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Thinking Globally, Acting Locally: The Problematically Peripheral Role of Immigration Law in the Globalization of Family Law

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I. INTRODUCTION

In the ongoing and accelerating globalization of family law, three major areas of law are intimately intertwined: family law, international law, and immigration law. From the interaction of these three areas, however, two very distinct stories emerge. One is a tale of gathered expertise, engaged debate, and the marshalling of public and private resources to develop processes and standards to address complex situations. The other is a narrative of crisis, separated families, and siloed family courts facing new and difficult challenges with few guideposts and fewer resources.

References to the "transnational family" invoke notions of the globalization of family law as marked by international treaties, the creation of national central authorities and institutions, the implementation of uniform state laws, and a significant investment of resources. The term "transnational family" calls to mind a variety of Hague Conventions, as it references international adoptions and high stakes child abductions.[1] Transnational family law addressing adoptions implicates not only expansive private investments but also public resources, such as the establishment of the U.S. Department of State as the U.S. Central Authority for international adoptions.[2] International treaties create international obligations and subsequently highlight the role of the National Conference of Commissioners

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[1] *See, e.g.*, Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134–46; Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89 [hereinafter Hague Convention on the Civil Aspects].

[2] *See* Designation of Central Authority, 22 C.F.R. § 94.2 (1995).

on Uniform State Laws in developing model laws to integrate international processes and norms into domestic contexts.[3] A robust body of transnational family law scholarship explores issues such as the ways in which mobility reconfigures families[4] and the puzzles created by cross border fertility care.[5] Though certainly not always the case, the realm of the "transnational family" in family law quite often is one of privilege and choice, of legal systems working to adapt to internationally mobile families for whom movement across borders is relatively unproblematic.

Yet a subset of transnational families finds movement across borders virtually impossible, as immigration law prevents desired movements or imposes unwanted departures. In contrast to the mobile "transnational family," the "immigrant family" in the United States invokes a different mental picture. An immigrant family (by simple definition, a family with at least some members who have immigrated to the United States from another country) has an inherently transnational or cross border aspect to its composition. But for many immigrant families the ultimate wish is to avoid borders and the transnational complications that accompany them. When family courts are called upon to resolve family disputes involving families threatened with separation or already separated across borders, often involuntarily by the operation of immigration law, isolated family courts across the nation struggle with complex practical and theoretical difficulties.[6] As families present a variety of immigration statuses, family courts grapple with basic questions of the appropriateness of and parameters for the consideration of immigration issues, with some seeking to avoid immigration issues altogether and others all too eager to attach exaggerated legal significance to immigration status differences.[7] Parties are often unrepresented and sometimes communicate best in languages other than English. Practical and legal challenges frequently strain limited resources and stretch beyond the experiences of the local family court benches and bars. The realm of the "immigrant family" in family law often is one of conflicting values, forced compromises, and harsh outcomes.

The transnational family and immigrant family narratives need not be as separate as they are, and both arenas would benefit from more holistic

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[3] *See, e.g.*, NAT'L CONFERENCE OF COMM'R ON UNIF. STATE LAWS (IMPLEMENTATION OF HAGUE CONVENTION ON PROTECTION OF CHILDREN) (2012), *available at* http://www.uniformlaws.org/shared/docs/hague_convention_on_protection_of_children/2012AM_HCPC_Draft.pdf.

[4] *See, e.g.*, Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*, 39 VAND. J. TRANSNAT'L L. 1551 (2006).

[5] *See, e.g.*, Kimberly M. Mutcherson, *Welcome to the Wild West: Protecting Access to Cross Border Fertility Care in the United States*, 22 CORNELL J.L. & PUB. POL'Y 349 (2012).

[6] *See, e.g.*, David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453 (2008).

[7] *See, e.g.*, David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45 (2005) [hereinafter *Of Borders and Best Interests*].

approaches. As the internationalization of family law draws attention and resources to the situations of transnational families, the contradictory role of immigration law is prominently on display. Processes to develop and implement international family law systems and norms highlight the dissonance between immigration law and mainstream values regarding children and families. In the everlasting debate on immigration reform, national and international discussions regarding the globalization of family law provide opportunity and perspective for scrutiny of immigration law and its impact on families and create an impetus to reconcile immigration law with mainstream values and international norms.

At the same time, federal and uniform law processes to implement international family law obligations can create, and indeed already have created, unintended immigration consequences for transnational families in the United States.[8] As family law moves forward, accompanied by even further globalization, there is significant danger that it will create damaging ripples in the immigration options of affected families. Immigration law is integrally interwoven into the realm of the transnational family, yet immigration concerns must be brought more openly into the process of developing international family law processes and norms. The merger of disparate conversations on families across borders will result in bettering both immigration law and family law.

II. IMMIGRANT FAMILIES AND THE INEVITABLE INTERACTION OF IMMIGRATION AND FAMILY LAW

Families are alternately facilitated by and assaulted by U.S. immigration law. Family plays a central role in U.S. immigration law, which encourages the movement of some families across borders, with the vast bulk of lawful immigration directly dependent on a family relationship.[9] Of this group, children are a significant portion of the flow of lawful immigration. For example, in fiscal year 2011, children constituted 28 percent of all family-sponsored immigration.[10] Similarly, 22 percent of employment-based visas and 23 percent of diversity visas were issued to children as derivatives of their immigrating parents.[11] Yet while immigration law often facilitates

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[8] *See infra* Section III.

[9] Stephen H. Legomsky, *Rationing Family Values in Europe and America: An Immigration Tug of War between States and their Supra-National Organizations*, 25 GEO. IMMIGR. L.J. 807, 808 (2011) n.2 (noting that the USCIS reported statistic that two-thirds of all grants of permanent resident status are linked to family actually understates by failing to include certain spouses and children who accompany immigrants).

[10] OFFICE OF IMMIGRATION STATISTICS, 2011 YEARBOOK OF IMMIGRATION STATISTICS , *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf, Table 7, Persons Obtaining Permanent Residence by Type and Detailed Class of Admission, indicates that of 680,089 persons admitted under immediate relative and family preference categories, 193,482 were children. *Id.*

[11] *Id.* Of 139,339 employment visas, 30,554 were issued to derivative children. *Id.* Child derivatives were 11,302 of 50,103 admissions under the diversity lottery. *Id.*

children moving along with adults who qualify for admission, it simultaneously regulates migration in a manner that creates insurmountable barriers to many persons achieving lawful immigration status despite close family connections with relatives living lawfully in the United States.[12] The result creates many mixed status families in which family members cannot share the same immigration or citizenship status.

The United States is often referred to as a nation of immigrants, but even more remarkable than the number of immigrants is the integration of immigrants into U.S. families. The United States is not simply a nation of immigrants, but rather a nation of immigrant families. Children in immigrant families now account for approximately one fourth of all children in the United States.[13] Some immigrant families are composed of members who all have lawful immigration status, but many are not. For example, 5.5 million children have at least one parent who lacks lawful immigration status.[14] From another perspective, 3.8 million parents of U.S. citizen children are unauthorized,[15] and parents of U.S. citizen children comprise 37 percent of the adult population of unauthorized immigrants.[16] Many, including about 82 percent of all children in families with an unlawfully present parent, are U.S. citizens.[17]

This is not to say that children themselves, as well as their parent migrants, are not found in large numbers within the population lacking lawful immigration status in the United States. Unaccompanied children arrive in the United States by the thousands each year, mostly to be turned away or placed in removal proceedings.[18] Children who arrive outside the

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[12] *See* David B. Thronson, *You Can't Get Here From Here: Toward A More Child-Centered Immigration Law*, 14 VA. J. SOC. POL'Y & L. 58 (2006) [hereinafter *You Can't Get Here From Here*].

[13] DONALD J. HERNANDEZ & WENDY D. CERVANTES, FIRST FOCUS, CHILDREN IN IMMIGRANT FAMILIES: ENSURING OPPORTUNITY FOR EVERY CHILD IN AMERICA 6 (2011).

[14] JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010 (2011) http://www/pewhispanic.org/files/reports/133.pdf [hereinafter NATIONAL AND STATE TRENDS, 2010].

[15] JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 8 (2009), *available at* http://pewhispanic.org/files/reports/107.pdf [hereinafter A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES]. *See also*, David B. Thronson, *Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children*, 14 U.C. DAVIS J. JUV. L. & POL'Y 239, 243 (2010) (explaining how "having a child in the United States does nothing to alter the parents' immigration status, and in all but the most extreme situations it has no impact on parents' immigration options").

[16] A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, *supra* note 15.

[17] NATIONAL AND STATE TRENDS, 2010, *supra* note 14.

[18] "According to the Congressional Research Service, more than 80,000 children have been apprehended annually since 2001, the vast majority having migrated from Mexico. Children from Mexico and Canada are nearly always repatriated immediately, since most lack asylum claims and because the United States has expedited repatriation agreements with these countries." Amanda Levinson, *Unaccompanied Immigrant Children: A Growing Phenomenon with Few*

frameworks of lawful immigration with their parents or other caretakers are an even greater presence. In 2010, approximately 1 million children without authorized immigration status lived in the United States with their parents.[19] Child immigrants living in the United States without lawful status constitute almost 10 percent of the estimated 11 million unauthorized migrants living in the United States.[20]

Combining the numbers of unauthorized parents, spouses, and children, over 9 million people in the United States live in families with at least one unauthorized immigrant.[21] It is in these mixed status families that immigration law limitations on achieving lawful immigrant status most frequently alter family decisions, impact power dynamics, and create uncertainties and stress. Even more directly, immigration law enforcement efforts have tremendous impact, as they create involuntary transnational families via detention and deportation. The number of families directly separated by deportation is staggering. In just "the six months between January and June 2011, Immigration and Customs Enforcement removed 46,486 parents of U.S.-citizen children from the United States."[22] This was not an anomaly, as recent data from U.S. Immigration and Customs Enforcement ("ICE") indicates that about 90,000 parents of U.S.-born citizen children are deported each year.[23] Meanwhile, the most recent Mexican Census reported 500,000 U.S. citizen children living in Mexico. More than a million people have migrated from the United States to Mexico since 2005, "including about 300,000 U.S.-born children, most [of whom] did so voluntarily, but a significant minority were deported and remained in Mexico."[24] At the same time, many children are left behind in the United States, and a recent field research study suggests that there may be as many as 5,100 children in foster care whose parents have been deported or detained at any one time.[25]

Easy Solutions, MIGRATION INFO. SOURCE (2011), http://www.migrationinformation.org/Feature/display.cfm?ID=823. *See also* CHAD C. HADDAL, CONG. RESEARCH SERV., RL33896, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES 1 (2009) (noting that in fiscal year 2007, the Department of Homeland Security detained 8,227 unaccompanied children).

[19] NATIONAL AND STATE TRENDS, 2010, *supra* note 14.

[20] Jeffrey Passel and D'Vera Cohn, *Unauthorized Immigrants: 11.1 Million in 2011*, PEW HISPANIC CENTER (Dec. 6, 2012), http://www.pewhispanic.org/2012/12/06/unauthorized-immigrants-11-1-million-in-2011.

[21] A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, *supra* note 15.

[22] Seth Freed Wessler, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, COLOR LINES (2012), *available at* http://arc.org/shatteredfamilies [hereinafter *Shattered Families*].

[23] Seth Freed Wessler, *Primary Data: Deportations of Parents of U.S. Citizen Kids*, COLOR LINES, (Dec. 17, 2012, 9:30 AM), http://colorlines.com/archives/2012/12/deportations_of_parents_of_us-born_citizens_122012.html.

[24] JEFFREY PASSEL, D'VERA COHN, & ANA GONZALEZ-BARRERA, PEW HISPANIC CTR., NET MIGRATION FROM MEXICO FALLS TO ZERO–AND PERHAPS LESS 8 (2012).

[25] *Shattered Families*, *supra* note 22.

This overview of the demographics of immigrant families and immigration enforcement gives an obvious sense of scale to the difficulties that local family courts face. In comparison to the one in four children in the United States in immigrant families, in fiscal year 2012, only 3,313 children were granted lawful permanent resident status in the United States under processes implementing the Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption.[26] This is fewer than the number of children in foster care following a parent's deportation, and for each child immigrating under the Hague Adoption procedures in 2012, there are well over 1,500 children living in the United States with a parent lacking permission to remain.[27]

Less obvious, and beyond the scope of this Article, is that the numbers of unauthorized children and families are, in part, a reflection of the fact that U.S. immigration law demonstrates a "systemic devaluation of children and the diminishment of their interests, giving rise to a narrow, parent-centered conception of family."[28] This consistent devaluation of children, coupled with "the excruciating complexity of immigration law can mask the ways in which seemingly innocuous immigration provisions work together to severely curtail immigration options for families in the United States."[29] Rigid immigration laws create a situation in which the vindication of immigration law goals often results in the compromise of family integrity, and achievement of family integrity often can be accomplished only in violation of immigration laws.

This bias against children's interests that characterizes immigration law also distances it from mainstream family law values and approaches.[30] Because immigration laws, which regulate the migration of people, consider family connections in only a limited fashion, the ability to achieve lawful immigration status in the United States diverges greatly from any notion that having close family connections provides a reliable path to lawful immigration status. Given this chasm, when immigration law and family laws inevitably collide, children routinely are caught in the middle. The interaction is not simply a clash of practical realities, but often a clash of values. On the most fundamental levels, the motivating forces of immigration

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[26] DEPARTMENT OF HOMELAND SECURITY, TABLE 7, PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2012, *available at* http://www.dhs.gov/yearbook-immigration-statistics-2012-legal-permanent-residents; *see also* Alex Dobuzinskis, *International Adoptions by U.S. Parents Fell in 2012, Continuing Multi-Year Decline*, HUFFINGTON POST (Jan. 24, 2013), http://www.huffingtonpost.com/2013/01/25/international-adoptions-us-parents-2012_n_2547549.html (placing total number of international adoptions by U.S. parents in 2012 at 8,668).

[27] Compare text accompanying UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, *supra* note 14; *Shattered Families*, *supra* note 22; and Dobuzinskis, *supra* note 26.

[28] *You Can't Get Here From Here*, *supra* note 12.

[29] *Id.*

[30] *See generally* David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393 (2010).

law and family law differ. The vindication of immigration law goals often compromises family integrity and the best interests of children. Consequently, family integrity often can be accomplished only in violation of immigration laws. Commonly, immigration law will reach a conclusion that an individual should be deported that is starkly contrary to an outcome that would advance the best interests of that person's children. Less dramatically, immigration status also can subtly influence family court decisions as misinformation and misunderstanding of immigration laws lead to questionable outcomes.

Given the prevalence of immigrant families in the United States, immigrants and issues of immigration often come before a family court. Yet determining the appropriateness of any parameters when considering immigration issues in family court decision-making is not a simple matter. Some courts seek to avoid immigration issues altogether, yet other "judges and advocates are all too eager to attach exaggerated legal significance to immigration status with little explanation and no analysis."[31] Also, when children of immigrant families are involved with child welfare systems, issues as central as seeking placements for children can create struggles as child welfare workers and courts grapple with the difficulties, both practical and legal, that arise in the vetting of possible transnational placements, potential placements with undocumented caregivers, and resource limitations related to immigration status that impact reunification planning.

At the intersection of immigration and family law, a profound lack of resources and isolated decision-making characterizes the work of family courts and child welfare systems with immigrant families. Issues related to immigration status in family law arise and are decided in local family courts, often without written opinions at the trial court level and a lack of resources for appellate consideration. In the absence of a shared practical and intellectual system in place for the examination of these issues, a piecemeal approach takes root across jurisdictions. Resolutions are not consistent, as the values gap between immigration law and family law regarding the treatment of children creates stark choices, thereby forcing courts to adopt a range of resolutions and practices.[32]

The growing patchwork of practices and policies at the intersection of immigrant law and family law, both procedurally and substantively, is quite different from the patterns emerging at the intersection of international law and family law. In sharp contrast to the values gap created by the marginalization of children in immigrant families in immigration law, alignment of values characterizes "[t]he internationalization of American

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[31] *Of Borders and Best Interests*, *supra* note 7 (surveying family court decisions and developing a classification of the approaches that family courts adopt when presented with immigration status issues).

[32] *Id.*

family law [which] has been spearheaded, as Merle Weiner has shown, by concern for children."[33]

III. TRANSNATIONAL FAMILIES AND THE ACCELERATING GLOBALIZATION OF FAMILY LAW

As immigration law remains distinctly bounded by national perspectives, family law increasingly recognizes that families transcend borders[34] and incorporates international perspectives into domestic norms and processes. Moreover, while efforts at immigration reform face political stalemate, family law is evolving at a surprisingly rapid pace to reflect the realities facing some transnational families. In particular, the adoption and implementation of multinational treaties, together with uniform state laws to implement those domestically, have provided family law an impetus to leap national boundaries and incorporate international frameworks. While often erroneously characterized as a concern solely of states and not the federal system,[35] family law increasingly is a matter of international law.

In specific contexts, international agreements have become central to the functioning of family courts, both procedurally and substantively.[36] For example, in matters of child abduction[37] and international adoption,[38] multinational treaties and implementing legislation are highly relevant and central in the work of frontline family courts. But even though child abduction occurs more frequently than desired, it is accountable for only a small portion of the daily work of family courts. With the prospect of U.S. implementation of multinational treaties touching on more routine and common issues such as child support,[39] the pace of the internationalization of

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[33] Barbara Stark, *The Internationalization of American Family Law*, 24 J. AM. ACAD. MATRIMONIAL L. 467, 469 (2012) (citing Merle H. Weiner, *Codification, Cooperation, and Concern for Children: The Internationalization of Family Law in the United States over the Last Fifty Years*, 42 FAM. L.Q. 619 (2008)).

[34] *See, e.g.*, Ann Laquer Estin, *Where (In the World) Do Children Belong?*, 25 BYU J. PUB. L. 217, 218 (2011) (calling for "a broad conception of belonging, based on the principle that children have a right to the care and protection of their parents and the different communities in which they belong").

[35] *See, e.g.*, Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1643 (2007); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 875 (2004) (noting that as they regulate family relationships and determine rights between family members, "federal social security law, employee benefit law, immigration law, tax law, Indian law, military law, same-sex marriage law, child support law, adoption law, and family violence and abuse law are also forms of family law").

[36] For a more detailed accounting of the trend toward the internationalization of family law than this essay can provide, *see* Stark, *supra* note 33, at 469.

[37] *See* Hague Convention on the Civil Aspects, *supra* note 1

[38] *See* Hague Convention on the Protection of Children, *supra* note 1.

[39] Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, 47 I.L.M. 257 (2008) [hereinafter Hague Convention on the International Recovery of Child Support].

family law will quicken. The globalization of family law practice will be widespread with the advent of the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children[40] reaching broadly into matters as commonplace as jurisdiction in custody matters.

Notably, the "codification of specific provisions related to transnational matters has tended to be in substantive areas related to children."[41] This internationalization "has been built on an expanding conception of children's well-being."[42] The wellbeing of children "provides countries a fairly broad platform for promulgating an ever-widening array of international instruments . . . [as a]n infinite number of issues affect children."[43] The international consensus that the interests of children are of primary concern is a value shared in both U.S. domestic law and international family law and has proven sufficient to overcome political hesitancy in committing to the formation of international obligations via multilateral treaty.[44]

This focus on children provides a solid foundation for the development of transnational law. The intersection of family law and international law thus is largely framed around shared values related to the interests of children. This contrasts sharply with the intersection of U.S. immigration law and family law where the presence of different underlying values frustrates rather than facilitates.[45]

The globalization of family law via the implementation of international treaties is also marked by the commitment of public resources and the gathering of expertise to the problems of implementation. First, many of the international treaties require the creation of a national central authority.[46] For example, as the central authority on issues of international child abduction, the U.S. Department of State's Bureau of Consular Affairs has

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[40] Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 35 I.L.M. 1391.

[41] Merle H. Weiner, *Codification, Cooperation, and Concern For Children: The Internationalization of Family Law in the United States Over the Last Fifty Years*, 42 FAM. L.Q. 619, 627 (2008).

[42] *Id.* at 628–29.

[43] *Id.* at 630.

[44] Stark, *supra* note 33, at 469.

[45] David B. Thronson & Frank P. Sullivan, *Family Courts and Immigration Status*, 63 JUV. & FAM. CT. J. 1, 8–11 (2012).

[46] *See e.g.*, 22 C.F.R. § 94.2 (establishing the U.S. Department of State as the U.S. Central Authority for international adoptions under the Hague Convention).

developed and maintains extensive resources for parents.[47] In addition to information, as central authority, the Department of State stands ready to open cases and provide a variety of services to parents of abducted children.[48] The provision of such resources is critically important to the impacted families, despite the relatively low numbers of 799 outgoing cases and 344 incoming abduction cases in calendar year 2012.[49] The commendable and significant commitment of resources in the context of treaty implementation again stands in stark contrast to the realities that immigrant families face in family court outside the treaty framework.

Second, the globalization of family law via international treaty is marked by extensive work to develop federal implementing statutes and regulations, together with model and uniform state laws. The accompanying processes are not always smooth, and certainly rarely easy, but they bring together a remarkable array of expertise and thoughtful engagement. For example, since 2010, when the United States signed 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, a drafting commission of the Uniform Law Commission has been working on amendments to the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") to create implementing legislation.[50] This is far from a simple task, yet issues related to implementation are being debated and vetted by experts in anticipation of the issues that will arise.[51] Through such processes, proposed reforms that are placed before federal and state legislatures are the products of concerted effort to reach consensus and bring relevant expertise to bear on difficult issues. Individual state legislatures and local courts are not left to grapple in isolation with the puzzles that borders bring to family law.

The globalization of family law through the implementation of international treaties, while far from perfect, provides a model by which more thought and resources might be brought to bear on the intersection of immigration law and family law. At the same time, bringing the perspectives of immigrant families more fully into conversations about the globalization of

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[47] *See* U.S. Dep't of State, Bureau of Consular Affairs, *International Parental Child Abduction*, U.S. DEP'T OF ST. BUREAU OF CONSULAR AFF., http://travel.state.gov/abduction/abduction_580.html (last visited Nov. 11, 2013).

[48] U.S. Dep't of State, Bureau of Consular Affairs, *Opening an International Parental Child Abduction Case*, U.S. DEP'T OF ST. BUREAU OF CONSULAR AFF., http://travel.state.gov/abduction/solutions/opencase/opencase_3849.html (last visited Nov. 11, 2013).

[49] *See* U.S. Dep't of State, Bureau of Consular Affairs, *International Parental Child Abduction: Resources*, U.S. DEP'T OF ST. BUREAU OF CONSULAR AFF., http://travel.state.gov/abduction/resources/resources_3860.html#statistics (last visited Nov. 11, 2013).

[50] Linda Elrod & Robert G. Spector, *A Review of the Year in Family Law 2011-2012: "DOMA" Challenges Hit Federal Courts and Abduction Cases Increase*, 46 FAM. L.Q. 471, 478–79 (2013).

[51] *See* Robert G. Spector, *Memorandum: Accommodating the UCCJEA and the 1996 Hague Convention*, 63 OKLA. L. REV. 615 (2011).

family law enriches that debate and avoids unintended immigration consequences for transnational families in the United States.

IV. MERGING THE CONVERSATIONS

Bringing the perspectives and concerns of immigrant families more fully into conversations on the globalization of family law adds value both to debates at the intersection of immigration law and family and to discussions at the intersection of international law and family law. First, family courts, child welfare agencies, and state legislative bodies could all benefit from the engagement and efficiencies that model and uniform state law procedures provide. Second, a more robust consideration of immigration issues in ongoing uniform state law processes would provide broader perspectives and help prevent unintended outcomes and impacts in immigration realms. Third, bringing family law expertise and international law perspectives into the everlasting immigration reform debate, through established mechanisms, perhaps provides an avenue to reframe issues and overcome stalemates that block reform.

A. Engaging National Resources for Immigrant Families

Efforts to address the issues that immigrant families present in family courts, through individual litigation or state-by-state legislation, are far less efficient and more likely to result in contradictory patchworks of legal obligations than more centralized and better resourced approaches. For example, California recently adopted the Reuniting Immigrant Families Act, which authorizes more time for child welfare agencies to find and reunite detained and deported parents with their children or find placement with a relatives, regardless of their immigration status.[52] A companion Calls for Kids Act requires law enforcement officers to ask whether an arrestee is a custodial parent at the time of arrest or booking and to notify a custodial parent of their right to make two additional phone calls to arrange for the care of their children.[53] These are examples of simple procedural reforms that greatly improve the ability of family law systems to reach reasoned decisions with full participation. Such issues face family courts and child welfare systems in every state.

The incorporation of provisions such as those adopted by California into a uniform state law would provide a strong vehicle to establish frameworks for family courts struggling with the due process concerns that deportation of parents present. The uniform state law approach is particularly useful in jurisdictions where such issues arise relatively rarely so there is little preexisting experience from which to draw upon in framing legislation or judicial decision-making. The Uniform Law Commission has mechanisms and processes in place to draw from existing statutory models, create new

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[52] CAL. FAM. § 3040 (West 2012); *see also About SB 1046*, http://www.sb1064.org/about-sb1064.

[53] CAL. PENAL § 815.5 (West 2012).

approaches, and vet different avenues in a way that can provide legislation that states can adopt with a higher level of confidence. The inclusion of such issues in uniform legislation also serves to insulate basic family law issues such as the due process concerns addressed by the California legislation from being branded as a hot-button partisan matter.

B. Bringing All Perspectives to Bear

Yet, even relatively well-resourced and deliberative processes are not perfect. When processes to implement federal regulations or uniform state laws do not have all perspectives at the table, the possibility of unforeseen harm or missed opportunity increases. For example, the Uniform Child Abduction Prevention Act ("UCAPA") includes broad provisions that potentially complicate custody disputes involving immigrant parents by mandating that, in determining risk of abduction, a court "shall consider" evidence such as whether the parent has "strong familial, financial, emotional or cultural ties to another state or country" or is "undergoing a change in immigration or citizenship status that would adversely affect the respondent's ability to remain in the United States legally."[54] As family courts struggle with the appropriateness of and parameters for the consideration of immigration issues in family court decision making, UCAPA clumsily places a finger on one side of the scale in a way that opens the door to argue that any immigrant is at heightened risk of abducting a child. Such overbroad profiling is unjustifiable. In this instance, the perspectives of those working on issues of international abduction issues at the intersection of family law with the Hague Convention on the Civil Aspects of International Child Abduction found voice, but the nuanced perspectives of those working with immigrant parents in family court custody disputes did not.[55]

Similarly, an unsettled and highly litigated issue under the Hague Convention on the Civil Aspects of International Child Abduction is the meaning of "habitual residence" — attempts to define the term in the Hague context have already created a circuit split.[56] In contrast to the nuance that this litigation exhibits, in creating regulations for applying this contested term in the immigration arena, the United States adopted regulations that flatly define a child's "habitual residence" as the child's country of citizenship.[57] This means "officials in the child's country of citizenship must

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[54] NAT'L CONFERENCE OF COMM'R ON UNIF. STATE LAWS (UNIF. CHILD ABDUCTION PREVENTION ACT § 7) (2006), *available at* http://www.uniformlaws.org/shared/docs/child_abduction_prevention/ucapa_final_oct06.pdf.

[55] Courts "have generally recognized the *in terrorem* effect of inquiring into a party's immigration status when irrelevant to any material claim." Topo v. Dhir, 210 F.R.D. 76, 78 (S.D.N.Y. 2002); *See also* Leslye Orloff et al., Office on Violence Against Women, *Countering Abusers' Attempts to Raise Immigration Status of the Victim in Custody Cases*, Ch. 6.1 at 6, LEGAL MOMENTUM (2004).

[56] Elrod & Spector, *supra* note 50.

[57] Orphan Cases Under Section 101(b)(1)(F) of the Act (non-Convention cases), 8 C.F.R. § 204.3(k) (2011).

approve an adoption into the United States, even if the child has been habitually residing in a different nation."[58] Further, the term "habitual residence" appears elsewhere in a federal immigration statute creating "special immigrant juvenile" status for certain court dependent children[59] and in many U.S. immigration statutes containing requirements related to residence.[60] This is but one example where the debate on the implementation of international law obligations in family law may have direct consequences in immigration law. Immigration law perspectives should be part of the law's development to avoid unintended consequences.

Moreover, having more diverse perspectives at the table trying to implement international law obligations in domestic family law arenas through uniform state laws also provides potential to identify opportunities to clarify and incorporate established practices related to immigration law in state courts. For example, immigration provisions for special immigrant juvenile status require factual findings that can only be made by certain state courts, and state courts often struggle to understand their role in this federal statutory scheme.[61] The jurisdictional issues that arise in such cases are highly likely to be impacted by jurisdictional provisions in a uniform state law implementing 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.[62] Having immigration law perspectives before the Uniform Law Commission drafting commission that is working on amendments to the UCCJEA to create implementing legislation would provide an opportunity to clarify the state court role rather than create further confusion and uncertainty.

C. *Reframing Debates*

Hope springs eternal that this time will be different, and current efforts at comprehensive immigration reform will not collapse. But the adult-centric orientation of immigration law means that reform proposals generally pay less attention to the interests of millions of U.S. citizen children who live in mixed status families than they to their parents. The contrasting focus on children found at the intersection of international law and family law provides an opportunity to bring immigration issues into the conversation with an alternate framing. Bringing immigration issues into the discussion

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[58] Estin, *supra* note 34.

[59] *See* 8 U.S.C. § 1101(a)(27)(J) (2013).

[60] *See, e.g.,* Holder v. Martinez Gutierrez, 132 S.Ct. 2011 (2012) (rejecting the claim that a parent's residence could be imputed to a child for purposes of establishing eligibility for cancellation of removal).

[61] *See* Katherine Brady & David Thronson, *Immigration Issues: Representing Children Who Are Not United States Citizens, in* CHILD WELFARE LAW AND PRACTICE MANUAL: REPRESENTING CHILDREN, PARENTS AND STATE AGENCIES IN ABUSE, NEGLECT AND DEPENDENCY CASES 415 (Duquette & Haralambie, 2d ed. 2010)

[62] Hague Convention on the International Recovery of Child Support, *supra* note 39.

forces a fresh look at immigration law's impact on children. The contrasting treatment of children is stark, and simply highlighting immigration law's divergence from norms relating to the treatment of children has value as an impetus to rethink its outlier status as regards the treatment of children. Further, involving family law and international law experts in a deeper examination of immigration law would bring new voices into the immigration debate. Entrenched positions may soften as new voices and perspectives are brought to bear.

V. CONCLUSION

Differences between transnational family and immigrant family narratives arise from the different approaches taken and the resources devoted to the intersections of international, family, and immigration law. Merging the distinct conversations on the globalization of family law and the treatment of immigrant families will help in the creation of more seamless and consistent developments of the law at these complicated points of interaction. Each conversation has direct value to the other. A mustering of resources and attention to immigrant families commensurate with that devoted to other transnational family issues would provide much needed support to family courts and child welfare systems struggling to achieve just solutions for immigrant families. Families transcend borders, and approaches to working with families must similarly extend across traditional disciplinary boundaries and limits.