

CHILDREN CROSSING BORDERS: INTERNATIONALIZING THE RESTATEMENT OF THE CONFLICT OF LAWS

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“[I]nterstate transactions are importantly different from international transactions. Differences between state and foreign nation laws are greater than differences between sister state laws. The Constitution applies only in part to such conflicts. On the other hand, only international transactions are influenced by international law and by foreign relations and foreign commerce considerations.”¹

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1. Ralf Michaels, *Symposium on the Third Restatement of Conflict of Laws: The Conflicts Restatement and the World*, 110 AJIL UNBOUND 155, 157 (2016); see also Mathias Reimann, *A New Restatement—For the International Age*, 75 IND. L.J. 575, 580 (2000).

INTRODUCTION

Treating internal U.S. conflicts and international conflicts law the same, without distinguishing between them, has always puzzled non-U.S. lawyers and scholars.² Europeans often do not understand how we can treat transnational choice of law decisions as if they were between two domestic states in light of the inherent differences between legal systems and traditions. Nowhere today is this contrast between international legal cultures and purely domestic matters more evident than in the realm of family law and in particular issues relating to children, where religion, culture, ethnicity, and morals help shape decisions. And nowhere is the question of whether domestic and international conflicts should be treated the same more pressing than in the current work of the American Law Institute (“ALI”).

The ALI is currently in the process of preparing a new Restatement of Conflicts (Third) and is faced with the issue of whether and how to address cross-border family law cases.³ This decision is complicated by the fact that the ALI is at the same time preparing a new Restatement of Foreign Relations Law (Fourth). Many observers are uncertain about where private international law aspects of private law matters such as family law should be covered—in the Restatement of Conflicts (Third), the Restatement of Foreign Relations Law (Fourth), or both. One often thinks of the Restatement of Foreign Relations as being addressed primarily toward issues of public international law. For example, when faced with a choice of law question involving a foreign custody order,⁴ few judges, and even fewer lawyers, would know to consult the Restatement of Foreign Relations Law (Third)⁵ about how to treat the foreign judgment. Indeed, there are almost no cases relying on Section 485 of the Restatement of Foreign Relations Law (Third).⁶ The dearth of references reflects in part the lack of familiarity by the U.S. bar and judiciary with the Restatement of Foreign Relations Law (Third) and

2. “On the whole, American courts and writers have not distinguished between international and interstate conflicts for choice-of-law purposes. Indeed, some of the leading choice-of-law cases in this country involved international conflicts, and in many of them that fact had no effect upon the ultimate decision.” RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 1.04 reporters n. (AM. LAW INST., Preliminary Draft No. 2 2016) [hereinafter PRELIMINARY DRAFT NO. 2].

3. PRELIMINARY DRAFT NO. 2 § 1.0, cmt. e (relation of Restatement of Conflicts to Restatement of Foreign Relations Law). The ALI is also currently working on a RESTATEMENT OF THE LAW CHILDREN AND THE LAW.

4. Although reference is made to custody orders, frequently disputes center on questions of access or contact or what is also called visitation.

5. The ALI has already undertaken work on a RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW.

6. See *Pefaur v. Pefaur*, 617 So. 2d 426, 427 (Fla. Dist. Ct. App. 1993); compare with *Cardenas v. Solis*, 570 So. 2d 996, 997 (Fla. Dist. Ct. App. 1990).

the attendant need to incorporate different concerns when cross-border elements are involved.

More importantly, the Restatement of Conflicts (Third) is confronted with the overall question of how to incorporate international conflicts within rules for interstate conflicts. This question of how different “foreign” as opposed to “domestic” conflicts are treated pervades the entire project.⁷ The current draft takes the position that international and interstate conflicts are generally to be treated the same:

c. International conflicts. For purposes of conflict of laws, the interstate and international contexts are broadly similar. The rules in this Restatement are also usually applicable to cases with contacts to one or more foreign nations. This is properly so since similar values and considerations are involved in both interstate and international cases

There is of course some irony in the fact that the “founding” Conflicts scholar, Justice Joseph Story, imported international public law concepts into domestic application in the concept of territorialism, which ensures sovereign control of all within the borders.

This essay looks at the Restatement of Conflicts (Third) within the context of family law involving children. Although the realm of family law involving children is vast,⁸ for purposes of this essay I have chosen to focus primarily on examples based on child custody, visitation, and related issues, and to exclude issues involving marriage and divorce.⁹ Within this category, I will focus on three general aspects of the question whether interstate and cross-border/international¹⁰ cases are the same and ought to be treated alike in the area of family law related to children. First, much of cross-border family law is covered by treaties and by regional instruments, including the work of the United Nations,¹¹ the Hague Conference on Private International

7. See generally Michaels, *supra* note 1 (arguing that international context must be considered in the upcoming Restatement).

8. The newly begun ALI RESTATEMENT OF THE LAW CHILDREN AND THE LAW evidences the breadth of the subject.

9. For purposes of this Symposium, my topic was limited to conflict law issues concerning the child. Professor Estin addressed marriage, divorce, and related issues.

10. I use the terms “cross-border” and “international” largely interchangeably, without necessarily intending to suggest a public international context, which is often presumed to be the meaning of “international” by some scholars.

11. Although the work of the United Nations to protect children’s rights cannot be overlooked, my focus is not on public international law and human rights but on “private international law” which is not the focus of most United Nations work in this area. On the other hand, the importance of the United Nations Convention on the Rights of the Child is integral to the earlier 1980 Hague Child Abduction Convention and the later 1996 Hague Child Protection Convention.

Law,¹² and regionally by the European Union.¹³ Domestically, cross-border family law is addressed by uniform state law¹⁴ and some federal law.¹⁵ Second, cross-border family law, especially those areas dealing with custody and visitation, may have significant cultural, ethnic, and religious dimensions that raise problems distinct from domestic cases; particularly in connection with cases involving personal law and religious courts. Third, an interrelated issue in the United States is the use of foreign law, the importance of which the new Restatement of Conflicts has recognized with draft provisions on proving foreign law.¹⁶ The proliferation of state foreign law prohibitions and anti-Sharia laws threaten to remove from courts the ability to resolve conflicts of law decisions in the cross-border context.¹⁷

This essay advocates a pragmatic approach to family law matters involving children with international connections. These matters demand special attention as the number of children crossing borders increases exponentially under the continuous influence of globalization.¹⁸ Specifically, I argue for addressing international conflicts involving children within the Restatement of Conflicts (Third)—where most lawyers would expect to find this analysis—but separately from purely domestic cases. International/cross-border cases are different from purely interstate cases in conflict of laws problems related to child custody, visitation, and measures of protection.¹⁹ The international component introduces a variety of elements,

12. *See infra* text accompanying notes 32–53.

13. Council Regulation 2201/2003, Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, 2003 O.J. (L 338) (EC) [hereinafter Brussels IIa Regulation]. The Brussels IIa Regulation (which entered into force on Mar. 1, 2005) applies to all Member States except Denmark and covers matrimonial matters and matters of parental responsibility, including custody, access and child abduction. The European Commission proposed new rules on June 30, 2016, COM (2016) 411 final 2016/0190 (CNS). The European Union also has a regulation for succession. *See* Regulation (EC) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, 2012 O.J. (L 201) 107 (applicable as of Aug. 17, 2015).

14. *See* UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (Proposed Draft 1997) [hereinafter UCCJEA]; UNIFORM INTERSTATE FAMILY SUPPORT ACT (amended 2008) [hereinafter UIFSA]; UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (Proposed Draft 1997, amended 2013) [hereinafter UCCJEA 2013].

15. *See, e.g.*, Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (2000); International Child Abduction Remedies Act (ICARA), 22 U.S.C.A. §§ 9001–11 (2014).

16. PRELIMINARY DRAFT NO. 2 §§ 5.06–5.12 (2016).

17. One recent example is the new Florida statute for family law cases. *See* FLA. STAT. ANN. § 61.0401 (West 2014) (this statute was created from SB 386, and was signed by the governor in 2014).

18. This cross-border movement is not limited to typical family movements but also results from increased migration of refugees and families displaced by conflicts and war.

19. The phrase “measures of protection” is amplified in the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental

including different legal, cultural, religious, social, and moral values that are not usually present in purely domestic cases, or at least not as prominent. While it is possible for religious issues to arise in purely domestic cases (particularly those involving marriage or divorce), in the international context, the religious issue is often government sanctioned, with the personal law being religious law and the family law courts being the religious courts, such as in Jordan or Egypt. The impact is evident in dealing with questions of jurisdiction and recognition and enforcement involving Islamic countries. Even within the Islamic countries, the means and the extent of the permeation of Sharia varies by country.²⁰ Family law pertaining to the role of women within the family structure, divorce, and child custody differs significantly from that in the Western legal tradition and in the United States.²¹

Certain aspects of situations concerning children touching on more than one country argue in favor of special treatment for such international conflict of law problems; these problems are distinct from wholly domestic cases. Acknowledging these aspects will produce more consistent results that will support harmonization in this critical area and allow children to move

Responsibility and Measures for the Protection of Children, and Decisions on Matters Pertaining to the Agenda of the Conference, art. 1, 35 I.L.M. 1391 (Oct. 19, 1996) [hereinafter 1996 Child Protection Convention]. Article 3 lists the topics such measures may cover:

- a) the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation;
- b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;
- c) guardianship, curatorship and analogous institutions;
- d) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- e) the placement of the child in a foster family or in institutional care, or the provision of care by *kafala* or an analogous institution;
- f) the supervision by a public authority of the care of a child by any person having charge of the child;
- g) the administration, conservation or disposal of the child's property.

20. Many countries have legal systems which have been influenced by, or based on, some form of Sharia law, reflecting the different schools of Islamic legal thought. Similarly, the extent of the inclusion of Sharia into the applicable family law rules varies as well, as does legislation on personal status. *See generally* JAMAL NASIR, *THE ISLAMIC LAW OF PERSONAL STATUS* (2d ed. 1990). Examples of these countries, not all of which are primarily Muslim, include: Afghanistan, Algeria, Bangladesh, Brunei, Comoros, Djibouti, Egypt, Eritrea, Ethiopia, The Gambia, Ghana, India, Indonesia, Iran, Iraq, Israel, Jordan, Kenya, Kuwait, Lebanon, Libya, Malaysia, the Maldives, Mauritania, Morocco, Nigeria, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Singapore, Somalia, Sri Lanka, Sudan, Tajikistan, Tanzania, Thailand, Uganda, the U.A.E. and Yemen.

21. Louise Ellen Teitz, *Malta Process and Cross-Cultural Aspects in Family Disputes*, in *THE CHILD'S INTERESTS IN CONFLICT: THE INTERSECTION BETWEEN SOCIETY, FAMILY, FAITH AND CULTURE* 163, 163 (Maarit Jänäterä-Jareborg ed., 2016).

seamlessly from one country to another without raising significant issues of private international law. In the bigger picture, United States decisions are more likely to gain respect and recognition outside of the United States when they reflect and embrace transnational norms rather than rely on purely domestic and sometimes parochial viewpoints. In the end, we need to evaluate what role the new Restatement of Conflicts (Third) can play in helping continue the harmonization of private international law in cross-border family cases. We need to decide whether that role is best served by integrating the cross-border cases with interstate/domestic cases or whether a dual approach will be more successful, looking at the question in the context of end-users: courts, governmental entities, practitioners, and academics.

I. THE IMPACT OF HARMONIZATION ON CROSS-BORDER CHILD DISPUTES

International family law as a discipline has experienced tremendous growth in the last quarter century.²² As a result, it has become the focus for increased unification and harmonization,²³ as well as the subject of more international and regional instruments.²⁴ There is every reason to believe that there will be increased unification in the near future.²⁵ One cannot

22. There are also increasing numbers of books dealing with cross-border family law issues. *See, e.g.*, ANN LAQUER ESTIN, INTERNATIONAL FAMILY LAW ABA DESK BOOK (2d ed. 2016); DAVID HODSON, THE INTERNATIONAL FAMILY LAW PRACTICE (4th ed. 2015).

23. The intergovernmental organizations, such as The Hague Conference, UNIDROIT, and UNCITRAL, have focused on unification (and indeed that is the stated purpose of the Hague Conference statute: “work for the progressive unification of the rules of private international law”). Their work has also included harmonization in the form of model laws, legislative guides, principles, and other soft-law instruments.

24. *See infra* notes 32–53 and *supra* note 13. In discussing “regional work,” one can also mention the work of the Uniform Law Commission (“ULC”) and the Uniform Law Commission of Canada on a joint project for cross-border recognition of civil protection orders. The ULC’s product is the Uniform Recognition and Enforcement of Canadian Domestic-Violence Protection Orders Act, completed in 2015 and enacted in Delaware. *See* UNIFORM RECOGNITION AND ENFORCEMENT OF CANADIAN DOMESTIC-VIOLENCE PROTECTION ORDERS ACT (UNIF. LAW. COMM’N 2015), <http://www.uniformlaws.org/Act.aspx?title=Recognition%20and%20Enforcement%20of%20Canadian%20Domestic-Violence%20-Protection%20Orders>.

25. The Hague Conference is currently working on potential instruments (hard law or soft law) in several areas involving children and family law. *See, e.g.*, Hague Conference on Private International Law, Report of the Experts’ Group Meeting on Cross-Border Recognition and Enforcement of Agreements in Family Matters Involving Children (2015); *see also* current Hague Conference on Private International Law projects, including the project on Recognition and Enforcement of Foreign Civil Protections Orders (<https://www.hcch.net/en/projects/legislative-projects/protection-orders>), the project on Parentage and Surrogacy, specifically The Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements (<https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>), and the project on Cohabitation Outside of Marriage (<https://www.hcch.net/en/projects/legislative-projects/cohabitation>).

underestimate the important role that uniform law, federal statutory, and international and regional instruments currently play in what otherwise is a private law area: family law. Today in the United States, uniform laws such as the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”),²⁶ the Uniform Interstate Family Support Act (“UIFSA”),²⁷ and related federal statutes such as the International Child Abduction Remedies Act (“ICARA”),²⁸ cover both domestic and cross-border cases. The UCCJEA, approved in 1997, governs state court jurisdiction to make and modify child custody determinations, including custody and visitation, but not child support or adoption, which are covered in other federal and state statutes. These uniform laws have been revised to incorporate international components and provide a part of the means by which international treaties such as the 2007 Hague Maintenance Convention²⁹ and the 1996 Child Protection Convention³⁰ are or will be implemented domestically. Cross-border family law includes and is shaped by international treaties which permeate decisions on child custody, support, adoption,³¹ parental child abduction, and child protection. These conventions largely include their own private international law rules, often by defining which country has jurisdiction and what law applies.

A. The Work of The Hague Conference

The Hague Conference on Private International Law, an intergovernmental entity based in The Netherlands, dating from 1893 and having eighty-two members currently,³² serves the express purpose of working “for the progressive unification of the rules of private international

26. See UCCJEA, *supra* note 14.

27. See UIFSA, *supra* note 14.

28. See 22 U.S.C.A. §§ 9001–11 (2014).

29. See Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, 47 I.L.M. (2008) [hereinafter 2007 Maintenance Convention].

30. See 1996 Child Protection Convention, *supra* note 19 (The United States has signed, but not yet ratified the Child Protection Convention); Hague Conference on Private International Law, 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, Status Table 34 <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70> (listing the contracting states to the Convention).

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

32. HCCH Members, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, <https://www.hcch.net/en/states/hcch-members> (demonstrating that the membership currently consists of eighty-one nations and the European Community, a regional economic integration organization).

law.”³³ The Hague Conference is well known for its seminal work in the area of cross-border family law, especially in creating structures for international legal cooperation to address international child abduction, child protection, support/maintenance, and cross-border adoption. In addition, the Hague Conference is currently working on possible instruments to facilitate cross-border recognition of voluntary agreements in international child disputes, cross-border surrogacy and parentage issues, cohabitation outside marriage, and cross-border recognition and enforcement of civil protection orders, all of which are in various stages of development.³⁴ The modern Hague family law conventions establish an administrative unit for cooperation (the Central Authority) in each contracting country and encourage amicable resolutions—largely in the form of mediation.³⁵ A country does not need to be a member of the Hague Conference to become a contracting party to a convention. For example, the 1980 Hague Child Abduction Convention,³⁶ discussed below, currently has ninety- seven contracting states.

The best known of the Hague Conference’s family law conventions is the 1980 Hague Child Abduction Convention, which focuses on obtaining the prompt return of a child wrongfully removed or retained in breach of custody rights. The Convention provides a mechanism that ensures the prompt return of a child up to the age of sixteen to his or her country of “habitual residence” in the belief that that country is in the best position to make determinations of custody and is able to determine what is in the best interests of that child. The 1980 Hague Child Abduction Convention is often referred to as a “venue” convention as it does not change the underlying substantive custody law.

The 2007 Maintenance Convention, known in the United States as the “Hague Child Support Convention,” establishes simple and inexpensive procedures for the processing of international child support cases. While the United States already has a comprehensive system to establish, recognize, and enforce domestic and international child support obligations in place, the Convention requires that all treaty partners have similar systems in place, making it easier to enforce outgoing United States judgments overseas. In addition to the Hague Child Support Convention, a separate Protocol provides uniform international rules for the determination of the law

33. Statute of The Hague Conference on Private International Law, art. 1, July 15, 1955, 220 U.N.T.S. 122.

34. *See supra* note 25.

35. *See* Convention on the Civil Aspects of International Child Abduction, art. 7 c), Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 97 [hereinafter 1980 Hague Child Abduction Convention]; 1996 Child Protection Convention, *supra* note 19, at art. 30; 2007 Maintenance Convention, *supra* note 29, at arts. 5, 6, 34.

36. 1980 Hague Child Abduction Convention, *supra* note 35.

applicable to maintenance obligations. The United States chose not to join the Protocol on the Law Applicable to Maintenance Obligation, a related instrument, primarily because the differences between civil law systems and common law systems were significant.

The 2007 Maintenance Convention entered into force for the United States on January 1, 2017. The United States signed the Convention when it was finished in 2007; work was undertaken on implementing legislation, including the revisions to the existing uniform state law, UIFSA, to accommodate the Convention. In 2010, the U.S. Senate approved ratification of the 2007 Child Support Convention, but Congress had yet to enact implementing legislation. There was some delay and the instrument of ratification could not be deposited until all U.S. states and territories enacted the amended version of UIFSA. In one highly publicized event, the Idaho legislature threatened to block the amendments from enactment because of fear that foreign law would control;³⁷ a special session of the Idaho Legislature was held to get approval and avoid the loss of federal funding for child support in the state.

The 1996 Child Protection Convention³⁸ is focused on providing clear and uniform rules concerning jurisdiction, applicable law, and recognition and enforcement in connection with “measures of protection” for children up to the age of eighteen.³⁹ The 1996 Convention also covers a broad range of areas within “measures of protection”⁴⁰ and is particularly useful in cases of access, cross-border placements, and cross-border relocation. As with the other contemporary Hague Conference Conventions, it provides for cross-border cooperation and communication, through the use of administrative agencies. The basic chapter on choice of law rules, Chapter III, consists of only eight articles. When measures of protection must be taken, the general rule is that the country where the child is present applies its own law to decide what measures can be taken.⁴¹

The 1996 Child Protection Convention, like some recent Hague

37. Steve Taggart, *SB 1067: A Stand for Liberty or a Disaster for Idaho's Children?*, IDAHO POL. WEEKLY (Apr. 19, 2015), <http://idahopoliticsweekly.com/politics/252-sb-1067-a-stand-for-liberty-or-a-disaster-for-idaho-s-children>.

38. 1996 Child Protection Convention, *supra* note 19.

39. See generally HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE 1996 HAGUE CHILD PROTECTION CONVENTION (2014); Hague Conference on Private International Law, Explanatory Report on the 1996 Hague Child Protection Convention, Report by Paul Lagarde (1998); NIGEL LOWE & MICHAEL NICHOLLS, THE 1996 HAGUE CONVENTION ON THE PROTECTION OF CHILDREN (2012); Linda Silberman, *The 1996 Hague Convention on the Protection of Children: Should the United States Join?*, 34 FAM. L.Q. 239 (2000).

40. See 1996 Child Protection Convention, *supra* note 19, at art. 3.

41. *Id.* at art. 15(1).

Conference Conventions, has been signed by the United States but not ratified, reflecting the realities of domestic implementation in an area—family law—that has traditionally been the province of state law. The UCCJEA was amended in 2013 to implement in part the Convention, but no effort has been made to have any state adopt these amendments pending the completion of some form of federal implementing statute as well. Based on the experience of UIFSA and concern by some states with anything “foreign,”⁴² the federal statute will need to have a “money hook” to motivate state adoption of the UCCJEA amendments by the states. Interestingly, the 2013 UCCJEA amendments to incorporate the 1996 Child Protection Convention are separated from the other provisions, setting up regimes for Convention countries under new Article 4 and non-Convention countries, reflecting the dual aspect of the UCCJEA.⁴³ This approach serves as a model and reinforces the need for a dual vision for the Restatement of Conflicts (Third) in this area as well.

All of the Hague family law (as well as non-family law) Conventions operate on a concept of “habitual residence”, an undefined term in Hague Conventions (which is a source of consternation to many U.S.-trained lawyers, judges, and academics) and a phrase that has come to permeate regional instruments such as the EU’s Brussels Regulation and the Brussels IIa Regulation.⁴⁴ The term “habitual residence” becomes the defining connecting factor for purposes of choice of law, jurisdiction, and recognition and enforcement.⁴⁵ While in the United States we have used the concept of “domicile” for many purposes⁴⁶ and in some statutes “home state,”⁴⁷ the phrase “habitual residence” cannot be ignored; particularly when dealing with cross-border child issues, even outside of an applicable treaty. Indeed, its importance as an integral part of unification of law cannot be overestimated in the international context. The initial draft of the

42. See Taggart, *supra* note 37; IDAHO CODE ANN. §§ 7-1001–76 (West 2016); see also S.B. 1067, 63d Leg., Reg. Sess. Idaho 2015) (showing that the original title of the bill was “amends and adds to existing law relating to the Uniform Interstate Family Support Act” but it was engrossed-dead in March of 2015).

43. For a thorough explanation of the 2013 Amendments, see Robert Spector, *Preface to the National Conference of Commissioners on Uniform State Laws, UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT (with 2013 Amendments Pertaining to International Proceedings)* 1, 1–5 (2013); see generally Robert G. Spector, *Memorandum: Accommodating the UCCJEA and the 1996 Hague Convention*, 63 OKLA. L. REV. 615 (2011).

44. See Brussels IIa Regulation, *supra* note 13.

45. The Hague Conference has resisted efforts to define “habitual residence” in the conventions.

46. PRELIMINARY DRAFT NO. 2 § 2.02 reporters n. 1 (2016) (“This Chapter continues this approach of giving dominance to the domicile concept.”).

47. See, e.g., UCCJEA, *supra* note 14.

Restatement of Conflicts (Third)⁴⁸ tended to collapse domicile and habitual residence, indiscriminately substituting the latter for the former. The newest draft is much more nuanced, returning to domicile but retaining habitual residence for limited purposes,⁴⁹ such as when required by statute or as a fallback when domicile cannot be determined.⁵⁰ The comments to the newest draft stress that “[t]he difference between the two concepts rests on the difference in proof.”⁵¹ The Restatement emphasizes the flexible nature of habitual residence based on multiple factors—in the international context these will need to include the approach of other jurisdictions, thereby requiring a comparative law analysis.⁵² When compared to domicile, habitual residence is more factual and objective, without focusing on subjective evidence.⁵³ Yet the tests and definitions for varying purposes, both domestic and international, perhaps need further refinement as the Restatement of Conflicts (Third) progresses.

B. The ALI’s Prior Work

The new Restatement of Conflicts (Third) needs to incorporate the international character of current factual patterns and to create rules and principles that are understandable by courts and judges in all fifty states in the United States.⁵⁴ This last issue highlights the overarching theme of this essay: how to relate cross-border cases to purely domestic law on one hand and international law on the other. Do issues of private international law associated with cross-border family law disputes (child-centered) belong in

48. RESTATEMENT (THIRD) OF CONFLICT OF LAWS §§ 2.01–2.11 (AM. LAW INST., Preliminary Draft No. 1 2015).

49. See PRELIMINARY DRAFT NO. 2 § 2.02 reporters n. 5; § 2.04 cmts. a, b, c; reporters n. 1, 2 (2016).

50. This position creates some confusion, particularly for European lawyers who see the dominant connecting factor as habitual residence.

51. PRELIMINARY DRAFT NO. 2 § 2.04 cmt. b (2016).

52. The Preliminary Draft makes reference to international child custody disputes and acknowledges how important it is that treaties “must be interpreted to achieve uniformity among the treaty-parties, and domestic interpretations of a term should not be imposed on international instruments.” PRELIMINARY DRAFT NO. 2 § 2.04 reporters n. 1 (2016). In connection with the 1980 Child Abduction Convention, countries are encouraged to consult the database of cases from many countries interpreting habitual residence. The database, INCADAT, can be found at HCCH, *The International Child Abduction Database* (INCADAT), <http://www.incadat.com>.

53. PRELIMINARY DRAFT NO. 2 § 2.04 cmt. b (2016):

In evaluating domicile, courts have often looked to whether a person regards a place as the person’s home, a subjective inquiry. The focus of habitual residence on a person’s myriad of activities helps to ensure the habitual residence determination turns on objective proof of where one has actually centered one’s life, rather than subjective evidence of emotional connection to a place.

54. This delicate balancing is evident in the UCCJEA incorporation of the “home state” and a six-month test to equal habitual residence. UCCJEA, *supra* note 14, at art. 1, § 102(7).

the Restatement of Conflicts (Third), or in the Restatement of Foreign Relations Law (Fourth)? We can begin by looking at what was in the Restatement (Third) of Foreign Relations Law; in particular Sections 484, 485 and 486. Section 484 addresses Recognition of Foreign Divorce Decrees;⁵⁵ Section 485 addresses Recognition and Enforcement of Foreign Child Custody Orders;⁵⁶ and Section 486 addresses the Recognition of Foreign Support Orders.⁵⁷ Section 485 is relevant for our discussion. It focuses on jurisdiction to modify custody orders and utilizes only habitual residence (not domicile).

55. (1) Courts in the United States will recognize a divorce granted in the state in which both parties to the marriage had their domicile or their habitual residence at the time of divorce, and valid and effective under the law of that state.

(2) Courts in the United States may, but need not, recognize a divorce, valid and effective under the law of the state where it was granted,

(a) if that state was, at the time of divorce, the state of domicile or habitual residence of one party to the marriage; or

(b) if the divorce was granted by a court having jurisdiction over both parties, and if at least one party appeared in person and the other party had notice of and opportunity to participate in the proceeding.

(3) A court that would not recognize a divorce that is within Subsection 2(a) or 2(b) may nevertheless recognize such a divorce if it would be recognized by the state where the parties were domiciled or had their habitual residence at the time of the divorce.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 484 (AM. LAW INST. 1987).

56. (1) A court in the United States will recognize an order of a foreign court awarding or modifying an award of custody of a child, valid and effective in the state where it was issued, if, when the proceeding was commenced,

(a) the issuing state was the habitual residence of the child;

(b) the child and at least one party to the custody proceeding had a significant connection with that state; or

(c) the child was present in that state and emergency conditions required a custody order for protection of the child;

provided that notice of the proceeding was given to each parent and to any other person having physical custody of the child.

(2) Ordinarily, a court in the United States may modify a custody order entitled to recognition under this section only if the rendering court no longer has jurisdiction to modify the order, or has declined to exercise its jurisdiction to modify it.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 485 (AM. LAW INST. 1987).

57. (1) A court in the United States will recognize and enforce an order of a foreign court for support, valid and effective under the law of the state where it was issued, if the issuing state

(a) was the domicile or habitual residence of both parties to the marriage when the obligation for support accrued;

(b) was the domicile or habitual residence of the support debtor at the time the order was issued; or

(c) was the domicile or habitual residence of the support creditor, and the support debtor appeared in the proceedings.

(2) A court in the United States may modify a support order entitled to recognition under Subsection (1), at the initiative of either party, if the court has jurisdiction over the other party in accordance with § 421(2)(b), (c), or (g).

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 486 (AM. LAW INST. 1987).

§ 485 Recognition and Enforcement of Foreign Child Custody Orders

(1) A court in the United States will recognize an order of a foreign court awarding or modifying an award of custody of a child, valid and effective in the state where it was issued, if, when the proceeding was commenced,

- (a) the issuing state was the habitual residence of the child;
- (b) the child and at least one party to the custody proceeding had a significant connection with that state; or
- (c) the child was present in that state and emergency conditions required a custody order for protection of the child;

provided that notice of the proceeding was given to each parent and to any other person having physical custody of the child.

(2) Ordinarily, a court in the United States may modify a custody order entitled to recognition under this section only if the rendering court no longer has jurisdiction to modify the order, or has declined to exercise its jurisdiction to modify it.⁵⁸

Very few cases exist in which courts have relied on Section 485 and none has occurred in the last fifteen years.⁵⁹ While this may suggest that courts do not consider the cross-border case as one of “foreign relations” law, it may also suggest that cases dealing with custody orders are being handled primarily by state uniform law and in the future by treaty law, under the 1996 Child Protection Convention, as implemented largely through state uniform law. The lack of reliance on Section 485 lends support for the inclusion of cross-border family law cases in the Restatement of Conflicts (Third)—where lawyers and judges will likely look for guidance—rather than in the Restatement of Foreign Relations (Fourth).

The provision in the Restatement of Conflicts (Second) considering when a state has power to exercise judicial jurisdiction, Section 79,⁶⁰ uses domicile (or presence) as the defining connection. The Restatement of Conflicts (Third) acknowledges in comments to Section 2.06, which focuses on the domicile of minors, that the rules for resolving child custody disputes must yield to “more specific statutes and treaties in the case of conflict.”⁶¹ The matter is complicated, however, by the existence of an independent

58. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 485 (AM. LAW INST. 1987).

59. *See* *Pefaur v. Pefaur*, 617 So. 2d 426, 427 (Fla. Dist. Ct. App. 1993); *Cardenas v. Solis*, 570 So. 2d 996, 997 (Fla. Dist. Ct. App. 1990).

60. A state has power to exercise judicial jurisdiction to determine the custody, or to appoint a guardian, of the person of a child or adult

- (a) who is domiciled in the state, or
- (b) who is present in the state, or
- (c) who is neither domiciled nor present in the state, if the controversy is between two or more persons who are personally subject to the jurisdiction of the state.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (AM. LAW INST. 1971).

61. PRELIMINARY DRAFT NO. 2 § 2.06 cmt. g (2016).

definition of habitual residence in Section 2.04 which may not be consistent with domestic and foreign interpretation of habitual residence, particularly in the context of treaty interpretation.

C. Merging Hague and ALI Approaches

The good news about the increased role that treaty law and uniform law play in domestic family law is the increasing harmonization both among domestic states in the U.S. and among foreign countries. But it also requires U.S. law and the Restatements to accommodate traditions not native to our common law. For example, in the United States, we generally recognize continuing jurisdiction by the court that entered the order so that multiple jurisdictions do not attempt to exercise jurisdiction and modify existing orders.⁶² The 1996 Child Protection Convention, however, allows a shift in jurisdiction when there is a change of habitual residence of the child. The court with jurisdiction is usually the court of habitual residence (except in cases involving emergency measures or refugee children); that court usually uses its own law and other countries must recognize and enforce its measures of protection.⁶³ The 1996 Child Protection Convention contains provisions allowing for the transfer of jurisdiction between courts (in effect incorporating a concept like *forum non conveniens*),⁶⁴ a *lis pendens* type provision,⁶⁵ and provisions for advance recognition of the judgment of one country, the state of habitual residence, by another country especially in connection with relocation.⁶⁶

One of the crucial aspects of the increased role of treaty law is the obligation to interpret provisions with consideration to their international character⁶⁷ and how other countries define crucial concepts such as habitual residence, rights of custody, and measures of protection, a concept of interpretation emphasized by the U.S. Supreme Court in *Abbott v Abbott*.⁶⁸ The Hague Conference maintains an online database, INCADAT, containing

62. The UCCJEA gives priority in jurisdiction to the child's home state, as defined in UCCJEA § 102, as the state where the child has lived with a parent for at least six consecutive months immediately prior to filing. UCCJEA, *supra* note 14, § 102. "Home state" under the UCCJEA may include a foreign country. *Id.* §§ 102, 105. The UCCJEA also provides for continuing exclusive jurisdiction. A state that takes jurisdiction over a child custody dispute retains jurisdiction so long as that state maintains a significant connection with the disputants or until all disputants have moved away from that state. *Id.* § 202.

63. 1996 Child Protection Convention, *supra* note 19, at arts. 5, 15, 17, 23.

64. *Id.* at arts. 8–9.

65. *Id.* at art. 13 (effectively staying the action of one court while another has priority).

66. *Id.* at art. 24.

67. The current Preliminary Draft also supports this view but perhaps it needs to be included in the blackletter and as a separate provision when dealing with cross-border cases. *See supra* note 48.

68. *Abbott v. Abbott*, 130 S. Ct. 1983 (2010).

more than 1,200 cases interpreting the Hague 1980 Abduction Convention; many of which are relevant to the 1996 Child Protection Convention as well, and including cases interpreting and construing “habitual residence,” thereby encouraging consistent interpretation by the ninety-seven countries that are currently states parties to the 1980 Convention.⁶⁹

In cases with cross-border elements, courts often consider habitual residence. Placing habitual residence more in the context of cross-border cases may assist inexperienced courts and practitioners in interpreting United States rules in relation to European instruments and regulations; in particular the Brussels IIa Regulation. On the other hand, federal domestic law, such as the Parental Kidnapping Prevention Act (“PKPA”), and uniform state law use “home state” instead of habitual residence. One example is the definition in the UCCJEA § 102(7):

“‘Home State’ means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child of less than six months of age, the term means the State in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.”⁷⁰

This term (“home state”) is used in UIFSA, and as mentioned in the UCCJEA, although that approach is replaced in the UCCJEA amendments of 2013 that would implement the 1996 Child Protection Convention; in that case, habitual residence appears as well.

For the new Restatement of Conflicts (Third), the crucial question is how, and if, to treat international cases and where to draw the line between domestic cases and cross-border; and where to divide the new work on Restatements—among the Conflicts (Third), Foreign Relations Law (Fourth), and the Restatement of the Law, Children and the Law. This question is not merely philosophical, but also practical, and it holds significant implications given the increased permeation of domestic law by international treaties in cross-border cases; this infiltration has led to significant divergence between cases involving Texas and Rhode Island and cases involving Rhode Island and Morocco, or Rhode Island and Japan.

69. The Hague Conference’s database is available at HCCH, The International Child Abduction Database (INCADAT), <http://www.incadat.com/>. The newest country to accede to the 1980 Convention is Jamaica where the Convention will enter into force on 1 May 2017. See *infra* at note 74.

70. UCCJEA, *supra* note 14, at art. 1, § 102(7).

II. THE CULTURAL, ETHNIC, AND RELIGIOUS DIMENSIONS OF CROSS-BORDER CHILD DISPUTES

Cross-border family law dealing with custody, visitation, and related matters raises the issue of significant cultural, ethnic, and religious variations, particularly when international cases involve personal status law and religious courts. The differences in legal systems are qualitatively different than state-by-state domestic variations, even when comparing with domestic cases that involve religious differences.⁷¹ There is typically no shared framework for jurisdiction as well as different concepts of gender-based roles of custody and guardianship that are State-sanctioned. In fact, the courts using orders/measures of protection will frequently be religious courts in many countries, rather than civil courts.

A. Islamic and Religious Law and the Malta Process

A key example of the issues present in cross-border cases is the situation involving Islamic countries, specifically the implications when states must address a child custody or visitation matter where the child's habitual residence may be in an Islamic country, or where one of the parents is habitually resident in an Islamic country. Aside from issues of anti-Sharia law, discussed later in this essay,⁷² the impact on conflict of laws determinations should not be underestimated. These differences between countries and their family law, especially when there is personal law and religious courts, illustrate a lack of shared values that is uncommon in purely domestic law cases. The difficulty in harmonizing rules for private international law in this area, especially where there is personal law, is one that the Restatement must confront—even within domestic interstate cases.

Recent work of the Hague Conference, as the premiere organization concerned with unification of private international law (conflict of laws), offers an example of some of these issues and various attempts to solve them. The 1996 Child Protection Convention, more than the 1980 Child Abduction Convention, openly embraces cultural and religious differences in the rules for jurisdiction and recognition and enforcement. The most obvious example is the inclusion of “kafala,” the Islamic functional equivalent to adoption, as a measure of protection in Article 33 on cooperation in cross-border placements.⁷³ The institution of “kafala,” which was included in the 1996 Child Protection Convention at the urging of Morocco, varies from adoption

71. See generally Ann Laquer Estin, *Foreign and Religious Family Law: Comity, Contract, and the Constitution*, 41 PEPP. L. REV. 1029 (2014).

72. See *infra* at Part IV.

73. 1996 Child Protection Convention, *supra* note 19, at art. 33.

in that it does not change parental rights directly. Another example is found in Article 10 which concerns a contracting state's jurisdiction to include claims of parental responsibility in connection with divorce proceedings. Article 10 is drafted so that countries with religious courts for divorce may simply exclude its application; the Article is largely a recognition of different legal systems with different characteristics. Since the 1996 Child Protection Convention gives no role to nationality or religion, instead placing an emphasis on the habitual residence of the child which it uses as the jurisdictional basis, that concept has created difficulties for some countries where family law is part of religious personal law. Thus far, Morocco, which has religious courts, is the only country in the Islamic world that is signatory to both the 1980 Child Abduction Convention and the 1996 Child Protection Convention. Iraq and Pakistan have acceded to the 1980 Child Abduction Convention.⁷⁴ Israel, which also includes religious courts in its faith-based personal law system, joined the 1980 Convention in 1991 and is currently preparing to join the 1996 Convention.

The work of the Hague Conference in connection with attempting to accommodate the Islamic countries is a broader example of the challenges of harmonization, a problem that the Restatement of Conflicts (Third) must confront. At the Hague Conference, the Malta Process,⁷⁵ a major project that began in 2004, specifically focuses on finding a means for contracting states to the 1980 Hague Child Abduction Convention (and the 1996 Child Protection Convention) and non-contracting states that have legal systems influenced by, or based on Sharia to work together. The Malta Process seeks to find solutions to cross-border family law disputes in situations where the relevant international legal structure is not applicable, by encouraging dialogue and improving cooperation between contracting states to the 1980 and 1996 Conventions and states with legal systems that are influenced by or based upon Sharia. Now more than a decade old, the Malta Process is based on shared concerns for the best interest of the child and encouraging mutual respect for different legal systems. The focus of the Malta Process is on the protection of children and the child's right to continuing contact with parents living in different countries. Four conferences of high-level experts, many from the judiciary, from contracting and non-contracting states worked on finding common responses to shared problems. One of the more successful aspects of the Malta meetings was the use of common cross-border family law problems as hypothetical cases—a process whereby the

74. Iraq became a Contracting State to the 1980 Convention in 2014. Pakistan became a Contracting State in December of 2016 and the Convention became effective on 1 March 2017

75. See generally Louise Ellen Teitz, *Malta Process and Cross-Cultural Aspects in Family Disputes*, in *THE CHILD'S INTERESTS IN CONFLICT* 163 (Maarit Jänträ-Jareborg ed., 2016).

participants, working through similar case studies, learned and shared their approaches. This introduced participants to a greater understanding of the importance of both common principles and agreed solutions. All four conferences focused on identifying common legal principles, such as concepts of jurisdiction, and shared values, such as the child having contact with both parents and the best interest of the child, which could lead to basic tools for better cooperation. Ultimately, the Malta Process attempts to bridge the gap created by a lack of shared jurisdictional bases through soft law tools and alternative dispute resolution—mediation. The Malta Process illustrates that the underlying issue of accommodating different cultural and religious values is not just an issue in United States and not one that can simply fall under “public policy” short of a violation of “fundamental principles of human rights.”⁷⁶

B. Morals and Mores and Cross-Border Surrogacy

A second example in cross-border family law that illustrates the depth of variations in underlying legal, cultural, and religious values is in the area of parentage and surrogacy.⁷⁷ The problems raised by cross-border surrogacy again differ from those in domestic interstate cases because they include components such as citizenship and sovereignty. If one is from Rhode Island or Texas, one is still a U.S. citizen, but if one is a child of a citizen of India as opposed to a U.S. citizen, the decision is different. Even more basic is the question of who is the parent of a child born from a cross-border surrogacy and resulting from other artificial reproductive technologies. There are multiple alternatives, and what role genetic material plays in connection with birth certificates or registries continues to raise variations of private international law that have plagued courts in many countries, as well as regional courts such as the European Court of Human Rights.⁷⁸ The problems are detailed in many of the documents produced by the Hague Conference,

76. See, e.g., 1980 Child Abduction Convention, at art. 20; UCCJEA 2013, *supra* note 14, § 310 (a)(1)(E) (providing an exception for recognition and enforcement of a foreign custody order where “the order sought to be enforced is from a nonconvention country whose child custody law violates fundamental principles of human rights”).

77. For a thorough discussion of the private international law issues involved in cross-border surrogacy arrangements, the possibility of a global instrument, and the work of the Hague Conference, see the work of the former Secretary General of the Hague Conference, Hans van Loon, Address at Gent University at the Private International Law Session: The Global Horizon of Private International Law (May 9, 2016) [hereinafter Hans van Loon Address].

78. See *Labassee v. France*, App. No. 65941/11, Eur. Ct. H.R. (2014); *Mennesson v. France*, App. No. 65192/11, Eur. Ct. H.R. (2014). For a discussion of the cases, see Liesbet Pluym, *Mennesson v. France and Labassee v. France: Surrogate motherhood across borders*, STRASBOURG OBSERVERS (Jul. 16, 2014), <https://strasbourgobservers.com/2014/07/16/mennesson-v-france-and-labassee-v-france-surrogate-motherhood-across-borders/>.

dating back to at least 2007 but especially since 2012 as it has tried to move forward to unify or harmonize this area of private international law and perhaps produce a binding instrument.⁷⁹ Questionnaires to member countries and to key stakeholders reflect different values and different approaches to filiation.⁸⁰ Indeed, the lack of shared values on these difficult issues that raise moral, religious, and cultural considerations has also made it difficult for the Hague Conference to find consensus among its member states to support a binding instrument.⁸¹

There is no binding instrument equivalent to the interstate Full Faith and Credit applicable to domestic cases to protect children when they cross international borders. There are numerous cases of children born from a foreign surrogacy, such as in India, not being able to return with the “commissioning” or intended parents, especially if there is no genetic link. As such, questions of status and the consequences of that determination—exacerbated by varying social, moral, and cultural values—become major issues in the international context, issues that the new Restatement (Third) must be equipped to address and provide assistance with for judges and practitioners.

Cross-border family law issues are influenced by rapidly changing social mores, from surrogacy to same sex marriage.⁸² Old presumptions, such as that favoring marriage, may not be relevant. And what we consider “marriage” changes, as we have seen in a recent U.S. Supreme Court decision⁸³ Public policy in determinations of conflict of laws in the international context may need to be resorted to more frequently in the international situation than in the purely domestic case. “[I]n the field of the

79. The Report of the Experts’ Group on Parentage/Surrogacy in February 2016 made the following conclusion and recommendation to the Council on General Affairs and Policy for its March 2016 meeting:

16. The Group determined that, owing to the complexity of the subject and the diversity of approaches by States to these matters, definitive conclusions could not be reached at the meeting as to the feasibility of a possible work product in this area and its type or scope. The Group was of the view that work should continue and at this stage consideration of the feasibility should focus primarily on recognition. The Group therefore recommends to Council that the Group’s mandate be continued . . .

See General Affairs and Policy, Report of the February 2016 Meeting of the Experts’ Group on Parentage/Surrogacy, Prelim. Doc. No. 3 (Feb. 2016), <https://assets.hcch.net/docs/f92c95b5-4364-4461-bb04-2382e3c0d50d.pdf>.

80. Responses to these questionnaires are available online at the web page of The Parentage/Surrogacy Project of the Hague Conference, <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

81. The Hague Conference, in adding projects to its Agenda and prioritizing work, operates by consensus at the Council on General Affairs and Policy.

82. For an interesting study of the changing family law in Europe, see generally FAMILY LAW AND CULTURE IN EUROPE: DEVELOPMENTS, CHALLENGES AND OPPORTUNITIES (Katharina Boele-Woelki et al. eds., 2014).

83. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

law of persons and families, private international law should not block but facilitate and support cross-border relationships, . . . and help avoid limping legal relationships, while recognizing that the impact of culture and traditions is generally more significant in this area than in the economic sphere.”⁸⁴ Any conflict of law rules will need to respond to changing values but those for international cases may need to be more nimble.

III. FOREIGN LAW IN U.S. COURTS

The last challenge facing the Restatement (Third) when dealing with cross-border cases involving children is that of how U.S. state law accommodates “foreign law” and the use of public policy.

The UCCJEA has treated foreign orders as those of a “sister state” generally. Although U.S. state cases in both family and nonfamily law areas have involved the role of religious law, including Judaism and Sharia, the question of foreign law has been getting intense scrutiny in state capitals and legislatures for the last decade, particularly in the form of laws banning courts from applying foreign law and international law. In the last eight years, these laws have gained momentum specifically in connection with anti-Islamic sentiment. These bans have not been limited to the family law area but certainly threaten to disrupt cross-border recognition and enforcement of child custody orders, visitation orders, and other measures of protection for children. Studies have suggested that more than twenty states have either proposed or adopted bills or state constitutional amendments to prevent state courts from using international law in court decisions.⁸⁵ Some scholars and legislators question why public policy is not sufficient protection without additional state bans to avoid the application of foreign law that “shocks the conscience.” The recent cases concerning these foreign law and Sharia bans have primarily challenged their constitutionality. So far there have not been cases using the ban to stop the application of foreign law.

One recent example of a state law ban of foreign law as applied to

84. Hans van Loon Address, *supra* note 77, at 45.

85. In a study completed in October 2015, the National Conference of State Legislatures found that twenty states had introduced legislation as of the year 2015 to restrict the use of foreign law in state courts, and Mississippi had enacted legislation on the topic in 2015. At that time, eight states had laws prohibiting the use of foreign laws in state courts. *2015 Foreign Law Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 10, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/2015-legislation-regarding-the-application-of-foreign-law-in-state-courts.aspx>.

An earlier 2013 study focused on anti-Sharia statutes and found that thirty-two states had “introduced and debated” these types of bills. *See FAIZA PATEL, AMOS TOH & MATTHEW DUSS, CENTER FOR JUSTICE and the CENTER FOR AMERICAN PROGRESS, FOREIGN LAW BANS: LEGAL UNCERTAINTIES AND PRACTICAL PROBLEMS* (May 16, 2013), <http://www.brennancenter.org/publication/foreign-law-bans-legal-uncertainties-and-practical-problems>.

family law is a Florida statute as originally proposed which would have forbidden Florida family courts from applying any foreign laws, legal codes or doctrines in divorce, child custody or child support cases. This would have prevented courts from recognizing any foreign orders in family court; a major difficulty which is larger than Sharia, and one that would seem significant in cross-border cases of divorce, custody, visitation, guardianship, and other measures of protection for children in a state that has many transplants, especially from areas of Latin America. The final version of the Florida statute was weakened and now simply invokes public policy as a means to avoid giving comity to a foreign law if it “contravenes the strong public policy of this state or [if the law is] unjust or unreasonable.”⁸⁶

The Florida statute highlights the issue that the Restatement of Conflicts (Third) must address, especially as we continue to have more cases that include conventions and as the state uniform laws adapt to cross-border cases. Certainly when or if the United States ratifies the 1996 Child Protection Convention, courts will have to address and recognize foreign measures of protection from treaty partners and non-contracting countries.

CONCLUSION

Issues of family law, especially those dealing with children, will increasingly raise international issues and inject foreign elements into an area traditionally considered purely “local” and governed by state law. Recognition of the importance of the international component is also shared by our colleagues abroad. Rt. Honorable Lady Justice Jill Black, the Head of International Family Justice for England and Wales, captures what we are struggling to incorporate into the Restatement: “These days, no family law practitioner or judge can afford to approach family law problems from a purely domestic perspective. So many cases involve international issues of some kind It is all too easy to fall into some sort of trap without even realizing it has happened.”⁸⁷

This area magnifies the overarching question facing the Restatement of Conflicts (Third) of how and where to address the international elements and cases. I have emphasized the need to acknowledge the differences in wholly domestic and cross-border cases and that by embracing that difference, we will produce more consistent results that will support harmonization in this critical area, helping to allow children to move seamlessly from one country to another without raising significant issues of private international law. We

86. *See supra* note 17.

87. Jill Black, *Foreword to International Issues*, in HENRY SETRIGHT ET AL., INTERNATIONAL ISSUES IN FAMILY LAW: THE 1996 HAGUE CONVENTION ON THE PROTECTION OF CHILDREN AND BRUSSELS IIA (2015).

must continue to evaluate what role the new Restatement (Third) can play in harmonizing private international law of in family law by addressing the differences from domestic law and finding a robust shared solution.