

# Codification, Cooperation, and Concern for Children: The Internationalization of Family Law in the United States Over the Last Fifty Years

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MERLE H. WEINER\*

## Introduction

The term “domestic relations” is often used to refer to the field of family law. In one sense, the use of “domestic” is now somewhat ironic: over the last fifty years, the field has undergone considerable “internationalization.”<sup>1</sup> This article explores the major changes that have occurred in the United States over the last fifty years with respect to the internationalization of the field and discusses the forces that may have led to these changes.

This article is divided into three parts. The first part situates this topic in the broader context of family law’s evolution over the last fifty years. The changes in international family law, while important, are quite modest compared to the significant doctrinal transformation in the field of family law generally. In addition, while there has been a large increase in the number of statutory provisions specifically addressing transnational families, these provisions are evolutionary, not revolutionary, because they are part of a subfield that has retained the same central components. The second

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\* Philip H. Knight Professor of Law, University of Oregon. I want to express my heartfelt thanks to Marianne Blair, Brad Lechman-Su, and Bob Spector for their helpful feedback on a draft of this article. I also want to thank the following research assistants for their invaluable help: Catriona Penfield, James Baldock, Matthew Tracey, Ellie Price, Snehata Karki, and Jen Maks. Finally, a warm thanks goes to Angus Nesbit, Stephanie Midkiff, and Karyn Smith for their assistance with this article.

1. By “internationalization,” I mean that there are new domestic statutory provisions, both state and federal, that address transnational family law disputes, new international instruments that apply even to purely domestic disputes, and new international venues to which litigants can bring their disputes.

part starts with an overview of the changes that have occurred over the last half century. It suggests that many of the new statutory provisions address issues that relate to children: child custody, adoption, and child support. This part then briefly describes these laws.<sup>2</sup> The last part discusses the forces that may have contributed to the increase in legislative activity. In particular, it highlights Central Authorities and Special Commissions. These two institutions have fostered cooperation, built trust, and contributed to the likelihood that the United States will join international instruments. The article also notes that the increased cooperation on the international level is mirrored by increased cooperation at home between the federal government, states, and law reform organizations. This domestic collaboration helps address “federalism” concerns, thereby minimizing an obstacle to U.S. participation in family law treaties.

### I. Perspective

The developments in international family law over the last fifty years are relatively minor compared to the effect and scope of family law reform generally in the United States. Most Americans are unaffected by international family law, let alone by its doctrinal revisions; most lawyers and judges do not deal with these issues on a regular basis. In addition, the major shifts in U.S. family law over the last fifty years, such as the advent of no-fault divorce, the development of marital property, the attention to domestic violence, and the focus on gender equality, to name just a few, seem largely unrelated to international family law. This disconnect exists even though foreign practices may have influenced some of these changes,<sup>3</sup> internation-

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2. This article primarily addresses the traditional areas of family law and omits many topics that might fit within a broad conception of the field. Hence, this article does not focus on the child welfare system, juvenile delinquency, guardianship, trusts and estates, immigration matters, nationality, human trafficking, or any of the procedural treaties that may be relevant to the adjudication of an international family law matter, such as the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, Oct. 5, 1961, 527 U.N.T.S. 189, the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 847 U.N.T.S. 231, or the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 658 U.N.T.S. 163.

3. See, e.g., UNIF. MARRIAGE & DIVORCE ACT prefatory note (amended 1973), 9A (pt. I) U.L.A. 161 (Supp. 2007) (mentioning that England allowed dissolution solely on the ground that the marriage was irretrievably broken); UNIF. MARITAL PROP. ACT prefatory note, 9A U.L.A. 111 (Supp. 2007) (mentioning that “the laws of other countries” have recognized that marriage is a partnership to which each spouse contributes equally). *But see* Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2050–51 (2000) (arguing that the California Governor’s Commission on the Family in the 1960s arrived at the idea of no-fault divorce “independently” of proposed reforms in England).

al instruments contain parallel reforms,<sup>4</sup> and transnational families sometimes experience the domestic reforms differently.<sup>5</sup>

Moreover, even though the subfield has seen significant change, new measures have not yet led to a transformation of the entire subfield. Significant features of international family law have remained relatively unchanged. International family law involves, as it always has, the application of existing family law doctrine to families whose members cross international borders. Often the substantive law is the same whether the court in the United States is addressing a transnational or domestic dispute. For example, a court will generally employ the same approach when faced with either the international or domestic relocation of a custodial parent.<sup>6</sup> A court may be particularly concerned about the degree to which

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4. The influence of gender equality on U.S. family law is usually attributed to the U.S. Constitution, the feminist movement, and changing norms in the United States. *See, e.g.*, LINDA C. McCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY AND RESPONSIBILITY* 60–61 (2006); DEBORAH L. RHODE, *JUSTICE AND GENDER* 56 (1989). A parallel movement for gender equality was occurring simultaneously at the international level. *See* U.N. Charter pmb. (“reaffirm[ing] faith in . . . the equal rights of men and women and of nations large and small”); Universal Declaration of Human Rights art. 16, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (stating that men and women “are entitled to equal rights to marriage, during marriage and at its dissolution”); International Covenant on Civil and Political Rights art. 23(4), Dec. 19, 1966, 999 U.N.T.S. 171 (“State Parties . . . shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”); Declaration on the Elimination of Discrimination Against Women art. 6(2)(b)-(c), G.A. Res. 2263, at 35, U.N. GAOR, 22nd Sess., Supp. No. 16, U.N. Doc. A/6716 (Nov. 7, 1967) (“Women shall have equal rights with men during marriage and at its dissolution,” and “Parents shall have equal rights and duties in matters relating to their children”); Convention on the Elimination of All Forms of Discrimination Against Women art. 16, Dec. 18, 1979, 1249 U.N.T.S. 13 (stating that States must take all appropriate measures “to eliminate discrimination against women in all matters relating to marriage and family relations”). At times, the United States has evaluated its own laws against these international standards. *See, e.g.*, Gladys A. Tillett, *Existing Law and Measures to Improve the Status of Women in the Western Hemisphere: U.N. Seminar on the Status of Women in Family Law* (Bogota, Colom., Dec. 3–17, 1963), in *DEP’T ST. BULL.*, July 24, 1964, at 128, 130-31.

5. *See, e.g.*, D. MARIANNE BLAIR & MERLE H. WEINER, *FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW* 400 (2003) (discussing the difficulty some foreign nationals might have establishing domicile for purposes of divorce jurisdiction since immigration law requires those on a nonimmigrant visa “to attest that they have no intention of abandoning their residence in their home country, and that they will return when the purpose for their visit is completed”).

6. *See, e.g.*, MacKinnon v. MacKinnon, 922 A.2d 1252, 1258 (N.J. 2007) (applying Baures v. Lewis, 770 A.2d 214 (N.J. 2001), to international dispute and allowing mother to relocate to Japan with child); Stonham v. Widiastuti, 79 P.3d 1188, 1194 n.8 (Wyo. 2003) (“Whether one parent is moving with the children across town or across the world, the analysis remains the same.”). *But cf.* O’Shea v. Brennan, 387 N.Y.S.2d 212, 216 (Sup. Ct. 1976) (changing custody to father when mother proposed to move with child to Australia because, inter alia, the move “would deprive [the child] of the right to be raised and educated in her own country—which is part of her birthright”).

an international move might affect visitation,<sup>7</sup> or whether the court will lose jurisdiction if the relocation is permitted,<sup>8</sup> but generally the analysis is similar. Likewise, other issues, such as whether a court will enforce a provision for “mahr” in a prenuptial agreement, often proceed along familiar grounds.<sup>9</sup>

In addition, the common law’s conflict-of-law principles are, and have always been, a staple of international family law. For example, *lex loci celebrationis* will typically determine the validity of a marriage regardless of whether the marriage occurred in a sister state or a foreign country,<sup>10</sup> and a marriage entered in either place may not be recognized if the marriage violates the forum’s strong public policy. Consequently, a polygamous marriage<sup>11</sup> or an arranged marriage to an underage party<sup>12</sup> may not be recognized, even if it is valid in the country of celebration. Similarly, the principles governing the recognition of a divorce judgment from a sister state or foreign country are coincident, although the analysis typically proceeds under the Full Faith and Credit Clause for the former and comity for the latter. Under either approach, a court will want one of the parties to have been domiciled in the jurisdiction issuing the decree,<sup>13</sup> and the

7. See, e.g., *Bergstrom v. Bergstrom*, 296 N.W.2d 490, 494 (N.D. 1980). *But see* *Love v. Love*, 851 P.2d 1283 (Wyo. 1993).

8. See, e.g., *Mitchell v. Mitchell*, 311 S.E.2d 456 (Ga. 1984); *In re Condon*, 73 Cal. Rptr. 2d 33, 42 (Ct. App. 1998).

9. Compare *In re Najani*, 251 Cal. Rptr. 871, 873 (Ct. App. 1988) (invalidating agreement that awarded wife mahr upon divorce as “facilitat[ing] divorce”), and *In re Noghrey*, 215 Cal. Rptr. 153 (Ct. App. 1985) (invalidating a kethuba that obligated the husband to give the wife at least \$500,000 upon divorce as encouraging divorce), with *Aziz v. Aziz*, 488 N.Y.S.2d 123, 124 (Sup. Ct. 1985) (upholding mahr provision because it conformed to the statutory requirements and its secular terms were enforceable). Mahr is a feature of the Islamic religion. It is a gift from the groom to the bride upon marriage, although the wife may sometimes receive part of it upon divorce or her husband’s death.

10. See *Lee v. Melanson*, No. 2006-T-0098, 2007 WL 1114012 (Ohio Ct. App. Apr. 13, 2007) (refusing to recognize that a marriage existed under South Korean law); *Farah v. Farah*, 429 S.E.2d 626 (Va. Ct. App. 1993) (refusing to recognize Muslim marriage contracted in England because the couple failed to comply with statutory requirements).

11. See, e.g., *People v. Ezeonu*, 588 N.Y.S.2d 116, 117 (Sup. Ct. 1992) (refusing, in rape trial, to recognize Nigerian marriage to a thirteen-year-old girl when defendant already had a wife at the time of his Nigerian marriage).

12. See, e.g., *B v. L*, 168 A.2d 90 (N.J. Super. Ct. Ch. Div. 1961)

13. Compare *Williams v. North Carolina (Williams II)*, 325 U.S. 226 (1945) (holding full faith and credit need not be given to a sister-state divorce decree when the issuing court lacked jurisdiction to grant it), with *Jewell v. Jewell*, 751 A.2d 735, 739 (R.I. 2000) (refusing to recognize ex parte divorce from Dominican Republic because neither party had a connection to the that country), and *Atassi v. Atassi*, 451 S.E.2d 371, 374 (N.C. Ct. App. 1995) (remanding to determine if defendant’s domicile was Syria for purpose of recognizing Syrian divorce). There are some exceptions, such as when the United States has no connection to the couple at the time of the divorce and the divorce was valid where granted, even though neither party was a domiciliary, see, e.g., *In re Goode*, 997 P.2d 244 (Or. Ct. App. 2000), or perhaps when there is a “bilateral” foreign divorce (both parties appear, even through an attorney), see, e.g., *Rabbani v.*

respondent to have been afforded due process.<sup>14</sup> These rules mean that the “Mexican mail order” divorce, which requires neither domicile nor personal appearances by either party, is just as problematic as the Nevada divorce obtained with a sham domicile.<sup>15</sup>

## II. New Statutory Provisions that Address International Family Law Disputes

### A. Overview

Although various aspects of international family law have remained relatively constant, some important changes have occurred over the last fifty years. Legislators have enacted numerous state and federal statutory provisions that are specifically relevant to family members who move across national boundaries. Private and public international law treaties have also become increasingly important to the resolution of family law matters. In addition, professional interest in the area has increased. Consequently, international family law has become a distinct and vibrant subset of “domestic relations.”

The number of new state and federal provisions addressing transnational families is notable. The Uniform Child Custody Jurisdiction Act (UCCJA),<sup>16</sup> the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),<sup>17</sup> the Uniform Reciprocal Enforcement of Support Act (URESAs)<sup>18</sup> and its revised version (RURESAs),<sup>19</sup> the Uniform Interstate Family Support Act (UIFSA),<sup>20</sup> the Uniform Adoption Act (UAA),<sup>21</sup> and

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Rabbani, 578 N.Y.S.2d 213, 214 (App. Div. 1991). *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 484 (1987 & Supp. 2007).

14. *See, e.g.*, Maklad v. Maklad, No. FA000443796S, 2001 WL 51662, at \*2 (Conn. Super. Ct. Jan. 3, 2001) (refusing to recognize Egyptian divorce in part because “plaintiff received no prior notice that defendant was seeking a certificate of divorce . . . and she was given no opportunity to be heard prior to the issuance of the decree”).

15. *Compare* Cammarota v. Sec’y of Health, Educ. & Welfare, 329 F. Supp. 1087 (N.D.N.Y. 1971) (holding that Mexican divorce was invalid), *with* Gage v. Gage, 89 F. Supp. 987 (D.D.C. 1950) (holding that Nevada divorce was not entitled to full faith and credit).

16. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 261 (1999) [hereinafter UCCJA].

17. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9 U.L.A. 649 (1999) [hereinafter UCCJEA].

18. UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9C U.L.A. 273 (2001) [hereinafter URESA].

19. REVISED UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9C U.L.A. 81 (2001) [hereinafter RURESAs].

20. UNIF. INTERSTATE FAMILY SUPPORT ACT (1996), 9 U.L.A. 281 (2005) [hereinafter UIFSA 1996]; UNIF. INTERSTATE FAMILY SUPPORT ACT (2001), 9 U.L.A. 159 (2005) [hereinafter UIFSA 2001].

21. UNIF. ADOPTION ACT (1994), 9 U.L.A. 11 (1999) [hereinafter UAA].

the Uniform Child Abduction Prevention Act (UCAPA)<sup>22</sup> all contain specific provisions addressing international aspects of cases.<sup>23</sup> Federal lawmakers have also enacted statutes addressing transnational issues, including the collection of child support for foreign creditors<sup>24</sup> and international dating.<sup>25</sup>

In addition, international treaties affect family law matters in the United States more than ever before. Congress has passed federal statutes to implement the United States' obligations under private international law treaties on the topics of abduction and adoption.<sup>26</sup> Treaties addressing the recovery of maintenance and the protection of children have attracted the United States' attention and may soon lead to additional implementing legislation.<sup>27</sup>

Public international law treaties have also impacted the practice of family law in the United States.<sup>28</sup> Various domestic statutes make international human rights relevant to the resolution of family law disputes. For example, the UCCJEA allows a court to forego enforcement of a foreign custody order "if the child custody law of a foreign country violates fundamental principles of human rights."<sup>29</sup> The UCAPA directs a court considering abduction prevention measures to assess whether the child's removal "poses a risk that the child's physical or emotional health or safety would be endangered in the country because of . . . human rights vio-

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22. UNIF. CHILD ABDUCTION PREVENTION ACT, 9 U.L.A. 34 (Supp. 2007) [hereinafter UCAPA].

23. See, e.g., *infra* text accompanying notes 68–76, 90–102, 134–59.

24. See *infra* text accompanying note 158.

25. See 8 U.S.C. § 1375a(d) (2006) (codifying part of the International Marriage Broker Regulation Act of 2005) (requiring that international marriage broker give information about the U.S. clients, including criminal record and marital history, to foreign client and obtain foreign client's consent to pass on the foreign client's contact information to U.S. client).

26. See *infra* text accompanying notes 78, 86–88, 119–30.

27. See *infra* text accompanying notes 163–86, 194–218.

28. See generally Sonja Start & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 217 (2003) (suggesting that increased protection for individual rights has also had an impact on internationalization).

29. See, e.g., UCCJEA, *supra* note 17, § 105(c); see also Hague Convention on the Civil Aspects of International Child Abduction art. 20, Oct. 25, 1980, 1343 U.N.T.S. 89 [hereinafter Hague Abduction Convention] (stating that the return of the child may be refused "if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms"); 42 U.S.C. § 11603(e)(2) (2006) (same). While Article 20 of the Hague Abduction Convention refers to the fundamental principles of the requested State, international treaties are relevant to ensure that the domestic principles qualify as fundamental principles. See Merle H. Weiner, *Strengthening Article 20*, 38 U.S.F. L. REV. 701, 711 (2004); see also Patricia Apy, *The Use of the United Nations Convention on the Rights of the Child in Family Litigation Involving American Children*, 5 GEO. J. ON FIGHTING POVERTY 215, 216–18 (1998) (arguing that a foreign judge might refuse to return a child to the United States because the United States has failed to ratify the Convention on the Rights of the Child).

lations committed against children.”<sup>30</sup> Family law litigators are also citing human rights instruments as binding or persuasive authority in other contexts,<sup>31</sup> although this practice is relatively rare and not necessarily successful.<sup>32</sup>

Litigants from the United States are now seeking relief in venues provided by international instruments. For example, in *Sylvester v. Austria*,<sup>33</sup> a U.S. father obtained a judgment from the European Court of Human Rights directing Austria to live up to its obligations under the Hague Abduction Convention.<sup>34</sup> Recently, Jessica Gonzales brought suit before the Inter-American Human Rights Commission against the United States after the U.S. Supreme Court denied her relief.<sup>35</sup> She claimed that her

30. UCAPA, *supra* note 22, § 7(a)(8)(C).

31. See generally Elizabeth M. Schneider, *Transnational Law as a Domestic Resource: Thoughts on the Case of Women’s Rights*, 38 NEW ENG. L. REV. 689, 709–12 (2004) (discussing various cases, including *Nguyen v. INS*, 553 U.S. 53 (2001), and *Nicholsen v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002), in which advocates employed public international law).

32. “[C]itations to the U.N. Charter, the [Universal Declaration of Human Rights], and other U.N. human rights instruments, are not commonplace” in case law. See Judith Resnick, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1632 & n.327 (2006). For example, courts in the United States have had a mixed response to arguments invoking the U.N. Convention on the Rights of the Child (CRC). Although the United States has never ratified the CRC after signing it, the CRC is persuasive to some judges. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005). U.S. litigants have occasionally invoked the CRC in family law matters, with some minor success. See, e.g., *Batista v. Batista*, No. FA 92 0059661, 1992 WL 156171, at \*6–7 (Conn. Super. Ct. June 18, 1992) (giving weight to Article 12 of CRC in deciding to issue temporary physical custody to father so father could have child heard in modification proceedings in Spain); *In re Adoption of Peggy*, 767 N.E.2d 29, 37–38 (Mass. 2002) (holding that adoption of child, and related proceedings, were in conformity with CRC even though CRC was not binding on court); *In re Julie Anne*, 780 N.E.2d 635, 656 (Ohio Ct. Com. Pl. 2002) (restraining smoking in child’s presence because smoking violated child’s rights under CRC, but mistakenly suggesting that the United States had ratified it); *In re Pedro M*, 864 N.Y.S. 2d 869, 872 n.8 (Fam. Ct. 2008) (ordering that juvenile be heard in court during permanency review). *But see* *Taveras v. Taveraz*, 477 F.3d 767, 780 (6th Cir. 2007) (holding that child abduction was not against the law of nations so as to give the court jurisdiction under the Alien Tort Claims Act, even though the CRC has various provisions on abduction, because none were precise enough to cover defendant’s acts); *Lazaridis v. Wehmer*, No. 06-793 SLR 2008 WL4758551 \*8 (D. Del Oct. 28, 2008) (rejecting argument based on CRC in case where father sought injunction against registration of French orders under the UCCJEA and UIFSA in Delaware). Whether family law judges will one day consider the CRC to be customary international law, and thereby binding on them, is a wholly different matter and unpredictable at this time. Outside the family law context, some courts have assumed that some provisions of the CRC represent customary international law. See, e.g., *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1010 (9th Cir. 2005); *O’Bryan v. Holy See*, 471 F. Supp. 2d 784 (W.D. Ky. 2007). Other courts have disagreed. See *Martinez-Lopez v. Gonzales*, 454 F.3d 500, 500–02 (5th Cir. 2006); *Arellano-Garcia v. Gonzales*, 429 F.3d 1183, 1187–88 (8th Cir. 2005).

33. 37 Eur. Ct. H.R. 417 (2003).

34. *Id.* at 433 (finding that Austria failed to act reasonably to enforce the return order and thereby breached the right to respect for family life found in Article 8).

35. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

human rights were violated when the town of Castle Rock failed to enforce her restraining order, leading to the murder of her three daughters by her ex-husband. The Inter-American Commission found her claim admissible and held a merits hearing on October 22, 2008.<sup>36</sup> Among other relief, Gonzales seeks an advisory opinion on “the nature and scope of United States obligations under the American Declaration [of the Rights and Duties of Man] in light of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).”<sup>37</sup> Other attorneys in the United States have followed suit. In 2007, a petition was filed with the Inter-American Commission on behalf of domestic violence victims who have suffered from the “policy and practice of giving child custody to abusers and molesters.”<sup>38</sup>

Professional interest in international family law has dramatically increased along with these developments. The International Society of Family Law began in 1973; the International Law Committee of the Section of Family Law of the American Bar Association (ABA) started in the late 1970s; the International Academy of Matrimonial Lawyers emerged in 1986; and the Family Law Committee of the International Law Section of the ABA formed in 2001–02. Law schools today offer courses specifically on international family law, and academics are pro-

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36. Gonzales v. United States, Petition 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L./V/II.130, doc. 22 rev. ¶ 60 (2007), available at <http://www.cidh.org/annualrep/2007eng/usa1490.05eng.htm>. Notably, the United States is not a party to the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, and the United States contends that the American Declaration of the Rights and Duties of Man is only a nonbinding aspirational statement. See D. MARIANNE BLAIR & MERLE H. WEINER, INTERNATIONAL FAMILY LAW: CONVENTIONS, STATUTES, AND REGULATORY MATERIALS 335 (2003) (citing evidence of the United States’ position). Yet the Inter-American Commission on Human Rights found various claims colorable under the American Declaration and indicated that it has the authority to make recommendations to the United States. See *Gonzales, supra*, at n.13. The merits hearing occurred on October 22, 2008. See Inter-American Commission on Human Rights, Schedule for Hearings for 133th Period of Sessions, <http://www.cidh.org/comunicados/english/2008/hearings133eng.htm> (last visited May 15, 2008).

37. See Petition Alleging Violations of the Human Rights of Jessica Gonzales by the United States of America and the State of Colorado, with Request for an Investigation and Hearing on the Merits 5-6 (Dec. 23, 2005), <http://www.aclu.org/pdfs/petitionallegingviolationsofthehumanrightsofjessicagonzales.pdf>. The United States is not a party to the Convention of Belém do Pará or the Convention on the Elimination of All Forms of Discrimination Against Women.

38. See Adriana Gardella, *Domestic Violence Case Makes International Claim*, WOMEN’S E-NEWS, Mar. 1, 2007, <http://www.womensenews.org/article.cfm?aid=3083> (targeting judges who ignore evidence of abuse that the law makes relevant to the decision); see also *United States Sued for Granting Abusers Child Custody*, 13 NAT’L BULL. ON DOMESTIC VIOLENCE PREVENTION 1 (June 2007).



ducing casebooks for these classes.<sup>39</sup> Practitioners and judges are being urged to take continuing legal education on the topic.<sup>40</sup> In sum, the new legal measures make international family law a much more complicated, dynamic, and exciting subfield today than fifty years ago, and the profession is responding accordingly.

### B. Children as a Catalyst

The codification of specific provisions related to transnational matters has tended to be in substantive areas related to children. This is certainly true of the uniform acts promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL). It is also true for the Hague Conference conventions. Since 1956, the Hague Conference has promulgated eleven conventions with a focus on children, including six on maintenance,<sup>41</sup> two on child protection,<sup>42</sup> one on abduction,<sup>43</sup> and two

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39. There are now several teaching tools available. BLAIR & WEINER, FAMILY LAW IN THE WORLD COMMUNITY: *supra* note 5 (2d ed. forthcoming in 2009 with Barbara Stark and Solangel Maldonado as additional co-authors); BARBARA STARK, INTERNATIONAL FAMILY LAW: AN INTRODUCTION (2005); ANN ESTIN & BARBARA STARK, GLOBAL ISSUES IN FAMILY LAW (2007).

40. See *Report of the Working Group on Lessons of International Law, Norms, and Practice*, 6 NEV. L.J. 656, 661 (2006) (suggesting that “1. Child lawyers, advocates, and judges need to be knowledgeable of and utilize international law and norms in representing children and families. 2. Education in international law, norms, and practices that affect children and families should take place in law schools and through continuing legal and judicial education.”). Law professors, lawyers, and advocates attended the conference that generated these recommendations. See *Participants in the Conference on Representing Children in Families: Children’s Advocacy and Justice Ten Years After Fordham*, 6 NEV. L. J. 688 (2006).

41. See *Convention sur la Loi Applicable aux Obligations Alimentaires Envers les Enfants* [Convention on the Law Applicable to Maintenance Obligations Towards Children] art. 1, Oct. 24, 1956, 510 U.N.T.S. 161, *translated in* 5 AM. J. COMP. L. 656 (1956) [hereinafter 1956 Hague Maintenance Convention]; *Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children*, Apr. 15, 1958, 539 U.N.T.S. 29 [hereinafter 1958 Hague Enforcement Convention]; *Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, Oct. 2, 1973, 1021 U.N.T.S. 209 [hereinafter 1973 Hague Enforcement Convention]; *Convention on the Law Applicable to Maintenance Obligations*, Oct. 2, 1973, 1056 U.N.T.S. 199 [hereinafter 1973 Hague Law Applicable Convention]; *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, Nov. 23, 2007, [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=131](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=131) [hereinafter 2007 Hague Maintenance Convention]; *Protocol on the Law Applicable to Maintenance Obligations*, Nov. 23, 2007, [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=133](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=133) [hereinafter 2007 Maintenance Protocol]. There was also one important U.N. Convention: *Convention on the Recovery Abroad of Maintenance*, June 20, 1956, 268 U.N.T.S. 3 [hereinafter 1956 New York Convention].

42. See *Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants*, Oct. 5, 1961, 658 U.N.T.S. 143 [hereinafter 1961 Hague Protection Convention]; *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children*, Oct. 19, 1996, 35 I.L.M. 1391 [hereinafter 1996 Hague Protection Convention].

43. See *Hague Convention on the Civil Aspects of International Child Abduction*, Oct. 25,

on adoption.<sup>44</sup> On the 100th anniversary of the first session of the Hague Conference, member States themselves recognized “that the Conference . . . is developing into a worldwide centre in the service of international judicial and administrative co-operation in the field of private law, and particularly in the area of child protection.”<sup>45</sup>

Children’s issues have similarly brought countries together to work on public international instruments. As accurately noted by the former executive director of the U.S. Committee for the United Nations Children’s Fund (UNICEF), “[w]hatever his differences may be, man can always unite in his concern for the welfare of his children and in his efforts to assist them.”<sup>46</sup> Consider that the 1924 League of Nations’ *Declaration on the Rights of the Child* was issued twenty-four years *before* the Universal Declaration of Human Rights. The 1959 Declaration on the Rights of the Child, with some principles that go beyond the Universal Declaration of Human Rights,<sup>47</sup> was adopted unanimously,<sup>48</sup> unlike the Universal Declaration of Human Rights, from which eight countries abstained.<sup>49</sup> The completion of the 1989 Convention on the Rights of the Child (CRC) was perhaps the epitome of world cooperation on behalf of children.<sup>50</sup> It was adopted without a vote, which means that no country opposed it.<sup>51</sup> Its drafting became a priority because of “the real political belief that the promotion and protection of children’s rights were less divisive than other issues on the diplomatic agenda.”<sup>52</sup>

International cooperation has been built on an expanding conception of

1980, 19 I.L.M. 1501.

44. See Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, Nov. 15, 1965, [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=75](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=75); Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 [hereinafter Hague Adoption Convention].

45. Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1146 [hereinafter Final Act of the 17th Session].

46. Norman Acton, *The World’s Children*, 28 J. EDUC. SOC. 282, 285 (1955).

47. Compare Declaration on the Rights of the Child, G.A. Res. 1386, at 19, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959) (Principles 4, 5, and 9), with Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

48. See CLAIRE BREEN, *THE STANDARD OF THE BEST INTERESTS OF THE CHILD: A WESTERN TRADITION IN INTERNATIONAL AND COMPARATIVE LAW* 78 (2002).

49. See PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 24 (1983).

50. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

51. See G.A. Res. 44/25, at 167, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Sept. 2, 1990); see also M.J. PETERSON, *THE GENERAL ASSEMBLY IN WORLD POLITICS* 86 (1986).

52. SIEGHART, *supra* note 49, at 25.

children's well-being. It was not until the nineteenth century that children were even seen as "a special vulnerable class in need of protection."<sup>53</sup> Today, countries identify more and more topics as relevant to children's well-being. In fact, the CRC is "the longest United Nations human rights treaty in force" if one counts substantive provisions.<sup>54</sup> It includes, for example, a provision on the child's right to participate in matters concerning him or her.<sup>55</sup> Even the more traditional provisions have been expansively interpreted. For example, the Committee on the Rights of the Child has interpreted the child's right to be free from "all forms of physical or mental violence"<sup>56</sup> as including the right to be free from corporal punishment by parents.<sup>57</sup>

Some of the private law treaties are also built on a broad understanding of children's well-being. For instance, the Hague Abduction Convention does not address "violent kidnappings by strangers,"<sup>58</sup> but is aimed at removals or retentions by family members, typically parents. Both international and U.S. law characterize these abductions as harmful to children,<sup>59</sup> although this was not always true.<sup>60</sup> Social scientists did not even

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53. See Stuart N. Hart, *From Property to Person Status: Historical Perspectives on Children's Rights*, 46 AM. PSYCHOLOGIST 53, 53–54 (1991). Geraldine Van Bueren argues that the CRC incorporated new rights because, among other things, nations "had themselves undergone a fundamental change in their attitude towards the status of children in their national laws," and cites *Tinker v. Des Moines*, 393 U.S. 503 (1969), as an example from the United States. See GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 13–14 (1995).

54. VAN BUEREN, *supra* note 53, at 16.

55. See CRC, *supra* note 50, art. 12.

56. *Id.* art. 19.

57. Comm. on the Rights of the Child, *General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, 42d Sess., ¶¶ 18–22, U.N. Doc. CRC/C/GC/8/2006 (Feb. 6, 2006).

58. *Mozes v. Mozes*, 239 F.3d 1067, 1069–70 (9th Cir. 2001).

59. See International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601(a)(1) (2006) (stating that "[t]he international abduction or wrongful retention of children is harmful to their wellbeing"). See generally Hague Abduction Convention, *supra* note 29, pmbl. (stating that signatory states want "to protect children internationally from the harmful effects of their wrongful removal or retention").

60. At one time, it was assumed that a child was not harmed if he or she remained in the company of a parent. See, e.g., *State v. Brandenburg*, 134 S.W. 529, 530 (Mo. 1911) ("The parental affection flowing from both father and mother to a child of tender years would be a protection to such child as long as it remained in the actual and immediate custody of either of them, and the filial love of the child would in most cases enable either parent to properly control its conduct; but these safeguards to the child would not exist between it and a mere agent, like the defendant in this case, who was not bound to it by any tie of consanguinity."). In addition, some courts suggested that the crime of child stealing was not a crime against the child, but only against the other parent. See *Wilborn v. Super. Ct. of Humboldt County*, 337 P.2d 65, 66 (Cal. 1959); see also *Wilson v. Mitchell*, 111 P. 21, 29 (Colo. 1910) (awarding custody to mother despite her abduction of child and not suggesting that abduction harmed child).

document the harm until the 1980s.<sup>61</sup> Similarly, the Hague Adoption Convention is premised on the view that international adoption is better for children than foster care in a child's country of origin,<sup>62</sup> an understanding that is arguably contrary to positions reflected in earlier international instruments.<sup>63</sup>

Children's welfare provides countries a fairly broad platform for promulgating an ever-widening array of international instruments. An infinite number of issues affect children. Currently, for example, there is talk about a new Protocol to the Hague Abduction Convention that would address measures to protect the returning parent; the Protocol is justified by the fact, admittedly true, that the well-being of the child is tied inextricably to the safety of the parent.<sup>64</sup> A convention on "the law applicable to unmarried couples,"<sup>65</sup> currently a low priority on the Hague Conference's

61. See Michael W. Agopian, *The Impact on Children of Abduction by Parents*, 63 CHILD WELFARE 511, 512 (1984) (stating that "no study to date has examined the impact of parental abduction on the victims"); Rebecca L. Hegar & Geoffrey L. Grief, *Impact on Children of Abduction by a Parent, A Review of the Literature*, 62 AM. J. ORTHOPSYCHIATRY 599, 599, 602 (1992) (asserting that "virtually nothing is known about the effects on [children] of parental abduction" and noting "the lack of reliable information about the wellbeing of the children"). Admittedly, individuals may have recognized the harm from abduction earlier, based upon personal observation. Some states had criminalized parental abduction by the 1930s. See 75 CONG. REC. H13296 (daily ed. June 17, 1932) (statement of Mr. Dyer). The 1968 UCCJA noted that children could be harmed if they were shifted from state to state. See UCCJA, *supra* note 16, § 1(a)(1).

62. See Final Act of the 17th Session, *supra* note 45, pmb., at 1139. Of course, the Hague Adoption Convention is also premised on the view that nations should eliminate the abuses of the international adoption system.

63. See CRC, *supra* note 50, art. 21 (suggesting that intercountry adoption is only appropriate "if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin"); see also Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, G.A. Res. 41/85, art. 17, at 265, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/Res/41/85 (Dec. 3, 1986) [hereinafter Declaration on Social and Legal Principles]. See generally Richard R. Carlson, *The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption*, 30 TULSA L.J. 243 (1994) (suggesting that the Hague Adoption Convention, as a whole, was a "clear rebuttal of restrictive interpretations" of the U.N. documents).

64. Hague Conference on Private Int'l Law, *Conclusions and Recommendations of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 1 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (30 October–9 November 2006)*, ¶ 1.8.3, at 12 (2006), [http://www.hcch.net/upload/concl28sc5\\_e.pdf](http://www.hcch.net/upload/concl28sc5_e.pdf) [hereinafter *Conclusions and Recommendations of the Fifth Meeting*].

65. See Hague Conference on Private Int'l Law, Prelim. Doc. No. 32A, *Report of the Special Commission on General Affairs and Policy of the Conference of 31 March / 1 April 2005*, at 28, (May 2005), [http://www.hcch.net/upload/wop/genaff\\_pd32a\\_e.pdf](http://www.hcch.net/upload/wop/genaff_pd32a_e.pdf); Council on Gen. Affairs & Policy, Hague Conference on Private Int'l Law, *Recommendations & Conclusions Adopted by the*

agenda, might become a higher priority if its proponents give greater emphasis to the link between children's well-being and the security and clarity of their parents' rights and obligations toward each other.<sup>66</sup>

The focus on children provides a wonderful opportunity to build consensus on a wide array of instruments, although at some point, nations may see the link between the instrument and children's welfare as too attenuated to justify the instrument's adoption.

### C. Measures of Note

Against this backdrop, this article now briefly turns to some of the statutory provisions in the United States specific to the field of international family law that were adopted over the last fifty years, most of which address topics relating to children: custody, adoption, and child support. After this quick description, the article will consider the possible reasons for the increase in U.S. legal provisions directed at transnational families.

#### 1. CHILD CUSTODY

In 1968, NCCUSL adopted the UCCJA, the first of several statutory efforts in the United States to deter child snatching, both domestically and internationally. The UCCJA reflects the belief that the place where the child lives is best situated to make a custody order; therefore, other jurisdictions should enforce, and not modify, the order.<sup>67</sup> Section 23 of the UCCJA made foreign custody orders similarly enforceable if they were made in conformity with the Act.<sup>68</sup> A few states never adopted Section 23,<sup>69</sup> and some courts occasionally questioned whether the UCCJA's pro-

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*Council 1* (Apr. 2-4, 2007), [http://hcch.e-vision.nl/upload/wop/genaff\\_concl2007e.pdf](http://hcch.e-vision.nl/upload/wop/genaff_concl2007e.pdf).

66. See Hague Conference on Private Int'l Law, Prelim. Doc. No. 11, *Note on Developments in Internal Law and Private International Law Concerning Cohabitation Outside Marriage, Including Registered Partnerships*, ¶ 40, at 14 (Mar. 2008) (prepared by Caroline Harnois & Juliane Hirsch), [http://hcch.e-vision.nl/upload/wop/genaff\\_pd11e2008.pdf](http://hcch.e-vision.nl/upload/wop/genaff_pd11e2008.pdf). It is notable that none of the four examples illustrating the need for an instrument involved children. *Id.* at 57-60.

67. See UCCJA, *supra* note 16, § 1 cmt.; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 13, § 485 cmt. b.

68. See UCCJA, *supra* note 16, § 23 ("The general policies of this Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons."). See, e.g., *Poluhovich v. Pellarano*, 861 A.2d 205 (N.J. Super. Ct. App. Div. 2004) (applying UCCJA and holding that New Jersey court did not have jurisdiction to modify Dominican Republic custody order).

69. See Robert G. Spector, *International Child Custody Jurisdiction and the Uniform Child Custody Jurisdiction and Enforcement Act*, 33 N.Y.U. J. INT'L L. & POL. 251, 259 (2000) (listing Missouri, New Mexico, and Ohio).

visions regarding simultaneous proceedings applied to foreign nations.<sup>70</sup> Prompted by these and other problems,<sup>71</sup> NCCUSL promulgated a new instrument: the UCCJEA.

The UCCJEA, like its predecessor, specifically addresses transnational child-custody cases. Section 105 requires a court to “treat a foreign country as if it were a State of the United States” for purposes of determining jurisdiction.<sup>72</sup> Foreign child-custody orders are to be recognized and enforced if they are made “under factual circumstances in substantial conformity with the jurisdictional standards” of the Act,<sup>73</sup> so long as the child custody law of the foreign country does not violate “fundamental principles of human rights.”<sup>74</sup> Section 305 provides a registration system, applicable to either a sister state or a foreign country’s order, that allows a parent to “predetermine the enforceability” of an order.<sup>75</sup> The commentary notes that a predetermination “may be of significant assistance in international cases.”<sup>76</sup> After all, a parent could ensure that a foreign order would be recognized and enforced prior to sending a child into the United States for parenting time.

In 1988, the United States became party to the 1980 Hague Convention on the Civil Aspects of International Child Abduction.<sup>77</sup> The Convention is implemented in the United States through the International Child Abduction Remedies Act.<sup>78</sup> The Convention requires the expeditious

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70. See *Goldstein v. Goldstein*, 494 S.E.2d 745 (Ga. Ct. App. 1998); *In re Marriage of Horiba*, 950 P.2d 340, 346 (Or. Ct. App. 1997).

71. There were also inconsistencies between the UCCJA and the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2000), that required attention.

72. UCCJEA, *supra* note 17, § 105(a). See, e.g., *In re Marriage of Sareen*, 62 Cal. Rptr. 3d 687, 692 (Ct. App. 2007) (permitting California trial court to take jurisdiction over custody matter despite the fact that earlier-filed simultaneous proceeding existed in India because California, not India, was child’s home state and Indian court’s exercise of jurisdiction was not in substantial conformity with the UCCJEA); *Susan L. v. Steven L.*, 729 N.W.2d 35 (Neb. 2007) (refusing to assume jurisdiction because courts of another country had continuing exclusive jurisdiction); *Hector G. v. Josefina P.*, 771 N.Y.S.2d 316 (Sup. Ct. 2003) (finding that court had jurisdiction because the home state, the Dominican Republic, deferred to the New York court, and New York had significant connections with the child and respondent); *Ruffier v. Ruffier*, 190 S.W.3d 884, 890 (Tex. App. 2006) (holding that Texas did not have child custody jurisdiction because Belarus was the home state).

73. See UCCJEA, *supra* note 17, § 105(b).

74. See *id.* § 105(c); see also D. Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 FAM. L.Q. 547, 565–66 (2004) (noting that the “escape clause” is seldom used).

75. See UCCJEA, *supra* note 17, § 305 & cmt.

76. See *id.*

77. See Hague Abduction Convention, *supra* note 29. The treaty entered into force for the United States on July 1, 1988. See HCCH.net, Status Table, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) (last visited May 15, 2008).

78. Pub. L. No. 100-300, § 2, 102 Stat. 437 (1988) (codified at 42 U.S.C. § 11601-11 (2006)).

return of a child to the child's habitual residence if the child has been wrongfully removed to, or wrongfully retained in, another Contracting State.<sup>79</sup> To obtain the remedy, the petitioner must have "rights of custody" and actually exercise those rights (or would have exercised those rights but for the removal or retention).<sup>80</sup> There are several defenses to the remedy of return, including that the child is "well-settled,"<sup>81</sup> that the child would be threatened with a "grave risk of harm" if returned,<sup>82</sup> that the child objects to return,<sup>83</sup> and that the left-behind parent acquiesced in the removal or retention.<sup>84</sup> Courts tend to interpret these defenses narrowly.

Implementation of the Convention is facilitated by an administrative structure comprised of Central Authorities,<sup>85</sup> as well as a provision in federal law that allows a prevailing petitioner to recover attorney's fees.<sup>86</sup> Both state and federal courts have jurisdiction to hear these cases.<sup>87</sup> A petitioner need not employ the assistance of the Central Authority, but can go directly to court.<sup>88</sup> The Convention is expressly not an alternative avenue for obtaining a custody determination. The Convention prohibits a court from deciding the merits of a custody dispute until the court has decided not to return the child.<sup>89</sup>

NCCUSL recently promulgated the Uniform Child Abduction Prevention Act (UCAPA).<sup>90</sup> UCAPA will help popularize the idea that "every abduction case may be a potential international abduction case."<sup>91</sup> The Act emphasizes prevention and was drafted, in part, to address the limited geographic scope of the Hague Abduction Convention and some countries' noncompliance with it.<sup>92</sup> Notably, UCAPA defines abduction more broadly than the Hague Abduction Convention by including interference with visitation.<sup>93</sup> UCAPA identifies risk factors for abduction and

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79. Hague Abduction Convention, *supra* note 29, art. 12.

80. *Id.* art. 3.

81. *Id.* art. 12.

82. *Id.* art. 13(b).

83. *Id.* art. 13.

84. *Id.* art. 13(a).

85. *See id.* art. 7.

86. *See* 42 U.S.C. § 11607(b)(3) (2006). Most other countries, however, offer free services to petitioners. *See* Hague Abduction Convention, *supra* note 29, art. 26.

87. 42 U.S.C. § 11603(a).

88. *Id.* § 11603(b).

89. Hague Abduction Convention, *supra* note 29, art. 16.

90. *See* UCAPA, *supra* note 22.

91. *See id.* § 8 cmt.

92. *See id.* prefatory note.

93. Abduction is defined under UCAPA as a wrongful removal or retention; both of these terms are defined to include the breach of another person's rights of custody or visitation. *See id.* §§ 2(1), (10), (11). The definition of abduction in UCAPA is similar to the definition in the International Parental Kidnapping Crime Act of 1993, 18 U.S.C. § 1204(b)(2) (2006) (defining

requires courts to impose appropriate prevention measures if there is a “credible risk” of abduction.<sup>94</sup>

The remedies available under UCAPA include the following: travel prerequisites, such as registering a custody order or obtaining a mirror order in the country of destination;<sup>95</sup> passport restrictions;<sup>96</sup> travel restrictions;<sup>97</sup> and conditions on the exercise of custody or visitation, such as agreeing to supervised visits, posting a bond, or receiving education on the harms of abduction.<sup>98</sup> In formulating an appropriate remedy, a court must consider whether the potential destination country is a party to the Hague Abduction Convention and whether that country complies with it.<sup>99</sup> The Act also permits an *ex parte* pick-up order to prevent imminent abduction, and this remedy is available even for parents who lack a custody determination.<sup>100</sup> UCAPA forthrightly addresses the fact that some abductors may be fleeing for reasons of safety and advises courts to avoid imposing restrictions that might harm these victims.<sup>101</sup>

## 2. ADOPTION

The Uniform Adoption Act of 1994 addresses intercountry placement and the recognition of foreign adoptions,<sup>102</sup> but only one state has adopted it.<sup>103</sup> Much more significant, therefore, is the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention),<sup>104</sup> which became effective in the

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“parental rights,” which cannot be obstructed, as including “visiting rights”). *Cf.* Hague Abduction Convention, *supra* note 29, arts. 3, 5 (defining abduction as a breach of “rights of custody”). Courts in the United States are divided about whether a *ne exeat* provision gives a party the rights of custody even if he or she only has rights of access otherwise. *Compare, e.g.,* Fawcett v. McRoberts, 326 F.3d 491 (4th Cir. 2003) (finding no rights of custody), *with* Furnes v. Reeves, 362 F.3d 702 (11th Cir. 2004) (finding rights of custody).

94. *See* UCAPA, *supra* note 22, § 8(b).

95. *Id.* § 8(c)(3), (6).

96. *Id.* § 8(c)(4).

97. *Id.* § 8(c)(1), (2).

98. *Id.* § 8(d).

99. *Id.* § 7(a)(8).

100. *Id.* §§ 8(e), 9(a), prefatory note; *see also id.* § 9 cmt. (indicating that Section 9 “mirrors Section 311” of the UCCJEA regarding a warrant to pick up a child).

101. *Id.* §§ 6 cmt., 7 cmt., 9 cmt. The commentary notes:

If the evidence shows that the parent preparing to leave is fleeing domestic violence, the court must consider that any order restricting departure or transferring custody may pose safety issues for the respondent and the child, and therefore, should be imposed only when the risk of abduction, the likely harm from the abduction, and the chances of recovery outweigh the risk of harm to the respondent and the child.

*Id.* § 7 cmt.

102. UAA, *supra* note 21, §§ 2-108, 1-108.

103. Uniform Law Commissioners, A Few Facts About The . . . Uniform Adoption Act (1994), <http://www.nccusl.org/Update/uniformact-factsheets/uniformacts-fs-aa94.asp> (last visited May 15, 2008).

104. Hague Adoption Convention, *supra* note 44.



United States on April 1, 2008. The Hague Adoption Convention is the first binding multinational instrument addressing adoption to which the United States is party.<sup>105</sup>

The Hague Adoption Convention seeks to establish safeguards, and a system of international cooperation to ensure that the safeguards are followed, so that “intercountry adoptions take place in the best interests of the child,” with respect for the child’s rights, and without practices like the sale, abduction, or trafficking of children.<sup>106</sup> The Convention is also designed to ensure that Contracting States recognize each other’s adoptions.<sup>107</sup> The Convention is beneficial for people in the United States because it provides a clear process for international adoptions, reassures sending nations that their children can safely be sent to the United States,<sup>108</sup> and establishes procedures for the small number of U.S. children who are adopted by foreigners.<sup>109</sup>

The Hague Adoption Convention operates through a system of Central Authorities, although accredited bodies can perform some of their functions.<sup>110</sup> The responsibilities of Central Authorities are logically divided between the sending and receiving nations. Consequently, a person seeking to adopt a child from another Contracting State must apply to the Central Authority (or an accredited body) in his or her own country of habitual residence.<sup>111</sup> The receiving nation is responsible for preparing a

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105. The United States has entered bilateral agreements with other nations, but nothing on the scale of the 1993 Hague Adoption Convention. The United States never became party to the 1965 Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions. The U.N. Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, has some provisions similar to those in the 1993 Adoption Convention, but it is a nonbinding declaration. *See* Declaration on Social and Legal Principles, *supra* note 63, pt. C, at 265. International adoption was specifically addressed in Articles 17–18, 20–24.

106. Hague Adoption Convention, *supra* note 44, art. 1(a)-(b). For a detailed description of the Convention’s provisions, see BLAIR & WEINER, *supra* note 5, at 928–37; *see also* G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (1994), <http://hcch.e-vision.nl/upload/exp133e.pdf>. For a nice overview of the Convention, *see* Carlson, *supra* note 63. For a brief discussion of the Hague Adoption Convention’s limitations, *see* Crystal J. Gates, *China’s Newly Enacted Intercountry Adoption Law: Friend or Foe?*, 7 *IND. J. GLOBAL LEGAL STUD.* 369, 377 (1999).

107. Hague Adoption Convention, *supra* note 44, art. 1(c); *see also id.* arts. 23–24.

108. *See* Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation Agencies; Approval of Persons; Preservation of Convention Records, 68 *Fed. Reg.* 54064 (proposed Sept. 15, 2003) (to be codified at 22 C.F.R. pt. 96) (reporting that some countries indicated their unwillingness to allow U.S. citizens to continue to adopt unless the United States ratified the Hague Adoption Convention).

109. *See* Peter Pfund, *The Hague Intercountry Adoption Convention and Federal International Child Support Enforcement*, 30 *U.C. DAVIS L. REV.* 647, 657 (1997).

110. *See* Hague Adoption Convention, *supra* note 44, art. 22(1), (4).

111. *Id.* art. 14. In the United States, the Attorney General, acting through the Commissioner of Immigration and Naturalization, performs the function of taking applications. *See* 42 U.S.C.

report on the prospective parents and determining their eligibility and suitability,<sup>112</sup> and then the sending nation is responsible for obtaining the necessary consents and preparing a report on the child.<sup>113</sup> Both Central Authorities, or accredited bodies, must ultimately approve the adoption.<sup>114</sup>

The Hague Adoption Convention sets forth some specific procedures for intercountry adoption,<sup>115</sup> including that no contact can occur between the prospective adoptive parents and the child's parents (or others who have care of the child) until, among other things, the child is determined to be adoptable, the necessary consents have been given, and the adopters have been determined suitable to adopt.<sup>116</sup> In addition, the transfer must occur, if at all possible, in the company of the adopters.<sup>117</sup> Private adoptions are regulated, but not prohibited.<sup>118</sup>

The U.S. implements the Hague Adoption Convention through the International Adoption Act of 2003 (IAA).<sup>119</sup> The IAA applies only to Convention adoptions,<sup>120</sup> although its Case Registry will include all intercountry adoptions.<sup>121</sup> The Department of State is designated as the Central Authority for the United States.<sup>122</sup> As permitted by the Convention, the State Department will use accredited agencies and approved persons to perform some of the U.S. Central Authority's functions.<sup>123</sup> It has designated the Council on Accreditation and the Colorado Department of Human Services as accrediting entities to help accredit adoption service

§§ 14913, 14902(6) (2006).

112. Hague Adoption Convention, *supra* note 44, art. 15(1).

113. *Id.* art. 16, 22(2).

114. *Id.* art. 17(c). This provision may make it difficult for some nontraditional families to adopt from some countries.

115. *Id.* ch IV.

116. *Id.* art. 29.

117. *Id.* art. 19(2).

118. See Pfund, *supra* note 109, at 651–54.

119. 42 U.S.C. §§ 14901-54 (2006).

120. The Special Commission, in 2000 and 2005, recommended that States Parties apply the law of the Hague Adoption Convention, as far as practicable, to non-Contracting States too. See Hague Conference on Private Int'l Law, *Conclusions and Recommendations of the Second Meeting of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (17–23 September 2005)* ¶ 19 (Oct. 2005), <http://www.hcch.net/upload/wop/concl33sc05e.pdf>.

121. 42 U.S.C. § 14912(e).

122. *Id.* § 14911. The Central Authority's work will be handled by employees of the Office of Children's Issues in the Office of Consular Affairs, located within the Department of State. See *id.* § 14911(b)(2). These people are to have "a strong background in consular affairs, personal experience in international adoptions or professional experience in international adoptions or child services." *Id.* The Secretary of State is responsible for a variety of tasks, including providing information about the U.S. adoption system to the Central Authorities of other countries, *id.* § 14912(b)(1), and ensuring that home studies go to the appropriate authority, *id.* § 14912(b)(4).

123. See Hague Adoption Convention, *supra* note 44, art. 9.

providers.<sup>124</sup>

No person may offer or provide adoption services in connection with a Convention adoption unless the person is accredited, approved, or provides services through or under the supervision of an accredited agency or approved person,<sup>125</sup> although several exceptions exist, including for lawyers who do not provide any adoption services in a case.<sup>126</sup> Participation in Convention adoptions without the proper accreditation or approval can result in stiff civil and criminal penalties.<sup>127</sup> The standards and procedures for the accreditation of agencies and approval of persons are found in the IAA and its regulations.<sup>128</sup> An agency accredited in the United States may only work in another country if it is authorized to do so by the other country,<sup>129</sup> which may cause duplicative regulation.

The United States also adopted the Child Citizenship Act of 2000 to implement the Hague Adoption Convention. The Act amends the Immigration and Nationality Act, and specifies that a child under the age of eighteen, in the physical and legal custody of a citizen parent, who was lawfully admitted to the United States, and who is adopted by a U.S. citizen here or abroad, automatically becomes a U.S. citizen.<sup>130</sup>

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124. See Colo. Dep't of Human Servs., The Hague Convention, [http://www.cdhs.state.co.us/childcare/Hague\\_home.htm](http://www.cdhs.state.co.us/childcare/Hague_home.htm) (last visited May 15, 2008).

125. See 42 U.S.C. § 14921.

126. See *id.* § 14921(b)(3). Adoption service is defined as “identifying a child for adoption and arranging an adoption;” “securing necessary consent to termination of parental rights and to adoption;” “performing a background study on a child or a home study on a prospective adoptive parent, and reporting on such a study;” “making determinations of the best interests of a child and the appropriateness of adoptive placement for the child;” “post-placement monitoring of a case until final adoption;” and, “where made necessary by disruption before final adoption, assuming custody and providing child care or any other social service pending an alternative placement.” *Id.* § 14702(3). The statute also specifies that “providing” includes “facilitating the provision of the service.” *Id.*

127. The possible penalties include a \$50,000 civil penalty for the first violation, *id.* § 14944(a)(1), (3), and up to five years imprisonment and fines of up to \$250,000 for a “willful” or “knowing” failure to become accredited or approved or to act under the necessary approved or accredited agency, *id.* § 14944(c).

128. See *id.* § 14923. The regulations are found at 22 C.F.R. §§ 96.1 to -111 (2006). For example, accredited bodies can only pursue “non-profit objectives.” See 42 U.S.C. § 14923(b)(1)(G); see also Hague Adoption Convention, *supra* note 44, art. 11(a). While approved persons can operate for profit, see 42 U.S.C. § 14923(b)(2), they must not, among other things, “derive improper financial or other gain from an activity related to intercountry adoption,” and they must charge only “costs and expenses, including reasonable professional fees.” See Hague Adoption Convention, *supra* note 44, art. 32. For other requirements, see *id.* arts. 10-11, 22, 32; see also 42 U.S.C. § 14923(b) (setting forth requirements in U.S. statute).

129. See Hague Adoption Convention, *supra* note 44, art. 12.

130. Child Citizenship Act of 2000, Pub. L. No 106-395, 114 Stat. 1631 (codified as amended at 8 U.S.C. § 1431 (2006)). The adoption must comply with the requirements applicable to adopted children under 8 U.S.C. § 1101(b)(1). *Id.*; see also *id.* § 1433 (providing conditions for acquiring certificate of citizenship if the child does not acquire citizenship automatically).

## 3. CHILD SUPPORT

Over the last fifty years, there have been major changes in the laws governing the transnational establishment and enforcement of child support orders. At common law, the enforcement of another nation's order was addressed as a matter of comity.<sup>131</sup> This older approach is now supplemented by state and federal agreements with foreign countries, uniform state laws, the U.S. Code, and a new treaty on maintenance.

The enforcement and establishment of foreign support orders was initially facilitated by the adoption of RURESA in 1968,<sup>132</sup> which modified the 1950 URESA.<sup>133</sup> RURESA permitted the civil enforcement and registration of foreign orders.<sup>134</sup> RURESA also allowed an out-of-state resident to obtain a support order in the respondent's state with the help of a public official and without traveling to that state.<sup>135</sup> Residents of foreign countries also qualified for this assistance as well as the registration and enforcement of their orders if the foreign jurisdiction had "a substantially similar reciprocal law . . . in effect."<sup>136</sup> Consequently, the enactment of RURESA fostered a series of bilateral agreements between states and foreign nations.<sup>137</sup>

In 1996, the federal government began entering similar agreements with foreign countries,<sup>138</sup> and explicitly authorized the states to continue

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131. Generally, courts will enforce an order for support issued by a foreign court if it is "valid and effective under the law of the state where it issued." *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 486(1) (1987 & 2007 Supp.). The issuing court's procedures must comport with due process, the defendant must have been subject to that court's jurisdiction, the defendant must have had notice of the proceeding, and the judgment must not conflict with state or federal public policy. *See id.* § 482. *See generally* Fickling v Fickling, 619 N.Y.S.2d 749, 749 (App. Div. 1994) (confirming the registration of an Australian property and child support order, entered by default, when there was no evidence of fraud or that registration would violate the strong public policy of the state); Office of Child Support v. Sholan, 782 A.2d 1199, 1202 (Vt. 2001) (enforcing German child support order under comity even though Germany was not a foreign reciprocating country).

132. *See* RURESA, *supra* note 19.

133. *See* URESA, *supra* note 18; Gloria DeHart, *Getting Support Over There*, 9 FAM. ADVOC. 34 (1987) (discussing URESA).

134. *See* RURESA, *supra* note 19, pts. III, IV.

135. *See id.* § 11(b).

136. *See id.* § 2(m).

137. *See* Gloria Folger DeHart, *Comity, Conventions, and the Constitution: State and Federal Initiatives in International Support Enforcement*, 28 FAM. L.Q. 89, 94 n.23 (1994) (explaining that Michigan, New York, and California had developed reciprocal arrangements with Ontario, Canada, and these agreements "increased interest in international enforcement"). For a list of states with state-level agreements with foreign countries, *see* U.S. Dep't of State, Child Support Enforcement Abroad, [http://travel.state.gov/law/info/info\\_608.html#states](http://travel.state.gov/law/info/info_608.html#states) (last visited May 15, 2008); *see also* 42 U.S.C. § 654(32) (2006) (indicating that a state plan for child and spousal support must treat requests by foreign reciprocating countries or foreign countries with which it has an agreement the same as requests by sister-states).

138. *See* Hague Conference on Private Int'l Law, Prelim. Doc. No. 2, *Maintenance*

entering their own agreements.<sup>139</sup> The federal government's agreements usually require the reciprocating nation to recognize and enforce U.S. orders, and to assist U.S. citizens at no cost in the establishment and enforcement of child support orders.<sup>140</sup> These agreements also impose obligations on the United States for the benefit of foreign citizens, which are generally satisfied today by provisions in the Uniform Interstate Family Support Act (UIFSA) and Title IV-D of the Social Security Act of 1975.

UIFSA was promulgated in 1992 to replace URESA and RURESAs,<sup>141</sup> in part because states were modifying registered orders from other states.<sup>142</sup> All states enacted UIFSA because the federal government made its adoption a condition for the receipt of federal child support funds.<sup>143</sup> UIFSA was amended in 1996 and 2001, and the 2001 amendments, in particular, have important implications for the enforcement of foreign orders,<sup>144</sup> although not all states have adopted these amendments.<sup>145</sup> UIFSA makes clear that it is not an exclusive remedy and that comity may still be important.<sup>146</sup>

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*Obligations: Note on the Desirability of Revising the Hague Convention on Maintenance Obligations and Including in a New Instrument Rules on Judicial and Administrative Co-operation* 27 (Jan. 1999) (prepared by William Duncan), <http://hcch.e-vision.nl/upload/wop/maint1999pd2.pdf> [hereinafter *Maintenance Obligations*]. See generally 42 U.S.C. § 659a(a) (authorizing the Secretary of State to declare a foreign country or political subdivision to be a foreign reciprocating country if it has certain procedures). The United States has federal reciprocal arrangements in force with a number of countries and Canadian provinces. See, e.g., Notice of Declaration of Foreign Countries as Reciprocating Countries for the Enforcement of Family Support (Maintenance) Obligations, 72 Fed. Reg. 39127, 39128 (proposed July 17, 2007). For a list of federally recognized foreign reciprocating countries, see Office of Child Support Enforcement, U.S. Dep't of Health & Human Servs., Foreign Reciprocating Countries, <http://www.acf.hhs.gov/programs/cse/international> (last visited May 15, 2008).

139. See 42 U.S.C. § 659a(d).

140. See *id.* § 659a(b)(1)(A)(i), (b)(1)(B). See, e.g., Admin. for Children & Families, U.S. Dep't of Health & Human Servs., Agreement Between the Government of the United States of America and the Government of Australia for the Enforcement of Maintenance (Support) Obligations, [http://www.acf.hhs.gov/programs/cse/international/country/australia/au\\_agreement.html](http://www.acf.hhs.gov/programs/cse/international/country/australia/au_agreement.html) (last visited May 15, 2008).

141. See UIFSA 1996, *supra* note 20.

142. See UIFSA 2001, *supra* note 20, prefatory note.

143. See 42 U.S.C. § 666(f); see also UIFSA 1996, *supra* note 20, prefatory note (explaining that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 required adoption of UIFSA).

144. For example, the 2001 amendments made explicit that a state can appoint an individual to determine whether a foreign country or political subdivision has a reciprocal arrangement for child support with that State. See UIFSA 2001, *supra* note 20, § 308(b). The 2001 amendments also make clear that domestic courts can communicate with courts in a foreign country to expedite the establishment and enforcement of a support order. See *id.* § 317 & cmt.

145. The 2001 amendments have been adopted by approximately nineteen states. See Table of Jurisdictions Wherein Act has Been Adopted, 9 (pt. 1B) U.L.A. 36 (2007 & Supp.). Federal law does not require states to enact the 2001 amendments.

146. See UIFSA 2001, *supra* note 20, § 104(a). UIFSA 2001 made this clear, although the

UIFSA improves upon RURESA in many important ways.<sup>147</sup> For instance, it requires courts to treat foreign orders as sister-state orders, even absent a reciprocal agreement,<sup>148</sup> so long as the foreign country has laws and procedures that permit a U.S. order to be recognized there.<sup>149</sup> In addition, a registered order cannot be modified, which occurred under RURESA; rather, the issuing court has continuing exclusive jurisdiction.<sup>150</sup> There is an exception, however,<sup>151</sup> if the foreign jurisdiction “will not or may not modify its order pursuant to its laws,”<sup>152</sup> and the U.S. court has personal jurisdiction over the parties. This situation might arise if the foreign country requires that the parties be present in order to modify support, and it is unable to compel a party living abroad to appear.<sup>153</sup> Since the tribunal of the enforcing State cannot modify the order, UIFSA requires it to follow the law of the issuing State.<sup>154</sup> Consequently, the law of the country that issued the order will determine the duration of the foreign child support order.<sup>155</sup> UIFSA also minimizes the importance of the two-state procedure of initiating and responding states, a hallmark of RURESA, by minimizing the initiating tribunal’s responsibilities and allowing an individual or support enforcement agency to initiate a pro-

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language in the 1996 Act is broad enough to reach this result too. *See* UIFSA 1996, *supra* note 20, § 103.

147. For example, UIFSA embodies the concept of continuing exclusive jurisdiction. *See* UIFSA 1996, *supra* note 20, §§ 205-207; UIFSA 2001, *supra* note 20, §§ 205-207. UIFSA also permitted parties to use the services of the state support enforcement agency or private attorneys. *See* UIFSA 1996, *supra* note 20, §§ 307, 309; UIFSA 2001, *supra* note 20, §§ 307, 309.

148. The 2001 amendments to UIFSA expanded the definition of “state,” explicitly using the term to cover either a foreign jurisdiction or its political subdivision if a federal reciprocal arrangement or a state reciprocal arrangement was in force, or if it has “enacted a law or established procedures for the issuance and enforcement of support orders which are substantially similar to the procedures under this Act.” UIFSA 2001, *supra* note 20, § 102(21).

149. *See id.* § 102 cmt.

150. *See* UIFSA 1996, *supra* note 20, §§ 205-06, 603; UIFSA 2001, *supra* note 20, §§ 205, 603; *see also* Traer Cundiff, *Making Sense of the Changes: The 2001 Amendments to UIFSA*, 20 J. AM. ACAD. MATRIMONIAL L. 323, 344–45 (2007).

151. Otherwise, a U.S. state can only modify a foreign order under the same conditions that it would modify a sister-state order. *See* UIFSA 1996, *supra* note 20, § 611; UIFSA 2001, *supra* note 20, § 611.

152. UIFSA 2001, *supra* note 20, § 615.

153. *Id.* § 615 cmt.

154. *See* UIFSA 1996, *supra* note 20, § 604; UIFSA 2001, *supra* note 20, § 604. *But see* UIFSA 1996, *supra* note 20, § 604(b) (“In a proceeding for arrearages, the statute of limitation under the laws of this State or of the issuing State, whichever is longer, applies.”); UIFSA 2001, § 604(b) (stating same except order must also be registered).

155. *See, e.g.,* *Grabka v. Grabka*, No. 641-990061, slip op. at 246, 251–52 (Conn. Super. Ct. Sept. 26, 2000) (holding that respondent had to pay postmajority support established in Polish order since Connecticut had adopted UIFSA, although result may have been different under RURESA).

ceeding directly in a responding tribunal.<sup>156</sup> Nonetheless, an initiating tribunal in a transnational case may still have certain responsibilities, such as specifying the amount of support sought in the foreign country's currency or providing certain documents, if requested to do so by the foreign nation.<sup>157</sup>

Under Title IV-D of the Social Security Act of 1975,<sup>158</sup> a party from a foreign reciprocating country is entitled to the services of the support enforcement agency of the state,<sup>159</sup> including the establishment of an initial order, enforcement of an existing order, and even enforcement of spousal support if the Title IV-D agency is enforcing the child support award and the child lives with the parent-obligee.<sup>160</sup> The same agency will help an applicant from the United States establish an order over a foreign respondent if a court in the U.S. state has personal jurisdiction over the respondent. The order can then be registered and enforced in the other nation.<sup>161</sup>

The United States signed a new convention on maintenance in 2007, and the government is expected to ratify it shortly.<sup>162</sup> The Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance (Hague Maintenance Convention)<sup>163</sup> will complement procedures available under UIFSA<sup>164</sup> and relieve the federal

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156. See UIFSA 1996, *supra* note 20, §§ 301, 304; UIFSA 2001, *supra* note 20, §§ 301, 304(a) & cmt.

157. See UIFSA 1996, *supra* note 20, § 304 & cmt; UIFSA 2001, *supra* note 20, § 304 & cmt. If asked to enforce a foreign support order stated in a foreign currency, the 2001 amendments require the responding tribunal to convert the amount stated in a foreign currency into dollars. See UIFSA 2001, *supra* note 20, § 305(f).

158. See 42 U.S.C. § 654 (2000 & Supp. V. 2005) (requiring a Title IV-D agency to treat requests from foreign reciprocating countries the same as requests from a Title IV-D agency in another state).

159. For a list of state recognized foreign reciprocating countries, see Office of Child Support Enforcement, U.S. Dep't of Health & Human Servs., Intergovernmental Referral Guide (IRG) Public Map Page, <http://ocse3.acf.hhs.gov/ext/irg/sps/selectastate.cfm> (last visited May 15, 2008). For a list of federally recognized foreign reciprocating countries, see Office of Child Support Enforcement, *supra* note 138.

160. A Title IV-D agency has discretion whether it will provide assistance for an individual in a nonreciprocating foreign country. BLAIR & WEINER, *supra* note 5, at 828–29.

161. See Hague Convention on Private Int'l Law, Prelim. Doc. No. 2, *Compilation of Responses to the 2002 Questionnaire Concerning a New Global Instrument on the International Recovery of Child Support and Other Forms of Family Maintenance* 58 (Apr. 2003), [http://www.hcch.net/upload/wop/maint\\_pd02.pdf](http://www.hcch.net/upload/wop/maint_pd02.pdf) [hereinafter *Compilation of Responses to the 2002 Questionnaire*].

162. See Robert G. Spector & Bradley C. Lechman-Su, *International Family Law*, THE INT'L LAW., Sum. 2008, at 1, available at <http://meetings.abanet.org/webupload/commupload/IC942000/relatedresources/2007YearInReview.pdf>.

163. See 2007 Hague Maintenance Convention, *supra* note 41.

164. The Hague Maintenance Convention does not abolish other methods of directly establishing or modifying a maintenance decision. See *id.* art. 37(1). Nor does it affect existing recip-

and state governments from having to negotiate with foreign nations individually to ensure enforcement of U.S. orders abroad—at least for those nations that become parties to the Hague Maintenance Convention. U.S. ratification will be a milestone if and when it occurs. The United States has never before become a party to a multilateral treaty on maintenance, even though several international instruments exist on the topic.<sup>165</sup>

The new Hague Maintenance Convention manages to avoid many of the problems that plagued earlier Hague instruments. For example, the 1958 and 1973 Hague Enforcement Conventions had provisions that would have violated the U.S. Constitution.<sup>166</sup> Those Conventions required enforcement of an order entered in the creditor's place of residence, even though such an order might not satisfy the U.S. due process requirements for personal jurisdiction over the debtor.<sup>167</sup> While the Hague Maintenance Convention has a similar provision,<sup>168</sup> the Convention expressly allows a Contracting State to make a reservation with regard to that provision. However, if a reservation is made, the Contracting state must still enforce the order so long as its own law "would in similar factual circumstances confer . . . jurisdiction on its authorities to make such a decision."<sup>169</sup> If a foreign order could not be enforced even under this broad provision, the United States would be obligated to establish a maintenance order for the creditor's benefit if the debtor were habitually resident in the United States.<sup>170</sup>

The Hague Maintenance Convention also avoids some of the pitfalls that led the United States to reject the 1956 New York Convention on the Recovery Abroad of Maintenance,<sup>171</sup> a U.N. Convention recommended to

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rocal agreements with other nations. *See id.* arts. 51(1), 52.

165. There have been five other major international instruments of note. *See supra* note 41. Two of the Hague Conventions address recognition and enforcement, with the 1973 Convention replacing the 1958 Convention for those countries that have adopted both. In addition, two of the Hague Conventions address choice of law, with the 1973 Convention replacing the 1956 Convention for those countries that have ratified both. The U.N. Convention on the Recovery of Maintenance, June 20, 1956, 268 U.N.T.S. 3 (known as the New York Convention), differed from the Hague Conventions in its administrative structure. The U.N. Convention provided administrative help to creditors who sought to institute a maintenance claim or enforce a judgment. For a good overview of the instruments, *see generally Maintenance Obligations, supra* note 138.

166. *See Compilation of Responses to the 2002 Questionnaire, supra* note 161, at 333; *Kulko v. California*, 436 U.S. 84, 91 (1978) (holding that a valid child support order required personal jurisdiction over the obligor).

167. 1958 Hague Enforcement Convention, *supra* note 41, arts. 2–3; 1973 Hague Enforcement Convention, *supra* note 41, arts. 4, 7(1).

168. 2007 Hague Maintenance Convention, *supra* note 41, art. 20(1)(c).

169. *Id.* art. 20(2), (3).

170. *Id.* art. 20(4).

171. *See* David F. Cavers, *International Enforcement of Child Support*, 81 COLUM. L. REV. 994, 1005 (1981) (describing the "Federal State clause" that would create a "difficult law-reporting task" for the federal government). The 2007 Hague Maintenance Convention has far



the State Department by the ABA and the National Child Support Enforcement Association.<sup>172</sup> Unlike the 1956 U.N. Convention, the Hague Maintenance Convention clearly establishes a regime for the establishment of maintenance decisions and ensures free legal assistance.<sup>173</sup>

The Hague Maintenance Convention operates through a system of Central Authorities.<sup>174</sup> The Central Authorities are supposed to assist with the establishment of a maintenance decision (including the establishment of parentage where necessary for the recovery of support)<sup>175</sup> the recognition and enforcement of a decision,<sup>176</sup> and the modification of a decision by either the creditor or debtor.<sup>177</sup> These services, which can be delegated, are to be provided free to applicants in most instances.<sup>178</sup> Spousal support orders are also entitled to recognition and enforcement, but creditors do not necessarily receive all the same administrative support, such as help locating the debtor and the debtor's assets.<sup>179</sup> Yet this extensive system of coop-

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less onerous reporting requirements, as a State Party need not update information pursuant to requests by other States Parties. See 2007 Hague Maintenance Convention, *supra* note 41, art. 57 (requiring that Contracting States provide to the Permanent Bureau, and keep up-to-date, information about their laws, procedures, and services).

172. See DeHart, *supra* note 133, at 35.

173. See *Compilation of Responses to the 2002 Questionnaire*, *supra* note 161, at 328; see also Mary Helen Carlson et al., *International Family Law*, 36 INT'L LAW. 665, 665 (2002) (suggesting that the U.N. Convention on the Recovery Abroad of Maintenance was not attractive to the United States because "it does not require the provision of legal services at no cost to the petitioner"). In 1996, Congress passed § 659A of the Social Security Act, see 42 U.S.C. § 659A(b)(1)(B) (2000), which requires reciprocity be granted only if, *inter alia*, the country provides services to U.S. residents at no cost. The new Hague Maintenance Convention requires the establishment and enforcement of orders and also requires that legal services be provided at no cost. See 2007 Hague Maintenance Convention, *supra* note 41, arts. 1, 10.

174. See 2007 Hague Maintenance Convention, *supra* note 41, arts. 4-8, 12.

175. See *id.* art. 10(1)(c)-(d). The new Hague Maintenance Convention requires States Parties to enter and enforce maintenance orders for children until the age of twenty-one, unless a State Party limits the Convention's application to children up to the age of eighteen. See *id.* art. 2(1)(a)(2). This is an improvement over the 1956 U.N. Convention, which some nations claimed did not go as far. See *Maintenance Obligations*, *supra* note 138, at 23.

176. See 2007 Hague Maintenance Convention, *supra* note 41, art. 10(1)(a)-(b). Applicants can include a public body that is owed reimbursement for benefits it provided in place of maintenance. See *id.* art. 36.

177. See *id.* art. 10(1)(e)-(f), (2)(b)-(c). Currently, the Central Authority for international child support agreements is the federal Office of Child Support Enforcement. See U.S. Dep't of State, U.S. Federal International Child Support Agreements, [http://travel.state.gov/family/services/support/support\\_2599.html](http://travel.state.gov/family/services/support/support_2599.html) (last visited May 15, 2008).

178. See 2007 Hague Maintenance Convention, *supra* note 41, arts. 8, 14-15. Some charges may be made for exceptional costs arising from a request for specific measures. See *id.* art. 8(2)-(3).

179. A spousal support application alone is not necessarily entitled to any of the administrative cooperation set forth in Chapters II and III. See *id.* art. 2(1)(b)-(c); Hague Conference on Private Int'l Law, Prelim. Doc. No. 32, *Hague Preliminary Draft Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, ¶¶ 48, 88 (Aug. 2007) (prepared by Alegría Borrás & Jennifer Degeling), [http://www.hcch.net/upload/wop/expl38draft\\_e.pdf](http://www.hcch.net/upload/wop/expl38draft_e.pdf) [hereinafter *Hague Preliminary Draft Convention*].

eration through Central Authorities should solve various problems that had previously existed, including the “black hole syndrome,” whereby a request for assistance would disappear once received by another country.<sup>180</sup>

The Hague Maintenance Convention is not a total panacea, however. Although the Convention tries to avert the possibility of multiple child support orders by requiring a debtor, in most cases,<sup>181</sup> to seek modification in the state of the creditor’s habitual residence so long as the order was entered there and the creditor continues to reside there,<sup>182</sup> the modification provision is under-inclusive. Commentators have noted, for example, that the provision does not address the situation in which the creditor moves from his or her habitual residence.<sup>183</sup> While this situation is covered by UIFSA for enforcement actions in the United States,<sup>184</sup> and by other nation’s rules for enforcement actions abroad (for example, the Brussels I regulation for Europe<sup>185</sup>), the differences in the jurisdictional approaches may result in two orders. Other potential problems exist too. For instance, there is nothing to stop a child abductor from seeking child support from the left-behind parent, other than the undefined idea of “ordre public.”<sup>186</sup> On balance, however, the Hague Maintenance Convention represents an important opportunity to increase the collection of child support abroad for parents in the United States.

At the time the Hague Maintenance Convention was completed, an optional protocol known as the Protocol on the Law Applicable to

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180. See *Compilation of Responses to the 2002 Questionnaire*, *supra* note 161, at 246. See, e.g., 2007 Hague Maintenance Convention, *supra* note 41, art. 12.

181. See 2007 Hague Maintenance Convention, *supra* note 41, art. 18(2).

182. See *id.* art. 18(1).

183. See Spector & Lechman-Su, *supra* note 162, pt. I.A.IV (discussing Article 18).

184. See UIFSA 2001, *supra* note 20, § 611.

185. See Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1, art. 5(2) (suggesting that the courts in the place where the maintenance creditor is domiciled or habitually resident have jurisdiction over maintenance matters). A new regulation is expected and it has wider grounds for jurisdiction. See *Commission Proposal for a Council Regulation of the European Community on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations*, COM (2005) 0649 final (Dec. 15, 2005). For proposed amendments to the Commission Proposal, see European Parliament Legislative Resolution of 13 December 2007 on the Proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0620+0+DOC+XML+V0//EN> (last visited May 15, 2008).

186. See 2007 Hague Maintenance Convention, *supra* note 41, art. 22(a). The United States does not believe that the 2007 Hague Maintenance Convention should apply when the creditor has abducted the child. See *Compilation of Responses to the 2002 Questionnaire*, *supra* note 161, at 273.

Maintenance Obligations was also completed.<sup>187</sup> It mandates that the law of the creditor's habitual residence govern maintenance obligations, except in certain designated situations.<sup>188</sup> The United States is unlikely to sign this Protocol. As the State Department explained, "insisting that lawyers and litigants analyze and argue foreign law, and that courts make decisions based on foreign law, would be an enormous burden, could be so costly as to effectively eliminate a litigant's rights, and would probably result in a decision based on incorrect application of foreign law."<sup>189</sup>

The United States has consistently resisted the application of foreign law to the establishment of maintenance obligations, which explains why the United States never ratified the 1956 and 1973 Hague Applicable Law Conventions.<sup>190</sup> Courts in the United States apply the law of the forum for child support matters, which includes a forum's choice of law provisions and any applicable federal law. The Hague Maintenance Convention specifies that the applicable law and the jurisdictional rules for most matters is the law of the requested state,<sup>191</sup> a rule that comports well with the practice of courts in the United States. Similarly, at the time of enforce-

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187. See 2007 Maintenance Protocol, *supra* note 41.

188. See *id.* art. 3(1). If and when the creditor moves, the law of the creditor's new habitual residence governs, see *id.* art. 3(2), even if the applicable law is that of a non-Contracting State. See *id.* art. 2. However, the 2007 Maintenance Protocol contains several provisions that seek to ensure a support order can be established. If the law to be applied would not provide maintenance, the Convention provides a number of alternative bases for choice of law. For example, for child support, if the creditor cannot obtain maintenance under the law of the creditor's habitual maintenance, then the law of the forum will apply. See *id.* art. 4(2). If the creditor is pursuing an action in the debtor's habitual residence, the law of the forum will apply unless the creditor cannot obtain maintenance from the debtor under it, in which case the law of the creditor's habitual residence shall apply. See *id.* art. 4(3). Finally, the law of their common nationality can apply if the creditor cannot otherwise obtain maintenance from the debtor. See *id.* art. 4(4). The 2007 Maintenance Protocol also contains a substantive provision for determining the amount of maintenance: "Even if the applicable law provides otherwise, the needs of the creditor and the resources of the debtor as well as any compensation which the creditor was awarded in place of periodical maintenance payments shall be taken into account in determining the amount of maintenance." 2007 Maintenance Protocol, *supra* note 41, art. 14. The 2007 Hague Maintenance Protocol differentiates between the applicable law for spousal maintenance and child support. See, e.g., 2007 Maintenance Protocol, *supra* note 41, art. 5.

189. *Compilation of Responses to the 2002 Questionnaire*, *supra* note 161, at 270, 338.

190. The 1956 and 1973 Hague Applicable Law Conventions both tend to apply the law of the creditor's habitual residence, even when the habitual residence changes. See 1956 Hague Maintenance Convention, *supra* note 41, art. 1; 1973 Hague Applicable Law Convention, *supra* note 41, art. 4. The 1973 Convention permits a reservation by a State Party to ensure that its internal law will apply when both parties are nationals of that country and the debtor is habitually resident there. See 1973 Hague Law Applicable Convention, *supra* note 41, art. 15. The 1956 Convention also permitted a State Party to apply its own law when an authority of the State was seized of the matter, the debtor and the minor child were nationals of that State, and the debtor was habitually resident in that State. See 1956 Hague Maintenance Convention, *supra* note 41, art. 2.

191. See 2007 Hague Maintenance Convention, *supra* note 41, arts. 10(3), 23(1), 32(1).

ment, courts in the United States will not typically reexamine the merits of an order,<sup>192</sup> and the Hague Maintenance Convention is in accord by giving only limited bases for refusing recognition and enforcement.<sup>193</sup>

#### 4. HAGUE PROTECTION CONVENTION

If topic (children), source (the Hague), and administrative structure (Central Authorities) predict the United States' likelihood of becoming a party to a convention, then the United States may become party to the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Hague Protection Convention).<sup>194</sup> This Convention's long title is aptly descriptive of what it is meant to accomplish.

Part of the Hague Protection Convention is loosely analogous to the UCCJEA. The Convention lays out rules regarding a court's jurisdiction to address custody, visitation, and guardianship, although the Convention also addresses jurisdictional rules for matters related to the child's property.<sup>195</sup> The Convention covers both private disputes and state action on behalf of children.<sup>196</sup> It does not address adoption, the establishment or disestablishment of a parent-child relationship, or other specified topics.<sup>197</sup> The main basis for jurisdiction is the child's habitual residence,<sup>198</sup> except when an abduction is involved<sup>199</sup> or when the parents are divorc-

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192. See *Compilation of Responses to the 2002 Questionnaire*, *supra* note 161, at 46; see also UIFSA 2001, *supra* note 20, § 604 & cmt.

193. See 2007 Hague Maintenance Convention, *supra* note 41, art. 22. The Convention contains a list of specific bases for nonrecognition, including the following: manifest incompatibility with public policy; the decision was obtained by fraud; an earlier filed case is pending in the requested State; a later decision supercedes the one for which the parties seek enforcement; the order violates procedural due process; or, the order was obtained from a tribunal other than the one having continuing jurisdiction. See *id.* art. 22.

194. 1996 Hague Protection Convention, *supra* note 42.

195. See *id.* art. 3. For an excellent description of the Hague Protection Convention and potential barriers to U.S. ratification, see generally Linda Silberman, *The 1996 Hague Convention on the Protection of Children: Should the United States Join?*, 34 *FAM. L.Q.* 239 (2000).

196. See, e.g., 1996 Hague Protection Convention, *supra* note 42, art. 3(e)-(f).

197. *Id.* art. 4.

198. See *id.* art. 5. However, there are a series of provisions that are exceptions to this rule. For example, the child's presence is the basis for jurisdiction for refugee children who are internationally displaced. See *id.* art. 6.

199. According to Article 7, the State Party where the child was habitually resident before the removal or retention keeps its jurisdiction until the child acquires a new habitual residence and either (1) each person having rights of custody acquiesced in the removal or retention, or (2) the child has lived in the new place for at least one year after the left-behind parent should have had knowledge of the child's whereabouts, no application for the child's return is still pending, and the child is well settled. See *id.* art. 7.

ing in a place other than the child's habitual residence.<sup>200</sup> In addition, any country where the child is present can take emergency or provisional measures for the child's protection.<sup>201</sup> A court with jurisdiction has the ability to transfer the case to another court.<sup>202</sup>

Under the Hague Protection Convention, measures taken in one country shall be recognized in all other Contracting States, unless one of the following facts exists: the court lacked jurisdiction when the order was issued; the child was not heard in the proceeding, except in matters of urgency; the parent was denied due process; or the result would be manifestly contrary to public policy.<sup>203</sup> The Convention permits a party to obtain a statement of recognition or nonrecognition from a Contracting State about a measure taken in another Contracting State,<sup>204</sup> although a Contracting State must declare a measure enforceable or register it for purposes of enforcement if a party seeks enforcement of the measure.<sup>205</sup> A declaration of enforceability may only be refused for the same reasons that justify the nonrecognition of a measure, set forth above.<sup>206</sup>

It is worth mentioning the Hague Protection Convention's position on applicable law, if for no other reason than to suggest that it should not be a barrier to ratification. The law applicable to measures of protection in the Convention is generally the internal law of the country exercising jurisdiction,<sup>207</sup> but not its choice of law rules,<sup>208</sup> and subject to an exception for reasons of "ordre public."<sup>209</sup>

Like the other conventions that the United States has joined, the Hague Protection Convention requires States Parties to have a particular administrative structure for the Convention's implementation, namely Central Authorities.<sup>210</sup> Either directly or through others, the Central Authorities

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200. If the court adjudicating a divorce is not located in the child's habitual residence, it can determine custody only if the parties agree and one of the parents habitually resides in that country. *See id.* art. 10.

201. *See id.* arts. 11–12.

202. *See id.* arts. 8–9.

203. *See id.* art. 23. There are also several other grounds for nonrecognition. *See id.* art. 23(e)–(f).

204. *See id.* art. 24.

205. *See id.* art. 26; *see also* Paul Lagarde, *Hague Conference on Private Int'l Law, Explanatory Report on the 1996 Hague Child Protection Convention*, 2 PROCEEDINGS OF THE EIGHTEENTH SESSION 538, 589 (1996).

206. *See* 1996 Hague Protection Convention, *supra* note 42, art. 26(3).

207. *See id.* art. 15(1). *But see id.* arts. 16–17 (stating that attribution or extinction of parental responsibility by operation of law, and exercise of parental responsibility, is governed by the law of the child's habitual residence).

208. *See id.* art. 21(2). *But see id.* art. 15(2) (permitting in exceptional circumstances consideration of the law of another country with which the situation has a substantial connection).

209. *See id.* art. 22.

210. *See id.* arts. 29–39; *see also* Lagarde, *supra* note 205, at 589–97.

have various obligations, including enabling communication between judges, helping locate a child if the child may need protection, facilitating the resolution of disputes by mediation or conciliation,<sup>211</sup> and providing relevant information to other Central Authorities regarding potential measures of protection.<sup>212</sup> The Central Authorities' obligations are markedly less onerous than under some of the other conventions.<sup>213</sup>

Professor Robert Spector has pointed to "difficulties" that the United States may have ratifying the Hague Protection Convention.<sup>214</sup> Most notably, the Convention lacks the concept of continuing exclusive jurisdiction, as is found in the UCCJEA.<sup>215</sup> Consequently, if a child's habitual residence shifts,<sup>216</sup> then a new court would acquire jurisdiction to modify custody or access, even if the shift resulted from child abduction.<sup>217</sup> Other countries rejected a U.S. proposal to have jurisdiction continue for at least two years after entry of an order so long as one parent continued to reside in the country that issued the order and that parent had a relationship with the child.<sup>218</sup>

The UCCJEA already affords foreign custody orders many of the benefits that the Hague Protection Convention would offer. Therefore, the major advantage of ratification for U.S. citizens would be the recognition and enforcement abroad of U.S. orders, assuming such orders are not currently recognized and enforced, and assuming that the failure of U.S.

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211. See 1996 Hague Protection Convention, *supra* note 42, art. 31.

212. See *id.* art. 34(1).

213. See Lagarde, *supra* note 205, at 591 (explaining the decision not to impose excessive bureaucracy given the number of children potentially involved); see also Hague Conference on Private Int'l Law, Prelim. Doc. No. 19, *Report on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (30 October – 9 November 2006)*, at 39 (Mar. 2007), [http://www.hcch.net/upload/wop/genaff\\_pd19e2007.pdf](http://www.hcch.net/upload/wop/genaff_pd19e2007.pdf) [hereinafter *Report on the Fifth Meeting*] (noting that the Permanent Bureau explained, "Article 30 of Chapter V of the 1996 Convention contained the only direct obligation imposed on Central Authorities because the other articles allowed for the possibility of imposing obligations on a competent authority").

214. See ROBERT G. SPECTOR, *The New Uniform Law with Regard to Jurisdiction Rules in Child Custody Cases in the United States with Some Comparisons to the 1996 Hague Convention on the Protection of Children*, in *INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN MEMORY OF PETER NYGH* 357, 361 (Talia Einhorn & Kurt Siehr eds. 2004).

215. See UCCJEA, *supra* note 17, at 202.

216. See 1996 Hague Protection Convention, *supra* note 42, art. 5(2). There is a limited exception if a court with jurisdiction was seized of the matter at the time the habitual residence shifted. See *id.* art. 13.

217. See *id.* art. 7; see also *supra* note 199.

218. Other countries feared that such a proposal would splinter jurisdiction for custody and access and other aspects of parental responsibility. See Lagarde, *supra* note 205, at 553–54.

courts to hear a child in some instances would not, on balance, hamper the enforcement of U.S. orders. It is debatable whether the enhanced enforceability of U.S. orders outweighs the disadvantage of excluding foreign orders subject to the Hague Protection Convention from the UCCJEA's concept of continuing exclusive jurisdiction.

### III. Why All of This Activity?

The explosion of statutory provisions related to international family law is probably attributable to several institutional shifts, both at home and abroad. First, the United States became an active member of the Hague Conference. Second, the Central Authorities and Special Commissions associated with the various Hague conventions have built competency among nations to address family law issues transnationally; they also have fostered trust among nations, which, in turn, has led to further international initiatives. Third, "federalism" has become less of an obstacle to the federal government's participation in international treaties that address family law topics.

#### A. *The United States at the Hague*

While countries have drafted international family law instruments at the Hague since the late 1800s,<sup>219</sup> the United States only joined the Hague Conference in 1964. U.S. participation has permitted the United States to tailor the instruments to its own needs,<sup>220</sup> and U.S. ratification has allowed other nations to receive more "bang" from an instrument, given the United States' size. The United States currently has the largest number of incoming and outgoing cases under the Hague Abduction Convention,<sup>221</sup> its

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219. See Simeon E. Baldwin, *The New Code of International Family Law*, 12 YALE L.J. 487 (1903) (detailing efforts by European countries to address conflict-of-law issues with respect to marriage, divorce, and guardianship of minors through conventions drafted at the Hague).

220. U.S. participation does not always mean that the United States will in fact join the instrument. See, e.g., Willis Reese, *The Hague Draft Convention on the Recognition of Foreign Divorces*, 14 AM. J. COMP. L. 692 (1966) (mentioning that the 1968 Convention on Recognition of Divorces and Legal Separations was the first in which the United States participated in drafting and it was drafted with United States' "needs" and "law" in mind). The United States never joined the 1968 Convention on Recognition of Foreign Divorces and Legal Separations.

221. In 2003, the United States received 23% of the total Hague Abduction Convention applications overall. England and Wales had the second highest number at 11%. The United States also initiated the most return applications, with 13% coming from the United States; England and Wales were again in second place with 10% of the total outgoing applications. See Hague Conference on Private Int'l Law, Prelim. Doc. No. 3, pt. II, *A Statistical Analysis of Applications Made in 2003 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* 14, 16 (Oct. 2006) (prepared by Nigel Lowe et al.), [http://hcch.e-vision.nl/upload/wop/abd\\_pd03efs2006.pdf](http://hcch.e-vision.nl/upload/wop/abd_pd03efs2006.pdf).

citizens adopt the most children internationally,<sup>222</sup> and it probably will have the largest volume of cases under the new Hague Maintenance Convention. Consequently, the United States' participation in drafting a convention increases the likelihood that the convention will be successful for the United States and for others too. Success, of course, breeds a willingness to try further ventures.<sup>223</sup> For example, the success of various Hague Children's Conventions was mentioned as a reason for why the Conference should draft a new Hague Maintenance Convention.<sup>224</sup>

*B. Central Authorities and Special Commissions:  
Cooperation, Trust, and Institutional Dynamics*

The 1956 New York Convention was the first family law treaty that required States Parties to adopt an ongoing system of transnational cooperation.<sup>225</sup> Many recent conventions have included provisions requiring continuous, active transborder cooperation through Central Authorities. Central Authorities are integral to the operation of the Hague Abduction Convention,<sup>226</sup> Hague Adoption Convention,<sup>227</sup> Hague Protection Convention,<sup>228</sup> Hague Maintenance Convention,<sup>229</sup> and Hague Protection of Adults Convention.<sup>230</sup> Professor Linda Silberman described the Central Authorities that were created pursuant to the Hague Abduction Convention as "not merely . . . passive depositor[ies] for papers and documents but as . . . active and dynamic institution[s] to facilitate communication between

222. See THOMAS JACOBS, 1 CHILDREN & THE LAW: RIGHTS AND OBLIGATIONS § 4:75 (Supp. 2007).

223. Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 956 (2005) (citing ROBERT JERVIS, SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE 125 (1997)) ("The positive feedback loop in international law enables change and growth in legal rules. Cycles of reinforcement lead to enhanced cooperation, as evidenced by the deepening integration of the European Union; success breeds success.").

224. See *Hague Preliminary Draft Convention*, *supra* note 179, at 8.

225. The New York Convention employed a system of administrative cooperation between transmitting and receiving agencies in the two countries. See 1956 New York Convention, *supra* note 41, art. 2(1), (2); see also *Hague Preliminary Draft Convention*, *supra* note 179, at 6 (mentioning that the 1956 New York Convention was the "first Convention in which a system of co-operation of authorities [was] established"). These administrative procedures have not always operated as designed, primarily because of insufficient funding. See *Maintenance Obligations*, *supra* note 138, at 23. For other difficulties with the New York Convention, see *id.* at 23–25.

226. Hague Abduction Convention, *supra* note 29, arts. 6–7.

227. See Hague Adoption Convention, *supra* note 44, art. 7 (stating that Central Authorities are to "co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and achieve the other objects of the Convention").

228. See 1996 Hague Protection Convention, *supra* note 42, art. 30.

229. See 2007 Hague Maintenance Convention, *supra* note 41, art. 5.

230. See Convention on the International Protection of Adults, art. 29, Jan. 13, 2000, 39 I.L.M. 7 (2000). The United States is not a party to this Convention.



the respective contracting states.”<sup>231</sup> Although the various conventions impose different levels of responsibility on the Central Authorities—for example, some conventions permit Central Authorities to delegate many of their functions so that their responsibilities are primarily supervisory—Central Authorities are still meant to be “active” and “dynamic.” Administrative cooperation generally enhances the effective implementation of a treaty,<sup>232</sup> thereby bolstering the likely success of a treaty that has it,<sup>233</sup> and also facilitating further transnational initiatives by the creation and nurturance of relationships.<sup>234</sup>

The United States has preferred joining conventions with a system of Central Authorities. The recent U.S. participation in negotiations over the Hague Maintenance Convention, in fact, demonstrates the importance of this administrative structure to the United States. The United States was resolute that the Hague Maintenance Convention should require States Parties to establish “strong, effective Central Authorities and other related authorities at every step in the process.”<sup>235</sup> For the United States, this was an “essential feature” of the Convention.<sup>236</sup>

In addition, the United States has only become a party to family law conventions that have had Special Commissions. Special Commissions also help the conventions succeed. The Special Commissions work out solutions to problems of implementation, encourage consensus on issues of interpretation, and expand cooperation and trust among the treaty participants.<sup>237</sup> Although not mandated by the Hague Abduction Convention itself, there have been five meetings of the Special Commission that

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231. See Silberman, *supra* note 195, at 262.

232. See, e.g., *Report on the Fifth Meeting*, *supra* note 213, at 23 (“The Special Commission was reminded that co-operation was the basis for the effective operation of the [Abduction] Convention.”).

233. See generally Glennon, *supra* note 223.

234. See *Hague Preliminary Draft Convention*, *supra* note 179, at 24 (“Experience with other Hague Children’s Conventions has shown that knowledge and understanding of other countries’ administrative and legal processes and requirements help to build the mutual trust and confidence that lead to better co-operation and more effective implementation of the Convention.”); see also James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT’L ORG. 943, 959–60 (1998) (explaining the possible effects of interaction on political competencies, including political compromise).

235. See *Compilation of Responses to the 2002 Questionnaire*, *supra* note 161, at 269.

236. *Id.*

237. Professor Carlson has noted, albeit in a slightly different context, how meetings to craft the Hague Adoption Convention built “trust between nations of origin and receiving nations” because they were “an opportunity to develop confidence-building rules,” and they were a “forum for mutual education.” See Carlson, *supra* note 63, at 263–64; see also Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 LAW & CONTEMP. PROBS. 209 (1994) (noting that the Special Commissions create “an acute awareness and self-consciousness by treaty countries of the needs and perceptions of the treaty partners in carrying out the mandate of the Convention”).

reviews its operation. The newer conventions require that the Special Commissions meet at regular intervals.<sup>238</sup> Again, to the extent that the Special Commissions helps make conventions effective, they also make it more likely that countries will join new initiatives.<sup>239</sup>

Special Commissions are also important for their generative potential. Not only do the Special Commissions support the work of the Permanent Bureau,<sup>240</sup> but they also propose new projects for the Permanent Bureau, some of which are themselves important for building trust and understanding among the treaty partners.<sup>241</sup> Special Commissions also generate enthusiasm for new international instruments. Consequently, there is a cyclical effect: a new instrument generates a need for a Special Commission, and the Special Commission then identifies new needs that require more international instruments. For example, at its last meeting, the Special Commission for the Hague Abduction Convention discussed possible legislation on transnational access, the safe return of the child and the accompanying parent, judicial communication, and international mediation.<sup>242</sup>

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238. See, e.g., Hague Adoption Convention, *supra* note 44, art. 42; 2007 Hague Maintenance Convention, *supra* note 41, art. 54; 1996 Hague Protection Convention, *supra* note 43, art. 56.  
239. See generally Glennon, *supra* note 223.

240. For example, in the context of the Hague Abduction Convention, there is now a Guide to Good Practice, a data collection database (INCASTAT), a case management system (iChild), a case law database (INCADAT), a focus on mediation, a judicial liaison network, an effort to create a new uniform form for permission to travel internationally, and a newsletter for judges. See generally Hague Conference on Private Int'l Law, Prelim. Doc. No. 3, *Projects Concerning the Children's Conventions, Maintenance, Adults and Cohabitation—Planning for 2008–2009* (Feb. 2008), [http://www.hcch.net/upload/wop/genaff\\_pd03e2008.pdf](http://www.hcch.net/upload/wop/genaff_pd03e2008.pdf); see also Linda J. Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1082–84 (2005) (noting the ways in which the Permanent Bureau encourages and supports such initiatives).

241. For example, a network of judicial liaisons was created to enhance operation of the Hague Abduction Convention. See generally Hague Conference on Private Int'l Law, Prelim. Doc. No. 8, *Report on Judicial Communications in Relation to International Child Protection* 5–8 (Oct. 2006) (prepared by Philippe Lortie), [http://hcch.e-vision.nl/upload/wop/abd\\_pd08e2006.pdf](http://hcch.e-vision.nl/upload/wop/abd_pd08e2006.pdf); see also *Report on the Fifth Meeting*, *supra* note 213, at 47–48 (“The States were encouraged to nominate liaison judges and to promote co-operation between judges.”).

242. See *Conclusions and Recommendations of the Fifth Meeting*, *supra* note 64, ¶ 1.6.7(e) (stating that the Permanent Bureau will “explore the value of drawing up principles concerning direct judicial communications, which could serve as a model for the development of good practice, with the advice of a consultative group of experts drawn primarily from the judiciary”); *id.* ¶ 1.7.2(b) (recommending that the Permanent Bureau “continue its work on a more general feasibility study on cross-border mediation in family matters including the possible development of an instrument on the subject, mandated by the Special Commission on General Affairs and Policy of April 2006”); *id.* ¶ 1.7.3 (“The Special Commission recognizes the strength of arguments in favour of a Protocol to the 1980 Convention which might in particular clarify the obligations of States Parties under Article 21 and make clearer the distinction between ‘rights of custody’ and ‘access rights.’ However, it is agreed that priority should at this time be given to the efforts in relation to the implementation of the 1996 Convention.”); *id.* ¶ 1.8.3 (“Positive consideration was given to the possibility of a Protocol to the 1980 Convention which would

A similar dynamic was seen at the regular diplomatic session that approved the Hague Adoption Convention. The omission of refugee children from the Hague Adoption Convention's scope led the Conference to call for "further study and possibly the elaboration of a special instrument supplementary to this Convention" for refugee children and other internationally displaced children, and "a working group" to make specific proposals to a Special Commission.<sup>243</sup> The Conference also decided to explore the possible revision of the 1961 Convention on the Protection of Minors<sup>244</sup> and "a possible extension of a new convention's scope to the protection of incapacitated adults."<sup>245</sup> These ideas led to the 1996 Convention on the Protection of Children<sup>246</sup> and the Convention on the International Protection of Adults.<sup>247</sup> Review of these conventions may, in turn, lead to other initiatives. In short, institutional dynamics explain the generative quality of these gatherings,<sup>248</sup> and will undoubtedly lead to more international instruments in the future.

### C. Federalism as a Barrier

Another factor contributing to the increase in international family law measures is the attitudinal shift within the United States about the appropriateness of the federal government legislating on family law matters. The Supreme Court's oft-quoted passage from *In re Burrus*<sup>249</sup> reflects the older view that family law was a topic solely for state regulation: "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."<sup>250</sup> In fact, it was just this sort of categorical federalism<sup>251</sup> that led

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provide a clear legal framework for the taking of protective measures to secure the safe return of the child (and where necessary the accompanying parent). The potential value of a Protocol was recognized though not as an immediate priority.").

243. See Final Act of the 17th Session, *supra* note 45, at 1145 (Decision, pt. c).

244. 1961 Hague Protection Convention, *supra* note 42.

245. See Final Act of the 17th Session, *supra* note 45, at 1145 (Decision, pt. b(1)).

246. See 1996 Hague Protection Convention, *supra* note 42; see also Gloria F. DeHart, *Introductory Note*, 35 I.L.M. 1391, 1391 (1996).

247. See Convention on the International Protection of Adults, *supra* note 230.

248. See March & Olsen, *supra* note 234, at 966 ("Organizations not only become better and better at what they do, they see new things to do. Having the capability of doing new things leads, in turn, to seeing their desirability."); *id.* at 963–64 (explaining how "epistemic-communities" create "frames for action that integrate across nation-states"); see also José Alvarez, *International Organizations: Then & Now*, 100 AM. J. INT'L L. 324, 328 (2006).

249. 136 U.S. 586 (1890).

250. *Id.* at 593–94 (granting writ of habeas corpus to release a grandfather who abducted his granddaughter in violation of an order that the district court had no jurisdiction to enter).

251. Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 620 (2001) (describing "categorical federalism" as a method by which a court says something is "truly" national or "truly" local and then presumes that decision makers in that

Willis L.M. Reese, the Director of the Parker School of Foreign and Comparative Law at Columbia University, to predict in 1956 that the United States would not become a formal member of the Hague Conference, but would remain an observer delegation with a “limited” role.<sup>252</sup> Fifty years later, the United States is no longer merely an observer,<sup>253</sup> and French is no longer the only official language of the Conference.<sup>254</sup>

When the United States joined the Hague Conference in 1964, it demonstrated a perceptible reluctance to become party to family law initiatives,<sup>255</sup> even if an instrument appeared beneficial for the United States. Consequently, for example, the United States never became party to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations,<sup>256</sup> even though many commentators thought it would be “of substantial value” for those with a U.S. divorce decree, since “many European states deny automatic recognition of United States divorce decrees, which are based solely on ‘domicile.’”<sup>257</sup> Professor Friedrich Juenger predicted correctly that the United States would not ratify that Convention. He explained that the United States was “reluctan[t] to enter into a treaty dealing with divorce, a matter left to the states.”<sup>258</sup> Although the United States became party to its first Hague Convention in 1967,<sup>259</sup> it

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realm have exclusive control over the subject matter).

252. See Willis L.M. Reese, *Some Observations on the Eighth Session on the Hague Conference on Private International Law*, 5 AM. J. COMP. L. 611, 612–13 (1956) (noting that “it is devoted exclusively to the preparation of conventions which involve matters falling in large part within the area reserved to the States under the Tenth Amendment to the Constitution”).

253. The American Bar Association urged the federal government to become a member of the Hague Conference, and Congress passed a law permitting it in 1963. See Peter H. Pfund, *U.S. Participation in International Unification of Private Law*, 19 INT’L LAW. 505 (1985) (citing 22 U.S.C. § 269g (1980)).

254. Reese, *supra* note 252, at 613. These two events are connected. When the United States joined the Hague Conference, English became the Conference’s second official language. See Silberman, *supra* note 195, at 258.

255. See DeHart, *supra* note 137 (talking about the child support instruments); see also STARK, *supra* note 39, at 219 (suggesting that the United States’ historical reluctance to become a party was “in part because the states, rather than the federal government, assume responsibility for such obligations”).

256. June 1, 1970, 978 U.N.T.S. 393.

257. Philip W. Amram, *Report on the Eleventh Session of the Hague Conference on Private Int’l Law*, 63 AM. J. INT’L L. 521, 524 (1969); Friedrich Juenger, *Recognition of Foreign Divorces—British and American Perspectives*, 20 AM. J. COMP. L. 1, 32 (1972) (asserting that the “benefits of ratification would be considerable”); Arthur T. von Mehren & Kurt H. Nadelmann, *The Hague Conference Convention of June 1, 1970 on Recognition of Foreign Divorce Decrees*, 5 FAM. L.Q. 303, 308 (1971) (noting that U.S. divorces would receive more recognition abroad); *Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law*, 8 I.L.M. 785, 800 (1969). For an excellent description of the Convention and how it would have operated, see generally Juenger, *supra*.

258. Juenger, *supra* note 257, at 34.

259. See Stephen B. Burbank, *The United States’ Approach to International Civil Litigation:*

took approximately twenty more years for the United States to become party to a Hague family law convention.

"Federalism" concerns seemed particularly compelling when treaty membership required fundamental changes to state family law and U.S. citizens would receive little benefit from the treaty. For example, the United States never became party to the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages (Hague Marriage Convention).<sup>260</sup> That Convention would have proved "troublesome" because it required recognition of evasivary marriages (marriages that were prohibited in the couple's domicile, but permitted in the place of celebration),<sup>261</sup> and most states in the United States thought evasivary marriages violated a forum's "public policy" and were an exception to the *lex loci* principle.<sup>262</sup> In addition, the Hague Marriage Convention required a determination of a marriage's validity without consideration of the incident sought, something typically not done by courts in the United States.<sup>263</sup> Although the United States might have been tempted to adopt the Convention if there were a large number of U.S. marriages that would have benefited from it, this appears not to have been the case.<sup>264</sup>

While federalism concerns may have stymied the United States' ratification of family law treaties during the first twenty years or so of its membership in the Hague Conference, federalism concerns have abated somewhat. Within approximately the last twenty years, the United States has become party to two Hague family law conventions, with a third likely and a fourth possible, and has entered twenty-two agreements on child

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*Recent Developments in Forum Selection*, 19 U. PA. J. INT'L ECON. L. 1, 1 (1998) (noting that the first Hague Convention to which the United States became a party was the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters). Professor Burbank explains that part of the strategy in the United States for ratification of this Convention was a "story . . . that, as a result of our success at the Hague, the Convention required very little change in domestic . . . practice." *Id.*

260. Mar. 14, 1978, 16 I.L.M. 18 [hereinafter Hague Marriage Convention]. For an informative essay on the Convention, see Willis L.M. Reese, *The Hague Convention on Celebration and Recognition of the Validity of Marriages*, in *THE FAMILY LAW IN INTERNATIONAL LAW: SOME EMERGING PROBLEMS* 1 (Richard B. Lillich ed. 1981).

261. See Reese, *supra* note 260, at 17.

262. See Lynn Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, 29 FAM. L.Q. 497, 506 (1995).

263. The Hague Marriage Convention had an "ingenious solution" for these sorts of cases. Reese predicted that most of the questions would arise with respect to incidents from marriages occurring in non-Contracting States, and the Convention "need not be applied where that other question, under the choice of law rules of the forum, is governed by the law of a non-Contracting State." Hague Marriage Convention, *supra* note 260, art. 12. To Reese, that meant the Convention "may not be worth the trouble." See Reese, *supra* note 260, at 17.

264. See Philip W. Amram, *Report of the Thirteenth Session of the Hague Conference on Private International Law*, 71 AM. J. INT'L L. 500, 503 (1977).

support with foreign countries or their provinces.<sup>265</sup> The United States' participation has become more likely over time, in part, because the federal government has become more comfortable with the federalism implications of its actions.

Several possible reasons for this comfort stand out. First, at times, the states themselves have asked the federal government for assistance on international family law matters. For example, such requests led the federal government to negotiate foreign reciprocal orders in the child support context.<sup>266</sup> Second, the federal government has sometimes been so involved already with a topic, as was the case with child support enforcement,<sup>267</sup> that taking action on the international level seemed unremarkable. For instance, at the same time Congress authorized the federal government to designate foreign reciprocating countries for purposes of child support collection,<sup>268</sup> it also required that states enact UIFSA in order to be eligible for federal funds.<sup>269</sup> Although the federal government was not very active on parental child abduction issues before the United States ratified the Hague Abduction Convention, Congress had at least ventured into the area by passing the Parental Kidnapping Prevention Act.<sup>270</sup> Similarly, Congress had passed the Multiethnic Placement Act of 1994 and the Adoption and Safe Families Act of 1997 before it ratified the Hague Adoption Convention.<sup>271</sup>

Third, the State Department and NCCUSL have worked cooperatively to minimize concerns about the federalism implications of U.S. treaty membership. It was almost fifty years ago that Harvard Law Professor Abram Chayes, former Legal Adviser at the State Department, told attendees at NCCUSL's annual meeting that the State Department "would not act on private law matters, such as transnational adoptions, unless advised

265. See U.S. Dep't of State, *supra* note 137.

266. See DeHart, *supra* note 137, at 107 (noting that "pressure by the states for federal action has increased").

267. The Child Support Enforcement Program, which includes the Federal Office of Child Support Enforcement (OCSE), see 42 U.S.C. §§ 651–69a (2000 & Supp. V. 2005) (Title IV-D of the Social Security Act), is an example of the federal government's involvement in establishing and enforcing child support orders. See generally Cavers, *supra* note 171, at 996 (mentioning the federal government's reluctance to be involved in addressing child support transnationally prior to 1975).

268. See 42 U.S.C. § 659a.

269. See *id.* § 666(f).

270. 28 U.S.C. § 1738A (2000). The International Parental Kidnapping Crime Act, 18 U.S.C. § 1204 (2000 & Supp. V. 2005), was enacted in 1993, after the United States ratified the Hague Abduction Convention.

271. Howard M. Metzbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056 (codified as amended at 42 U.S.C. § 1996b (2000)); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

to do so by associations of private lawyers.”<sup>272</sup> NCCUSL’s attention to transnational legal matters began shortly thereafter, motivated by a desire to keep traditional areas of state power in the hands of the states.<sup>273</sup>

NCCUSL’s interest in transnational legal matters has waxed and waned over time,<sup>274</sup> but today the organization’s efforts are robust. The State Department and NCCUSL have a “strong working relationship,” and two lawyers from the Office on Private International Law in the State Department are Advisory Members of NCCUSL.<sup>275</sup> In 2004, NCCUSL established a Committee on International Legal Developments. In 2007, the ABA and NCCUSL created a Joint Editorial Board for International Law, with the following express purposes: to promulgate uniform laws that are consistent with the United States’ international obligations, to advise NCCUSL on international and transnational legal matters that fall within the scope of NCCUSL’s work, and “to inform and assist the U.S. government with respect to the negotiation of international treaties and agreements.”<sup>276</sup> Recently, NCCUSL formed a drafting committee to amend UIFSA, if necessary, to make it consistent with the Hague Maintenance Convention.<sup>277</sup> Also, at the request of the State Department, NCCUSL assembled a study group to advise on whether the United States should join the Hague Protection Convention and what changes to domestic law might be necessary.<sup>278</sup>

While federalism concerns have become more manageable, these concerns still shape the contours of international family law in the United States. Federalism has influenced the scope of legislation that implements U.S. treaty obligations.<sup>279</sup> It also has served as a justification for the

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272. Peter Winship, *The National Conference of Commissioners on Uniform State Laws and the International Unification of Private Law*, 13 U. PA. J. INT’L BUS. L. 227, 264 (1992).

273. *Id.* at 279–80.

274. *Id.* at 273.

275. See generally Fred H. Miller, *International Legal Developments and Uniform State Laws: A Radical Proposal?*, 60 CONSUMER FIN. L.Q. REP. 402 (2006).

276. See Memorandum of Understanding Between the Joint Editorial Board for International Law and the National Conference of Commissioners on Uniform State Laws (Jan. 3, 2000), [http://www.law.upenn.edu/bll/archives/ulc/jeb/memo\\_understanding.pdf](http://www.law.upenn.edu/bll/archives/ulc/jeb/memo_understanding.pdf).

277. See Uniform Law Commission, Drafting Committees, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=59> (last visited May 15, 2008).

278. See Uniform Law Commission, Study Committees, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=1&tabid=40> (last visited May 15, 2008).

279. The federal government’s implementing legislation often appears to make the federal government’s footprint in an area no larger than is necessary for treaty compliance. For example, with passage of the International Adoption Act (IAA), the federal government made clear that State regulation is pre-empted only to the extent that it is directly inconsistent. See 42 U.S.C. § 14953(a) (2000). Consequently, for example, while the IAA and its regulations provide a method by which for-profit entities and individuals can be approved for participation in international adoptions, states are not required to allow involvement by for-profit entities and individuals. In fact, states are not even required to permit Convention adoptions in their juris-

United States' refusal to ratify certain international agreements, such as the Convention on the Rights of the Child<sup>280</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>281</sup>

Whether the federalism concerns are well-founded is sometimes debatable. I argued in a recent article that the Executive Branch invoked federalism disingenuously at the last meeting of the Special Commission to review operation of the Hague Abduction Convention.<sup>282</sup> While the U.S. delegation argued that the United States could not be involved in certain initiatives because of federalism, the delegation never mentioned that courts in the United States would be unlikely to interpret federalism as broadly as the Executive Branch<sup>283</sup> and that the invocation of federalism was a political choice, not a legal necessity. Certainly, the last twenty years suggest that federalism is less of a barrier to federal efforts than it was previously.

### Conclusion

Given the momentum generated by international family law initiatives over the last fifty years, additional growth in the subfield will likely be forthcoming. Only time will tell if concern for children will continue to be the basis upon which cooperation is forged, or whether enough trust and commonality have been established to foster cooperation on initiatives independent of their relevance to children. In addition, only time will tell if residual notions of "categorical federalism" will inhibit such efforts. One suspects that these factors will continue to have an important impact on the subfield's evolution.

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dictions. Federal legislation on other topics similarly includes various accommodations for state law. For example, the remedies under the International Child Abduction Remedies Act are not exclusive, *see* 42 U.S.C. § 11603(h), and there are various provisions that explicitly require compliance with state law, *see, e.g., id.* § 11604(b) (regarding removal of a child from a person having physical control of the child); *id.* § 11604(a) (regarding measures necessary to protect the well-being of the child). In addition, States are explicitly permitted to enter into their own reciprocal arrangements regarding child support to the extent consistent with federal law. *See* 42 U.S.C. § 659a(d).

280. *See* Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 171–72, 175–77 (2006).

281. *See* Catherine Powell, *Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331, 336–37 (2005) ("In rejecting CEDAW, the United States has hidden behind the banner of constitutionalism—particularly notions of federalism and limited government inherent in U.S. constitutionalism.")

282. Merle H. Weiner, *Half-Truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Special Session to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction*, 2008 UTAH L. REV. 221, 259–60.

283. *Id.* at 229–30, 279–80.