty.html> (last visited Apr. 14, 2004).

As Nobel prize-winning economist Amartya Sen has demonstrated, however, the data both overstate and understate women's economic subordination.⁶⁶ First, such statistics understate women's economic subordination because they omit the women presumably born who never appear in the statistics. Sen summarizes the research showing a substantial biological component favoring women.⁶⁷ If women are treated as well as men, that is if they receive a proportionate amount of food, health care, and other resources, then there should be more women than men.⁶⁸ Using the sub-Saharan African ratio (1.02) of females to males, Sen estimates the number of "missing women" at more than 100 million.⁶⁹ These are the abandoned infant girls in China, the brides who die in "kitchen fires" in India, the baby girls in Africa who are not taken to the clinic to be treated for diarrhea as quickly as their brothers—the women and girls who have been unable to claim enough of the world's resources to survive.⁷⁰

Second, the picture shifts depending on whether, like Heyzer,⁷¹ we focus on commodities and income or whether we focus on what Sen calls "functionings and capabilities."⁷² As Sen has demonstrated, benefits such as communal health services, medical care, and basic education affect quality of life as surely as income indicators.⁷³ As Kerry Rittich has recently argued, however, globalization has eviscerated such programs, both as a result of Structural Adjustment

66. Amartya Sen, *Capability and Well-Being*, in THE QUALITY OF LIFE 30 (Martha Nussbaum & Amartya Sen eds., Oxford Univ. Press 1993).

67. AMARTYA SEN, *INEQUALITY REEXAMINED* 123–24 (1992).

68. *Id.*

69. Amartya Sen, *More Than One Hundred Million Women Are Missing*, N.Y. REV. BOOKS, Dec. 20, 1990, at 61 (cited in STEINER & ALSTON, *supra* note 22, at 896). In India, 36.7 million women are missing, in China 44 million, in North Africa 2.4 million, and in Latin America 4.4 million. Martha Nussbaum, *Introduction to WOMEN, CULTURE AND DEVELOPMENT* 3 (Martha C. Nussbaum & Jonathan Glover eds., Clarendon Press 1995). *But see* Eve Conant, *What Carried the Girls Away*, N.Y. TIMES MAGAZINE, Feb. 16, 2006, at 27 (describing a recent study suggesting that hepatitis B might have been responsible for some of Sen's missing women but also noting the growing impact of sex-specific abortions).

70. Each of the examples in this sentence raises IFL issues because each involves traditional family law issues (abandonment and neglect with respect to the baby girls in China and Africa, domestic violence in the case of the kitchen fires) and international human rights issues (specifically, gender discrimination). *See infra* Part II.B.2.a.

71. Moyers, *supra* note 65.

72. SEN, *supra* note 67, at 126 (describing programs in China, Sri Lanka, and Costa Rica.) In the Indian state of Kerala, similarly, "[w]hile incomes . . . are among the lowest, residents have the highest life expectancy at birth, a comparatively very low infant mortality rate, and higher level of literacy (especially female literacy, 87% compared to the national average of 39%)." *Id.* at 127.

73. *See id.* at 102–16.

Programs (SAPs) and the collapse of socialism in the former Soviet republics.⁷⁴

Globalization both improves women's situation and makes it worse. While a recent study by economists at the International Center for Research on Women concludes that "women have also benefited from improvements in the world economy,"⁷⁵ the experts in another symposium describe "the overall negative effects of globalization on women."⁷⁶ Everyone agrees that globalization affects men and women differently. This is attributable to their different roles and to the fact that men, in general, have higher incomes and greater access to capital.⁷⁷

Women earn less than men everywhere, but globalization seems to be narrowing the gap.⁷⁸ Economist Zafiris Tzannatos shows that while women's pay remained "remarkably stable at around two-thirds of male pay until 1970 . . . significant changes have taken place within the last few decades" in developing countries.⁷⁹ Women are catching up. Globalization seems to be decreasing the earnings gap between men and women, even as it increases economic polarization in general.⁸⁰

The transformation of women's roles shifts the balance of power within families.⁸¹ When women bring in more of the family's income,

74. KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM 43-47.

75. Rekha Mehra & Sarah Gammage, *Trends, Countertrends and Gaps in Women's Employment*, 27 WORLD DEV. 533, 534 (1999); see also Susan Horton, *Marginalization Revisited: Women's Market Work and Pay, and Economic Development*, 27 WORLD DEV. 571, 571 (1999).

76. Alfred C. Aman, Jr., *Introduction: Feminism and Globalization: The Impact of the Global Economy on Women and Feminist Theory*, 4 IND. J. GLOBAL LEGAL STUD. 1, 4 (1996); see also Saskia Sassen, *Toward a Feminist Analytics of the Global Economy*, 4 IND. J. GLOBAL LEGAL STUD. 7, 10 (1996). Women are paid less than men for doing the same work, and women are limited to low-income sectors by widespread sex-based occupational segregation. *Id.* In Brazil, for example, income earned by women is equivalent to 54% of that received by men. *Id.*

77. See *supra* text accompanying note 58.

78. Zafiris Tzannatos, *Women and Labor Market Changes in the Global Economy: Growth Helps, Inequalities Hurt and Public Policy Matters*, 27 WORLD DEV., 551, 552 (1999).

79. Tzannatos, *supra* note 76, at 552; Inter-Am. C.H.R., Report of the Inter-American Commission on the Status of Women in the Americas, OEA/Ser.L/V/II.100, doc. 17 (1998) [hereinafter Status of Women in the Americas]. In Costa Rica, for example, the average monthly salary of women was 82% of that of men in 1990. In Uruguay, women earned 75% of the income received by men. Status of Women in the Americas, *supra* note 78, at D. The Principles of Equality and Nondiscrimination in Labor Law.

80. See *supra* text accompanying note 60.

81. See Marion Crain, *"Where Have All the Cowboys Gone?": Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1906 (2000) ("Where gender roles in marriage were once clear, now they must be constantly negotiated and renegotiated, which is time-consuming and itself becomes an additional source of marital tension.").

it gives them more of a say. It enables some women to leave bad marriages where they would have otherwise been trapped.⁸² It may induce some men to stay in a relationship that has more of an economic benefit. But, it might also provoke a backlash, especially if the man of the house has lost his job.⁸³

At the same time, because of women's nurturing work within the family, they bear most of the burden when social welfare programs are cut. While some women need less support because they are able to earn more, accordingly, others need more support because of family break-down or the disappearance of social safety nets. Thus, even as globalization propels some women into the labor market, it forces others to assume care-giving responsibilities that, in the past, had been shared by the State. This is further complicated, as discussed below, by the increased mobility described in the preceding Section. In growing numbers of cases, support depends on transnational enforcement to be effective.

2. Transnational Support

The income shifts described above often separate wage earners from those in need of support, both by forcing migration and by creating fault lines within the family that result in marital breakdown. It becomes increasingly important, accordingly, to establish and enforce support obligations.⁸⁴ On the national level, Western States have established sophisticated data banks to track obligors. A creative range of enforcement mechanisms, from attaching tax refunds to revoking driving licenses, have dramatically improved compliance.⁸⁵

Internationally, however, there is no coordinated support system.⁸⁶ States have developed very different approaches to the

82. At the same time, traditional disapproval of divorce is likely to be weakening. See *supra* text accompanying notes 48–51.

83. See, e.g., Deborah M. Weissman, *The Political Economy of Violence: Toward an Understanding of the Gender-Based Murders of Ciudad Juarez*, 30 N.C. J. INT'L L. & COM. REG. 795 (2005) (analyzing the multiple causes of the Juarez murders).

84. WILLIAM DUNCAN, DEPUTY SEC'Y OF THE HAGUE CONFERENCE, TOWARD A NEW GLOBAL INSTRUMENT ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE REPORT, reprinted in STARK, *supra* note 10, at 111.

85. *Id.* Whether the support actually collected is sufficient is another question. See, e.g., Marsha Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 62–67 (1998) (noting that child support in the United States remains inadequate, notwithstanding the promulgation of guidelines); see generally Symposium, *Child Support*, 33 FAM. L. Q. 157 (1999) (discussing development and effects of child support guidelines).

86. This has been a growing concern for some time. See, e.g., David F. Cavers, *Draft Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, 21 AM. J. COMP. L. 154, 154 (1995); David F. Cavers,

matter, which complicate efforts to create such a system. "Maintenance," for example, may refer to child support, spousal support, or both.⁸⁷ Child support is increasingly addressed administratively, moreover, while spousal support is left to judicial discretion.⁸⁸ Thus, coordination may be necessary among several different administrative and judicial authorities in various States.⁸⁹ While the problem in the aggregate may be significant, the impact on any single State may not provide enough of an incentive to reform a domestic system (that may work quite well) to better harmonize with an international system (that may not work at all).

In addition to the basic lack of agreed-upon definitions, international cooperation is hampered by a deeper lack of normative consensus. The tension between Western hegemony and traditional cultures, discussed above, also plays out in conflicting norms regarding support. In traditional Muslim societies in the Middle East, for example, women are entitled to support only during three menstrual cycles, known as their "waiting period," after which they are on their own.⁹⁰ In Europe, in contrast, spousal support is often a function of the duration of the marriage. A long marriage, for example, is likely to result in extended support.⁹¹ Some of the Nordic States "assure" maintenance for the dependent spouse, and the burden of collecting the maintenance due from the obligor spouse is assumed by the State.⁹² Thus, the notion that one has an ongoing financial obligation to a former spouse, whether or not there are any children, is taken for granted in some cultures and anathema in others.⁹³

International Enforcement of Family Support, 81 COLUM. L. REV. 994, 994–97 (1981); David F. Cavers, *Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, in 1973 U.S. Dept. of State Report of the United States Delegation to the Twelfth Session of the Hague Conference, 12 INT'L. LEGAL MATERIALS 869 (1973); David F. Cavers, *Twelfth Session of the Hague Conference on Private International Law: Supplementary Report*, 21 AM. J. COMP. L. 593, 593 (1973).

87. DUNCAN, *supra* note 84.

88. *Id.*

89. *Id.*

90. In theory, the divorced woman will also be able to live on her dowry, or a portion of it, which is to be returned at divorce. See, e.g., The Muslim Women (Protection of Rights on Divorce) Act, 1986, No. 25 s3, Acts of Parliament, 1986 (India), available at www.sudhirlaw.com/themuslimwomen.htm (requiring that dower be paid). In practice, however, her claim is often unenforceable.

91. Matrimonial Causes Act, 1973, ch. 18, § 25 (Eng.), reprinted in STARK, *supra* note 10, at 123.

92. *Id.*

93. See Gloria Folger DeHart, *Comity, Conventions, and the Constitution: State and Federal Initiatives in International Support Enforcement*, 28 FAM. L.Q. 89, 100 (1994) (stating that enforcement of spousal support is requested, but not required, to establish reciprocity of support); William Duncan, *The Hague Conference on Private International Law and its Current Programme of Work Concerning the International Protection of Children and Other Aspects of Family Law*, 2 Y.B. PRIVATE INT'L. L. 41,

C. *How Culture Changes Everything*

But cultures are changing. It is not just dollars that are flowing freely around the world but Western culture, constitutionalism and Coca Cola, free market ideology and Angelina Jolie.⁹⁴ While the impact of globalization on cultures is complex, for present purposes it is useful to focus on three major consequences. First, globalization means westernization. As Boaventura de Sousa Santos explains, globalization is “the process by which a given local condition or entity succeeds in expanding its reach over the globe and, by doing so, develops the capacity to designate a rival social condition or entity as local.”⁹⁵ In the context of IFL, globalization has become synonymous with the inundation of Western culture. Rival social conditions that traditionally defined the family are designated as local.

Second, as Nathan Glazer concedes, “[w]e are all multiculturalists now.”⁹⁶ It is widely accepted that there are many different ways of being in the world, and that these are culturally and socially constructed.⁹⁷ Indeed, international human rights law explicitly recognizes and protects a right to culture.⁹⁸ Third, as

42–44 (2000); Francis Raday, *Transnational Maintenance Obligations*, 13 ISR. L. REV. 525, 526 (1978) (noting the difference between Turkish and Israeli laws on spousal maintenance).

94. Jolie brought the dilemma of international adoption to supermarket checkouts across the country. See, e.g., Anthony Mitchott & Nyra Mahmood, *Angelina was Duped over Adoption of Baby Zahara*, THE NAT'L ENQUIRER, Sept. 26, 2005, available at <http://www.nationalenquirer.com/celebrity/63421> (claiming that the birth mother of Jolie's adopted daughter was in fact alive, contrary to court papers).

95. Boaventura de Sousa Santos, *Oppositional Postmodernism and Globalization*, 23 L. & SOC. INQUIRY 121, 135 (1998); see also Jane Jenson & Boaventura de Sousa Santos, *Introduction* to GLOBALIZING INSTITUTIONS 13 (Jan Jenson & Boaventura de Sousa Santos eds., 2000) (noting the “vernacularization of historical religious sites for tourists”). As critical theorist Huyssen argues, “[e]specially with the help of the new technological media of reproduction and dissemination monopoly capitalism has succeeded in swallowing up all forms of older popular cultures, in homogenizing all and any local or regional discourses, and in stifling by co-option any emerging resistances to the rule of the commodity.” ANDRES HUYSEN, *AFTER THE GREAT DIVIDE: MODERNISM, MASS CULTURE, POSTMODERNISM* 21 (Teresa de Lauretis ed., 1986).

96. NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* 13–14 (1997).

97. For an enlightening introduction, see Amy Gutman, *Introduction* in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 4 (Amy Gutman ed., 1994). For a rigorous and provocative feminist explication, see Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001).

98. International Covenant on Civil and Political Rights art. 27, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter the Civil Covenant]; International Covenant on Economic, Social and Cultural Rights art. 16, Jan. 3, 1976, 993 U.N.T.S. 3. This is reflected in the proposed guidelines for a new maintenance convention. DUNCAN, *supra* note 84. The 1956 Convention, drafted when “family law” referred to the family law of the Western imperial powers, was assumed to be relatively homogenous. This was no longer the case in 1973, when the revised Convention explicitly provided for States to opt out in cases of conflicting public policies. *Id.*

American feminist Katha Politt observes, "[i]n its demand for equality for women, feminism sets itself in opposition to virtually every culture on earth. You could say that multiculturalism demands respect for all cultural traditions, while feminism interrogates and challenges all cultural traditions."⁹⁹ The family is both women's traditional domain and a major site of women's historical oppression. It is not surprising, accordingly, that it is also a profoundly contested site in which to observe the ways in which globalization plays out. Among feminists, the family is a site of ongoing ambivalence. As globalization has brought different cultures into closer proximity, sometimes even into the same family, this ambivalence has become deeper, more complex, nuanced, and contentious.¹⁰⁰

All three of these factors—the dominance of Western culture, the simultaneous recognition of multiculturalism, and the focus on the family as "ground zero in the gender wars"¹⁰¹—affect IFL. This is demonstrated graphically in the context of child custody. First, Western notions of the "best interests of the child" are in direct conflict with Islamic rules regarding child custody.¹⁰² The dominance of Western culture is reflected in the Convention on the Rights of the Child,¹⁰³ which explicitly endorses "the best interests of the child" standard,¹⁰⁴ familiar to those in the United States from its own child custody laws. Under Islamic law, in contrast, custody of a child under seven is generally awarded to the mother, while custody of an older child is generally awarded to the father.¹⁰⁵ While the result

99. Katha Politt, *Whose Culture?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 29 (Joshua Cohen et al. eds., 1999).

100. Some of the premises of feminist theory, for example, have been exposed as the premises of liberal feminist theory as they come into contact with "other" cultural premises. Volpp, *supra* note 97, at 1181–83; see also Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 29 (2002) (discussing feminism's victim subject and its disempowering effect on Third World women).

101. JUNE CARBONE, FROM PARTNERS TO PARENTS 180, 193 (2000).

102. DUNCAN, *supra* note 84.

103. G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No.49, U.N. Doc.A/44/49 (Nov. 20, 1989), *entered into force* Sept. 2, 1990.

104. *Id.* at art. 3.1. This standard has been criticized widely among those who have adopted it because of its indeterminacy and the enormous discretion it vests in the decisionmaker. See, e.g., *infra* note 123 (describing growth of fathers' rights groups, whose members argue that the standard favors mothers). But see, e.g., Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 192–203 (1992) (analyzing cases to show that primary caretaker presumption actually benefits fathers). See generally Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 300–16 (1992) (applying feminist analysis of the primary caretaker presumption in Minnesota and West Virginia). For a comprehensive history of custody law in the United States, see MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS* (1994).

105. There are variations among the different schools of Islamic law and among different Islamic States. For a current survey of family law in the twenty-two Islamic

may be the same in some cases, usually the different standards will produce different outcomes. Even where the result is the same, where the mother would receive custody under both the best interest standard and the age of the child standard, neither court will adopt the reasoning of the other.¹⁰⁶ There is no treaty, accordingly, providing for recognition of custody awards between Islamic and Western States. Instead, States enact restrictive legislation to prevent parents from taking children to States where their laws will not be recognized¹⁰⁷ and issue warnings to their nationals.¹⁰⁸

At the same time, multiculturalism is also reflected in the IFL custody context. Parties to the Convention on Abduction,¹⁰⁹ for example, have agreed to disagree.¹¹⁰ Under the Convention, States agree to defer to the judgments of other States, as long as doing so will not “expose the child to . . . harm”¹¹¹ or violate “human rights and fundamental freedoms” recognized by the requested State.¹¹² This broad discretion permits the fact-finder to base a decision on culturally sensitive factors. The foreign court will recognize the resulting decision even where the second court would not have framed the inquiry in the same way. Thus, State Parties agree to respect the determination of the foreign fact-finder who has agreed to be bound by the same inchoate standard.

States, in Africa and Asia as well as the Middle East, see Islamic Family Law, <http://www.law.emory.edu/IFL/index2.html> (last visited Sept. 30, 2006). For an overview of Islamic laws, codified as well as uncoded, in the Arab world, see DAWOUD EL ALIMI & DOREEN HINCHCLIFF, *ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD* (1996). See also Azizah Al-Hibri, *Marriage Laws in Muslim Countries: A Comparative Study of Certain Egyptians, Syrian, Moroccan, and Tunisian Marriage Laws*, in *GENDER BIAS AND FAMILY LAW*, *supra* note 17, at 231–33.

106. Interestingly, an age of the child standard was once part of U.S. law. The tender years doctrine in the United States, under which maternal custody of children under ten was presumed to be in the child's best interest, has been rejected, but not that long ago. See *Pusey v. Pusey*, 728 P.2d 117, 120 (Utah 1986) (stating that tender years presumption is based on outdated stereotypes); *Ex parte Devine*, 398 So. 2d 686, 695 (Ala. 1981) (holding the doctrine unconstitutional); *Bazemore v. Davis*, 394 A.2d 1377, 1390 (D.C. 1977) (doctrine violates best interest standard).

107. See, e.g., Child Abduction Act, 1984, c. 37 (Eng.).

108. See, e.g., U.S. Dep't of State, International Child Abduction/Islamic Family Law, http://travel.state.gov/family/abduction/resources/resources_557.html (last visited Sept. 30, 2006) (warning of possible subjection to Islamic family law).

109. See Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, http://www.international-divorce.com/hague_conv_text.htm [hereinafter Abduction Convention]. This has been implemented in the United States through the International Child Abduction Remedies Act, 42 U.S.C. § 11601 (2002).

110. Sensitivity to multiculturalism is not limited to abduction cases. Rather, it plays out in many ways in the context of child custody. See, e.g., Woody Baird, *Appeals Court Hears Chinese Custody Case*, SFGATE.COM, Feb. 15, 2005, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/02/15/national/a000556S27.DTL> (describing high profile case raising question of Tennessee judge's bias against Chinese parents of six-year-old temporarily left with U.S. couple, who filed for adoption).

111. Abduction Convention, *supra* note 109, at art. 13.

112. *Id.* at art. 20.

Finally, recognizing the family as ground zero in the gender wars¹¹³ has profound and sometimes counterintuitive implications for international custody law.¹¹⁴ The best interest of the child test, for example, although gender-neutral on its face, undermines traditional presumptions of maternal custody. In the United Kingdom, Canada, and the United States, for example, fathers have successfully relied on that standard to defeat mothers' claims.¹¹⁵ The major impetus for the Hague Convention on Abduction, similarly, was to deter child abduction by the parent with the means to whisk the child out of the country.¹¹⁶ In practice, however, it is increasingly used to return domestic violence victims and their children to the jurisdictions of their violent husbands.¹¹⁷ Thus, international treaty terms, although facially gender neutral, in practice operate to deprive mothers of custody and to return domestic violence victims to their abusers.

How Globalization Affects IFL

Globalization	How IFL is Affected
Mobility	Divorce – Distance strains marriages and divorce becomes increasingly available
Income Shifts	Support – Challenges traditional arrangements, lack of coordination among national regimes, widely varying norms
Culture	Custody – Best interests of the child (from whose perspective?) vs. Age of child standard

113. This notion is central to both charges of Western hegemony and the embrace of multiculturalism described above. Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights, and the Empowerment of Women*, 34 GEO. WASH. INT'L. L. REV. 483, 483–84 (2002–2003); see also Islamic Family Law, *supra* note 105 (noting Islamic laws that deny custody to women who reject traditional roles).

114. Applying a gender perspective to ostensibly neutral laws often exposes hidden bias. U.S. feminist Katherine Bartlett calls this “asking the woman question.” Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831 (1989–1990).

115. See Becker, *supra* note 104, at 172–83; Symposium, *Protection of Children at Divorce*, 65 LA. L. REV. 1293 (2004–2005) (analyzing cases in the United Kingdom and Canada). For a discussion of the ways in which courts subject men as well as women to gender bias in custody cases, see Nancy Levitt, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1073–79 (1995–1996).

116. Abduction Convention, *supra* note 109, at pmb1.

117. Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000) (describing cases in which victims of domestic violence have been returned to the jurisdiction of their abusers under the Act); see also Merle Weiner, *Using Article 20*, 38 FAM. L.Q. 583, 583–84 (2004) (suggesting Article 20 as a remedy); Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT'L. L.J. 41, 42 (2003) (calling for Convention protection of children and spouses from domestic violence).

III. HOW HUMAN RIGHTS LAW AFFECTS IFL

A. *How Human Rights Norms Apply in General*

1. In Theory

Human rights law is grounded in the Universal Declaration of Human Rights, drafted in 1948.¹¹⁸ In horrified response to the Nazi atrocities, States recognized that individuals had rights against the State itself. These include civil and political rights, such as the right to vote, freedom of expression, and freedom from arbitrary detention or torture.¹¹⁹ These rights are familiar to those in the United States from our their own Constitution. The Universal Declaration also includes economic and social rights, such as the right to health care and an adequate standard of living.¹²⁰

The Universal Declaration was merely aspirational¹²¹ because the parties did not intend it to be legally binding.¹²² Rather, it was expected that a binding convention would be drafted in due course.¹²³ By 1952, however, it was clear that the ideological schism between the Soviets and the United States precluded a single convention.¹²⁴ In addition, there was an emerging consensus that different kinds of rights could be better implemented by different mechanisms.¹²⁵ Instead of one legally binding convention, accordingly, two were

118. Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter Universal Declaration].

119. *Id.* at art. 21.3 (right to vote), art. 19 (freedom of expression), art. 5 (freedom from torture), art. 9 (freedom from arbitrary detention).

120. *Id.* at art. 25.

121. The Universal Declaration adopted stirring but imprecise language, allowing it to be appropriated by opposing camps. It has been cited both by those in favor of same-sex marriage and those opposed. Compare Edward H. Sadtler, *A Right to Same-Sex Marriage Under International Law: Can It Be Vindicated in the United States?*, 40 VA. J. INT'L L. 405, 417 (1999) (arguing that the Universal Declaration implies a right to same-sex marriage) with Scott T. FitzGibbon, *The Formless City of Plato's Republic: How the Legal and Social Promotion of Divorce and Same-Sex Marriage Contravenes the Principles and Undermines the Projects of the Universal Declaration of Human Rights*, ISSUES IN LEGAL SCHOLARSHIP, Aug. 2004, at 5, available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1059&context=ils> (arguing that same-sex marriage contravenes the Universal Declaration).

122. Many of the provisions set out in the Universal Declaration have since become binding as a matter of customary international law. LOUIS HENKIN ET AL., HUMAN RIGHTS 322 (1999).

123. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS ORIGINS, DRAFTING AND INTENT 12–19 (1999).

124. *Id.* at 18–19.

125. *Id.*

drafted: the International Covenant on Civil and Political Rights (the Civil Covenant)¹²⁶ and the Economic Covenant.¹²⁷

Human rights law traditionally focuses on the individual's rights vis-à-vis the State, that is, the State's treatment of its people.¹²⁸ While the family has always been recognized and protected under international human rights law,¹²⁹ the focus has similarly been on the family's rights vis-à-vis the State.¹³⁰ As globalization has facilitated the spread of the "human rights' idea," however, human rights have increasingly come into contact and conflict with family laws. The Section below explains how human rights law protects families. The Section which follows focuses on the rights of individuals within the family against each other.

a. Human Rights of the Family

For the most part, the distinction between civil/political and economic/social rights noted above¹³¹ also applies to rights regarding the family. The Civil Covenant addresses negative obligations of the State; that is, it imposes limits on State interference with individuals or families.¹³² The Economic Covenant, in contrast, basically addresses affirmative obligations of the State, including the provision of welfare and social security benefits.¹³³ In Article 10 of the Economic Covenant, for example, the parties recognize that mothers are entitled to "special protection" before and after childbirth, including paid leave.¹³⁴ Thus, a State Party would be required to

126. *Id.* at 19–20

127. *Id.* Together with the Universal Declaration, these comprise the International Bill of Rights. *Id.*

128. Thus, the subject of human rights law historically has been the persecuted, silenced, wrongly-detained (male) "prisoner of conscience." See, e.g., HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW* 231–37 (2000); Temma Kaplan, *Women's Rights as Human Rights: Women as Agents of Social Change*, in *WOMEN, GENDER, AND HUMAN RIGHTS* 191, 191–93 (Marjorie Agosin ed., 2001).

129. See, e.g., LOUIS HENKIN, *THE AGE OF RIGHTS* 150–51 (1990).

130. FitzGibbon, *supra* note 121, at 16 (explaining the Universal Declaration as a "reaction against attacks on the family").

131. See *supra* text accompanying notes 104–05.

132. Civil Covenant, *supra* note 98.

133. Economic Covenant, *supra* note 23. There is an overlap between the Covenants. As set out in the Universal Declaration, "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." *Id.* at art. 16.3. Article 23 of the Civil Covenant expressly reiterates the State's obligation to protect the family as "the natural and fundamental group unit of society." *Id.* at art. 23. Article 10 of the Economic Covenant, similarly, provides that, "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children." *Id.* at art. 10.

134. *Id.*

incorporate into domestic law either welfare provisions assuring compensation or a requirement that private employers do so.

But the distinction between economic/social and civil/political rights plays out differently in the family context. For example, as described above,¹³⁵ some States support unmarried or separated women and their children, while others view such support as the father/husband's responsibility. Still others consider support subject to an ongoing relationship, so that the obligation effectively ends when the relationship does.¹³⁶ The obligation to assure "an adequate standard of living" under the Economic Covenant specifies neither the mechanisms for doing so nor the source of the support. Thus, either of the first two approaches (State support or State-enforced support by a former spouse) satisfies the Covenant. Even the last option, where support ends with the relationship, would arguably be permissible if such support were not necessary to assure an adequate standard of living.

If the divorced spouse or children of unmarried parents do not enjoy an adequate standard of living, however, failure to assure support raises human rights issues. As a result of globalization and the elimination of social safety nets,¹³⁷ family support is increasingly privatized; that is, responsibility is shifting from State support to support by family members. The State's failure to assure a minimum core standard, however, remains a human rights violation.

b. Human Rights Within the Family

Individuals' obligations to each other (such as parents' obligation to support their children), have traditionally been regarded as private matters. That is, the State has been prohibited from interfering with the intact family. Family privacy has prevented State intervention where family members have abused or neglected children¹³⁸ or spouses. Privacy has also been relied upon in the United States to

135. See *supra* Part II.B.

136. See generally EL ALAMI & HINCHCLIFFE, *supra* note 105 (describing Muslim laws).

137. See RITTICH, *supra* note 74, at 45.

138. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 203 (1989) (noting that workers who failed to protect a child from an abusive father "would likely have been met with charges of improperly intruding into the parent-child relationship" had they moved too soon to take custody away from the father). *But see generally* Patricia Wald, *Government Benefits: A New Look at an Old Gift Horse*, 65 N.Y.U. L. REV. 247 (1990) (criticizing Supreme Court's decision in *DeShaney v. Winnebago*). See also Barbara Armacost, *Affirmative Duties, Systematic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 985 (1996) (defending the decision as appropriate deference to legislature.); cf. *A v. U.K.*, [1999] 27 EHRR 611 (observing that European Court of Human Rights might hold member States liable for failure to protect children from abusive parents).

limit state restrictions on contraception¹³⁹ and abortion.¹⁴⁰ In the European Union, privacy has been relied upon to protect homosexual relationships.¹⁴¹ In many States, the family is viewed as a protected zone, in which ordinary rules can and should be suspended for the benefit of vulnerable family members, particularly women and children.

A broad range of theoretical arguments as well as practical developments has challenged this view. Some claim family laws do not, in fact, protect the vulnerable members of the family; rather, they perpetuate traditional patterns of domination and subordination.¹⁴² Others suggest that protection is no longer necessary.¹⁴³ Finally, the case has been made that the fundamental structure of family law itself is not only gendered but also bad for women.¹⁴⁴

Human rights law has become a powerful tool with which to challenge the public/private distinction.¹⁴⁵ The incursion of the State into the traditionally private sphere of the family, for example, has been justified on the grounds of the significant human rights at

139. *Griswold v. Conn.*, 381 U.S. 479 (1965) (striking down Connecticut statute prohibiting the prescription of contraceptives for married couples). *See also Carey v. Population Servs.*, 431 U.S. 678 (1977) (addressing an individual's right to access to contraceptives).

140. *See, e.g., Roe v. Wade*, 410 U.S. 139 (1973). Grounding a right to abortion in "privacy" jurisprudence has proven problematic. For a thoughtful historical analysis, see generally Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992). *See also Planned Parenthood v. Casey*, 505 U.S. 833 (1992); Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2025 (1994) (criticizing the decision for failing to establish a coherent methodology). For a pragmatic analysis, see generally Kathleen Sullivan, *The Supreme Court 1991 Term, Foreward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

141. *Dudgeon v. U.K.*, [1981] 4 Eur. Ct. H.R. 149 (holding that criminalization of homosexual practices between consenting adults violated Article 8 of the European Convention on Human Rights). In the United States, in contrast, protection for same-sex relationships has been grounded in "equality." *See also infra* Part IV.C.2.

142. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 32–45 (1987).

143. *See, e.g., Orr v. Orr*, 440 U.S. 268 (1979) (rejecting "old notion" that the man was responsible for providing a home as gender discrimination). *But see* Donald G. McNeil Jr., *Real Men Don't Clean Bathrooms*, N.Y. TIMES, Sept. 19, 2004, at 4.3 (summarizing a recent report of Bureau of Labor Statistics documenting the persistence of gendered division of labor).

144. MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 70 (1995); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498–99 (1983).

145. *But see* Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143, 147 (Dorinda Dallmeyer ed., 1993) (explaining how the dichotomy may be useful for women.)

stake.¹⁴⁶ Thus, the family privacy argument has largely been rejected where it shields violations of human rights, at least in theory.¹⁴⁷ In 1993, 190 States signed the Declaration on the Elimination of Violence Against Women,¹⁴⁸ which explicitly recognizes domestic violence as a violation of women's human rights.

Human Rights and the Family: Some Examples

	Civil/Political	Economic/Social
Human Rights of the Family	privacy, contraception, abortion	support from State, paid maternity leave assured by State
Human Rights Within the Family	to be free from domestic violence	support from wage earner or parent to dependent spouse or child

2. In Practice

Human rights norms are increasingly applied to family law issues throughout the world.¹⁴⁹ Human rights law may be applied as a result of State ratification of human rights treaties.¹⁵⁰ Examples range from the requirement that Ireland permit the dissemination of information about abortion pursuant to the European Convention on

146. *Id.* at 150.

147. *See, e.g.*, Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, art. 19.1 (stating Parties shall take all appropriate measures in preventing violence against children).

148. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104 (Dec. 20, 1993).

149. *See, e.g.*, Carsten Smith, Chief Justice, Supreme Court of Norway, *Human Rights as the Foundation of Society*, in *FAMILY LIFE AND HUMAN RIGHTS* 15 (Peter Lodrup & Eva Modvar eds., 2004).

150. There are two basic ways in which countries deal with international treaties. In monist legal systems, like the Netherlands, once human rights instruments are ratified, they are incorporated into domestic law. MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW* 176 (2001). As part of domestic law, the substantive provisions of the instruments may be relied upon as substantive domestic law. *Id.* In dualist legal systems, like the United States, in contrast, human rights instruments (as well as other international treaties) do not become part of domestic law until—and unless—domestic implementing legislation is enacted. *Id.* at 188. This is further complicated in the United States by the doctrine of self-executing treaties. That is, certain treaties (such as friendship, commerce, and navigation treaties) are considered self-executing, and no domestic legislation is required. *Id.* at 173–76. Since none of the human rights treaties are self-executing, however, this does not change the basic analysis here. Even in countries where domestic legislation is not legally required, moreover, as a practical matter it may be necessary. *Id.* As Arthur Chaskalson, former Chief Justice of the South African Supreme Court, has explained, courts are ill-equipped to enforce broad statements of economic rights. Arthur Chaskalson, former Chief Justice of the South African Supreme Court (Nov. 3, 2004).

Human Rights¹⁵¹ to the procedural safeguards for surrendering parents in international adoptions under the Convention on Inter-country Adoption.¹⁵² In some cases, international human rights support domestic law, such as the United Nations Children Fund (UNICEF) Report on Child Marriage,¹⁵³ which strongly affirms India's Child Marriage Restraint Act of 1929.¹⁵⁴

In other cases, human rights norms challenge domestic law. Where the State has ratified the pertinent treaty but failed to conform its own laws and practices, it is in violation of international law.¹⁵⁵ In some States, individuals can seek relief in domestic courts.¹⁵⁶ In others, the treaty monitoring bodies are likely to criticize the State, providing leverage for local groups. NGOs may focus their campaigns on recalcitrant States. In Kenya, for example, Human Rights Watch has documented the ways in which customary law regarding marital property leaves Kenyan women destitute and without recourse at divorce, in violation of the Women's Convention.¹⁵⁷

Even where a State fails to ratify the human rights conventions, international human rights norms have been adopted in a broad range of contexts to provide normative guidance. Municipalities, like San Francisco, and states, like Massachusetts, have explicitly drawn on international human rights law to signal support for a range of

151. United Nations Population Division, Country Profiles: Ireland, <http://www.un.org/esa/population/publications/abortion/profiles.htm> (last visited Oct. 19, 2006).

152. Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption, Chapt. II, May 29, 1993, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=69.

153. UNICEF, INNOCENTI RES. CTR., EARLY MARRIAGE: CHILD SPOUSES, 7 INNOCENTI DIGEST 3 (2001). In the United States, similarly, many of the Articles of the Civil Covenant are viewed as coterminous with similar guarantees in the Constitution.

154. *Id.* at 8. STARK, *supra* note 10, at 16. In England and some parts of Canada, premarital agreements regarding property and maintenance are not binding. Rather, the court's "power to do economic justice at divorce" trumps. See *infra* notes 206–08. For a rigorous analysis of the ways in which several States have incorporated international treaty norms related to gender, see Ruth Rubio-Marin & Martha Morgan, *Constitutional Domestication of International Gender Norms*, in GENDER AND HUMAN RIGHTS 113 (Karen Knop ed., 2004). This basic notion of "economic justice," is absent from U.S. law in general. See, e.g., Barbara Stark, *The ALI Principles and International Human Rights Law*, in CRITICAL PERSPECTIVES ON THE ALI PRINCIPLES 404 (Robin Fretwell Wilson ed., 2006) (arguing that the Principles are too vague about substantive requirements).

155. It may not, however, violate domestic law. JANIS & NOYES, *supra* note 150, at 176 (explaining the difference between monist and dualist systems).

156. In the Netherlands, for example, nationals can sue for violation of human rights in domestic courts. Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1414 (1998) (discussing "judicial internalization" in which domestic litigation prompts adoption of international norms).

157. *Double Standards: Women's Property Rights Violations in Kenya*, 15 HUM. RTS. WATCH 1, 25 (2003), available at <http://hrw.org/reports/2003/kenya0303>.

concerns, from gay rights to democracy in Burma.¹⁵⁸ Multinational corporations have adopted Model Codes of Conduct, both to signal support for human rights and, it has been suggested, to preempt binding regulation.¹⁵⁹ Even if particular human rights instruments are not ratified or acceded to by the State, they may be relied upon as non-binding "soft law."¹⁶⁰ Even if these norms are not recognized as soft law, they may be cited as persuasive authority.¹⁶¹

International human rights norms, while not explicitly incorporated in U.S. family law, increasingly influence that law.¹⁶² This is the result of two distinct but converging trends: first, the increasing receptivity of U.S. courts to human rights in general, and second, the increasing application of human rights norms to family law issues, by human rights bodies as well as domestic courts, throughout the world.¹⁶³

The new openness of U.S. courts to human rights is shown in several recent Supreme Court decisions.¹⁶⁴ In *Roper v. Simmons*,¹⁶⁵

158. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (holding Massachusetts Burma law restricting the ability of Massachusetts and its agencies to purchase goods or services from companies that did business with Burma invalid under the Supremacy Clause).

159. See Neil Kearney, *Corporate Codes of Conduct: The Privatized Application of Labour Standards*, in REGULATING INTERNATIONAL BUSINESS BEYOND LIBERALIZATION 208 (2000) (suggesting that "the great majority of corporate codes have been little more than public relations exercises").

160. The Sullivan Principles in South Africa are a well-known example of the use of soft law to promote human rights. S. PRAKASH SETHI, *SETTING GLOBAL PRINCIPLES* 95 (2003).

161. Justice Stephen Breyer, Remarks at Georgetown Univ. Law Ctr. (Jan. 5, 2006), available at <http://www.law.georgetown.edu/news/documents/BreyerTranscriptJan06.pdf>.

162. Berta Hernandez-Truyol, *Asking the Family Question*, 38 FAM. L. Q. 481, 481 (2004).

163. See *supra* Part III.A.1.

164. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (upholding the affirmative action program at the University of Michigan Law School, explicitly citing "the international understanding of the office of affirmative action" in the International Covenant on the Elimination of All Forms of Racial Discrimination, Nov. 20, 1963, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force Jan. 4, 1969), to which the United States is a party, and the Women's Convention, to which the United States is a signatory). Post 9-11 developments, including challenges to the interrogation and detention of "war on terror" detainees, while not explicitly relying on international law, similarly demonstrate an encouraging respect for its norms. See, e.g., *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that U.S. District Courts have jurisdiction to hear challenges to legality of detention of foreign nationals captured abroad and incarcerated at Guantanamo Bay, Cuba); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that a citizen detained by the United States as an enemy combatant had to be given a meaningful opportunity to challenge that detention before a neutral decisionmaker, even if the detention was authorized by Congress). But see, e.g., *Medellin v. Dretke*, 544 U.S. 660, 663 (2005) (dismissing its own writ of certiorari regarding the effect of the International Court of Justice's decision in *Avena*, holding that U.S. courts must reconsider cases where foreign criminal defendants had not been advised of their rights under the Consular Convention.); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004)

the Court finally joined the rest of the world in rejecting the juvenile death penalty. While expressly noting that “[t]he overwhelming weight of international opinion against juvenile death penalty is not controlling here,” Justice Kennedy stressed that such opinion,

provides respect and significant confirmation for the Court’s determination that the penalty is disproportionate punishment for offenders under 18. The United States is the only country in the world that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom.¹⁶⁶

For family lawyers, *Roper* suggests openness to other States’ perspectives on juveniles.¹⁶⁷

In *Lawrence v. Texas*,¹⁶⁸ the Court struck down a Texas sodomy statute by citing to an international human rights instrument. The majority explicitly referred to the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁶⁹ for the proposition that homosexual activity should not be criminalized.¹⁷⁰ At least some members of the court are showing what Justice Blackmun, citing the Declaration of Independence, referred to as a

(reversing Ninth Circuit decision that the extraterritorial arrest and detention of Alvarez gave rise to a cause of action under the Alien Tort Claims Act, holding that the Act enabled federal courts to hear claims in a “very limited category” of cases).

165. 543 U.S. 551 (2005). For a cogent analysis of the role of foreign law in this decision, see Comment, *The Debate Over Foreign Law in Roper v. Simmons*, 119 HARV. L. REV. 103 (2005). For a thoughtful assessment from an internationalist, see Roger P. Alford, *Roper v. Simmons and Our Constitution in International Equipose*, 53 UCLA L. REV. 1 (2005).

166. *Roper*, 543 U.S. at 554.

167. It has been argued, for example, that there is an emerging consensus against the use of corporal punishment by parents on the international level. See, e.g., Convention on the Rights of the Child, *supra* note 147 (“States Parties shall take all appropriate . . . measures to protect the child from all forms of physical or mental violence . . .”). On the domestic level, see, e.g., SATOSHI MINAMIKATA & TEIKO TAMAKI, *Family Law in Japan During 2000*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 221 (Andrew Bainham ed., 2002); CrimA. 4596/98 Israel v. Plonit [2000] (Israeli court convicted a mother of assault and abuse); RHONA SCHUZ, *Child Protection in the Israeli Supreme Court: Tortious Parenting, Physical Punishment, and Criminal Child Abuse*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 165 (Andrew Bainham ed., 2001). In many States, however, corporal punishment remains legal. See, e.g., ELAINE E. SUTHERLAND, *Family Law in Scotland*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 379, 389 (Andrew Bainham ed., 2003); *Committee on the Rights of the Child: Summary of the 909th Meeting*, CRC/C/SR.909 (Oct. 3, 2003) (noting that Singapore supports the use of corporal punishment in the court system, schools, and at home).

168. 123 S. Ct. 2472, 2481 (2003).

169. Nov. 4, 1950, 213 U.N.T.S. 22 (entered into force Sept. 3, 1953).

170. *Lawrence*, 123 S. Ct. at 2481.

"decent respect for the opinion of mankind."¹⁷¹ *Lawrence*, moreover, shows the Court's recognition of the pertinence of human rights norms in the context of intimate relationships, which have historically been the province of family law.¹⁷²

The incorporation of international human rights law has additional, equally important consequences for domestic law. First, recognition of human rights law promotes increased participation in private international law regimes, such as the pending Convention on Maintenance, which incorporate human rights norms.¹⁷³ Second, recognition of human rights law by national courts encourages greater respect for the decisions of those courts by foreign courts.¹⁷⁴ Third, international human rights law may be relied upon to fill gaps in domestic law.

Where international human rights law corresponds to a lacuna in domestic law, it is often regarded with suspicion, as a foreign imposition.¹⁷⁵ Or it may simply be viewed as unnecessary. This is often the case when domestic family law confronts two of the most contentious and important norms in international human rights law: gender equality and economic rights.

171. Harry A. Blackmun, *The Supreme Court and the Law of Nations: Owning a Decent Respect to the Opinions of Mankind*, 88 AM. SOC'Y INT'L L. PROC. 383, 383 (1994).

172. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 439-40 (2005).

173. DUNCAN, *supra* note 84, at para. 13.

174. HAROLD HONGJU KOH, ASSISTANT SEC'Y OF STATE, *Introduction to 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES* (2000), available at www.state.gov/www/global/human_rights/1999_hrp_report/overview.html (describing transnational human rights networks).

175. The Economic Covenant, for example, has no counterpart in U.S. jurisprudence, and the United States has historically been hostile to these rights. In part, this hostility can be attributed to the rhetoric of opportunity, the rhetoric of the "American Dream." Barbara Stark, *Postmodern Rhetoric, Economic Rights and an International Text: "A Miracle for Breakfast"*, 33 VA. J. INT'L L. 433, 438 (1993). In part, it can be attributed to the Cold War, to what Professor Henkin has referred to as the "blind confusion of ideological communism . . . with commitment to the welfare of individual human beings." LOUIS HENKIN, *Preface to HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY*, at XX (Louis Henkin & John Lawrence Hargrove eds., 1994). *But see* Charles L. Black Jr., *Further Reflection on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1104-05 (1986) (arguing that economic rights can be grounded in Constitution); Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L. J. 1623, 1627-28 (1988) (noting the "intellectual power" of constitutionality-based arguments for economic rights); Frank I. Michaelman, *Forward on Protecting the Poor Through The Fourteenth Amendment*, 83 HARV. L. REV. 7 *passim* (1969) (exploring the Fourteenth Amendment as vehicle to protect against poverty). For a thoughtful analysis of the Supreme Court's resistance to economic rights, see Jonathan R. Macey, *Some Causes and Consequences of the Bifurcated Treatment of Economic Rights and "Other" Rights Under the United States Constitution*, in ECONOMIC RIGHTS 141, 151-70 (Ellen Frankel Paul et al. eds., 1992).

B. Two Crucial Norms

The preceding Section explained the State's obligation to assure the human rights of its people, both as members of a family (*vis-à-vis* the State) and as individuals within a family (*vis-à-vis* each other). This Section hones in on specific, rather than general, obligations: human rights norms regarding gender equality and economic rights. It analyzes the impact of these norms in two of the contexts discussed in the preceding Section, divorce and financial arrangements at divorce, to show how these norms influence IFL, both separately and in tandem.

1. Gender Equality

The Women's Convention provides a useful framework for recognizing and reallocating the costs of ongoing gender discrimination. It begins by defining the phrase "discrimination against women" to mean "*any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*"¹⁷⁶ This effectively holds the State responsible for *all* discrimination on the basis of gender, whether through state policy or private prejudice.¹⁷⁷ Article 2 of the Women's Convention further requires the State "[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."¹⁷⁸ Thus, the Women's Convention imposes an affirmative obligation on the State to take whatever steps are necessary to counteract discrimination against women.¹⁷⁹

Article 16.1 explicitly focuses on marriage and divorce:

State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: . . .

176. Convention on the Elimination of All Forms of Discrimination Against Women art. 1, Sept. 25, 1981, 1249 U.N.T.S. 16 (emphasis added).

177. See Rebecca J. Cook, *State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 228, 236–38 (Rebecca J. Cook ed., 1994).

178. Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 176, at art. 2(f). See also Cook, *supra* note 176, at 236–38.

179. Rubio-Marin & Morgan, *supra* note 154, at 113.

- (c.) The same rights and responsibility during marriage and at its dissolution.¹⁸⁰

Although more states have taken reservations to Article 16 than to any other Article in the Women's Convention,¹⁸¹ in conjunction with provisions requiring gender equality in other human rights instruments,¹⁸² it has encouraged reform of divorce laws around the world. These reforms make divorce more readily available in general. In particular, they make divorce more available to women who historically had no right to divorce. In China, for example, a new law liberalizing divorce by mutual consent was enacted in 2001.¹⁸³ Ethiopia reformed its divorce law following a change of government in 1991.¹⁸⁴ The new government ratified the International Bill of Rights, the Women's Convention, and the Convention on the Rights of the Child.¹⁸⁵ In 1995, a new constitution was adopted, explicitly assuring women equality with men.¹⁸⁶ Domestic family law was revised to conform to these new obligations.¹⁸⁷ Similarly, in Russia the Family Code was reformed in 1996 to conform to the new Russian Federation Constitution to simplify the procedure for divorce.¹⁸⁸ As Armenia noted in its most recent report to the Convention on the Elimination of All Forms of Discrimination Against Women Committee, "[w]omen have equal rights with men to initiate divorce proceedings."¹⁸⁹ In 2000, Egypt adopted a new divorce law enabling a woman, for the first time, to obtain a divorce without proving abuse,

180. Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 176, at art. 16.1.

181. Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 702 (1990).

182. See, e.g., Civil Covenant, *supra* note 98, at art. 2; Economic Covenant, *supra* note 23, at art. 2; Universal Declaration, *supra* note 118, at art. 2.

183. Marriage Law of the Peoples Republic of China, Sept. 10, 1980, *amended by* Decision on Amending Marriage Law of the People's Republic of China, April 28, 2001, available at <http://www.jstor.org/view/0030851x/dm992021/99p03372/0?frame=noframe&userID=813b6282@vanderbilt.edu/01cc99332300501af9141&dpi=3&config=jstor>. For a poignant description of the difficulties of obtaining a divorce under the old law, see generally HA JIN, *supra* note 56.

184. The Revised Family Code [2000] (Ethiopia).

185. T. Techome, *Ethiopia: Reflections on the Revised Family Code of 2000*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 153 (Andrew Bainham ed., 2000).

186. CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA art. 25.

187. See *infra* Part IV.C.2 (describing enforcement of new law).

188. Semeinyi Kodeks RF [SK] [Family Code] art. 89 (Russ.). It should be noted that under this law, spousal maintenance is strictly limited to situations where a needy ex-spouse is unable to work or is taking care of a disabled child or a child under three years old. This is consistent with the underlying premise of gender equality, which has been part of Russian law since 1917.

189. Committee on the Elimination of Discrimination Against Women, *Second Periodic Reports of States Parties: Armenia*, ¶ 118, U.N. Doc. CEDAW/C/ARM/2 (Sept. 9, 1999) ("Women have equal rights with men to initiate divorce proceedings, to remarry and have custody of children, and also to receive support from children.").

adultery, or other fault on the part of the husband.¹⁹⁰ Under liberal rules allowing husbands to appeal, such proceedings typically took years.¹⁹¹

Even where the law assures equality, however, it may not be enforced or it may be overridden by other considerations. In Uzbekistan, women face barriers to divorce despite the constitutional guarantee of equality because the government views “protection of the family” as more important.¹⁹² Access to divorce is not universal, moreover, and there is a backlash to norms of gender equality that promote such access. The divorce laws of Morocco, Israel, and Uzbekistan still discriminate against women.¹⁹³ No culture can entirely avoid exposure to divorce, however,¹⁹⁴ because of the “closer integration of the cultures and people of the world”¹⁹⁵ that characterize globalization. Nor can any State ignore the growing demands of a population that increasingly sees divorce as a right.¹⁹⁶

2. Economic Rights

As Jacobus tenBroek noted forty years ago, there are two systems of family law in the United States, one for the rich and one for the poor.¹⁹⁷ Divorce is primarily for the former, whereas welfare laws are entirely for the latter.¹⁹⁸ This bifurcation between family law for the rich and family law for the poor is replicated throughout the world. The incorporation of human rights, especially economic rights, into domestic family law challenges this bifurcation and

190. See HUMAN RIGHTS WATCH, *DIVORCED FROM JUSTICE: WOMEN'S UNEQUAL ACCESS TO DIVORCE IN EGYPT* 2–3 (2004), available at <http://hrw.org/reports/2004/egypt1204/egypt1204.pdf> [hereinafter *DIVORCED FROM JUSTICE*].

191. Tahir Mahmood, *Egypt*, in *STATUTES OF PERSONAL LAW IN ISLAMIC COUNTRIES* 10, 14 (2d ed. 1995); STARK, *supra* note 10, at 77.

192. HUMAN RIGHTS WATCH, *SACRIFICING WOMEN TO SAVE THE FAMILY? DOMESTIC VIOLENCE IN UZBEKISTAN* 9 (2001), available at <http://www.hrw.org/reports/2001/uzbekistan/uzbek0701.pdf>.

193. HUMAN RIGHTS WATCH, *WORLD REPORT 2002: WOMEN'S HUMAN RIGHTS* (2002), available at <http://www.hrw.org/wr2k2/women.html>.

194. Indeed, anthropologists complain about the increasing difficulty of finding suitably isolated tribes. Marc Lacey, *Remote and Poked, Anthropology's Dream Tribe*, N.Y. TIMES, Dec. 18, 2005, at 1 (describing the Ariaal tribe in northern Kenya).

195. STIGLITZ, *supra* note 35, at 9.

196. See, e.g., Rohter, *supra* note 49 (describing divorce reform in Chile).

197. See Jacobus tenBroek, *California's Dual System of Family Law: It's Origin, Development, and Present Status (Part II)*, 17 STAN. L. REV. 614, 614–16 (1965); Jacobus tenBroek, *California's Dual System of Family Law: It's Origin, Development, and Present Status (Part I)*, 16 STAN. L. REV. 257, 258 (1964).

198. *Id.*; see also, Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 423 (1983) (noting that “[t]he foster care system’s lack of concern for natural parents reflects centuries of a dual family law—one for the rich and one for the poor.”).

makes IFL a tool for the poor as well as the rich. As noted above, the Economic Covenant assures basic economic and social rights, including the right to health and the right to an adequate standard of living.¹⁹⁹ Article 10 of the Economic Covenant addresses “family rights.”²⁰⁰ By affirming that States “recognize that . . . [t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society,” Article 10 establishes the scope of the State’s duty. Considered in conjunction with Articles 2 and 3, which require States to “ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights,”²⁰¹ Article 10 requires State parties to assure economic rights at divorce.²⁰² The Women’s Convention similarly has been construed to require such protections.²⁰³

The application of international norms to domestic support and property division regimes presents complex challenges. These are heightened when multiple States are involved. Financial arrangements at divorce are governed by two very different mechanisms: laws regarding support or maintenance and laws regarding property distribution. Maintenance gives the dependent party, usually the woman, ongoing access to the independent party’s (usually the man’s) higher income. A property award, in contrast, is a one-time event. The awards may be fungible in a particular case—a \$10,000 bank account is basically the same as support at \$5,000 a year for two years.²⁰⁴ But in different States and among different populations, the value of the awards may vary significantly. Where

199. Economic Covenant, *supra* note 23, at arts. 11–12; see also Asbjorn Eide & Allan Rosas, *Economic, Social and Cultural Rights: A Universal Challenge*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 15, 17 (Asbjorn Eide et al. eds., 1995) (viewing economic, social and cultural rights as raising “question[s] of income distribution” and “protection of vulnerable groups such as the poor”); Danilo Turk, *The United Nations and the Realization of Economic, Social and Cultural Rights*, in *THE IMPLEMENTATION OF ECONOMIC AND SOCIAL RIGHTS: NATIONAL, INTERNATIONAL AND COMPARATIVE ASPECTS* 95, 106–07 (Franz Matscher ed., 1991).

200. Economic Covenant, *supra* note 23, at art. 10.

201. Economic Covenant, *supra* note 23, at art. 3. Article 2 provides, “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of kind as to race, colour, sex, . . . or other status.” *Id.* at art. 2. However, Article 2 only appears to apply to rights recognized in the Covenant. MATTHEW C. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 26 (1995).

202. Economic Covenant, *supra* note 23, at art. 10.

203. See, e.g., Committee on the Elimination of Discrimination Against Women, *Third and Fourth Periodic Reports of States Parties: Kenya*, U.N. Doc. CEDAW/C/KEN/3-4 (Feb. 14, 2000) [hereinafter *Third and Fourth Periodic Reports of State Parties*]; see also Carmen Diana Deere, *Married Women’s Property Rights and Human Rights: The Latin American Contribution*, 17 FLA. J. INT’L L. 101, 112 (2005).

204. Payments over time must be discounted for present value, i.e., it is worth more to have the money available immediately.

income is the greatest marital asset, for example, property distribution does not make much of a difference for impoverished divorcing women. This is often the case in the United States.²⁰⁵

Where maintenance is rare and property is the family's only source of wealth, however, the rules regarding property distribution become crucial. This is often the case in Kenya.²⁰⁶ In addition, in some States, such as Sweden,²⁰⁷ social welfare programs assure healthcare and provide housing assistance. In others, such as Japan, support for single mothers is viewed as encouraging divorce.²⁰⁸ Whatever the local law or culture, however, international norms are increasingly relied upon to assure the economic rights of the vulnerable at divorce, whether through monitoring reports of the treaty bodies, NGO initiatives, or domestic law.²⁰⁹

Many countries that have ratified the Economic Covenant have also ratified regional human rights instruments and adopted national legislation more closely tailored to national needs and circumstances. Such legislation reflects and reinforces the same norms about society's responsibility to its most vulnerable members that leads States to ratify the Covenant. In Canada, economic rights are protected under the Canadian Charter of Rights and Freedoms.²¹⁰ In the United Kingdom, economic rights are protected under the European Social Charter.²¹¹ Family laws in both States require "economic justice" to be taken into account at divorce.²¹²

205. In New York in the early 1990s, for example, property subject to distribution was usually worth less than \$25,000. See Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 662-63 (1991); see generally LENORE WEITZMAN, *THE DIVORCE REVOLUTION* (1985) (arguing that wives' standard of living plunged after divorce). For a cogent survey of the literature criticizing and supporting Weitzman, see ELLMAN ET AL., *supra* note 14, at 376-79.

206. See *supra* text accompanying note 64.

207. See STARK, *supra* note 10, at 208-10, for Sweden's response to the 2002 Hague Conference Questionnaire on Support.

208. In response to an increasing divorce rate, Japan has sought to limit aid to single mothers to discourage divorce by mothers with young children. J.S. CURTIN, POOREST JAPAN FAMILIES GETTING POORER, GLOCOM PLATFORM - JAPANESE INST. OF GLOBAL COMM'NS, Aug. 28, 2002, available at http://www.glocom.org/special_topics/social_trends/20020828_trends_s4/index.html (describing Japan's recent adoption of measures to further restrict eligibility for childcare benefits for single mothers).

209. See generally, e.g., Alicia Ely Yamin, *The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social, and Cultural Rights into the Mainstream Human Rights Agenda*, 27 HUM. RTS. Q. 1200, (2005) (discussing range of mechanisms for drawing on international economic rights norms).

210. For the Canadian Charter of Rights and Freedoms, see Constitution Act, 1982, Ch. 11, sched. B, available at <http://lois.justice.gc.ca/en/charter/index.html>.

211. European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89.

212. Stark, *supra* note 154, at 405.

How Human Rights Law Affects Family Law

Human Rights Norms	Family Law
Gender Equality	Divorce: Women have greater access to divorce but less ability to block it, equal rights to property at divorce
Economic and Social Rights	Financial Arrangements: State assurance, social safety nets

IV. INTERNATIONAL FAMILY LAW COMES OF AGE

A legal subject²¹³ comes of age when it must, that is, when too many people have legal problems that must be resolved and cannot be resolved without it. Until that point, a legal subject can dally in elective seminars and esoteric panels. But when clients demand lawyers, judges ask for memos, lawyers call their old professors, committees are formed, and bar panels organized, the legal subject must put aside the games of childhood and become rigorous and responsible. For a legal subject to come of age, accordingly, it must first *matter* enough to generate demands that it do so.²¹⁴ Second, for a legal subject to come of age, there must be a coherent body of substantive law and an agreed upon set of rules or processes that enable it to function. Third, for a legal subject to come of age, it must become a player; it must grapple with the issues of the day. This Part explains how IFL meets each of these criteria.

A. *Why IFL Matters*

IFL matters most, of course, to the children and parents and wives and husbands whose intimate lives it governs. It matters *most* both in the sense that it matters more to them than to anyone else and in the sense that it may well matter more to them than anything

213. A legal subject, of course, has no independent consciousness. It is merely a metaphor and to invest too much in it risks reification, i.e., the projection of our own perceptions (and agendas) on to some larger-than-life construction. For a brilliant description of this process and its risks, see generally Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991).

214. See, e.g., Judge Stephen M. Schwabel, *Careers in International Law*, in CAREERS IN INTERNATIONAL LAW 1 (2006) (describing the “modern explosion of international law-making” and the resulting demand for international lawyers); LAWRENCE STONE, A HISTORY OF AMERICAN LAW 207 (1972) (how divorce law came of age in response to the need for certainty and predictability of title to property among growing numbers of separating couples in the United States).

else in their lives. Although the forms of family and the explanations of what binds them vary,²¹⁵ the bottom line is that family matters enormously everywhere.²¹⁶ Family may be valued most in tumultuous times, when it is seen as a refuge, a haven, from a hostile world. But families themselves are moving²¹⁷ and changing,²¹⁸ and the laws and norms that govern them are in flux.²¹⁹ When trust, love, and tradition can no longer assure support or fidelity, people turn to law.

IFL matters to lawyers because they are increasingly confronted with issues regarding adoption, child abduction, divorce, custody, and domestic violence where the parties reside in, or are citizens of, different States. While major issues in IFL, such as those addressed in the Hague Convention on Child Abduction,²²⁰ can be at least touched upon in a general course, growing numbers of students go on to specialize in family law.²²¹ For these future lawyers, IFL is increasingly a necessity. In fact, the failure to anticipate IFL issues, such as the removal of children to another country during visitation, may well expose a lawyer to a malpractice claim.²²²

IFL also matters to the multiple communities, cultures, and States of which family members are a part. Thus, IFL matters politically.²²³ As the Elían Gonzalez case showed,²²⁴ IFL disputes

215. These explanations range from Sigmund Freud's *eros*, THE FREUD READER 744–45 (Peter Gay ed., 1989), to Claude Lévi-Strauss, *The Family, in MAN, CULTURE AND SOCIETY* 261 (Harry L. Shapiro ed., 1956). They include Christian, Muslim, and Jewish theology; Chinese traditions that have survived over fifty years of communism; African customary laws; and Afghan tribal systems. See also *supra* note 61.

216. See generally LINDA MCCLAIN, THE PLACE OF FAMILIES (2006) (explaining the crucial role of families in civil society); David Brooks, Op-Ed., *Longer Lives Reveal the Ties That Bind Us*, N.Y. TIMES, Oct. 2, 2005, at 4.12 (citing the Report of the President's Council on Bioethics (the Kass Report), explaining that since children need more preparation to participate in the new economy, and parents live longer and need more care, "[t]he defining characteristic of our time seems to be that we are both younger longer and older longer." As Brooks concludes:

The report also shows how far social thinking has moved in the past 30 years. A generation ago, all the emphasis was on rebelling against conformity, on liberating the individual. Now the emphasis is on nurturing bonds so sacred they are beyond the realm of choice. Now the individual is less likely to be regarded as the fundamental unit of society. Instead, it's the family.

217. See *supra* Part II.A.

218. See *supra* Part II.C.

219. See *supra* Part III.

220. See *supra* note 1.

221. In the United States, more pleadings are filed in family law matters than in any other area of civil litigation. HERBIE DIFONZO & MARY O'CONNELL, INTERIM REPORT OF THE FAMILY LAW REFORM PROJECT (2006) (on file with author).

222. See, e.g., STARK, *supra* note 10, at 2; Jeremy D. Morley, *International Family Law*, N.Y. L. J., Nov. 24, 2004, available at http://www.international-divorce.com/int_fam_law.htm.

223. See, e.g., Roger Cohen, *U.S. – Europe Relations: Tiffs Over Bananas and Child Custody*, N.Y. TIMES, May 28, 2000, § 4, at 1 (explaining why emotional issues such as custody play such an important role in post-Cold War foreign policy).

evoke powerful emotions among spectators as well as those directly involved. Such disputes become pivotal in domestic politics.²²⁵ Every country has its Elian Gonzalez case, in which a family crisis becomes a flashpoint for a national crisis. At the Olympic Games in Seoul, the North Koreans accused the South Koreans of selling their babies to the West.²²⁶ In post-Soviet Romania, a moratorium on all inter-country adoptions was declared following news reports of babies' being sold on the streets.²²⁷ Adoption is not the only sensitive subject in IFL.²²⁸ British foreign minister David Blunkett's affair with someone from the United States, for example, ended his political career and discredited his government.²²⁹ Such cases capture the public imagination, spice up the evening news, and sell tabloids.²³⁰

The economic impact of IFL is not limited to tabloid sales. Besides lawyers' fees, court costs, and the often prohibitive expenses

224. See *supra* text accompanying notes 18–19.

225. They are appropriated for their own purposes by domestic political factions. See, e.g., Deere, *supra* note 203 (discussing the Blunkett affair); Ludden, *supra* note 28 (discussing the Hispanic vote in Miami).

226. See, e.g., Sam Jameson, *Keeping Them Home: Orphan – A Shade Fades in S. Korea*, L.A. TIMES, Sept. 1, 1989, at 1 (describing North Korea's propaganda about the South's "orphan exports").

227. From August 1, 1990, through July 17, 1991, following the rescission of the law requiring a presidential decision to authorize inter-country adoption, there were no restrictions on such adoptions. "During this period, 10,000 children were sent abroad." Alexandra Zugravescu & Ana Iacovescu, *The Adoption of Children in Romania*, in INTERCOUNTRY ADOPTION: LAWS AND PERSPECTIVES OF "SENDING COUNTRIES" 39, 42–43 (Eliezer D. Jaffe ed., 1995). There were no criminal sanctions in Romania for improper financial gain from adoptions, which "led to trafficking in children and excessive profits from adoptions conducted in Romania and abroad." Update on Romanian Moratorium on International Adoption, (last visited June 1, 2002) *reprinted in* STARK, *supra* note 10, at 69.

228. Excerpts from a "cultural sensitivity card" distributed to 19,000 U.S. troops in Afghanistan include the following:

Males may never ask a man about his wife, daughters or sisters. Females can.

* * *

Speak about your families. Afghans like to know you have them.

Eric Schmitt, *A Man Does Not Ask a Man About His Wife*, N.Y. TIMES, Jan. 8, 2006, at 7.

229. *Third Man Emerges in Blunkett Affair*, THE AGE, Dec. 20, 2004, available at <http://www.theage.com.au/articles/2004/12/19/1103391636330.html>; John Lettice, *Mugging the Truth to Spin Blunkett's Comeback*, THE REGISTER, Dec. 20, 2004, available at http://www.theregister.co.uk/2004/12/20/labour_spins_blunkett/print.html. For an erudite analysis of the ways in which politics may be shaped by desire, see Nathaniel Berman, *The Appeals of the Orient: Colonized Desire and the War of the Riff*, in GENDER AND HUMAN RIGHTS 195 (Karen Knop ed., 2004.)

230. See, e.g., Mitchott & Mahmood, *supra* note 94 (describing Jolie's international adoptions). IFL also serves as fodder for soap operas, television specials, films, and fiction. See *supra* notes 20–22.

of transnational litigation,²³¹ family support provides major income flows between the global North and the global South.²³² According to the World Bank, the registered flow of migrants' remittances worldwide amounts to approximately \$80 billion, with over 60% going to developing countries.²³³

Finally, IFL matters to those concerned with gender issues, including the U.N.,²³⁴ feminists, and human rights advocates. Families are where women everywhere *live*, where their lives are centered.²³⁵ For this reason, families are also where human rights norms of gender equality most directly and viscerally challenge culture.²³⁶

IFL makes a difference to growing numbers of individuals, as well as growing numbers of State and non-State actors. The next Section describes the laws and processes IFL draws on to address their growing demands.

B. Substantive Laws and How They Function

IFL consists of a large and growing body of substantive law. This includes treaties promulgated by the Hague Conference on

231. A recent analysis of high stakes divorce litigation in the United States suggests the impact of divorce on corporate "masters of the universe." Geraldine Fabrikant, *Divorce, Corporate America Style*, N.Y. TIMES, Aug. 14, 2005, at 3.1. As corporations and their leaders become increasingly transnational, such divorces are increasingly likely to have transnational impact.

232. See *supra* Part II.B.

233. INTERNATIONAL OFFICE OF MIGRATION, IOM DATA WORKSHOP, DATA ON MIGRATION AND DEVELOPMENT 3 (2003), available at http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/Data_Collection_08090903/conf_breakB.pdf. If unofficial remittances are included, that number should be multiplied by two or three. *Id.*

234. This includes a broad range of constituent organs, from the General Assembly to the Committee established pursuant to the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. See, e.g., Declaration on the Elimination of Violence Against Women, *supra* note 148. The United Nations has officially "mainstreamed gender." For a scathing critique, see generally Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1 (2005).

235. Arvonne Frasier, *Women's Human Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 59 (Louis Henkin & John Hargrove eds., 1994) ("Women have moved from the private sphere of home and family into the public sphere as citizens and workers Yet reconciling family obligations with political and economic responsibilities remains a challenge for most women of the world.").

236. See generally Jessica Neuwirth, *Inequality Before the Law: Holding States Accountable for Sex Discriminatory Laws Under the Convention on the Elimination of All Forms of Discrimination Against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RTS. J. 19 (2005) (providing an account of the ways in which human rights norms challenge culture).

Private International Law,²³⁷ regional treaties,²³⁸ bilateral treaties,²³⁹ and multilateral human rights treaties explicitly addressing family law issues.²⁴⁰ IFL also includes a range of processes through which this substantive law is applied by a growing network of lawyers, judges, legislators, and mediators.²⁴¹ The internationalization of law in general²⁴² and human rights law in particular,²⁴³ is the subject of a burgeoning literature. This literature describes the complex and growing international networks through which legal workers develop relationships and organizational frameworks with their counterparts in other States.²⁴⁴ IFL is an

237. For a cogent history and description of its methods of operation, see Hague Conference on Private International Law, Overview, http://www.hcch.net/index_en.php?act=text.display&tid=26 (last visited Oct. 2, 2006).

238. The European Union, for example, has generated a substantial body of law reconciling and harmonizing the family laws of its respective member States. In addition to the examples cited throughout this Article, see, e.g., *supra* note 203. See generally 1-3 ORGANISING COMMITTEE OF THE COMMISSION ON EUROPEAN FAMILY LAW, THE EUROPEAN FAMILY LAW SERIES (K. Boele-woelki et al. eds., 2003.). For an analysis of the European Community's changing approach to family law, see P. McEleavy, *The Brussels II Regulation: How the European Community Has Moved Into Family Law*, 51 INT'L. & COMP. L.Q. 883 (2002).

239. The United States, for example, has entered into a series of bilateral support treaties. A sample is reprinted in STARK, *supra* note 10, at 219-20.

240. See *supra* Part III.A.2.

241. See Lawrence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Litigation*, 107 YALE L.J. 273, 298 (1997).

242. See the following articles for a discussion of the internationalization of law in general: Robert Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004); Thomas M. Franck, *Clan and Superclan: Loyalty, Identity, and Community in Law and Practice*, 90 AM. J. INT'L L. 359 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599 (1997); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003). U.S. participation in this process has been mixed. See generally Jordan J. Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 SANTA CLARA L. REV. 829 (2005). The scholarship on internationalization includes scholarship focusing on the role of courts in the process of regional integration. See, e.g., J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2425-26 (1991). It also includes scholarship on the role of institutions other than courts. See generally Benedict Kingsbury et al., *Foreword: Global Governance as Administration - National and Transnational Approaches to Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 1 (2005) (discussing the notion of "Global Administrative Law"); Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143 (2005) (discussing the notion of "institutional settlement").

This scholarship, predictably, has spawned a vociferous opposition. See, e.g., Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 1 (2005) (arguing that independent tribunals are not necessarily more effective at resolving disputes than so-called "dependent" tribunals).

243. See, e.g., Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society*, 14 AM. U. INT'L L. REV. 1335 (1999).

244. A series of world conferences have promoted such networks. See, e.g., U.N. Fourth World Conference on Women, *The Beijing Declaration and Platform for Action*,

important factor in these developing networks, and they, in turn, contribute to its growth and visibility.²⁴⁵

The focus here, however, is not on the professional and social networks of which IFL is a part but on the doctrinal networks that have developed within it. IFL draws on three distinct bodies of law: family, international, and comparative law.²⁴⁶ These are the sources for the substantive norms of IFL and the rules through which they are applied.

1. Family Law

Domestic family law, including U.S. family law, sets out the basic concerns of IFL: marriage, divorce, custody, support, adoption, abortion, and domestic violence. While no single body of domestic law captures the full scope of IFL, the influence of Western family law is

Sep. 15, 1995, U.N. Doc. DPI/1766/WOM. For a perceptive overview, see REBECCA J. COOK, *THE ELIMINATION OF SEXUAL APARTHEID: PROSPECTS FOR THE FOURTH WORLD CONFERENCE ON WOMEN* (American Society of International Law, Issue Papers on World Conferences No. 5, 1995). See also Susan Greenhalgh, *Fresh Winds in Beijing: Chinese Feminists Speak Out on the One-Child Policy and Women's Lives*, 26 SIGNS: J. WOMEN CULTURE & SOC'Y 847, 856–57 (2001) (describing “multiplying links to transnational agencies and feminist and reproductive health networks” forged at the Fourth World Conference on Women held in Beijing in 1995).

245. Paul Schiff Berman's recent work on cosmopolitanism, which offers an appealing alternative to hegemonic universalism, is particularly pertinent for purposes of IFL. As Professor Berman defines it,

[C]osmopolitanism . . . is the acknowledgement of multiple communities, rather than the erasure of all communities except the most encompassing. Thus, although a cosmopolitan conception of choice of law often seeks to acknowledge and accommodate transnational and international norms, it does not require a universalist belief in a single world community.

Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1861 (2005). The Author would argue, however, that this recognition has been insufficient, confirming Professor Minow's observation about the status of family law, *supra* note 19.

246. Alternative Dispute Resolution (ADR) is often addressed in both Family Law and International Law. See, e.g., NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* (1989); Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1330–48 (1995) (providing a comprehensive discussion of the regulatory schemes for mandatory mediation). In a New York study, women received a somewhat larger share of major assets in mediated settlements. Carol Bohmer & Marilyn L. Ray, *Effects of Different Dispute Resolution Methods on Women and Children After Divorce*, 28 FAM. L. Q. 223, 231 (1994). But see Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1559 (1991) (arguing that women are more likely to make financial sacrifices in order to maintain relationships). A comprehensive text on international ADR has recently been published. MARY ELLEN O'CONNELL, *DISPUTE RESOLUTION IN INTERNATIONAL LAW* (2005). ADR is key to both for the same reason it is key to IFL—when there is no controlling substantive law, it is necessary to have some process for resolving the dispute at hand.

pervasive. This is attributable both to Western hegemony²⁴⁷ and the related but distinct growing influence of human rights law. At the same time, as the world becomes increasingly cosmopolitan,²⁴⁸ Western family law increasingly addresses issues like dowry and religious marriage contracts.²⁴⁹ While an understanding of the basic principles of domestic family law is necessary for IFL, it is only the beginning. IFL must also consider how the basic principles of different States play out internationally and comparatively, as discussed below.

2. International Law

Private international law historically referred to the rules regarding conflicts of law in disputes between private legal persons, including individuals or corporations. Public international law, by contrast, historically referred to the rules and norms governing disputes among nation-States. The distinction between public and private international law, however, has steadily eroded.²⁵⁰ States increasingly engage in the same kinds of commercial activities as private entities. In addition, because of the growing influence of international human rights, the individual has increasingly become the subject of public international law.²⁵¹

Historically, IFL has been regarded as the province of private international law, requiring familiarity with conflicts of law principles in general and the conventions promulgated by the Hague Conference on Private Law in particular. Public international law plays an increasingly important role, however. Even as the Hague Conference studies the problem of transnational child support, for example, States enter into growing numbers of bilateral treaties addressing the issue. Such treaties are governed by public international law.²⁵² As described above,²⁵³ international human

247. See *supra* Part II.C.

248. See, e.g., APPIAH, *supra* note 1 (espousing "universalism plus difference"); GLAZER, *supra* note 96 (describing the growth of multiculturalism).

249. See, e.g., Brief for Respondent, *Hamud v. Hamud*, 2000 WL 342 33950 (Cal. Dist. Ct. App. March 16, 2000) (dowry unenforceable under California law); *In re Marriage of DeJani* (Cal. Dist. Ct. App. 1988), 204 Cal. App. 4th 1387, 1389-90 (payment of dowry held unenforceable under California law.) But see Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777, 797 (1994) (noting that family law has long recognized religious marriage contracts).

250. See, e.g., JANIS & NOYES, *supra* note 150, at 2.

251. Mark W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61, 61 (1984) (explaining how individuals have emerged as active—and accountable—subjects of international law).

252. See The Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (1969). The United States is not a party to the Vienna Convention but accepts it as binding customary law. JANIS & NOYES, *supra* note 150, at 307.

rights law has infused IFL, from the refusal to recognize institutions such as polygamy (as a violation of human rights) to the recognition of reproductive rights.²⁵⁴

In sum, the erosion between public and private international law has been so thorough in the context of IFL that the subject can no longer be understood merely as a part of private international law. Rather, it requires a grasp of public international law, especially human rights law, as well.

3. Comparative Law

While international law refers to shared or agreed upon rules and norms among a group of States, comparative law refers to the respective rules and norms applicable in two or more particular States.²⁵⁵ Comparative family law is an essential component of IFL. There is no possibility of coordinating or reconciling different domestic family law systems unless their respective orientations, the ways in which they frame family law issues, are understood. Support may require familiarity with local laws regarding income transfers between ex-spouses, for example, but it may also require an understanding of religious marriage contracts, national social welfare systems, or both.²⁵⁶

Comparative law also expands horizons.²⁵⁷ Lawmakers increasingly look abroad for new approaches to intractable domestic problems.²⁵⁸ At the same time, a particular reform—such as

253. See *supra* Part III.

254. Article 12 of the Women's Convention, for example, requires States to "ensure access to healthcare services, including those related to family planning" and further requires States to "ensure . . . appropriate services." See Reed Boland, *Population Policies, Human Rights, and Legal Change*, 44 AM. U. L. REV. 1257, 1258 (1995) (describing relegation of reproductive rights to "second-class status . . . as social and economic rights or [as] women's rights"); Berta Hernandez, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L. L. 309, 310–11 (1991) (arguing that there is a right to reproductive choice under customary international law); see generally Barbara Stark, *Crazy Jane Talks With the Bishop: Abortion in China, Germany, South Africa and International Human Rights Law*, 12 TEX. J. WOMEN & L. 287 (2003) (comparing approaches to abortion).

255. See generally John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617 (1998) (offering nine principles, the first of which "insists that comparative method involves explicit comparison of . . . two or more legal systems").

256. See *supra* Part II.B.2.

257. For an example of rigorous research, see D. Marianne Blair & Merle H. Weiner, *Resolving Parental Custody Disputes – A Comparative Exploration*, 39 FAM. L.Q. 247 (2005).

258. Tennessee, for example, drew on the adoption law of New South Wales. See M. Christina Reuff, *A Comparison of Tennessee's Open Records Law with Relevant Laws in Other English-Speaking Countries*, 37 BRANDEIS L.J. 453, 453 (1998–99). The resulting law opened previously sealed records. TENN. CODE ANN. §§ 36-1-125–29 (1996). Courts, too, are increasingly receptive to the decisions of their foreign

retroactive laws opening adoption records—might be functional in one context because it is compatible with the underlying social norms, but less functional in another context where it is not.²⁵⁹ Thus, comparative family law highlights the ways in which culture supports or undermines law.

A comparative perspective not only provides a window into another culture, but also exposes the often unquestioned assumptions of one's own.²⁶⁰ Studying custodial presumptions in Islamic States,²⁶¹ for example, shows how culture shapes such presumptions. By doing so, it encourages a more critical stance towards one's own presumptions.

While comparative analysis is an integral part of IFL, its focus remains on the analytic and procedural processes that govern the interaction between national laws. That is, the emphasis in IFL is on the legal mechanisms necessary to reconcile the different perspectives that a study of comparative family law reveals.

C. *The Impact of IFL*

For a legal subject, as for a carbon-based subject, coming of age means taking a more proactive role. This Part concludes, accordingly, by showing how IFL is beginning to have an impact on globalization and human rights. Because of the symbiotic relationship between IFL and both globalization and human rights law, this is concededly problematic. These relationships are perhaps best understood as continuous loops. While there are clearly relationships, it is not so clear which is changing the other. Parts II and III showed how specific features of globalization, such as mobility, affected specific problems of IFL. This Part shows how specific features of IFL, in turn, affect globalization and human rights. While causality remains complicated, the examples set out below show that IFL has taken on a life of its own.

counterparts. See *supra* note 165 and accompanying text (citing Justice Kennedy in *Roper v. Simmons*).

259. See *ALMA v. Mellon*, 601 F.2d 1225 (2d Cir. 1979) (refusing to repeal laws regarding sealed adoption records). For an analysis of constitutional arguments and legislative measures, see Debra D. Poulin, Note, *The Open Adoption Records Movement: Constitutional Cases and Legislative Compromise*, 26 J. FAM. L. 395 (1987–88).

260. See Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L. J. 737, 741 (1999).

261. See *supra* text accompanying notes 91–92.

1. On Globalization

IFL facilitates globalization by facilitating the flow of human capital across borders.²⁶² Human capital refers to a person's investment of time, energy, and resources in another person, such as parents' investment in their children. This may be driven by love, altruism, or the hope for a future return—that the children will care for the parents in their old age, for example.²⁶³ A key function of family law everywhere is to promote and protect such investments. Child support,²⁶⁴ for example, promotes parents' future investment in children.²⁶⁵ Property distribution at divorce similarly recognizes a wife's investment in her husband's career.²⁶⁶ Without IFL, however, these investments cannot be legally enforced when family members live in (or move to) different States.²⁶⁷ Thus, IFL makes it possible for investments in human capital to flow across borders.

The failure to protect or promote such investments hurts individuals, especially the most vulnerable, and the larger communities of which they are a part. In South Africa, for example, a series of laws over a period of almost fifty years made it progressively more difficult for black workers to live with their families. The Native Lands Act, passed in 1913, apportioned 93% of the land to whites and seven percent to blacks.²⁶⁸ Under laws passed in the late 1940s, African groups were assigned to remote tribal "homelands."²⁶⁹

262. Globalization, it will be recalled, refers to "flows of goods, services capital, knowledge (to a lesser extent) and people across borders," STIGLITZ, *supra* note 35.

263. In China, for example, sons were traditionally considered their parents' social security and old-age insurance. A 1980 law imposed a duty to support family members, including that of children for their parents. DANIEL C.K. CHOW, *LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 359 (2003); see Gerrie Zhang, Note, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 *HOUS. J. INT'L L.* 557, 564 n.41 (1996).

264. See, e.g., HAGUE CONFERENCE ON INTERNATIONAL LAW, JAPAN PRELIMINARY DOCUMENT NO. 2, RESPONSES TO 2002 QUESTIONNAIRE (2003) (citing Article 760 of the Japanese Civil Code), available at http://www.hcch.net/upload/wop/insolv_rep.pdf; See generally WILLIAM DUNCAN, FIRST SEC'Y, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, NOTE ON THE DESIRABILITY OF RESOLVING THE HAGUE CONVENTIONS ON MAINTENANCE OBLIGATIONS (1999), available at <http://www.hcch.net/upload/wop/maint1999pd2.pdf> (explaining purposes of proposed convention).

265. See NANCY DOWD, *REDEFINING FATHERHOOD* 142-46 (2001) (explaining the range of mechanisms through which such investments can be encouraged).

266. See *DIVORCED FROM JUSTICE*, *supra* note 190 (describing the systematic, widespread denial of women's property rights at divorce); *Third and Fourth Periodic Reports of State Parties*, *supra* note 203 (announcing the creation of a Task Force to investigate and rectify these violations).

267. This is a tautology but an instructive one. To the extent that such investments are protected under local laws, such laws already incorporate IFL.

268. Daisy M. Jenkins, *From Apartheid to Majority Rule: A Glimpse into South Africa's Journey Towards Democracy*, 13 *ARIZ. J. INT'L & COMP. L.* 463, 469 (1996).

269. Frank Vorhies, *Hunger and Farming in Black South Africa*, <http://www.self-gov.org/freeman/8906vorh.html> (last visited Oct. 29, 2006).

Black miners lived in barracks near the mines, while their families were isolated in the homelands. Family life was essentially destroyed for these miners and their wives and children.²⁷⁰

Support for investment in family members, in contrast, makes it easier for labor to follow capital. There are multiple forms of human capital, of course, including the practice of pooling resources in extended families.²⁷¹ Such practices are more likely to be grounded in tradition than in IFL, but IFL establishes a crucial floor.²⁷²

2. On Human Rights

IFL is beginning to affect human rights both doctrinally and normatively. First, IFL is changing the laws defining families, including laws regarding child marriage and same-sex marriage.²⁷³ This reflects and reinforces recent developments in human rights law. It also breaks new ground, especially where, as in Africa, such law is the first to recognize gay and lesbian rights. Second, IFL is changing

270. See generally DONALD DENOON & BALAM NYEKO, *SOUTHERN AFRICA SINCE 1800* (Longman Group 1984) (1972). The impact of these laws on South African families was movingly depicted in ALAN PATON, *CRY, THE BELOVED COUNTRY* (1949). This book, too, was made into a movie, starring James Earl Jones. *CRY, THE BELOVED COUNTRY* (Miramax Films 1995). The breakdown of the black family in South Africa raised IFL issues because the ongoing enforcement of the homelands laws, and apartheid in general, violated the human rights of black African families. For an account of the resistance movements which challenged apartheid within South Africa, see JEANNE M. WOODS & HOPE LEWIS, *HUMAN RIGHTS AND THE GLOBAL MARKETPLACE* 718–21 (2005).

271. See CHUA, *supra* note 35 (explaining how ethnic Chinese families pool resources).

272. IFL addresses both the human rights of families vis-à-vis the State and the human rights of individuals within families. The latter may be especially important for those who challenge their families, extended families, or the larger tribes of which they are a part. See, e.g., *Lovelace v. Canada*, No. 24/1977, at 83, U.N. Doc.CCPR/C/OP/I (1981) (discussing a Masliseet Indian woman denied rights and tribal membership upon her marriage to a non-Indian man); Schneider, *supra* note 45 (describing the murders of young immigrant women in Berlin by family members).

273. Other significant ways in which IFL is changing the laws defining families include the recognition of the child, regardless of parenthood, as a person before the law, as set out in the Children's Convention, *supra* note. Cf. *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) ("We start from the premise that illegitimate children are not 'non-persons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."). See also *Gomez v. Perez*, 409 U.S. 535 (1973) (striking state support law that discriminated against out-of-wedlock children); see generally William N. Eskridge, Symposium, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) (describing how social movements changed twentieth century constitutional law); Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727 (1992) (arguing that decisions by parents to have illegitimate children should not adversely affect those children).

expectations, the normative landscape upon which human rights law plays out.

a. Changing the Laws Defining Families

IFL changes the laws defining families from the laws that determine family membership and laws barring polygamy and child marriage²⁷⁴ to laws recognizing same-sex marriage. By doing so, IFL changes the rights and obligations of family members to each other. These changes have a ripple effect, changing the larger societies of which they are a part.

As noted above,²⁷⁵ Ethiopia reformed its family laws to comply with international human rights norms in the early 1990s. As part of these reforms, child marriage was barred.²⁷⁶ Professor Bereket Selaissie, Attorney General of Ethiopia at the time of the reform, was deeply committed to the new law.²⁷⁷ He also had the full support of the executive in enforcing it.²⁷⁸ A twelve year-old girl who has been given in marriage to a fifty year-old man learns a powerful lesson in human rights when local authorities return her to her home. Her family, neighbors, and erstwhile husband, learn an equally powerful lesson. Over time, child marriages have become increasingly rare.

Same-sex marriage, on the other hand, is becoming more common.²⁷⁹ Justice Albie Sachs of the Constitutional Court of South Africa and Justice Margaret Marshall of the Supreme Court of Massachusetts are the authors of two recent, controversial decisions striking down bars to same-sex marriage: *Fourie v. Minister of Home Affairs*²⁸⁰ and *Goodridge v. Dept. of Public Health*, respectively.²⁸¹ Both justices grew up in South Africa under apartheid, and both trace their deep commitments to an expansive, inclusive notion of rights to that experience.²⁸² Both are repelled by the idea of denying equal status and dignity to any human being, and both explicitly ground their decisions on same-sex marriage in their commitment to equal

274. See *supra* sources cited in notes 21, 146–47; see also Annie Bunting, *Child Marriage*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 669.

275. See *supra* text accompanying notes 21.

276. *Id.*

277. According to Professor Selaissie, “[i]t was a pleasure to enforce it.” Interview with Professor Bereket Selaissie, in Durban, South Africa (Dec. 13, 2005).

278. *Id.*

279. See *infra* sources cited in note 294.

280. *Minister of Home Aff. Fourie* 2004 No. 232/2003 (S. Afr.), available at <http://fl1.findlaw.com/news.findlaw.com/nytimes/docs/glrts/mhofourie120105.pdf>.

281. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003).

282. Justice Albie Sachs, *The Legal Treatment of Socially and Morally Divisive Issues*, South Africa and the U.S. Compared: Abortion, Capital Punishment, Religion, and Homosexuality, Remarks at Columbia Law School (Jan. 17, 2006); Chief Justice Margaret Marshall, Remarks at the Conference of Black Judges, Boston College Law School (Apr. 30, 2004).

rights. There is no question that human rights law shaped these decisions.²⁸³

The argument here, however, is that these family law decisions shape human rights. By establishing constitutional rights to same-sex marriage under the Massachusetts and South African constitutions, *Goodridge* and *Fourie* shape human rights both practically and symbolically. First, as a practical matter, these decisions assure gay and lesbian couples that choose to marry the full panoply of rights and benefits available to heterosexual couples.²⁸⁴ These include public benefits, such as preferential tax treatment, as well as private benefits, such as health insurance.

Arguably more important, however, is the symbolic significance of marriage for same-sex couples.²⁸⁵ Civil unions were unacceptable to both justices, because they establish a separate, second-class status.²⁸⁶ Their decisions, in contrast, recognize explicitly same-sex relationships as equal to heterosexual relationships.²⁸⁷ Same-sex marriage publicly recognizes and endorses gay and lesbian relationships. This is groundbreaking in the United States, although bias against such relationships has been eroding.²⁸⁸ While there is

283. See generally Kennedy, *supra* note 258 (explaining the relationship between gay/lesbian and black liberation).

284. See generally Joseph William Singer, *Same-sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1 (2005) (discussing the scope of rights assured by marriage).

285. Jeffrey A. Kershaw, Note, *Towards an Establishment Theory of Gay Personhood*, 58 VAND. L. REV. 555, 573 n.111 (2005).

286. See *supra* sources cited in note 282. Many countries recognize domestic partnerships, which are generally marriage-like but do not contemplate parenthood. Martha A. McCarthy & Joanna L. Radbord, *Family Law for Same Sex Couples: Chart(er)ing the Course*, 12 CAN. J. FAM. L. 101, 121, n.60 (1998) (explaining that Denmark, the Netherlands, Norway, Sweden, Hungary, Iceland, and Spain, for example, have instituted Registered Domestic Partnership (RDP) schemes). The Netherlands and Spain now recognize same-sex marriage as well. See generally AMERICAN PSYCHOLOGICAL ASSOCIATION, LESBIAN AND GAY PARENTING: A RESOURCE FOR PSYCHOLOGISTS 8 (1995) (reviewing forty-three empirical studies as well as other articles and concluding that "not a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents"), cited in David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 539, n.50 (1999).

287. See generally WILLIAM ESKRIDGE, *THE CASE FOR SAME SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996). But see John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049 (1994) (opposing same-sex marriage as inconsistent with "biological purpose" of marriage); Lynn D. Wardle, *Legal Claims for Same Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735 (1998).

288. The Defense of Marriage Act, 28 U.S.C. § 1738C (1996) authorized each state to disregard the marriage laws of any other state, insofar as they may recognize same-sex marriage. As many commentators have noted, DOMA may well be unconstitutional. See generally Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); Scott

increasing support for some protections, such as health insurance for same-sex partners, and even growing recognition of civil unions,²⁸⁹ marriage was a line that had not be crossed until Justice Marshall crossed it.²⁹⁰ *Fourie* represents an even more radical step in Africa, where, as recent press reports confirm, "homosexuality remains largely taboo."²⁹¹

Many States have reformed their traditional family laws,²⁹² whether under pressure from global trading partners or because of the growing appeal and widening scope of human rights law.²⁹³ The resulting new laws, such as the law in Ethiopia regarding child marriage and the Massachusetts law regarding same-sex marriage, have an immediate and direct impact on the human rights of the parties.²⁹⁴ Equally important, they ratchet up the basic expectations regarding human rights. They begin to change the normative landscape.

Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997).

289. See generally Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992) (reviewing domestic partnership ordinances adopted throughout the country, usually to recognize homosexual relationships).

290. Robin Toner, *The Culture Wars, Part II*, N.Y. TIMES, Feb. 29, 2004, at 4.1 (citing the Pew Research Center, noting both that those in the United States were "far more tolerant of basic [gay and lesbian] rights than they were 15 years ago" but that there was a "backlash" against gay marriage).

291. Jonathan Clayton, *Same-Sex Marriages Given Blessings by South Africa*, THE TIMES, Dec. 2, 2005, at 47 (quoting the following African Presidents: President Mugabe of Zimbabwe ("It [homosexuality] degrades human dignity. It is unnatural and there is no question ever of allowing these people to behave worse than dogs and pigs."); President Museveni of Uganda ("Look for homosexuals, lock them up and charge them . . . God created Adam and Eve. I did not see God creating man and man."); President Nujoma of Namibia ("See to it that there are no criminals, gays and lesbians in your villages and regions."); and President Obasanjo of Nigeria ("Such a tendency is clearly un-Biblical, unnatural and definitely un-African.")). See also Sipokazi Maposa, *Mixed Reaction to Same-Sex Ruling*, ALL AFRICA GLOBAL MEDIA, Dec. 2, 2005.

292. See *supra* text accompanying notes 12–13.

293. Sometimes this is cosmetic, and the new law is ignored, such as the property law in Kenya. See, e.g., *supra* text accompanying notes 157, 266.

294. *Fourie* did not have the same kind of immediate impact because the Court gave the legislature a year in which to draft a new law that would pass constitutional muster. This was criticized by some for "delaying justice." See, e.g., Carmel Rickard, *South African: At Heart, Ruling Lacks Courage*, SUNDAY TIMES, Dec. 4, 2005. Justice Sachs defended it as an appropriate deferral to the legislative branch. Sachs, *supra* note 282. The Vermont Supreme Court had similarly referred the state constitutional violation to the legislature. *Barker v. State*, 744 A.2d 864, 867 (Vt. 1999) (resulting in a civil union statute); see VT. STAT. ANN. tit. 15, § 1201 (2000).

b. Changing the Normative Landscape

As noted above, the normative landscape is always changing.²⁹⁵ Human rights scholars have shown how human rights law affects human rights norms,²⁹⁶ and family law scholars have shown how family law affects family norms.²⁹⁷ The relationship between norms and law is often complex, and it varies as a function of the particular norms and laws in issue.²⁹⁸ The argument here, however, is not that IFL is changing norms but merely that it is contributing to a normative shift already underway. U.S. conceptions of race are in flux and IFL is contributing to emerging understandings of race. It does so in ways that may be difficult to quantify, but it is nevertheless significant.²⁹⁹

This was made clear in Derrick Bell's 2005 Lecture at New York University, *And We Still Are Not Saved*.³⁰⁰ Professor Bell retold the story of the Space Traders, introduced in his 1989 book, *Faces at the Bottom of the Well*.³⁰¹ The Space Traders arrive on Earth with an outrageous proposition. They offer to solve all our problems, from poverty to disarmament, and to provide us with unimaginable wealth.³⁰² In return, they want all of the African Americans in the United States. There is much debate and agonizing before the matter is put to a referendum. The majority votes for the trade.³⁰³

295. See *supra* Part II.C.

296. See generally Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935 (2002) (analyzing the relationship between countries' human rights treaties and countries' human rights practices).

297. WEITZMAN, *supra* note 205 (explaining how the "divorce revolution" undermined traditional support for wives and mothers). Family law scholars have also shown how family law reforms have failed to affect norms. See, e.g., Ira Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L. J. 773, 773 (1996.)

298. Scholars have developed sophisticated methods of analyzing these relationships. See, e.g., ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000) (analyzing costs and benefits of a range of social norm reform efforts); Eric A. Posner, Symposium, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996). But see Amartya Sen, *Freedoms and Needs*, reprinted in STEINER & ALSTON, *supra* note 22, at 269 (arguing that economic cost/benefit analysis omits critical factors). For a creative and provocative investigation, see JACK BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (1998).

299. The Author has described elsewhere, for example, how the thousands of baby girls adopted from China every year by Americans are changing our conceptions of family. Stark, *supra* note 36, at 1234–35. Racially-mixed families comprise a growing proportion of the population. SAM ROBERTS, *WHO WE ARE NOW: THE CHANGING FACE OF AMERICA IN THE 21ST CENTURY* 161 (2004).

300. Derrick Bell, 10th Annual Derrick Bell Lecture at NYU Law School: *And We Are Still Not Saved* (Nov. 3, 2005).

301. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (1989).

302. *Id.* at 159–60.

303. Written in 1989, Professor Bell's sobering parable has inspired a thoughtful literature. See, e.g., Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L. J. 1357 (1992) (introducing Rodrigo Crenshaw, Geneva's brother). It continues to be cited in cutting-

In his lecture, Professor Bell described the responses he receives when he tells the story: “[t]here are usually a few young black men who shout out, ‘Sign me up! I’m ready to go!’ but basically the response breaks down by race. Whites say, ‘That’s not what would happen,’ and blacks say, ‘It is.’”³⁰⁴ Professor Bell urged the whites in the audience to “[t]hink about the people you grew up with, voting privately.”³⁰⁵

I thought about the people I grew up with, and all of them had at least one person of color in their families by now. These people of color had come into their families through marriage (including international marriage), adoption (including international adoption),³⁰⁶ and non-marital births (with international partners.) No one was going to let the Space Traders have their spouses, partners,³⁰⁷ children, grandchildren, nephews or nieces.³⁰⁸ For them, family trumps race.³⁰⁹

edge scholarship. See, e.g., Jim Chen, *Mayteenth*, 89 MINN. L. REV. 203, 205 n.13 (2004); Angela Onwuachi-Willig, *For Whom the Bell Tolls: The Bell Tolls for Brown?*, 103 MICH. L. REV. 1507, 1512 n.17 (2005).

304. Bell, *supra* note 300.

305. *Id.*

306. See, e.g., JOAN HEIFETZ HOLLINGER & ABA CENTER ON CHILDREN AND THE LAW, A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996, at 6 (1998), available at <http://www.acf.hhs.gov/programs/cb/pubs/mepa94/>. Black-white adoptions remain controversial. As Twila Perry observes, “The researchers on transracial adoption are still virtually unanimous in their conclusion that it remains preferable for Black children to be placed with Black adoptive parents, if possible.” Twila L. Perry, *Transracial and International Adoption: Mothers, Heirarchy, Race and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 126 n.85 (1998). But see Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 948 (1994) (noting that “[w]hite parents can provide books and music about Black culture, encourage friendships with other Black children, and encourage participation in Black cultural activities”).

307. There is a still small but growing number of black-white interracial couples in the United States. “In 1960, when black-white marriages were still illegal in about one in three states, there were 51,000 of them . . . Overall, the number of interracial marriages and domestic partnerships quadrupled since 1970, from 500,000 to 2 million.” ROBERTS, *supra* note 299, at 155. It is unclear how many of these involve individuals from different States. Since the human rights norm of non-discrimination is involved, however, these couples fall within the ambit of IFL. In addition, as Roberts observes:

During the 1990s, the nation’s population grew to an estimated high of more than 292 million people, the largest 10-year numerical increase ever . . . immigration from abroad was a major reason . . . in 2001 more than one million legal immigrants entered the United States.’ [In the 1990s] America’s foreign born population increased by 57 percent, to more than 31 million, a record high, making America now the least “American” it has ever been.

ROBERTS, *supra* note 299, at 68, 114, 129.

308. In some cases, probably, they would even hold onto their in-laws. See, e.g., Susan Straight, *We Are (Still) Family*, N.Y. TIMES, Dec. 18, 2005 (Magazine), at 86 (a white woman describing her ongoing relationship with her black ex-husband’s family);

This may be understood as part of a well-documented and more profound shift in the normative landscape. There is growing evidence and awareness that families have, in fact, been racially mixed for some time.³¹⁰ Indeed, race itself is an increasingly dubious category.³¹¹ Racism nevertheless remains an intractable dilemma, as Professor Bell made all too clear.³¹² At the same time, science and census data³¹³ are subverting old concepts of race. IFL contributes to this ongoing subversion.³¹⁴

Benedict Carey, *In-Laws in the Age of the Outsider*, N.Y. TIMES, Dec. 18, 2006 (Magazine), at 4.1.

309. As a corollary, family undermines racism. This was certainly well understood by those who drafted, and defended, the miscegenation statutes, like the Virginia law struck down by the Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967). For a rigorous historical analysis, see Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L. J. 756 (2006).

310. Claudia Kalb, *In Our Blood*, NEWSWEEK, Feb. 6, 2006 (Cover Story), at 46 (explaining how DNA is used to establish ethnic identities); see also *African American Lives* (PBS television broadcast Feb. 1, 8, 2006) (tracing the DNA of famous African Americans). See also, e.g., Brent Staples, *Why Race Isn't as 'Black and White' as We Think*, N.Y. TIMES, Oct. 31, 2005, at A18 (African-American columnist discussing his unexpected Asian ancestry); Elizabeth Bernstein, *Genealogy Gone Haywire*, WALL ST. J., June 15, 2001, at W1 (describing surprises in store for those embarking on genealogical searches). This, too, is reflected in popular culture. John Hartl, *Mother and Daughter in Interracial Discovery*, (reviewing SECRETS & LIES) available at <http://film.com/film-review/1996/9388/109/default-review.html> (last visited Feb. 12, 2002) (noting that, like the reunion between the adopted black optometrist and her white biological mother in SECRETS & LIES, "[i]t's been a year for late-blooming interracial discoveries. Robert Duvall finds out that James Earl Jones is his half-brother in A FAMILY THING. Chris Cooper discovers that he has a Hispanic half-sibling in LONE STAR.").

311. There is no biological basis for race. Naomi Zack, *American Mixed Race: The U.S. 2000 Census and Related Issues*, 17 HARV. BLACKLETTER L.J. 33, 33 (2001).

312. As Professor Bell explains,

Black people are the magical faces at the bottom of society's well. Even the poorest whites, those who must live their lives only a few levels above, gain their self-esteem by gazing down on us. Surely, they must know that their deliverance depends on letting down their ropes. Only by working together is escape possible.

BELL, *supra* note 301, at v. Freud described a similar phenomenon, as the "narcissism of minor differences." FREUD READER, *supra* note 214.

313. As Roberts notes:

The 2000 census began with six categories and added a seventh, newly-designated "two or more races" category . . . 7 million Americans, or 2.4 percent of the population, chose this option. The rate for children was double what it was for adults, which suggests that the proportion will grow as the spectrum expands and our complexion changes and that race might someday diminish as the prism through which Americans define the politics of identity.

ROBERTS, *supra* note 299, at 160–61.

314. It does so, in part, by legitimating "mixed-race" families. Although "race" is not recognized by science, recognition of "mixed-race" identity has been promoted as a "heuristic device for social change." Zack, *supra* note 311. At the same time, Roberts

V. CONCLUSION

This Article has shown how globalization and the spread of human rights have transformed IFL. The mobility of capital and labor and the ways in which borders have become more porous have radically reconfigured families. Income shifts, both among families and within families, have changed power dynamics. Cultures have clashed, but they have also melded, wedded, and produced offspring. We have come to recognize our own culture as a lens; we are no longer able to take it for granted as an unchallenged given.

This Article has also shown how human rights law has infused IFL and challenged traditional norms. Long naturalized conceptions of gender have eroded, even as fathers' rights have gained new clout. Shredded social safety nets have left vulnerable women and children increasingly dependent on private support.

Finally, this Article has described how globalization and the spread of human rights have produced a growing demand for IFL. It has shown how IFL has emerged as an autonomous legal subject in response to these demands. It has concluded by considering how IFL, in turn, has begun to shape human rights law and globalization.

When globalization hits home, IFL becomes a necessity. IFL translates the often abstract forces of globalization and human rights into human terms. IFL's project, abstractly, is to explore and establish the legal parameters of changing relationships in a changing world. IFL's project, in human terms, is to enable a growing range of families to thrive.
