Journal of Gender, Social Policy & the Law

Volume 11 | Issue 2 Article 19

2003

The Potential and Challenges of Transnational Litigation for Feminist Concerned about Domestic Violence Here and Abroad

Merle H. Weiner

THE POTENTIAL AND CHALLENGES OF TRANSNATIONAL LITIGATION FOR FEMINISTS CONCERNED ABOUT DOMESTIC VIOLENCE HERE AND ABROAD

MERLE H. WEINER*

I. THE THIRD STRAND: WHY FEMINISTS SHOULD TURN THEIR ATTENTION TO PRIVATE INTERNATIONAL LAW

Legal reformers working to maximize battered women's safety must focus on more than the relationship between women and their batterers. Reformers must also consider how the law treats the relationship between women and their children when battered women attempt to find safety. Women's identities are often tied to

* Associate Professor of Law, *University of Oregon School of Law*. The author wants to thank her research assistants, Jane Trost and Philip Huang, for their excellent assistance.

their role as mothers.[1] Consequently, many domestic violence victims see themselves as mothers first and battered women second, or at least give great weight to their mothering role. Their relationships with their children may be more important than their own safety. Asking these battered women to safeguard themselves at the expense of their relationship with their children,[2] or at the expense of their children's well being,[3] may be asking the impossible.

A braid is being woven with three separate threads of legal advocacy on behalf of domestic violence victims and their children that recognizes the importance of this dynamic. One thread has

1. *See* ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 149 (2000) (noting women's complex experiences of motherhood and citing Dorothy Roberts for the proposition that "motherhood is for many women life's greatest joy"); *see also* Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 189-92 (2000) [hereinafter Cahn, *Power of Caretaking*] (providing a historical overview of how women came to be valued for mothering). For a contemporary view of how social status is achieved through mothering, see MONA HARRINGTON, CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS 105 (1999) (discussing Hillary Clinton as an example of "the remaining power of the idea that women are most admirable, most virtuous, most worthy of praise when they are fulfilling the supportive role of wife and mother"). *See* Cahn, *Power of Caretaking*, *supra*, at 195-98 (discussing women's socialization that leads them to "view themselves as mothers, and to make decisions to support that role").

2. The importance of a woman's relationship with her children is a well-recognized reason why some women do not leave the battering relationship. *See* Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A. Why Abuse Victims Stay*, 28 COLO. LAW. 19, 20 (1999) ("Fear of losing child custody can immobilize even the most determined abuse victim. Since batterers know that nothing will devastate the victim more than seeing her children endangered, they frequently use the threat of obtaining custody to exact agreements to their liking. Custody litigation becomes yet another weapon for the abuser, heightening his power and control tactics to further terrify the victim."); *see also* Mayumi Waddy, *DVRO: Just a Piece of Paper*, 11 J. CONTEMP. LEGAL ISSUES 81, 84 (2000) ("Parents may fear these allegations will be so terrible that they will lose custody of their children, a threat their batterers have often used against them to convince them to stay."). Linda Gordon also noted that this reasoning blocked women's exits from abusive domestic relationships in the late nineteenth and early twentieth centuries. *See* Linda Gordon, *Women's Agency, Social Control and the Construction of "Rights" by Battered Women*, *in* NEGOTIATING AT THE MARGINS: THE GENDERED DISCOURSES OF POWER AND RESISTANCE 122, 135 (Sue Fisher & Kathy Davis eds., 1993) ("The biggest obstacle for most women living with abusive men was that they did not wish to lose their children; indeed, their motherhood was for most of them (including many who were categorized as abusive or neglectful parents) their greatest source of pleasure, self-esteem, and social status. In escaping they had to find a way simultaneously to earn money and raise children in an economy of limited jobs for women, little child care, and almost no reliable aid to single mothers.").

3. "Some victims believe it is in the children's best interest to have both parents in the home, particularly if the abuser does not physically assault the children," and some women remain in abusive relationships because their children plead with their mothers to stay with the fathers. Buel, *supra* note 2, at 20. *See also* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1234 (1993) ("While concern for their children may lead some battered women to leave a relationship that has reached an intolerable level of abuse, it may lead others to remain, believing that to separate the children from their father may be detrimental to the children.").

culminated in the legal recognition in the United States that domestic violence harms children. This legal recognition has materialized quickly over the last fifteen years,[4] although reformers have been making the connection between domestic violence and harm to children for a much longer time.[5] Now virtually every state acknowledges that domestic violence is relevant to a custody contest between parents.[6] The American Law Institute acknowledged the importance of domestic violence to custody contests in its *Principles of the Law of Family Dissolution: Analysis and Recommendations*.[7] The National Council of Juvenile and Family Court Judges has proposed a model state statute that recommends against visitation when it would threaten the safety of the custodial parent.[8] Supervised visitation centers have increased in number,[9] supported by state funding[10] and

4. *See* Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1090 (1991) (recommending that "all states should admit evidence of abuse in recognition of its relevance to the best interest of the child"); Linda R. Keenan, Note, *Domestic Violence and Custody Litigation: The Need for Statutory Reform*, 13 HOFSTRA L. REV. 407, 439-40 (1985) (urging statutory adoption of a presumption that domestic abuse is harmful to children).

5. *See* Gordon, *supra* note 2, at 129.

> Women's rights advocates [in the nineteenth century] also agitated against wife beating in the context of child-raising discourse. Elizabeth Cady Stanton . . . summed up a common view when she said that "the condition of the child always follows that of the mother." Mothers of any properly operating families were not conceived to have interests separate from, let alone antithetical to, those of their children. Damage to one was damage to both.

Id.

6. The current situation has developed through both statute and case law. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.13 cmt. c (2002) (observing that approximately "one third of states authorize the court to order an investigation and report, either by a guardian ad litem or by a social-service agency, juvenile court, or appropriate private organization"). In addition, "every state now has case law allowing courts to consider domestic violence in their custody decisions." Joan Zorza, *Protecting a Battered Woman's Whereabouts from Disclosure*, DOMESTIC VIOL. REP., Oct./Nov. 1995, at 3 (citations omitted).

7. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002); *see also* Merle H. Weiner, *Domestic Violence and Custody: Importing the American Law Institute's PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION into Oregon Law*, 35 WILLAMETTE L. REV. 643 (1999).

8. MODEL CODE ON DOMESTIC AND FAM. VIOLENCE § 402 (Nat'l Council of Juv. & Fam. Ct. Judges 1994).

9. *Compare* Robert B. Straus, *Supervised Visitation and Family Violence*, 29 FAM. L.Q. 229, 233-34 (1995) ("There are fifty-six known supervised visitation programs operating in twenty-eight different states. These statistics probably represent about a third to one-half of the existing programs. Many of the programs are small, part-time, and recently opened."), *with* Janet R. Johnston & Robert B. Straus, *Traumatized Children in Supervised Visitation: What Do They Need?*, 37 FAM. & CONCILIATION CTS. REV. 135, 135 n.1 (1999) ("[M]embership in the Supervised Visitation Network, the largest organization of providers, has gone from 70 in 1992 to 430 as of September 1998.").

federal funding.[11] The National Commissioners on Uniform State Laws adopted the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), which explicitly authorizes courts to assume emergency jurisdiction in a custody action when a parent is fleeing from domestic violence, thereby improving tremendously upon the Uniform Child Custody Jurisdiction Act.[12] Congress has ordered that the Attorney General study the effect of the Parental Kidnapping Prevention Act and the UCCJEA in cases where domestic violence is present.[13] Somewhat paradoxically, the fact that domestic violence harms children is also evident in the efforts of child protective service agencies' to terminate battered women's parental rights for the "failure to protect" their children.[14]

---

10. *See, e.g.*, JUD. COUNCIL OF CAL., CTR. FOR FAMS., CHILD. AND THE CTS., ACCESS TO VISITATION GRANT PROGRAM (last visited Oct. 28, 2002), *available at* http://www.courtinfo.ca.gov/programs/cfcc/resources/grants/a2v/rfpinfo.htm; *see also* STATE OF TEX. VISITATION CTRS. (last updated Dec. 3, 1999), *available at* http://www.sbotfam.org/visitationcenters.pdf.

11. *See, e.g.*, 42 U.S.C. § 669B (2002) (providing grants to states to establish and administer programs facilitating noncustodial parents' access to their children, including supervised visitation); *see also* U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, SAFE HAVENS: SUPERVISED VISITATION AND SAFE EXCHANGE GRANT PROGRAM (2002), *available at* http://www.ojp.usdoj.gov/vawo/grants/safehavens/shsvse02.txt.

12. UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 204 (1997).

13. *See, e.g.*, Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1303(a)-(b), 114 Stat. 1464, 1513 (codified as amended at 22 U.S.C.) (authorizing $200,000 to conduct the study). *See also id.* § 131(c). Some courts have recognized that domestic violence is relevant to determinations of venue. *See, e.g.*, E.M. v. M.M., 734 N.Y.S.2d 837, 838-39 (N.Y. Fam. Ct. 2001) (rejecting a father's change of venue motion for custody and family offense petitions even though the county where the petitions were filed had "no substantial contacts" with the case since the petitioner had been in the county for less than one week, and noting that "the domestic violence factor clearly outweighs the usual factor of witness convenience and substantial contacts with the original county of residence").

14. Battered women's children are sometimes removed from their mothers because of the mothers' failure to protect, even though the women often make active efforts to protect their children. *See* SCHNEIDER, *supra* note 1, at 77; *see also, e.g.*, *In re* C.J.K. & K.K., 774 So. 2d 107, 115 (La. 2000) (finding passive abuse because the children were exposed repeatedly to violence against their mother by their father); *In re* J.K. & R.T.H., 38 S.W.3d 495, 501 (Mo. Ct. App. 2001) (noting that Battered Women's Syndrome, by statute, is a condition that supports termination of the mother's rights). In this context, women generally have not done enough to satisfy authorities that they are trying to end the domestic violence. *See generally* "FAILURE TO PROTECT" WORKING GROUP, *Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849 (2000) (suggesting that the societal awareness that domestic violence harms children has led to more protection for children, but it has also resulted in a punitive policy towards battered women); Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the "Protected Child" in Child Neglect Proceedings*, 58 ALB. L. REV. 1087, 1090 (1995) (criticizing failure-to-protect laws for holding mothers accountable for failing to stop abuse directed at them); Jeanne A. Fugate, Note, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 287-305 (2001) (acknowledging the gender impact of failure-to-protect laws and suggesting changes, including the adoption of affirmative defenses and clarification

The second thread is found in public international law, which in the past twenty years has focused on the harm domestic violence causes to both women and children.[15] General Recommendation No. 19 in 1992[16] and the United Nations ("U.N.") Declaration on the Elimination of Violence Against Women in 1993[17] sounded a clear

---

of scope of duty, which would allow for equal expectations based upon gender); Melissa A. Trepiccione, Note, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect her Child an Acceptable Solution when her Child Witnesses Domestic Violence?*, 69 FORDHAM L. REV. 1487, 1516-17 (2001) (arguing that the removal of children who witness abuse of their victimized mothers is unacceptable from both a social science viewpoint and a constitutional law perspective).

In New York City, this practice was recently enjoined by the Eastern District of N.Y. in *In re* Nicholson, 181 F. Supp. 2d 182, 184-85 (E.D.N.Y. 2001) (enjoining the practices of the Administration for Children's Services ("ACS") who removed children of battered mothers for the reason that the "mothers 'engaged in' domestic violence by being victims of such violence," and then after returning the children to the mothers sometimes "pursue[d] neglect actions against the mothers in Family Court solely on the ground that they were victims of domestic violence"). As the court stated, "the government may not penalize a mother, not otherwise unfit, who is battered by her partner, by separating her from her children; nor may children be separated from the mother, in effect visiting upon them the sins of their mother's batterer." *Id.* at 188.

15. *See generally* SCHNEIDER, *supra* note 1, at 53-54 (stating that "[t]he development of women's international human rights is an important example of the dialectical dimensions of rights claims in envisioning new political possibilities").

16. *See* CEDAW General Recommendation No. 19, U.N. HCHR, 11th Sess., at 1, U.N. Doc. A/47/38 (1992) (stating that domestic violence is a type of discrimination that prevents women from enjoying equality of rights); Berta Esperanza Hernandez-Truyol, *Sex, Culture & Rights: A Re/Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 627 (1997) (arguing that the international community must change the way it views violence in order to provide women with greater protections against violence in the twenty-first century). Work on behalf of battered women at the international level was evident as early as 1980 at the Copenhagen Conference. "In a resolution on battered women and violence in the family, the Conference, without a vote, requested the Secretary-General, in co-operation with the World Health Organization, to prepare a study on the extent and types of physical, sexual and other forms of abuse in families and institutions and on existing resources available to address that problem. It urged Member States to establish adequate family counseling services to assist in the solution of conflicts among family members, and to consider establishing family courts, staffed wherever possible with personnel trained in law and in other relevant disciplines." ANNUAL REVIEW OF UNITED NATIONS AFFAIRS 1980 273 (William A. Landskron ed., 1981).

17. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., U.N. Doc. A/48/104 (1993) [hereinafter Declaration on the Elimination of Violence Against Women] (declaring violence against women a violation of women's rights and noting an urgent need for women to gain equality of rights). Shortly after that Declaration was issued, there were a series of other significant events in public international law for domestic violence victims. *See Preliminary Report Submitted by the Special Rapporteur on Violence against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights Resolution 1994/45*, U.N. ESCOR, 50th Sess., at ¶¶ 32-41, U.N. Doc. E/CN.4/1995/42 (1994) (detailing important events in international law for domestic violence victims). These developments include the following: the appointment of a UN special rapporteur on violence against women, *see* Appointment of the U.N. Special Rapporteur on Violence Against Women, Radhika Coomaraswamy in 1994, Commission on Human Rights Resolution Appointing a

message that public international law condemns domestic violence and imposes obligations on states to help combat and end domestic violence. These types of obligations also arose through regional agreements like the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará).[18] Scholars, focusing on these instruments as well as suggesting others, explained how a human rights perspective could help address violence against women both in the United States and abroad.[19]

Public international law also recognizes the harm domestic violence causes to children. For example, the U.N. Convention on the Rights of the Child requires States Parties to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse . . . while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."[20] The Committee on the

---

Special Rapporteur on Violence Against Women, Comm'n H.R. Res. 1994/95, ESOPR, 1994 Supp. No. 4 at 140, Mar. 11, 1994, *reprinted* in THE UNITED NATIONS AND THE ADVANCEMENT OF WOMEN 1945-96, at 492 (1996); and the adoption of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará) by the General Assembly of the Organization of American States. *See* Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "Convention of Belém do Pará," June 9, 1994, 33 I.L.M. 1534.

18. *See* Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 17. The United States did not sign or ratify the Convention, but approximately twenty-three countries have done so. *See also* Rhonda Copelon, *Violence Against Women: The Potential and Challenge of a Human Rights Perspective*, 1 WOMEN'S HEALTH COLLECTION 114, 116 (1996) [hereinafter Copelon, *Violence Against Women*].

19. Professor Schneider sees this as the center of some "trailblazing work on battering in the United States," e.g., "to 'bring Beijing home.'" *See* SCHNEIDER, *supra* note 1, at 28. *See, e.g.,* Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994) [hereinafter Copelon, *Recognizing the Egregious*]; Hilary Charlesworth, *Symposium on Method in International Law: Feminist Methods in International Law*, 93 AM. J. INT'L L. 379 (1999); Barbara Cochraine Alexander, Note, *Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims*, 15 AM. U. INT'L L. REV. 895 (2000); Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 VAND. J. TRANSNAT'L L. 503 (2000); Merle Weiner, *Violence Against Women*, *in* FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW (D. Marianne Blair & Merle H. Weiner eds., forthcoming 2003) (manuscript on file with author).

20. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., pt. 1, art. 19(1), U.N. Doc. A/44/25 (1989) [hereinafter Convention on the Rights of the Child]. The Convention on the Rights of the Child states:

> Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Rights of the Child has spoken to countries specifically about domestic violence. For instance, the Committee criticized representatives of Jordan for "'the lack of adequate measures taken . . . to evaluate and address . . . domestic violence,' and recommended that Jordan study the problem and enact 'appropriate follow-up measures.'"[21] The U.N. Declaration on the Elimination of Violence against Women recognizes that children of domestic violence victims may need "specialized assistance," including treatment and counseling to help promote their "safety and physical and psychological rehabilitation."[22] Similarly, regional organizations, such as the Council of Europe, have addressed the harm caused to children by domestic violence.[23]

Private international law, particularly transnational custody litigation between a battered woman and her batterer, constitutes the third thread.[24] Our interconnected and mobile world gives rise daily

---

Id. at art. 19(2).

21. RACHEL HODGKIN & PETER NEWELL, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 240 (1998) (citing Jordan IRCo, Add.21, paras. 15 and 23). Similarly, one Committee member said the following to a representative from Burkina Faso: "The Committee considered article 19 of the Convention, on the topic of domestic violence, of great importance in ensuring the protection of children from ill-treatment; its provisions were intended to prompt those in authority in each country to find the most effective ways in their own societies to break cycles of violence that were often perpetuated from generation to generation under the cover of tradition and custom." *Id.* at 242 (citing Burkina Faso SR.136, para. 41).

22. Declaration on the Elimination of Violence Against Women, *supra* note 17, at art. 4(g).

23. *See, e.g.,* Recommendation No. R(85)4 of the Committee of Ministers to Member States on Violence in the Family (1985) (adopted by the Committee of Ministers on Mar. 26 1985, at the 382nd meeting of the Ministers' Deputies), *available at* http://www.social.coe.int/en/cohesion/fampol/recomm/family/R(85)4.htm. The Recommendation states:

> Considering that such violence affects in particular children on the one side and women on the other, though in differing ways; Considering that children are entitled to special protection by society against any form of discrimination or oppression and against any abuse of authority in the family and other institutions [. . .] Recommends that the governments of member states: [. . .] III. With regard to state intervention following acts of violence in the family: 9. take steps to ensure that, in cases of violence in the family, the appropriate measures can be quickly taken, even if only provisionally, to protect the victim and prevent similar incidents from occurring; 10. take measures to ensure that, in any case resulting from a conflict between a couple, measures are available for the purpose of protecting the children against any violence to which the conflict exposes them and which may seriously harm the development of their personality.

Id.

24. There are other areas of transnational law for which feminist theory on domestic violence can make a significant difference. For example, there is the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, which entered into force on May 29, 1993. The Convention

to these types of disputes in courts around the world. Sometimes these disputes are governed by domestic law, with courts either assessing a child's best interest and considering domestic violence in that assessment,[25] or deciding whether to enforce a foreign custody decree. Domestic violence is relevant to this latter decision because a domestic court need not defer to a foreign order if the child custody law of a foreign country violates fundamental principles of human rights[26] or if the foreign court did not base its decision on the child's best interest.[27] Similarly, the new Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures to Protect Children states that recognition of a foreign custody order may be refused "if

---

requires that the adoptive parents be suitable. *Id.* at art. 5(a). Professor Schneider's work with Hedda Nessbaum reminds us that a child can be badly abused when adopted into an abusive household. Similarly, any relinquishment must be voluntary under the Hague Adoption Convention. *Id.* at art. 4(c)(1). Domestic violence might undermine the voluntary nature of relinquishment for a domestic violence victim.

25. *See, e.g.*, McDermott v. McDermott, 946 P.2d 177 (Nev. 1997) (reversing and remanding so that the trial court could consider the rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child in custody modification proceeding); Custody of Vaughn, 664 N.E.2d 434 (Mass. 1996) (remanding so that trial court could make explicit findings about the effect of violence on the child and the appropriateness of awarding father primary physical custody and joint legal custody). *Cf. In re* Heather A., 60 Cal. Rptr. 2d 315 (Cal. Ct. App. 1996) (finding the juvenile court's order removing children from their father's custody was supported by evidence that the children were exposed to violence between their father and stepmother).

26. *See* UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 105(c) (1997), 9 U.L.A. 649 (1999) ("A court of this State need not apply this Act if the child custody law of a foreign country violates fundamental principles of human rights.").

27. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971) ("No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum."); *see also In re* Custody of R, 947 P.2d 745, 761-62 (Wash. Ct. App. 1997) (holding that trial court should have looked at substantive and procedural law employed by the Muslim Shari'a court when the Muslim court awarded custody to a batterer father in order to determine if the order was enforceable in Washington, and in particular whether the foreign court applied the best interest of child standard or applied a rule of law, evidence, or procedure so contrary to public policy that confidence in the outcome is undermined); Malik v. Malik, 638 A.2d 1184, 1186 (Md. Ct. Spec. App. 1994) (holding that a Pakistani court's custody determination would not be enforced if it was made without giving primary consideration to the best interest of the child); Ivaldi v. Ivaldi, 685 A.2d 1319, 1327 (N.J. 1996) (stating in dicta that the trial court could refuse to enforce a Moroccan decree if the Moroccan court on remand denies the father procedural due process or refuses to consider the child's best interest); Al-Fassi v. Al-Fassi, 433 So. 2d 664, 668 (Fla. Dist. Ct. App. 1983) (stating "[c]omity must give way to the interests of the state in exercising parens patriae jurisdiction over the child with the objective of protecting the recognized best interests of the child" and refusing to enforce a Bahamian decree where custody was determined based on the risk of the children becoming "'little Americans'" and losing their royal inheritance); Ali v. Ali, 652 A.2d 253, 262 (N.J. Super. Ct. Ch. Div. 1994) (refusing to enforce decree of a Shari'a court that did not apply best interests of the child standard and that failed to give notice of the proceeding to the mother).

such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child."[28] While the United States has not yet ratified the Hague Convention on Jurisdiction, individuals in the State Department hope to see it enacted,[29] and courts in the United States have cited it when evaluating whether foreign custody orders should be enforced.[30]

Commonly, transnational disputes involve the "abduction" of a child by a parent and are governed by a treaty.[31] The Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") provides a remedy for parents whose children have been removed or retained in breach of their rights of custody.[32] Frequently, litigants in these cases raise the issue of domestic violence,[33] particularly because the *victims* of domestic violence are most often the abductors in these cases. These abductors contend that the abduction occurred as part of an effort to escape from domestic violence and, therefore, that the domestic violence should excuse their actions.[34]

Each of these three threads influences and reinforces the others, and the effects of the symbiosis is seen both in the United States and

---

28. The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, art. 23(d), 35 I.L.M. 1391 [hereinafter Hague Convention on Jurisdiction].

29. *See* Gloria Folger DeHart, *The Relationship Between the 1980 Child Abduction Convention and the 1996 Protection Convention*, 33 N.Y.U. J. INT'L L. & POL. 83, 100 (2000) (stating "unequivocal[ly]" that the United States should ratify the Convention on Jurisdiction). Ms. DeHart is the Attorney Adviser (International) in the Office of the Assistant Legal Adviser for Private International Law at the State Department.

30. *See Ivaldi*, 685 A.2d at 1327.

31. In much of Europe, the enforcement of a child custody decree is also governed by treaty. *See* European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, *opened for signature* May 20, 1980, Europ. T.S. No. 105. The Convention on Jurisdiction, *supra* note 28, is currently in force in six countries. *See* HAGUE CONF. ON PRIVATE INT'L L., FULL STATUS REPORT CONVENTION #34 (Mar. 16, 2003), *available at* http://www.hcch.net/e/status/stat34e.html.

32. Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (entered into force Dec. 1, 1983) [hereinafter Hague Convention on Child Abduction].

33. *See* Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 277 (2002) [hereinafter Weiner, *Navigating the Road*] (observing that "seven of the nine cases decided by the United States courts of appeal between July 2000 and January 2001 involved an abductor who alleged that she was a victim of domestic violence").

34. *See generally* Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000) [hereinafter Weiner, *International Child Abduction*].

abroad. Public international law influences both domestic and transnational child custody litigation[35] as well as legislative efforts on the national and transnational level that affect battered women and their children.[36] Similarly, transnational child custody litigation impacts domestic custody litigation[37] and shapes the development of

35. *See, e.g.*, Batista v. Batista, No. FA 92 0059661, 1992 WL 156171, at *7 (Conn. Super. Ct. June 18, 1992) (refusing to modify a Spanish custody order because such modification would be contrary to the UCCJA, but awarding temporary custody of a fifteen year old to the father and ordering him to make the child available at a Spanish modification hearing because Spain, a signatory to the U.N. Convention on the Rights of the Child, would be obligated to hear a child's claim pursuant to article 12 of that Convention). *Cf.* Beharry v. Reno, 183 F. Supp. 584, 600, 602, 604 (E.D.N.Y. 2002) (citing international law, and particularly the Convention on the Rights of the Child and its status as customary international law, as the basis for reinterpreting Immigration and Naturalization Act ("INA") provision). *See also* Constant A. v. Paul C.A., 496 A.2d 1 (Pa. Super. Ct. 1985) (concluding that a parent's homosexuality is relevant to a custody contest and citing the U.N. Charter for the proposition that the right to marry is a fundamental right and that the right to privacy applies unequally to homosexual and heterosexual couples); Montgomery County Dep't Soc. Servs. v. Sanders, 381 A.2d 1154, 1156 (Md. Ct. Spec. App. 1978) (affirming the return of a child battered by his father to his biological mother over the objection of the foster parents and citing the U.N. Declaration on the Rights of the Child for the proposition that "(m)ankind owes to a child the best it has to give").

36. *See* William Duncan, Hague Conference on Private International Law, Consultation Paper on Transfrontier Access/Contact, ¶ 5 (2001) (citing Preliminary Report on Transfrontier Access/Contact and the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction, Prel. Doc. No. 4 of March 2001 (Annex I), ¶ 62) ("[I]t is important, in considering what improvements may be achieved by the Hague Conference, to bear in mind the important work being carried out by other international and regional organizations, such as the Organization of American States, Council of Europe and the European Union. The objective should be to avoid conflict and any unnecessary duplication."); Elisa Pérez-Vera, Explanatory Report, *in* Hague Conference on Private International Law, III Actes et documents de la Quatorzieme Session, Oct. 6-25, 1980, ¶ 24 (citing as authority for the Hague Convention's philosophy, as reflected in its preamble, Recommendation 874 (1979) of the Parliamentary Assembly of the Council of Europe, which states that "children must no longer be regarded as parents' property, but must be recognized as individuals with their own rights and needs"). The effect of public international law is seen at the national level as well. *See* Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine,* 2 U. PA. J. CONST. L. 1, 37 (1999) (noting that the extensive protection afforded to children by the South Africa Constitution, including the right to protection from abuse, was influenced by the U.N. Convention on Rights of the Child); *see also* Copelon, *Violence Against Women, supra* note 18, at 117 (describing how nine Latin American countries passed laws against domestic violence since approval of the Convention of Belém do Pará). *Cf.* Jordan J. Paust, *Human Rights Purposes of the Violence Against Women Act and International Law's Enhancement of Congressional Power,* 22 HOUS. J. INT'L L. 209, 216-21 (2000) (explaining how the Violence Against Women Act can be constitutionally justified as a necessary and proper supplement to Congress' treaty-making power).

37. *See In re* Marriage of Condon, 73 Cal. Rptr. 2d 33, 51 (Cal. Ct. App. 1998) (assessing the conditions on which transnational relocation should be permitted given that the Hague Convention on Child Abduction only protects a custodial parent from unlawful retention for one year); *In re* Marriage of Jeffers, 992 P.2d 686, 689-90 (Colo. Ct. App. 1999) (noting that prior to enforcing a Greek custody order and turning over the children, a Colorado court must decide if the children were to

public international instruments.[38] In addition, the domestic law of nations influences the content of international law[39] and the resolution of transnational custody disputes.[40]

Just as legal doctrine is affected as ideas and concepts from each of the strands influence the others, so too is individuals'

---

be returned pursuant to the Hague Convention on Child Abduction); Pefaur v. Pefaur, 617 So. 2d 426, 427 (Fla. Dist. Ct. App. 1993) (refusing to review a non-final order under the UCCJA, and deferring jurisdiction to Argentina, noting that Argentina is a signatory to the Hague Convention and that the Hague Convention states that the children's best interests are "'of paramount importance'" in custody disputes). One of the major issues percolating below the surface is whether a successful defense to the Hague Convention on Child Abduction provides a reason under the UCCJA or UCCJEA not to enforce a foreign decree. I have found no cases addressing this issue. However, the UCCJEA states in section 105 that "A court of this State need not apply this [Act] if the child custody law of a foreign country violates fundamental principles of human rights." The commentary notes how "the same concept is found in the Section 20 of the Hague Convention on the Civil Aspects of International Child Abduction."

38. Convention on the Rights of the Child, *supra* note 20, at art. 11(1) ("1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad. 2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements."). There was recently a suggestion by at least one State Party that the U.N. Committee on the Rights of the Child monitor the 1980 Hague Convention. *See* Checklist of Issues Raised and Recommendations Made in Response to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 Oct. 1980 on the Civil Aspects of International Child Abduction, Prelim. Doc. No. 5 of March 2001 (Mar. 2001), at 14. The U.N. Special Session on Children, held May 8-10, 2002, was a meeting of the U.N. General Assembly that focused on children. A resolution, entitled *A World Fit for Children*, contains the following language: "Address cases of international kidnapping of children by one of the parents." G.A. Res. S-27/2, U.N. GAOR, 27th Special Sess., Agenda Items 8 and 9, at III.B.3, U.N. Doc. A/Res/S-27/2 (2002). It contains language that states: "[D]omestic violence and sexual violence against women and children remain serious problems." *Id.* *See also* Ignaccolo-Zenide v. Romania, No. 31679/96 (Eur. Ct. H. R. 2000) (finding a violation of article 8's right to respect for family life when Romania failed to uphold its obligations under the Hague Convention on Child Abduction to ensure the applicant's rights were respected, but instead allowed the father to evade enforcement of a French custody and access judgment and to manipulate the Romanian system to his advantage), *available at* http://www.ehcr.coe.int/eng.

39. *See* INT'L CT. OF JUSTICE, ARTICLE 38, STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (June 26, 1945), 59 Stat. 1055, T.S. No. 993, *available at* http://www.icj-cig.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#toc.

40. In cases decided pursuant to the Hague Convention on Child Abduction, courts frequently examine whether domestic law can protect a victim of domestic violence and her children if the children are ordered to return. *See, e.g.*, Blondin v. Dubois, 189 F.3d 240 (2d Cir. 1999) ("*Blondin II*"); Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000); Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045, 1061 (E.D. Wash. 2001) (granting article 13(b) defense and noting that there was "no evidence that there are governmental benefit programs which would supply financial or other support for [a mother] who has been subject to spousal abuse"). In addition, article 20 of the Hague Convention on Child Abduction provides a defense to a petition for child abduction. It states: "The return of the child under the provision of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Hague Convention on Child Abduction, *supra* note 32, at art. 20.

conceptualization of domestic violence and the related legal issues. For example, after Rhonda Copelon explained how domestic violence constitutes torture in international human rights law,[41] the term torture started appearing with more frequency in advocates' descriptions of domestic violence domestically.[42] After Martha Mahoney popularized the term "separation assault,"[43] the concept started showing up in advocates' work on transnational litigation[44] and in foreign nations' law reform efforts.[45] After Lenore Walker coined the phrase "battered woman syndrome,"[46] the concept appeared throughout the world in documents and cases addressing domestic violence.[47]

41. *See generally* Copelon, *Recognizing the Egregious, supra* note 19. *See also* Copelon, *Violence Against Women, supra* note 18, at 120 (noting that the purpose of equating domestic violence with torture was not to secure equal punishment, but rather to achieve "a massive public health and human rights public education campaign against it, as well as attention to its root causes").

42. Before Rhonda Copelon's article, *Violence Against Women, supra* note 18, the word "torture" was only used twice in cases involving "domestic violence" or "domestic abuse." *See* North Carolina v. Syriani, 428 S.E.2d 118, 142 (N.C. 1993); Sielski v. Sielski, 604 A.2d 206, 210 (N.J. Super. Ct. Ch. Div. 1992). After her article, the characterization was used nine times in eight years. While none of the courts cite Copelon's article, the correlation between the publication of her article and the term's use suggests that domestic legal actors may have been influenced by her work. *See* Washington v. Domke, No. 18987-2-III, 2002 WL 191647 at *6 (Wash. Ct. App. Feb. 05, 2002); North Carolina v. Anthony, 555 S.E.2d 557, 597 (N.C. 2001); *In re* Destiny Q., 2001 WL 1678984, at *25 (Conn. Super. Ct., Dec. 10, 2001); *In re* Dyer, 20 P.3d 907 (Wash. 2001); Ali v. Reno, 237 F.3d 591, 596 (6th Cir. 2001); New Jersey v. Timmendequas, 737 A.2d 55, 73 (N.J. 1999); New York v. Koertge, 701 N.Y.S.2d 588, 596 (N.Y. Sup. Ct. Nassau County 1998); Corrente v. Corrente, 657 A.2d 440, 442 (N.J. Super. 1995); Peranio v. Peranio, 654 A.2d 495, 498 (N.J. Super. App. Div. 1995). Only one of these nine cases cited one of the two cases that predated Copelon's article. *See* North Carolina v. Anthony, 555 S.E.2d 557, 597 (N.C. 2001) (citing North Carolina v. Syriani, 428 S.E.2d 118, 142 (N.C. 1993)).

43. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 6 (1991). *See, e.g.*, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, ANNUAL REPORT TO CONGRESS, DOMESTIC VIOLENCE, STALKING, AND ANTISTALKING LEGISLATION intro. (1996), *available at* http://www.ojp.usdoj.gov/ocpa/94Guides/DomViol/intro.htm.

44. *See* Weiner, *International Child Abduction, supra* note 34, at 636 n.231; Michelle J. Anderson, Note, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401, 1401 n.2 (1993).

45. *See, e.g.*, STATE OF QUEENSLAND, THE ABORIGINAL AND TORRES STRAIT ISLANDER WOMEN'S TASK FORCE ON VIOLENCE REPORT (1999), *available at* http://www.qldwoman.qld.gov.au/publications/atsiviolence.pdf; NEW ZEALAND LAW COMM., SOME CRIMINAL DEFENSES WITH PARTICULAR REFERENCE TO BATTERED DEFENDANTS, 36 Report No. 73 (May 2001), *available at* http://www.lawcom.govt.NZ/Documents/Publications/R73bat.

46. *See generally* LENORE WALKER, THE BATTERED WOMAN SYNDROME (1984) (providing an overview of battered woman syndrome, the psycho-social characteristics of batterers, battered women and nonbatterers, and behavioral descriptions of violence).

47. *See, e.g.*, Kevin Dawkins & Margaret Briggs, *Criminal Law*, 3 N.Z. L. REV. 317, 331, 337, 345-46 (2001) (analyzing battered women's syndrome's usefulness to issues

Describing the three strands as merely parts of a general dialogue helps us remember that the strength of any one strand depends, in part, upon the strength of the others, and that each particular thread deserves attention. The interrelationship between the three threads suggests that improving the response to domestic violence in one arena has collateral consequences that sometimes go unrecognized. The opposite is true as well. If the response to domestic violence in an area is weakened, the response to domestic violence in the other areas may be injured as well.

This Article explores the benefits and challenges that private transnational litigation poses for feminists committed to keeping women safe and to ending domestic violence, and specifically it focuses on litigation pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention"). Arguably, this thread has received the least attention from domestic violence scholars. Yet, transnational litigation is different enough from domestic litigation and from public international law efforts that it deserves its own consideration. Much of the potential and many of the challenges of domestic violence advocacy identified by Professor Schneider in her excellent book, *Battered Women and Feminist Lawmaking*,[48] also apply to transnational litigation; although, in the context of transnational litigation these benefits and challenges take on a slightly different form. Shedding more light on this third strand may help channel additional efforts into this area, thereby strengthening the overall position of battered women with children in the law.

II. BACKGROUND TO HAGUE CONVENTION CASES

The Hague Convention on the Civil Aspects of International Child Abduction governs all civil cases of international child abduction so long as both countries are parties to the Convention. It was completed by the Hague Conference on Private International Law in

---

of justification and excuse in New Zealand criminal law); Juliet Behrens & Kim Bolas, *Violence and the Family Court: Cross-vested Claims for Compensation,* 11 AUSTL. J. FAM. L. 164, 167 n.20 (1997) (describing the history of the term "cycle of violence" and noting it was first found in Lenore Walker's *The Battered Woman Syndrome*); The Queen v. Osland, 1997 VIC LEXIS 324 (S.C. Vic. 1997) (holding battered woman syndrome evidence was admissible on self-defense claim); R. v. La Vallee, [1990] 1 S.C.R. 852, 872, 889 (permitting expert testimony on battered woman syndrome in a murder trial); R v. Hobson, 43 B.M.L.R. 181 (Eng. C.A. 1997) (allowing retrial after battered woman's syndrome was included in the British classification of mental diseases).

48. SCHNEIDER, *supra* note 1.

October 1980,[49] and is presently in force in more than seventy countries,[50] including the United States.[51] The Convention seeks "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and also "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."[52]

---

49. *See generally* Elisa Pérez-Vera, *Report of the Special Commission*, Prelim. Doc. No. 6, May 1980, *in* Hague Conference on Private International Law, III Actes et documents de law Quatorziene Session, October 6-25, 1980, ¶ 11 [hereinafter Pérez-Vera, Special Commission Report].

50. As of April 2002, the Convention had been ratified or acceded to by Argentina, Australia, Austria, Bahamas, Belarus, Belgium, Belize, Bosnia and Herzegovina, Brazil, Burkina Faso, Canada, Chile, China (Hong Kong Special Administrative Region only), China (Macau Special Administrative Region only), Columbia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Georgia, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, the former Yugoslavia Republic of Macedonia, Malta, Mauritius, Mexico, Moldova, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, St. Kitts and Nevis, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkmenistan, Turkey, the United Kingdom, the United States, Uruguay, Uzbekistan, Venezuela, Yugoslavia, and Zimbabwe. *See* HAGUE CONF. ON PRIVATE INT'L L., FULL STATUS REPORT CONVENTION # 28 (last visited Jan. 18, 2003), *available at* http://www.hcch.net/e/status/stat28e.html.

51. The United States became a signatory of the Convention on December 23, 1981. *See Hearing Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 98th Cong. 40 (1983) [hereinafter *Parental Kidnapping Hearing*] (statement of James G. Hergen, Assistant Legal Adviser for Consular Affairs, Office of the Legal Adviser, U.S. Department of State). The Convention was transmitted to the Senate on October 30, 1985. *See* Letter of Transmittal, Hague Convention on the Civil Aspects of International Child Abduction, S. Treaty Doc. No. 99-11, at 1 (1985). There was strong support for the Convention throughout the country. *See Parental Kidnapping Hearing, supra*, at 53 (statement of James G. Hergen) (commenting that "the American Bar Association, state and federal authorities, the academic community and parents' groups, among others, have shown strong support for the Convention"). The Senate unanimously ratified it on October 9, 1986 with several reservations. *See* 132 CONG. REC. S29,885 (daily ed. Oct. 9, 1986) (noting a vote of ninety-eight senators in favor, none against, and two not voting). The reservations, explicitly permitted by the Convention, relate to a required English translation of all documents sent to the United States Central Authority (pursuant to arts. 24 and 42), and the refusal to assume costs or expenses in connection with legal counsel or court proceedings related to return of children except as a legal aid program may cover those expenses (pursuant to arts. 26 and 42). *See id.* For a general history of the United States' response to the Hague Convention, *see* Peter H. Pfund, *The Hague Convention on International Child Abduction, the International Child Abduction Remedies Act, and the Need for Availability of Counsel for All Petitioners*, 24 FAM. L.Q. 35, 35-38 (1990) [hereinafter Pfund, *Availability of Counsel*] (noting the United States' enactment of the International Child Abduction Remedies Act of 1988 ("ICARA"), signed by the President in 1988). *See also* International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (1988) (codified as amended at 42 U.S.C. §§ 11601-11610). The United States deposited its instrument of ratification at the Hague on that same day. Pfund, *Availability of Counsel, supra*, at 38. The Convention went into force in the United States on July 1, 1988. Exec. Order No. 12,648, 53 Fed. Reg. 30637B (Aug. 15, 1988).

52. Hague Convention on Child Abduction, *supra* note 32, at art. 1.

A person invoking the Hague Convention typically seeks the "remedy of return."[53] The remedy returns a child to his or her habitual residence, and is meant to reestablish the factual status quo as it existed prior to the abduction.[54] The remedy applies solely to a wrongful removal or retention of a child, and requires that the left-behind parent had "rights of custody."[55] Rights of access, in contrast, are vindicated in the State to which a child has been abducted.[56] Contracting States cannot decide the merits of a custody dispute until a petition for the child's return has been denied.[57]

---

53. *Id.* at arts. 1(a), 12.

54. *See* Hague Convention on the Civil Aspects of International Child Abduction, S. Exec. Rep. No. 99-24, at 15-16 (1986) (citing U.S. Department of State's legal analysis of the Convention). The Convention states:

> In contrast to the restoration of the legal status quo ante brought about by the application of the UCCJA, the PKPA, and the Strasbourg Convention [Council of Europe's Convention on the Recognition and Enforcement of Decisions Relating to the Custody of Children, adopted in Strasbourg, France in November 1979], the Hague Convention seeks restoration of the *factual* status quo ante and is not contingent on the existence of a custody decree. The Convention is premised upon the notion that the child should be promptly restored to his or her country of habitual residence so that a court there can examine the merits of the custody dispute and award custody in the child's best interests.

Id.; *see also id.* at 28 (calling the right of return the "core of the Convention"); *see also International Child Abduction Act: Hearings on H.R. 2673 and H.R. 3971 before the Subcomm. on Admin. L. and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong. 58 (1988) (statement of Patricia M. Hoff, Co-chairman, Child Custody Comm. of the Family Law Section, ABA) ("The Convention's chief objective is expeditiously to restore the factual situation that existed prior to the child's wrongful removal or retention."); 134 Cong. Rec. H1176 (daily ed. Mar. 28, 1988) (statement of Rep. Cardin); President Reagan's Letter of Transmittal, Hague Convention on the Civil Aspects of International Child Abduction, S. Treaty Doc. No. 99-11, at 1 (1985) ("The Convention's approach to the problem of international child abduction is a simple one. The Convention is designed promptly to restore the factual situation that existed prior to a child's removal or retention."); Adair Dyer, *The Hague Child Abduction Convention—Past, Present and Future, in* ABA CENTER ON CHILDREN AND THE LAW, NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES 17 (Sept. 30-Oct. 1, 1993) ("Since an order for the return of the child is not a determination on the merits of any custody issue . . . the parent who removed the child still may contest custody on the merits in the courts of the child's habitual residence. The order simply restores the *status quo* as it existed before the child's removal or retention."); Freidrich v. Freidrich, 983 F.2d 1396, 1400 (6th Cir. 1992) (asserting that preserving the status quo is a "primary purpose of the Convention").

55. *See* Hague Convention on Child Abduction, *supra* note 32, at arts. 3 & 8.

56. *Id.* at art. 21. *See, e.g.*, Viragh v. Goldes, 612 N.E.2d 241 (Mass. 1993) (rejecting petition for return of the child to Hungary since his father only had rights of access, but making effective his rights of access in the United States); Bromley v. Bromley, 30 F. Supp. 2d 857 (E.D. Pa. 1998) (holding that the federal district court has no authority to enforce rights of access since the remedy is not right of return). This distinction has not always been appreciated by courts in this country. *See, e.g.*, Harliwich v. Harliwich, 1998 WL 867328 (Conn. Super. Ct. Dec. 3, 1998) (granting remedy of return even though father only had rights of access).

57. Hague Convention on Child Abduction, *supra* note 32, at art. 16.

The remedy of return requires a petitioner to establish that there was a "wrongful removal or retention" of the child from the child's "habitual residence," and that the habitual residence was a Contracting State at the time of abduction.[58] Article 3 of the Convention defines the removal or retention as "wrongful" when it occurred "in breach of rights of custody," and when "those rights were actually exercised."[59]

Several defenses exist to the remedy of return. Article 12 contains the "well-settled exception," which permits a court to deny a petition for the return of a child if one year has elapsed since the wrongful removal or retention and the child is now settled in the new environment.[60] Article 13(a) permits a court to deny a petition if the person seeking the child's return "was not actually exercising the custody rights at the time of removal or retention,"[61] or "had consented to or subsequently acquiesced in the removal or retention."[62] Article 13(b) provides that the court need not return the child if there is "a grave risk" and that the "return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[63] An unnumbered portion of article 13 allows a petition to be denied if the child objects to being returned and is of an age and maturity so that the child's views matter.[64] Finally, article 20 permits a court to refuse to return a child when required by "the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."[65]

As I have written elsewhere, the Hague Convention was drafted based upon the prediction that a non-custodial father, or a father

58. *Id.* at art. 4.

59. *Id.* at art. 3. Article 3 states that a removal or retention is wrongful when:

> a) it is in breach of rights of custody attributed to a person, an institution or other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Id.

60. *Id.* at art. 12.

61. *Id.* at art. 13(a).

62. *Id.*

63. *Id.* at art. 13(b).

64. *Id.* at art. 13.

65. *Id.* at art. 20.

who was unlikely to win custody, would typically be the abductor.[66] The Convention's "remedy of return" was supposed to quickly return abducted children to their habitual residences, and usually their primary caretakers.[67] In addition, the "remedy of return" was supposed to discourage abductions and locate the custody contest in the forum where most of the relevant evidence existed.

As it turns out, the drafters' vision of a typical abduction has proven incorrect. Published figures indicate that seventy percent of the abductors are now mothers,[68] typically the child's primary caretaker. Often these mothers are victims of domestic violence, and they are fleeing transnationally with their children in order to escape the domestic violence. Seven of the nine cases that reached the United States Courts of Appeals between July 2000 and January 2001, for example, involved an abductor alleging that she was a victim of domestic violence.[69]

---

66. *See* Weiner, *International Child Abduction, supra* note 34; *see also* Pérez-Vera, Special Commission Report, *supra* note 49, ¶ 11 ("[T]he situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child.").

67. The preamble to the Convention is short and states that the Convention exists because the members were "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody," and that the members desired "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention on Child Abduction, *supra* note 32, at pmbl.

68. *See* Nigel Lowe et al., *A Statistical Analysis of Applications Made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction,* Preliminary Doc. No. 3 of March 2001 for the Attention of the Special Commission of March 2001, 8 (2001) [hereinafter Lowe, *Statistical Analysis*].

69. *See, e.g.,* Diorinous v. Mezitis, 237 F.3d 133, 136 (2d Cir. 2001) (noting that the mother, here a petitioner, although previously a respondent, had obtained from the New York Family Court a temporary protective order prohibiting her husband from harassing her); Blondin v. Dubois, 238 F.3d 153, 156 (2d Cir. 2001) ("Dubois claims that Blondin abused her and their children throughout the time they lived together."); *In re* Tsarbopoulos, 2000 WL 1721800, *2 (9th Cir. Nov. 17, 2000) ("She alleged that she and the children had suffered abuse."); Whallon v. Lynn, 230 F.3d 450, 460 (1st Cir. 2000) ("The district court found that the alleged instances of verbal abuse of Lynn and her older daughter Leah, and of physical abuse of Lynn, while regrettable, neither were directed at Micheli nor rose to the level of the conduct of the petitioner father in Walsh."); Croll v. Croll, 229 F.3d 133, 135 (2d Cir. 2000) (indicating that Mrs. Croll filed an action in April 1999 seeking an order of protection); Walsh v. Walsh, 221 F.3d 204, 209 (1st Cir. 2000) ("The events of the following five years evidence John's violent behavior toward his wife and others."); Kanth v. Kanth, 232 F.3d 901 (10th Cir. 2000).

Commentators, myself included, probably underestimate the domestic violence at issue in these cases. Domestic violence may escape notice, either because it is not mentioned or emphasized by a court, or raised by either party. For instance, the district court in *Kanth* only described the relationship as "deeply troubled." Kanth v. Kanth, 79 F. Supp. 2d 1317, 1320 (D. Utah 1999). Yet according to the Affidavit of Cory Leigh Kanth, filed in the district court, there was real and serious violence in the relationship. For example, according to Ms. Kanth's affidavit, Mr. Kanth was

I have previously argued that the Hague Convention often operates unjustly when the abductor is a domestic violence victim.[70] While the remedy of return works well when the abductor is a non-custodial father, the remedy of return is inappropriate when the abductor is the primary caretaker and is seeking to protect herself and her children from the other parent's violence.[71] The Convention has no "domestic violence defense" for these abductors, and courts are often inhospitable to domestic violence victims' efforts to employ the existing defenses.[72] Even when courts are receptive to domestic violence victims' arguments, the courts' opinions are sometimes written in a way that limits the decisions' usefulness for other victims.[73] The opinions' flaws include disregarding sister signatories' case law, departing unnecessarily from the prevailing approach, and/or justifiably departing from a uniform interpretation but failing to explain the departure in terms of the object and purpose of the treaty.[74]

Much substantive work needs to be done in Hague cases to make the Hague Convention less devastating for domestic violence victims who flee with their children to escape domestic violence. The high number of these cases that involve domestic violence allegations means that lawyers representing battered women will have the opportunity and the need to improve the Hague Convention's application. The work that beckons offers a variety of benefits and challenges. I start by focusing on the enormous potential these cases offer to feminists concerned about domestic violence here and abroad. As Professor Judith Resnik has said, "[G]lobalism offers a contested political space, an interesting, additional place of potential power, of shifting categories and of new organizations."[75] This

extremely controlling. In one instance, "he repeatedly threatened to 'kick my teeth in' if I bathed the girls when he forbade me." Aff. of Cory Leigh Kanth, Aug. 18, 1999, Kanth v. Kanth, Case No. 2: 99 CV 532 C, § 47 (Judge Tena Campbell). On one occasion he threw her out of their apartment in her pajamas on a cold winter morning and refused to let her back inside. *Id.* On other occasions, he controlled her ability to leave the house, to handle money, and to access the family's passports. *Id.* §§ 47-49, 52.

70. *See* Weiner, *International Child Abduction*, *supra* note 34. My *International Child Abduction* article sought to "detect[] the silences," and show how the Hague Convention deems domestic violence relatively "irrelevant or of little significance." *See* Hilary Charlesworth, *Symposium on Method in International Law: Feminist Methods in International Law*, 93 A.J.I.L. 379, 380-81 (1999).

71. *See* Weiner, *International Child Abduction*, *supra* note 34.

72. *Id.* at 654-61, 662-67, 669-71, 673-74.

73. Weiner, *Navigating the Road*, *supra* note 33.

74. *Id.*

75. Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 YALE L.J. 619, 679 (2001).

optimism is later tempered, although not altogether squashed, by the suggested difficulties of this work.

III. THE POTENTIAL OF TRANSNATIONAL LITIGATION

Hague Convention cases offer numerous benefits for lawyers dedicated to combating domestic violence. At the most concrete level, lawyers get to help individual battered women who seek to maintain custody of their children. Each case, however, also potentially has a much broader societal— and even global— impact. In the particular country to which the child is to be returned, these cases help enforce public international norms related to domestic violence. In addition, the information about domestic violence contained in judicial opinions may spread around the world, increasing further a decision's importance. In fact, the impact can be enormous as the international cross-fertilization of ideas then penetrates different types of legal disputes within countries.

A. Helping Particular Women

Private international law affects people's lives in an immediate and tangible way. In this respect, Hague Convention litigation is like domestic custody litigation and unlike public international law. As Professor Schneider notes, a certain frustration has been expressed about "the lack of concrete results of women's international human rights advocacy."[76] This criticism seems especially apt at home, where the United States has not become a party to the U.N. Convention on the Elimination of All Forms of Discrimination against Women or the U.N. Convention on the Rights of the Child. Even when the United States has ratified an international treaty, such as the International Covenant on Civil and Political Rights, the United States submits such extensive reservations, understandings, and declarations that the treaties are rendered virtually meaningless for the United States.[77]

---

76. SCHNEIDER, *supra* note 1, at 54 (citing "widespread criticisms"). *See also* Kenneth Roth, *The Charade of U.S. Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347, 350 (2000). Roth states:

> Indeed, one is hard-pressed to identify any U.S. conduct that has changed because of the governments supposed embrace of international human rights standards. The only two ratification-induced changes that come to mind are the government's establishment and enhancement of criminal and civil liability in the United States for those responsible for torture and other severe mistreatment in other countries, as required by the Torture Convention, and the outlawing of genocide, as required by the Convention on the Prevention and Punishment of the Crime of Genocide.

Id.

77. *Compare* Roth, *supra* note 76, *with* Jack Goldsmith, *Should International Human Rights Law Trump U.S. Domestic Law?*, 1 CHI. J. INT'L L. 327 (2000). In addition,

In contrast to public international law instruments, the Hague Convention matters to individual litigants because the United States is a party to the Hague Convention and the United States' reservations do not limit the treaty's substantive provisions.[78] The United States has already passed implementing legislation—the International Child Abduction Remedies Act[79]—which moots any concern about "non-self-executing treaties" raised in relation to public international law instruments. In short, the Hague Convention is relevant law in the United States and dictates the results in cases to which it applies.

A substantial number of women and children find their lives touched by the Hague Convention. There were approximately 1250 Hague cases filed worldwide with Central Authorities in 1999 alone.[80] These applications often involve multiple children in a family, and researchers estimate that over 1800 children were involved.[81] These numbers do not reflect Hague Convention cases that go directly to the courts, cases involving non-contracting countries, or cases that are resolved through instruments like the UCCJEA. In 1998 in the United States, there were 241 new incoming Hague Convention cases and 503 new outgoing cases, with approximately fifty percent of the outgoing cases involving the Hague Convention.[82] As mentioned above, a disproportionate number of abductors in Hague Convention cases are women who claim to be fleeing from domestic violence.[83]

Importantly, none of the numbers about court filings and Central Authority filings capture the real impact of the Hague Convention on the lives of women and children experiencing domestic violence.

---

human rights treaties are typically not self-executing, which limits the ability of individuals to rely on their provisions in U.S. courts.

78. The United States entered two reservations, both permitted by the Convention. The first reservation was to article 24. Now all documents submitted to the U.S. Central Authority must be accompanied by an English translation. The second reservation was to article 26, which would have obligated the United States to pay legal expenses incurred in connection with efforts to secure a child's return from the United States, except as otherwise covered by a legal aid program. *See* 132 CONG. REC. S15, 767 (Oct. 9, 1986).

79. *See* Pub. L. No. 100-300, 102 Stat. 437-42 (codified as amended at 42 U.S.C. §§ 11601-11610 (1989)).

80. Lowe, *Statistical Analysis*, *supra* note 68, at 5. Most of these are applications for the return of the child, and not for access to the child. *Id.* (noting a 83% to 17% ratio of return to access applications).

81. *Id.*

82. SUBCOMM. ON INT'L CHILD ABDUCTION, FEDERAL AGENCY TASK FORCE ON MISSING AND EXPLOITED CHILDREN AND THE POLICY GROUP ON INTERNATIONAL PARENTAL KIDNAPPING, A REPORT TO THE ATTORNEY GENERAL ON INTERNATIONAL PARENTAL KIDNAPPING § 3 (1999).

83. *See supra* text accompanying notes 68 & 69.

The Hague Convention on Child Abduction traps countless numbers of women and children in abusive relationships. These are victims who never try to flee for safety because they know the Hague Convention will force them to return their children. These are also victims who do flee, but then return with their children after their batterer succeeds on his Hague Convention application. No one knows how many of these women have been subjected to further violence. When lawyers help individual women achieve favorable outcomes under the Hague Convention, these lawyers also indirectly help other women by widening the exit door.

B. Enforcing Public International Law Obligations

Hague Convention cases potentially have a broad impact in the country to which a child might be returned. In a sense, Hague Convention litigation on behalf of domestic violence victims can help enforce a State's public international law obligations to combat domestic violence. This benefit may occur among States Parties when a judge adjudicating a Hague Convention defense examines a State's efforts to combat domestic violence. This benefit may also occur among non-parties when they seek to accede to the Hague Convention and existing parties evaluate their applications for accession.

At present, this benefit is most evident among States Parties in relation to the article 13(b) defense. Article 13(b) states that a court need not return the child if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[84] When a respondent raises an article 13(b) defense and argues that returning the child would subject the child to a grave risk of harm because the petitioner is a batterer, the court often wants to know whether the mother and child can be adequately protected if the child is returned. Some courts believe that adequate protection renders irrelevant the truth of the woman's concerns about her or the children's safety;[85] adequate protection offers a procedural shortcut to the adjudication of the article 13(b) defense itself.[86]

---

84. Hague Convention on Child Abduction, *supra* note 32, at art. 13.

85. March v. Levine, 136 F. Supp. 2d 831, 853 (1st Cir. 2000); Blondin v. Dubois, 189 F.3d 240 (2d Cir. 1999) ("*Blondin II*"); Friedrich v. Friedrich, 78 F.3d 1060, 1067 (1996); Walsh v. Walsh, 221 F.3d 204, 219 (1st Cir. 2000); Turner v. Frowein, 752 A.2d 955, 974 (Conn. 2000).

86. *But see* Danaipour v. McLarey, 286 F.3d 1 (1st Cir. 2002) (holding that the district court had to resolve whether sexual abuse existed before it could decide whether the children could be safely returned; the district court could not short-cut

In evaluating the article 13(b) shortcut, courts often focus on the batterer's undertakings.[87] Courts also examine the State's ability to protect the mother and child upon return; courts sometimes ask a foreign State for information on the systems available to protect domestic violence victims and particularly what measures would be taken to protect this victim.[88] If the child's habitual residence would insufficiently protect the mother and child, the child need not be returned.[89] A court's refusal to return children to a particular State indirectly sanctions that State for its failure to live up to public international law norms regarding the protection of women and children from domestic violence. The repeated refusal by courts to return children on this basis might prompt a State to take measures to satisfy other States Parties that children can be returned to it.

Another defense also provides an avenue by which public international law norms may be accepted. Article 20 states, "The return of the child . . . may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and international freedoms." Pursuant to article 20, courts faced with Hague Convention petitions might refuse to return children to countries where the primary caretaker will not be protected from domestic violence. Article 20 requires, however, that the country whose court is adjudicating the Hague

---

the article 13(b) inquiry with undertakings by the batterer given the court's inaccurate knowledge of the Swedish system).

87. *See Walsh*, 221 F.3d at 219 ("A potential grave risk of harm can, at times, be mitigated sufficiently by the acceptance of undertakings and sufficient guarantees of performance of those undertakings."). An example of such undertakings can be seen in *In re* Walsh, 31 F. Supp. 2d 200, 207 (D. Mass. 1998):

> John is to provide for the transportation and escort of the children back to Ireland. Once the children reach Ireland, John is to provide adequate housing, clothing, medical care and serve as a parental figure for the children. If John cannot provide adequate housing and provisions then he must provide the Court a detailed description of how the Social Services authorities in Ireland will make these provisions. In either event, the Court is to be informed specifically what provisions are in place before the children will be ordered returned to Ireland.
>
> If Jackie determines to return to Ireland with the children, she must do so at her own expense. If she does return to Ireland, however, John must have no contact with her nor come within 10 miles of her residence, wherever she chooses to take up residence. Moreover, if Jackie returns to Ireland, John will have no contact with the children unless ordered by the authorities in Ireland. Each of these undertakings are conditions of this Court's order, and if any is violated, the order will be of no force and effect.

Id. (citation omitted).

88. *See, e.g.*, *Blondin II*, 189 F.3d at 249.

89. *Danaipour*, 286 F.3d at 15 (holding that "the proponent of the undertaking bore the burden of showing that an equivalent evaluation could be done as well as in Sweden").

petition must itself be an adherent to the fundamental principle. Lawmakers' desire to have their courts credibly accept the article 20 defense when raised in this context may provide an impetus for some States, such as the United States, to adopt international instruments such as the Convention of Belém do Pará, or to ratify the U.N. Convention on the Elimination of All Forms of Discrimination Against Women or the U.N. Convention on the Rights of the Child.[90] In this way, the Hague Convention might serve as an incentive for the United States or other States Parties to become parties to some of the international conventions that address domestic violence.

Similarly, article 20 may prevent some foreign courts from returning children to nations that have not ratified these same treaties, like the United States.[91] Refusal to return children to the United States (for example, because of concern about batterers' ability to obtain visitation) might encourage the United States to become a fuller participant in the various public international law regimes addressing domestic violence.[92]

The Hague Convention also helps enforce public international law norms in another way. Each existing member decides whether to accept the accession of countries seeking to become new parties to the Hague Convention.[93] Many States Parties screen new applicants before accepting an accession because the Hague Convention rests on the belief that other signatories can decide the underlying custody dispute in an adequate and fair manner. Since "it is for the country of origin to determine the conflict between the parents that has culminated in flight," a country must have faith "that the family dispute will be determined in the country of origin according to standards and principles of justice broadly comparable to those

90. Acceptance of an article 20 defense need not necessarily be predicated on adoption of an international treaty by the abducted-to state. A country might argue that it follows a particular fundamental principle in its internal law, even through it is not a party to a convention.

91. *See* Patricia Apy, *The Use of the United Nations Convention on the Rights of the Child in Family Litigation Involving American Children*, 5 GEO. J. ON POVERTY L. & POL'Y 215, 215-16 (1998) (suggesting that the refusal to return abducted children to the United States for lack of human rights protection would focus legal attention on article 20 of the Hague Convention).

92. *See In re* Marriage of Condon, 73 Cal. Rptr. 2d 33 (Cal. Ct. App. 1998) (noting that some countries are much better at denying visitation to batterers than most states in the United States). A foreign court could reject returning a child to the United States, citing the possibility of visitation with the batterer and the United States' abysmal record on ratifying the human rights conventions.

93. *See* Hague Convention on Child Abduction, *supra* note 32, at art. 38 ("The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession.").

available in the returning state."[94] The United States has not yet accepted the accession of numerous countries.[95] The criteria the United States uses to either accept or reject an accession is unfortunately not made available to the public.[96]

Accession is a time when countries can ask the newcomer for information about how it addresses domestic violence. The Hague Conference facilitates the exchange of this information by providing a questionnaire for prospective States Parties. States are encouraged to provide information responsive to the question, "What are the legal criteria by which custody and contact determinations are made?" These States are also encouraged to provide information about "the services available for the protection (if necessary) of returning children, as well as the services available (including legal advice and representation) to a parent accompanying the child on return."[97] Unfortunately, these questions do not specifically reference domestic violence, and a prospective State Party might not address this aspect of the broader question. Yet, State Parties need not, and should not, accept an accession unless the newcomer specifically says whether domestic violence is relevant to a custody dispute and whether effective protection exists for domestic violence victims and children.[98]

---

94. Osman v. Elasha, 2000 Fam. 62, 69 (Eng. C.A.).

95. The United States has not accepted the accession of Belarus, Brazil, Costa Rica, El Salvador, Estonia, Fiji, Georgia, Guatemala, Hungary, Latvia, Malta, Moldova, Nicaragua, Paraguay, Peru, Sri Lanka, Trinidad and Tobago, Turkmenistan, Uruguay, and Uzbekistan. In contrast, the United States has accepted the accession of Bahamas, Belize, Burkina Faso, Chile, Colombia, Cyprus, Ecuador, Honduras, Iceland, Mauritius, Mexico, Monaco, New Zealand, Panama, Poland, Romania, Saint Kitts and Nevis, Slovenia, South Africa, and Zimbabwe. *See* HAGUE CONF. ON PRIVATE INT'L L., FULL STATUS REPORT CONVENTION # 28 (last visited Jan. 18, 2003), *available at* http://www.hcch.net/e/status/stat28e.html.

96. The United Kingdom has voiced its opposition to accession by countries who either base their legal system upon Shariá or Islamic law, or who do not have an effective central authority. *See* INTERNATIONAL CENTRE FOR MISSING AND EXPLOITED CHILDREN, REPORT AND RECOMMENDATIONS TO THE FOURTH SPECIAL COMMISSION ON THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 12 (2001). However, Lord Justice Thorpe has criticized the United Kingdom's criteria, commenting that the governmental office ensures only that there is a central authority and a judicial system, and the governmental office lacks any "minimum standards" for the family justice system in the acceding state. *Osman*, 2000 Fam. at 69.

97. *See* Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction 8, ¶ 2.3 (2001). While this information may help, it may also give courts a false sense of security, especially if there is a disjunction between the law on the books and law in action, or if the batterer is dangerous.

98. *See generally* Carol S. Bruch, *Religious Law, Secular Practices, and Children's Human Rights in Child Abduction Cases under the Hague Child Abduction Convention,* 33

C. Cross-Fertilization of Ideas

Transnational litigation, by its nature, fosters the cross-fertilization of ideas. A decision in a Hague case is usually of interest to government attorneys, scholars, and judges in the two countries involved, and not just the litigants. Government attorneys monitor the decisions for the State's compliance with its treaty obligations. In the United States, the aggregate performance of our courts in Hague Convention cases is reported to Congress.[99] Scholars monitor the decisions because there is a cadre of academics who focus on the Convention and its application.[100] Judges monitor the decisions because, in some countries, a small group of judges specialize in these cases.[101] In addition, some judges, like some scholars, have a particular interest in the Hague Convention and its application.[102]

More importantly, decisions attract the attention of litigants, courts, scholars, and policy makers outside of the two countries involved in the dispute. The Hague Convention is like a uniform law in the United States, and courts adjudicating a legal issue in one country are frequently interested in how courts in other jurisdictions

---

N.Y.U. J. INT'L L. & POL. 49, 57-58 (2000) (calling for caution in accepting accessions but also suggesting federal guidance "concerning what standards and proof should control" for an article 20 defense, either by statute or executive order or regulation).

99. *See International Child Abduction: Implementation of the Hague Convention on Civil Aspects of International Child Abduction: Hearing Before the House Comm. on Int'l Relations*, 106th Cong. (1999) (statement of Mary A. Ryan, Asst. Sec. For Consular Affairs, U.S. Dep't of State). *Cf.* Concurrent Resolution Urging Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, H.R. Con. Res. 293, 106th Cong. Rec. H5089-07 (2000) (enacted).

100. In the United States, several academics pay significant attention to the Hague Convention. *See* Weiner, *International Child Abduction*, *supra* note 34; Weiner, *Navigating the Road, supra* note 33; *see* Linda Silberman, *Patching up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT'L L.J. 41 (2003); Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT'L L. & POL. 221 (2000); Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9 (1994); Linda Silberman, *Hague International Child Abduction Convention: A Progress Report,* 57 LAW & CONTEMP. PROBS. 209 (1994); Carol Bruch, *Religious Law, Secular Practices, and Children's Human Rights in Child Abduction Cases Under the Hague Child Abduction Convention*, 33 N.Y.U. J. INT'L L. & POL. 49 (2000); Carol S. Bruch, *The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed*, 28 FAM. L.Q. 35 (1994). For additional writings by Bruch, see HAGUE CONF. ON PRIVATE INT'L L., BIBLIOGRAPHY OF CONVENTION #28 (last visited Jan. 18, 2003), *available at* http://www.hcch.net/e/conventions/bibl28e.html.

101. *See* Weiner, *Navigating the Road, supra* note 33, at 284-85.

102. *See* HON. JAMES D. GARBOLINO, INTERNATIONAL CHILD ABDUCTION: GUIDE TO HANDLING HAGUE CONVENTION CASES IN U.S. COURTS (1997); *see also* Hon. Danny J. Boggs, *Remarks on the 1980 Hague Convention on the Civil Aspects of International Child Abduction*, 33 N.Y.U. J. INT'L L. & POL. 43 (2000).

resolve similar issues.[103] International databases and judicial conferences make many of the decisions of other nations available to all.[104]

Transnational litigation provides an opportunity for education across State borders about domestic violence. These Hague Convention cases can spread various messages, including the following: that domestic violence harms children, that domestic violence is about power and control, that safety is sometimes only achievable by keeping the batterer and the victim geographically distant, and that women are the predominant victims of violence because of gender inequality. Cross-fertilization through litigation provides a tremendous opportunity for feminist legal doctrine to spread and take root.

Consider, for example, the message that domestic violence has harmful effects on children. This message was articulated well by the First Circuit Court of Appeals in *Walsh v. Walsh*.[105] In that case, the

103. This often proves more true in countries other than the United States. *See generally* Weiner, *Navigating the Road*, *supra* note 33, at 280 (criticizing the Second Circuit Court of Appeals' lack of commitment to the importance of uniformity).

104. The Hague Conference on Private International Law has established a database of judicial opinions issued by signatories. *See* HAGUE CONF. ON PRIVATE INT'L L., INTERNATIONAL CHILD ABDUCTION DATABASE ("INCADAT") (last visited Feb. 6, 2003), *available at* http://212.206.44.26/. Judges have already recognized the usefulness of the database. *See* INTERNATIONAL JUDICIAL SEMINAR ON THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, CONCLUSIONS AND RECOMMENDATIONS (2001) ("The establishment of INCADAT and its free availability on the internet are welcomed by judges as an important contribution to the spread of knowledge about the Convention and as a means of promoting consistent interpretation of the Convention internationally."). There is also a twice yearly Judges' Newsletter on International Child Protection. *See id.* The Hague Conference also sponsors judicial conferences to review application of the Convention. *See* HAGUE CONF. ON PRIVATE INT'L L., HAGUE CHILD ABDUCTION CONVENTION: JUDICIAL SEMINARS ON THE INTERNATIONAL PROTECTION OF CHILDREN (last visited Feb. 25, 2003) (providing notes from judicial seminars in 1998, 2000, and 2001), *available at* http://www.hcch. net/e/conventions/seminar.html. For example, the third Judicial Conference at De Ruwenberg was attended by thirty-one judges from seven jurisdictions: the United Kingdom, France, Germany, Netherlands, Scotland, Sweden, and the United States of America. *See* Conclusions and Recommendations, International Judicial Seminar on the 1980 Hague Convention on the Civil Aspects of International Child Abduction, De Ruwenberg Conference Centre, Netherlands (20-23 October 2001). Other groups have also organized judicial conferences. *See, e.g.*, Francophone-Anglophone Family Law Judicial Conference, June 4-7, 2001 (final resolutions *available at* http://www. hcch.net/e/conventions/seminar.html); Common Law Judicial Conference on International Parental Child Abduction, Sept. 17-21, 2000 (sponsored by the U.S. State Department's Office of Children's Issues and the U.S. Central Authority).

105. 221 F.3d 204 (1st Cir. 2000); *see also* Opinion of the Justices to the Senate, 691 N.E.2d 911, 917 n.5 (Mass. 1998) (summarizing risks, including that " (1) batterers are more likely to abuse their children than the average parent . . . (2) children exposed to domestic violence suffer both behavioral and developmental harm . . . and (3) that children exposed to domestic violence are more likely to be violent with their spouses or children. . . .").

district court originally had ordered that the children be returned to Ireland, despite evidence that their father was extremely abusive to their mother. The district court emphasized that the violence was not directed toward the children, and concluded that the violence was therefore irrelevant to the article 13(b) defense. The appellate court reversed. Among other things, the appellate court stated:

> The district court distinguished these acts of violence because they were not directed at [the children]. Setting aside, for now, [the mother's] allegations of John's direct physical and psychological abuse of the children, the district court's conclusions are in error, whatever the initial validity of the distinction. First, John has demonstrated an uncontrollably violent temper, and his assaults have been bloody and severe. His temper and assaults are not in the least lessened by the presence of his two youngest children, who have witnessed his assaults — indeed, [one of the children] was forced by him to witness the aftermath of his assault on [his twenty-year-old son from a previous marriage]. Second, John has demonstrated that his violence knows not the bonds between parent and child or husband and wife, which should restrain such behavior. Third, John has gotten into fights with persons much younger than he, as when he attempted to assault the young man in Malden. Fourth, credible social science literature establishes that serial spousal abusers are also likely to be child abusers. *See, e.g.,* Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering,* 5 Violence Against Women 134 (1999); Anne E. Appel & George W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal,* 12 J. Fam. Psychol. 578 (1998); Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse, in* Kersti Yllo & Michele Bograd, *Feminist Perspectives on Wife Abuse* 158 (1988); Susan M. Ross, *Risk of Physical Abuse to Children of Spouse Abusing Parents,* 20 Child Abuse & Neglect 589 (1996). *But cf. Nunez-Escudero, 58 F.3d at 376-77; K. v. K.* [1997] 3 F.C.R. 207 (Eng.Fam.). Fifth, both state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser. Thus, a congressional resolution, passed in 1990, specifically found that:
>
> > Whereas the effects of physical abuse of a spouse on children include . . . the potential for future harm where contact with the batterer continues . . .
> >
> > Whereas children often become targets of physical abuse themselves or are injured when they attempt to intervene on behalf of a parent;
>
> H.R. Con. Res. 172, 101st Cong., 104 Stat. 5182, 5182 (1990); *see also Opinion of the Justices to the Senate, 427 Mass. 1201, 691 N.E.2d*

> *911, 917* n. 5 (1998); *Custody of Vaughn, 422 Mass. 590, 664 N.E.2d 434, 439 (1996)*. These factors are sufficient to make a threshold showing of grave risk of exposure to physical or psychological harm.[106]

Walsh went further in its language about domestic violence than any prior U.S. case on the Hague Convention.[107] While this language from *Walsh* has not yet appeared in the reported decisions of courts abroad,[108] and while the First Circuit has backed away from a broad interpretation of *Walsh*,[109] *Walsh* has been cited by other courts in the United States.[110] Since *Walsh* is still a relatively recent decision, its effect abroad may yet be seen.

---

106. *Walsh*, 221 F.3d at 220.

107. A few other cases recognize the harm to children from domestic violence, albeit with less dramatic language. *See, e.g.*, Pollastro v. Pollastro, [1999] D.L.R. (4th) 32 (Ont. Ct. App.). Even in those jurisdictions where favorable case law has emerged, there are setbacks. For example, the Ontario Court of Appeal decided *Finizio v. Scoppio-Finizzio* six months after it decided *Pollastro*. There the respondent had alleged that the petitioner punched her in the face, but the court stated that this one incident was insufficient to establish the article 13(b) defense. Finizio v. Scoppio-Finizio, [1999] 46 O.R.(3d) 226, 234 (Ont. Ct. App.).

108. *But see* DP v. Commonwealth Cent. Auth., (2001) 206 CLR 401, 417 n.37 (citing the trial court opinion in *Walsh* solely for the proposition that article 13(b) is to be narrowly construed).

109. The First Circuit itself backed away from its language in *Walsh* in *Whallon v. Lynn*, 230 F.3d 450, 452 (1st Cir. 2000). In *Whallon,* the mother accused the father of "subjecting her and Leah [the child's half sister] to significant verbal abuse and of allowing matters to escalate to physical violence against Lynn herself." *Id.* However, as the First Circuit emphasized, "Lynn made no such claim that Whallon acted that way towards [the child] Micheli." *Id.* There was a dispute as to whether the father instructed or had knowledge that the gunman would try to prevent the mother and children's departure from the country. The First Circuit emphasized, " [T]he district court found that the alleged instances of verbal abuse of Lynn and her older daughter Leah, and of physical abuse of Lynn, while regrettable, neither were directed at Micheli nor rose to the level of the conduct of the petitioner father in *Walsh*. We agree." *Id.* at 460. The court emphasized the difference in the length of time spousal abuse had been occurring, that the father did not physically or psychologically abuse the child (accepting the district court's determination that the father's testimony was more credible on the question of whether he was involved in keeping the family in Mexico at gunpoint), and that the father did not disobey court orders. The appellate court concluded:

> The logic, purpose, and text of the Convention all mean that such harms are not per se the type of psychological harm contemplated by the narrow exception under article 13(b). To conclude otherwise would risk substituting a best interest of the child analysis for the analysis the Convention requires. This would undercut the Convention's presumption of return where rights of custody have been violated by wrongfully removing a child in situations where that child had a sibling who was not wrongfully removed.

Id.

110. *See, e.g.*, *Whallon*, 230 F.3d at 460; March v. Levine, 136 F. Supp. 2d 831, 846, 848 (M.D. Tenn. 2000); Ostevoll v. Ostevoll, 2000 U.S. Dist. LEXIS 16178, at *51 (S.D. Ohio Aug. 16, 2000); Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045, 1058 (E.D. Wash. 2001); Danaipour v. McLarey, 286 F.3d 1, 26 (1st Cir. 2002).

Of course, cross-fertilization goes in all directions. Other nations are much more aware of the risks to mothers and children if children continue to visit with their mothers' batterers.[111] Foreign solutions and experience may influence U.S. practices.

Similarly, other countries are much more willing to grant custodial parents' requests to relocate, and courts in those jurisdictions articulate the importance of this orientation for the success of the Hague Convention. For example, an English court refused to enforce a custody order of a Shariá court because the mother would have no right to seek the Shariá court's permission to relocate with the child. The opinion then continued:

> The interrelationship between the wrongful international abduction of children and the rights of a parent to relocate on separation have always seemed to me to be intricately interconnected. In this jurisdiction we do not refuse the application of the parent with the residence order the right to exercise that responsibility in another jurisdiction, unless the decision is clearly shown to be incompatible with the paramount welfare consideration. . . . But the approach that we adopt is by no means universal or even common place even amongst the member states. Obviously the adoption of a more restrictive approach to relocation applications increases the pressure and temptation to

111. *See* Guardianship Act of 1968 § 16b(4)(a)-(b) (as amended by Guardianship Amendment Act, 1995, No. 89) (N.Z.) (setting forth a presumption against granting unsupervised access to a batterer unless the court is satisfied that the child will be safe during access); *id.* (expressly requiring the court to consider whether the other party to the proceedings believes the child will be safe during access). *See* Felicity Kaganas, *Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence) Contact and Domestic Violence,* 12 CHILD & FAM. L.Q. 311 (2000) (detailing how a decision by the English Court of Appeal in four joined cases "reins back, in domestic violence cases, what was a very strong trend to prioritize contact between children and non-resident parents and to downgrade the risks to which such contact might expose mothers and children"); *see also* Advisory Board on Family Law: Children Act Subcomm., A Report to the Lord Chancellor on the Question of Parental Contact in Cases Where There Is Domestic Violence ¶ 5.5(b) (2000). The Report directs that,

> in deciding the issue of contact the court should . . . in every case [where relevant findings of domestic violence have been made] consider the harm which the child has suffered as a consequence of that violence and the harm which the child is at risk of suffering if an order for contact is made and only make an order for contact [if] it can be satisfied that the safety of the residential parent and the child can be secured before, during, and after contact.

Id.; *see also* A v. A [1998] Fam. L. R. 25 ¶¶ 3.32-.34, 4.3-.6 (Austl. Fam. Ct.) (emphasizing the importance of domestic violence to making the visitation determination and mandating strictly supervised and limited visitation for a father who tried to kill the child's mother); *see id.* ¶¶ 3.26-.29 (stating, in dicta, that a trial court may deny visitation to father where the mother holds a genuine belief, albeit an unreasonable one, that the father tried to kill her and that visits with father would have a "significant impact" on a mother's capacity as custodian).

abduct.[112]

In contrast, state courts in the United States often impose high hurdles before a custodial parent can relocate to another country, even if the custodial parent has been a victim of domestic violence. For example, the California Court of Appeals expressed "concerns" about transnational relocation orders in a case where a domestic violence victim sought to return to her homeland, Australia, with her two children, both of whom were born there.[113] The appellate court reluctantly approved the trial court's order permitting relocation[114] and called foreign relocations "different in kind" from intrastate and interstate relocations.[115] In addition, the court suggested that these relocations should be permitted only in limited circumstances and with proper procedural protection.[116]

The United States might also learn from reform efforts abroad specifically related to improving the Hague Convention's application to domestic violence victims. For example, the Australian Law Reform Commission has recommended that an amendment be

112. Osman v. Elasha, [2000] Fam. 62, 72 (Eng. C.A.).

113. *See In re* Marriage of Condon, 62 Cal. App. 4th 533, 536 (Cal. Ct. App. 1998). In this case, Ms. Cooper, an Australian native, was married to Mr. Condon, an American citizen. *Id.* The two children were both born in Australia. *Id.* The family lived for several years in California. *Id.* After one of many domestic violence incidents, the mother left with the children for Australia. *Id.* at 537. An Australian court granted the father's Hague petition and ordered the children to be returned to the United States. *Id.* at 538. The mother and children returned, and thereafter a California court adjudicated the divorce and child custody proceedings. *Id.* An interim order gave the father joint physical and legal custody, with visitation occurring approximately two afternoons each week and on alternating weekends. *Id.* at 539 n.2. Ms. Cooper requested that she and the children be allowed to relocate to Australia. The trial court agreed that relocation would be in the children's best interest. *Id.* at 540. The trial court emphasized the following: "[the mother's] ability to financially support herself in Australia rather than be wholly dependent on [the father] for support; the impact of the parties' stressful relationship on the children; [the mother's] extensive family in Australia; the children's primary emotional attachment to their mother; and, the children's lack of a firm long-time base in California." *Id.* at 540.

114. *Id.* at 549.

115. *Id.* at 546. First, the court noted "the cultural problem." *Id.* The court explained how children might be exposed abroad to harmful cultural practices or experience disadvantages not existing in the United States. *Id.* Second, the court mentioned "the distance problem." *Id.* The court emphasized the cost of international travel and the burden this might have on low- or middle-income individuals. *Id.* at 547. Third, the court stated the "most difficult" problem: "the jurisdictional problem." *Id.* The court noted that U.S. orders lack enforceability in foreign countries, thereby threatening custody and visitation orders entered domestically. *Id.*

116. *Id.* at 561-62. The appellate court reversed and remanded with an instruction that the trial court amend its order so as "to incorporate Ms. Cooper's concession of continuing jurisdiction in the California courts and appropriate sanctions to enforce that concession. . . ." *Id.* at 562. This required, at a minimum, the posting of a monetary bond. *Id.*

passed to the Australian legislation implementing the Hague Convention. The amendment would allow courts deciding article 13(b) defenses to "have regard to the harmful effects on the child of past violence, or of likely violence to the abducting parent if the child was returned."[117] The Law Reform Commission also recommended "inclusion of a provision that the child should not be returned if there was a reasonable risk that to do so would endanger the safety of the parent who has care of the child."[118] This Australian reform effort might inspire efforts for a similar amendment to the International Child Abduction Remedies Act ("ICARA") in the United States.

D. Eroding False Categorizations

Feminists have long criticized legal doctrine that rests on false categorizations. Often the categories are paired as opposites, and those categories associated with female qualities are devalued. Hilary Charlesworth succinctly identified some of the common dichotomies in international legal discourse: "objective/subjective, legal/political, logic/emotion, order/anarchy, mind/body, culture/nature, action/passivity, public/private, protector/protected, independence/dependence."[119]

Hague Convention cases that involve domestic violence victims who abduct can help break down many of these false categorizations. For example, the notion that there is a division between the public and private spheres, and that States have no responsibility for perpetuating private violence, is shown to be false. As with public international law, Hague Convention cases allow an examination of the "broader notions of state responsibility and complicity."[120] In addition, these suits illustrate "the roles . . . other institutions, law, and culture [play] in encouraging, legitimizing, and perpetuating violence," thereby facilitating a "more nuanced approach to the role of the state concerning intimate violence."[121]

---

117. John Caldwell, *Child Welfare Defenses in Child Abduction Cases—Some Recent Developments*, 13 CHILD & FAM. L.Q. 121, 129 (2001).

118. *Id.* (noting that such a provision would be consistent with the trend toward greater "awareness and sensitivity" to domestic violence issues).

119. *See* Hilary Charlesworth, *Symposium on Method in International Law: Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 382 (1999) (explaining that the first term signifies "male" characteristics and the second term "female" characteristics). Charlesworth suggests that international law places a greater value on the male-oriented first term in each category. *Id.*

120. *See* SCHNEIDER, *supra* note 1, at 54 (providing information about how regional, ethnic, and international groups approach human rights issues).

121. *Id.* at 196 (recognizing that government is an important, but not the sole,

At least three facts in Hague Convention cases involving domestic violence help establish that the State is responsible for perpetuating private violence: (1) the woman's need for flight, (2) the woman's difficulty in resisting the Hague Convention petition for her children's return, and (3) the States' failure to address the injustice of subjecting domestic violence victims to the remedy of return.

First, the fact that women have to flee their countries in order to obtain safety reveals much about the systemic nature of violence against women in the societies from which they fled. The stories of women who flee (often not found in the law reporters or even the court documents) are frequently filled with women's unsuccessful efforts to enlist the State's assistance to end the violence.[122]

Second, as discussed below,[123] women then encounter practical and substantive obstacles to defeating a Hague petition litigated in the forum to which they have fled. The result is that women's children are often returned, sometimes to the women's batterers, and the women themselves face pressure to return to their batterers' domicile, at least to adjudicate custody. This private international law framework, established by nations, thereby provides batterers with a tool to further control their victims.

Third, nations are not working together to alleviate the problems that have arisen with respect to the Hague Convention's application. For example, at the Fourth Meeting of the Special Commission to Review the Operation of the Convention, only minimal recognition was given to the problem of domestic violence. The Special Commission's recommendations on this topic were found in the following single sentence: "the protection of the child may also sometimes require steps to be taken to protect an accompanying parent."[124] This single sentence has no legally binding force. William Duncan, Deputy Secretary General of the Hague Conference, recognized, "Recommendations cannot of course amend the 1980 Convention. . . . [T]here is no guarantee of universal adherence to recommendations. They are not legally binding and the mutual

source of perpetuating gender inequalities); *see also* Judith Armatta, *Getting Beyond the Law's Complicity in Intimate Violence Against Women*, 33 WILLAMETTE L. REV. 773, 786-802 (1997) (detailing laws in other nations that "operate to trap women in abusive relationships").

122. *See* Weiner, *International Child Abduction, supra* note 34, at 626-32 (detailing the story behind *In re* Prevot, 855 F. Supp. 915 (W.D. Tenn.), *rev'd*, 59 F.3d 556 (6th Cir. 1995)).

123. *See infra* Part IV; *see also* Weiner, *International Child Abduction, supra* note 34.

124. *See* Conclusions and Recommendations of the Fourth Meeting of the Special Commission, *supra* note 97, at 6.

confidence which arises from a guarantee of reciprocity is lacking."[125] Moreover, this one suggestion is hardly responsive to all of the problem's dimensions. Even the most fundamental question—whether the Hague Convention is just or sensible when applied to these abductors and their children—was not addressed. While the topic of domestic violence may have been too large for a full discussion at the Fourth Special Commission meeting, the participants did not decide to study the issue further, as they did for the issues of direct judicial communications[126] and transfrontier access.[127]

States' ability and failure to address the injustice of these cases at the domestic level also shows the governments' complicity in the violence. In the United States, the blame falls mostly on our federal government because the United States' federal government is intimately involved with these Hague Convention cases. It is the federal government that is responsible for the United States' compliance with the treaty, it is the United States' representatives who participate in Hague Conference events about the Convention, and it is the federal government that passed the law in the United States which implements the Hague Convention at home. The fact that the federal government bears the bulk of the responsibility undermines the traditional notion that domestic violence disputes between individuals are a "local" issue for state governments. In fact, since Hague Convention cases are often litigated in federal court, the "historic public-private dichotomy, which labels intimate violence as a 'private' matter that should not be litigated in federal courts," is also eroded.[128] ICARA, the federal law that implements the Hague Convention in the United States, gives federal courts concurrent jurisdiction over these cases.[129] Professor Judith Resnik credits public international law with helping to show, as an empirical matter, that federalism is really multi-faceted, and that the federal government can regulate for the betterment of women.[130] Private international

125. *See* Duncan, *supra* note 36, ¶ 5.

126. *See* QUESTIONNAIRE CONCERNING PRACTICAL MECHANISMS FOR FACILITATING DIRECT INTERNATIONAL JUDICIAL COMMUNICATIONS IN THE CONTEXT OF THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (Jan. 2002).

127. Duncan, *supra* note 36, ¶ 5.

128. SCHNEIDER, *supra* note 1, at 182 (noting how the Violence Against Women Act brought domestic violence into federal courts).

129. *See* 42 U.S.C. §§ 11601-11610 (2000).

130. *See* Resnik, *supra* note 75, at 621 (noting that decades of federal constitutional law have created rights in a variety of areas that affect women and families, including welfare, taxes, and immigration).

law, and specifically the Hague Convention, demonstrates the same. When the federal government fails to seek either domestic or international reform of the Hague Convention, it contributes to batterers' abilities to control their vicitms.

Other dichotomies are also challenged in the Hague Convention context. The conception of battered women as dependent and passive gives way as stories emerge of abduction and women's efforts to flee from their batterers. The notion that women are protected, and that men are the protectors, proves false as male batterers abuse their female victims who then act to protect their children. The dichotomy between the legal and the political evaporates when courts choose to interpret the Hague Convention restrictively, to the detriment of domestic violence victims and their children, deferring instead to the State Department's interpretation of the treaty.[131]

Overall, Hague Convention cases offer new ground in which feminist doctrine and ideas can take root. It is particularly fertile ground and offers much to those who decide to focus their efforts in this area. At a minimum, attention to these cases can help individual victims who desperately need competent legal representation. At its fullest potential, Hague Convention litigation provides an avenue to combat battering and gender discrimination on an international level.

IV. THE CHALLENGES OF TRANSNATIONAL LITIGATION

In many ways, the challenges involved in transnational litigation replicate the challenges lawyers and lawmakers encounter in domestic legal systems when representing domestic violence victims. The specific issues vary, as do the responses, but the categories of problems are similar. The challenges identified in the pages that follow are not related to doctrinal matters, for I have addressed those elsewhere.[132] Rather, Professor Schneider's work helps us identify some of the additional challenges litigators will face in these cases. In

131. *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 179 (1972) (indicating that courts defer tremendously in treaty interpretation to the Department of State's interpretation because of the political implications of their decisions). *See* Danaipour v. McLarey, 286 F.3d 1 (1st Cir. 2002) (stating that the United States typically has taken positions opposed to the respondent/domestic violence victim). However, sometimes the government's position is twisted to the benefit of domestic violence victims. *See, e.g., id.* at 22 (according "great weight" to Department of State's view that undertakings should be "limited in scope"). The dichotomy between the political and legal also gives way when courts adjudicating Hague petitions explicitly notice the divergence in the rate of return effectuated between countries. *See, e.g.*, Croll v. Croll, 229 F.3d 133, 143 n.6 (2d Cir. 2000).

132. *See* Weiner, *International Child Abduction*, *supra* note 34; *see also* Weiner, *Navigating the Road, supra* note 33.

particular, this Article now discusses the need for effective storytelling, the problem of experts, the difficulty of accessing information from abroad, the challenge of finding experienced lawyers for women in the United States and abroad, and the difficulty of linking gender inequality and domestic violence in these cases.

A. Effective Storytelling

Effective storytelling is essential in order for domestic violence victims to have any chance of prevailing in Hague Convention cases. Professor Schneider has stated, "the task for feminist lawyers is both to describe and allow for change: to describe a legal problem for women—describe it in detail and in context—and translate it to unsympathetic courts in such a way that it is not misheard and at the same time does not remain static."[133]

Effective storytelling is particularly critical in Hague Convention cases because domestic violence victims who abduct encounter a double bias against them: they are both parents who abduct and battered women. Mothers who suffer domestic violence and who abduct are literally "damned if they do and damned if they don't." They are blamed for abducting because that harms children and they are blamed for staying because that harms children. Since many women stay for a while before they abduct, they face society's and the courts' most severe condemnation.[134]

The Hague Convention is premised on a belief that child abduction is per se harmful to children. Therefore, women who abduct their children are seen as exposing their children to the harms of child abduction; they are presumptively bad mothers because exit inherently is believed to cause harm. Missing from this simplistic description is the fact that mothers who flee from domestic violence with their children often view flight as the best alternative for their children. In fact, concern for their children's physical and psychological well-being often motivates abductions. These women's

133. *See* SCHNEIDER, *supra* note 1, at 7-8 (claiming that this is a task needing "close attention to the interrelationship between theory and practice in our understanding of the complexity of women's lives and in the articulation of women's experiences into legal claims").

134. *See* Miranda Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women and Children are Being Returned by Coach and Four*, 13 INT'L J.L. POL'Y & FAM. 191, 192 (1999) (suggesting that judges (1) view the mothers as "hostile and manipulative," (2) have an "unrealistic [view of] . . . the ability of the legal system to protect women and children from violence," (3) "underestimat[e]" the harm children experience from domestic violence; and (4) are concerned that "any 'special' consideration [shown] to victims of violence would undermine the Convention" since "the presence of violence in relationships is recognized as so common").

perceptions are not misguided, but rather are corroborated by social science evidence that indicates the potential harm to children from remaining in battering households.[135]

Professor Schneider details how mothers who are battered women are also viewed with a certain disdain. Informed by her own work with Hedda Nussbaum, Professor Schneider states the following: "Because we consider that a mother's fundamental duty is to protect her children, maternal behavior that exposes children to harm is viewed as unthinkable, unnatural, and incomprehensible. Battered women who are mothers are reviled."[136] She continues, "[A] whole category of bad mothering is reserved for women who appear to be placing their own needs or interests ahead of their responsibility to the children."[137] These views are fueled by cultural stereotypes of mothers as perfect and selfless.[138]

Women who abduct need effective storytelling to ensure that they are listened to without bias and revulsion, in order to maximize their chances of defeating the Hague Convention petition. These women also need effective storytelling when they are involved in any subsequent custody contest because the act of abduction *and* the fact of being battered serve as a potential double whammy against obtaining, or maintaining, custody.[139] The fact of abduction can be

135. *See, e.g.*, Betsy M. Groves et al., *Silent Victims: Children who Witness Violence*, 269 JAMA 262, 262-64 (1993) (remarking on the impact seeing violence has on children's development); *see also* Mindy S. Rosenberg, *Children of Battered Women: The Effects of Witnessing Violence on Their Social Problem-Solving Abilities*, 10 BEHAV. THERAPIST 85 (1987); Michael Hershorn & Alan Rosenbaum, *Children of Marital Violence: A Closer Look at the Unintended Victims*, 55 AM. J. ORTHOPSYCHIATRY 260, 263-64 (1985) (presenting an assessment of the effect that marital discord and marital violence can have on the behavior and emotions of children); Debra Kalmuss, *The Intergenerational Transmission of Marital Aggression*, 46 J. MARRIAGE & FAM. 11, 17 (1984) (indicating that children who witness hitting between their parents are more likely to engage in severe aggression in marriage themselves than are children who were only hit as teenagers by their parents).

136. SCHNEIDER, *supra* note 1, at 148.

137. *See id.* at 152 (reiterating the societal stigma attached to battered women who are mothers).

138. *See id.* at 150 (noting the pillorying of mothers who kill or use drugs).

139. *See, e.g.*, *In re* Zhang, 734 N.E.2d 379, 386 (Ohio Ct. App. 1999) (affirming the trial court's decision to terminate the parental rights of a mother based upon evidence that the mother fled with her child to China, disrupting the child's relationship with his foster parents); Ayyash v. Ayyash, 700 So. 2d 752, 752-53 (Fla. Dist. Ct. App. 1997) (holding that trial court abused its discretion by modifying a father's temporary custody order to give the battered mother custody since the mother hid the children from their father for over six years); Kearney v. Hudson, 2001 WL 128925, *4 (Conn. Super. Ct. Jan. 22, 2001) (holding that both the father's abuse and the mother's flight from the violence with children were egregious conduct and that the "bright line test of the home state rule [under the Parental Kidnapping Prevention Act] ought not be employed to deprive the state of jurisdiction otherwise conferred").

held against abducting parents in custody contests,[140] as can the fact of being battered.[141] Lawyers and their clients must provide judges with the "complex vision of agency," "the broader problems of contradiction and complexity, and shifting combinations of choice and restriction within which these actions take place."[142]

Effective storytelling in Hague Convention cases takes a different form than in domestic child custody litigation or child abuse and neglect proceedings. In those contexts, lawyers often have to address the question, "Why didn't she leave?"[143] In the context of international child abduction, the question shifts. Courts want to know, "Why did she leave," or put another way, "Why did she not litigate in the child's habitual residence?" These questions plague mothers who abduct and reflect the same rigid victim-irrational agent dichotomy that Professor Schneider has identified in other contexts.[144] Consequently, feminist litigators have to educate judges about the rationality of the battered woman's actions, including departure.

In particular, advocates need to explain the "woman's 'resistant self-direction,'"[145] why her efforts failed, the danger of separation assault, the batterer's dangerousness, and how geographic distance may be the best, and perhaps only, guarantee of safety.[146] The story must include an explanation of the difference between the law on the books and the law in action,[147] and how legal remedies are not always

140. *See, e.g.,* Malik v. Malik, 638 A.2d 1184, 1192 (Md. Ct. Spec. App. 1994) (stating that "proof that a parent has removed the child from the jurisdiction of the court is a relevant evidentiary fact that may be weighed against that parent").

141. *See* SCHNEIDER, *supra* note 1, at 170 (noting that "the standard stereotype of battered women as helpless victims works against women in the context of a custody proceeding"); *id.* at 169 (affirming that "battered women's fears of losing custody are realistic. Women who depart from traditional stereotypes of good mothers, which include women who are sexually active, lesbian, or battered, are penalized in custody decisions.").

142. *See id.* at 85.

143. *See id.* at 77.

144. *See id.* at 76 (noting similar agent-victim dichotomies in sexual harassment situations).

145. *See id.* at 231.

146. *See id.* at 77 (indicating that "leaving provides battered women no assurance of separation or safety; the stories of battered women who have been hunted down across state lines and harassed or killed are legion").

147. *See* Armatta, *supra* note 121, at 802-05 (detailing how women often face difficulties accessing available remedies); *id.* at 809-26 (detailing criminal law reform and impediments to its implementation); *see also* U.S. DEPARTMENT OF STATE, 2000 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, TURKMENISTAN (Feb. 23, 2001) (reporting that anecdotal evidence "indicate[s] that domestic violence against women is common, but no statistics are available. The subject is not discussed in society. There are no court cases available and no references to domestic violence in

accessible or meaningful. As Special Rapporteur Ms. Radhika Coomaraswamy reported in 1999:

> Overwhelmingly, States are failing in their international obligations to prevent, investigate and prosecute violence against women in the family. While there are encouraging moves to create and implement new policies, procedures and laws with respect to violence against women generally, and domestic violence specifically, such violence does not appear to command Governments' attention. National policies continuously fail to give priority and force to women's human rights. . . . With few exceptions, domestic violence continues, to varying degrees, to be treated by Governments as a private family matter.[148]

---

the media. One unofficial group to support battered women operates in Ashgabat."), *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/eur/850.htm; U.S. DEPARTMENT OF STATE, 1998 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, SAINT LUCIA (1999) (noting that "[p]olice and courts enforce laws to protect women against abuse, although police are hesitant to intervene in domestic disputes, and many victims are reluctant to report cases of domestic violence and rape or to press charges"), *available at* http://www.usis.usemb.se/human/human1998/stlucia.html; U.S. DEPARTMENT OF STATE, 1998 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, GREECE (1999), *available at* http://www.usis.usemb.se/human/human1998/greece.html. The Greece report observed:

> The General Secretariat for Equality of the Sexes ("GSES"), an independent government agency, asserts that police tend to discourage women from pursuing domestic violence charges and instead undertake reconciliation efforts, although they are neither qualified for nor charged with this task. The GSES also claims that the courts are lenient when dealing with domestic violence cases. Facilities for battered women and their children exist but are often inadequately staffed to handle cases properly.

Id.; *see also* U.S. DEPARTMENT OF STATE, 2000 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, BULGARIA (2001), *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/eur/705pf.htm. The Bulgaria report remarked:

> The law exempts from state prosecution certain types of assault if committed by a family members, and the Government generally does not assist in prosecuting crimes of domestic assault unless the woman has been killed or injured permanently. Courts and prosecutors tend to view domestic abuse as a family rather than criminal problem, and in most cases, victims of domestic violence take refuge with family or friends rather than approach the authorities. Police often are reluctant to intervene in cases of domestic abuse, even if a woman calls them seeking protection or assistance. No government agencies provide shelter or counseling for victims.

Id.; *see also* U.S. DEPARTMENT OF STATE, 2001 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, SAINT LUCIA (2002), *available at* http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8254.pf.htm. The Saint Lucia report states:

> The law has no provision for restraining orders to protect battered women against further abuse. For example, in divorce cases, courts frequently grant a divorce but do not issue a property settlement, forcing women to return to their abusive husbands. This problem is exacerbated by a lack of alternative housing in the country.

Id.

148. *See* Radhika Coomaraswamy, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, to the Hum. Rts. Comm., 55th Sess.,

The story must also include the "broader systemic pattern of gender socialization and 'coercive control.'"[149]

Yet the underlying question to which one's client must respond is itself problematic. Just as the question, "Why did she not leave?" is misguided, so is the question, "Why did she not litigate in a particular forum?" Both questions put "the woman's conduct under scrutiny, rather than placing the responsibility on the battering man."[150] As Professor Schneider states, the question should be, "Why does society tolerate men who batter?" In the context of the Hague Convention, one might also want to ask, "Why does society allow batterers to use the courts to continue controlling their victims?"

The Hague Convention itself frustrates any attempt to refocus attention onto men's battering or men's use of the courts to further control their victims. The Hague Convention puts women on the defensive; it does so without even providing a domestic violence defense. While a man's battering can be relevant to various substantive issues, e.g., whether a child's "habitual residence" was voluntarily established and whether a child faces a grave risk of psychological or physical harm if returned (the article 13(b) defense), these issues are often resolved with inadequate weight, if any, being given to the fact of domestic violence.[151] Feminists

---

ESCOR, ¶ 242, U.N. Doc. E/CN.4/1999/68 (1999).

149. *See* SCHNEIDER, *supra* note 1, at 230.

150. *See id.* at 77.

151. *See* Weiner, *International Child Abduction, supra* note 34, at 620; *see also* March v. Levine, 136 F. Supp. 2d 831, 848 (M.D. Tenn. 2000), *aff'd*, 249 F.3d 462 (6th Cir. 2001) (holding that the father's alleged murder of the mother was insufficient to give rise to the article 13(b) defense). It was insufficient for the following reasons:

> The Levines do not assert that the alleged abuse of Janet March by Perry March that began in 1990 or his alleged killing of her in 1996 took place in front of the children or that those acts were ever known to the children. Instead, they argue that his alleged killing of Janet 'has deprived the Children forever of Janet's love, affection, attention, devotion and guidance.' . . . Much more is required under the case law to establish this exception of grave risk of harm to the children by clear and convincing evidence.

March, 136 F. Supp. 2d at 848. The court cited three older cases where courts had expressly refused to equate battery of the mother with harm to the children. *Id.* at 844-45 (citing Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 376-78 (8th Cir. 1995) (rejecting mother's argument that article 13(b) was satisfied, in part, by physical, sexual and verbal abuse by her husband, the child's father, because "[t]he evidence is general and concerns the problems between [the mother], her husband and father-in-law," and the district court should not "consider evidence relevant to custody or the best interests of the child"); Tabacchi v. Harrison, 2000 WL 190576, *13 (N.D. Ill. Feb. 10, 2000) (rejecting the mother's argument that her husband's history of repeated physical and verbal abuse towards her, sometimes in the child's presence, was sufficient to satisfy article 13(b) because primary risk of harm was to the mother and not to the child); Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 850-51 (Ky. Ct. App. 1999) (rejecting a mother's argument that article 13(b) was satisfied by

litigating these cases have the enormous challenge of showing that domestic violence is substantively relevant to the adjudication of these petitions, and then of ensuring that the women's stories are heard and understood.[152]

B. Information Gathering

Another challenge facing domestic violence victims in Hague Convention litigation is proving their abuse. Some courts feel compelled to act expeditiously on petitions, citing article 11.[153] These courts may put Hague cases on a "fast track" and disallow discovery or even an evidentiary hearing.[154] For example, the trial court in

---

evidence that the father abused her because there was "absolutely no competent evidence before the Court that [the child] has been abused or neglected by [the father], or that [the child] faces certain danger in Greece. Likewise, there is no evidence that the courts in Greece cannot protect [the child]."). As for contrary cases, the court emphasized that those cases had "clear and convincing evidence to support a finding that the parent seeking the return had seriously abused the child." *Id.* at 845 (discussing Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 459-61 (D. Md. 1999) (denying a Hague petition given the extensive evidence of physical and psychological abuse of the oldest child and the mother by the father who sought the return and citing testimony of witnesses, including the testimony of a psychologist); Blondin v. Dubois, 78 F. Supp. 2d 283, 285 (S.D.N.Y. 2000) (denying a Hague petition and citing evidence of father's battery of child and threats to kill her); Walsh v. Walsh, 221 F.3d 204, 220 (1st Cir. 2000) ("*Blondin III*") (denying the father's petition for return, and finding that he had repeatedly beaten his twenty-year-old son from a prior relationship and younger children had frequently witnessed the father's violent assaults). Recent statements by the Permanent Bureau suggest that article 13(b), which has almost always been "narrowly construed," should continue to be "interpret[ed] . . . in a restrictive fashion." *See* Conclusions and Recommendations of the Fourth Meeting of the Special Commission, *supra* note 102, at 11.

152. *See* SCHNEIDER, *supra* note 1, at 103 (discussing the "complexities of voice, i.e., all the ways women's voices can be heard and yet not *really* heard").

153. *See, e.g., March*, 136 F. Supp. 2d at 833 (explaining that the case was appropriately resolved in a succinct manner); *see also* Hague Convention on Child Abduction, *supra* note 32, art. 11. Article 11 states:

> The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
>
> If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Id.

154. *See March*, 136 F. Supp. 2d at 833; *see also* Shalit v. Coppe, 182 F.3d 1124, 1131 (9th Cir. 1999) (affirming the district court's granting of summary judgment in favor of respondent in an ICARA case); *see also In re* F (A Minor), [1995] Fam. 224 (C.A.) (Butler-Sloss, L.J.) (noting that the "[a]dmission of oral evidence in Convention cases should be allowed sparingly").

March v. Levine[155] precluded the respondent-grandparents from engaging in discovery or an evidentiary hearing even though they alleged that the petitioner-father had killed the children's mother.[156] The grandparents had won a default judgment against the father as a discovery sanction in a wrongful death action, and were also trying to terminate the father's parental rights.[157] Even so, the court refused to allow discovery and an evidentiary hearing, and then found that the allegations were insufficiently documented to allow the article 13(b) defense.[158]

Without discovery, fact gathering is hampered. While federal regulations provide that the National Center for Missing and Exploited Children shall "[u]pon request, seek from foreign Central Authorities information relating to the social background of the child,"[159] the National Center primarily responds to discrete requests for systemic information, such as requests for a description of the law or the social welfare system. Occasionally the National Center facilitates obtaining evidence, such as police reports, although this is rare. The National Center does not engage in discovery for a party or

155. 136 F. Supp. 2d 831 (2000).

156. *See id.* at 837 n.10 ("Janet March disappeared in August 1996, at a time when she and Perry March were having marital problems. . . . The Levines believe that Perry March killed her. . . . The case has received enormous coverage in the local press, due in part to the fact that Perry March was named the "prime and only" suspect in her murder. . . .").

157. *See id.* at 836-37.

158. *See id.* at 847 (citing Docket No. 54, Levine's Aff., Ex. 1). The wrongful death action made twelve factual findings, including:

> 2. Over time, beginning in 1990, Perry March became increasingly physically, verbally, and emotionally abusive toward Janet Levine March. . . . 4. On August 15, 1996, after a heated argument, Perry March intentionally inflicted severe, physical harm and serious bodily injury on Janet Levine March. Perry March's intentional physical assault caused such severe bodily injury to Janet Levine March that she died. As a direct, proximate result of Perry March's violent and brutal act, Janet Levine March died on August 15, 1996 or very shortly thereafter.

Id.; *see also id.* (suggesting that these findings were prepared by the Levines' counsel and based upon no proof). *But see id.* at 851 (noting that the district court did have substantial information before it on the summary judgment motion, including the report of a licensed clinical psychologist who assisted the court and a report by a Mexican social worker of the Chapala DIF System, who conducted a home visit in connection with the petition of the father's second wife to adopt the children); *id.* at 854 (noting the court also had the complaints lodged regarding threats Mr. March had made to others).

159. *See* 22 C.F.R. § 94.6(f) (2002); *see also* Hague Convention on Child Abduction, *supra* note 32, art. 13 ("In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.").

act as an investigator.[160] In addition, courts feel pressure not to seek information relating to the child's social background, for this takes time and there is a premium on speed in Hague Convention cases. Finally, any fact-gathering conducted by the Central Authority of the child's habitual residence, or by International Social Service, may well be one-sided, since representatives of these organizations undoubtedly will talk to the left-behind parent and may not talk to the respondent.

Apart from gathering evidence of the domestic violence between the petitioner and respondent, advocates also must gather evidence of the legal and social milieu for domestic violence victims in the child's habitual residence. The Fourth Special Commission recently made a recommendation that will facilitate this fact gathering. It recommended that each Central Authority publish information concerning "the services applicable for the protection of a returning child (and accompanying parent, where relevant), and concerning applications for legal aid for, or the provision of legal services to, the accompanying parent on return."[161] However, this information may cause harm if courts assume that services will automatically protect a victim or child. A litigant has to convince a court that the law on the books does not necessarily mean safety, e.g., the laws may not be adequately implemented, or may be inaccessible to victims, or may be irrelevant given the batterer's dangerousness. Experts can help establish whether a country has an effective system to combat domestic violence, but finding and affording such experts can be difficult.

Advocates may also need to hire an expert so that the court understands how custody decisions are made in the child's habitual residence. Did the foreign court that adjudicated custody exclude or ignore evidence of domestic violence in assessing the child's best interest? Will it do so if custody has not yet been adjudicated? The Convention is premised on the notion that each State Party can be trusted to decide custody matters in the best interest of child.[162] Yet, this fundamental assumption may be untrue if the habitual residence

160. Interview with Kathleen Ruckman, Supervising Attorney, International Division, National Center for Missing and Exploited Children, Apr. 9, 2002 (on file with author).

161. *See* Conclusions and Recommendations of the Fourth Meeting of the Special Commission, *supra* note 97, at 5.

162. *See, e.g.,* Miller v. Miller, 240 F.3d 392, 402-03 (4th Cir. 2001) (explaining that the country from which the child was abducted is "as ready and able as we are" to protect the children); *see also* Friedrich v. Friedrich, 78 F.3d 1060, 1068 (6th Cir. 1996) (stating that the court system in the child's habitual residence should be trusted to evaluate the child's environment for safety).

would not accord weight to the batterer's violence in its custody determination. In such a case, a litigant might have a further basis for an article 13(b) defense since there would be a risk that the child would be returned both to his or her habitual residence *and* to the batterer.

C. Expert Testimony

Another major challenge for feminist lawyers relates to the use of expert testimony in these Hague Convention cases to demonstrate the harm from battery. Where battered women have been successful in resisting the return of their children, they typically introduce expert testimony as part of their article 13(b) defense. This expert testimony often shows that the woman or children suffer from post-traumatic stress disorder.[163] When the mother suffers from post-traumatic stress disorder, the experts testify that her return to the place where the battery occurred might trigger a severe psychological reaction, leading to maternal dysfunction or perhaps even suicide. The expert then suggests that the children would be harmed in either case by the loss of their mother.

Professor Schneider explains that the use of expert testimony creates a dilemma for feminists. The testimony can be very effective,

---

163. *See, e.g.*, Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 459 (D. Md. 1999). In *Rodriguez*, the district court denied the petition for return of three children to Venezuela in light of extensive evidence that the father physically and psychologically abused the oldest child and the mother. A psychologist testified that the two oldest children and the mother suffered from post-traumatic stress disorder. *Id.* at 461. Similarly, in *Blondin v. Dubois*, the district court found that the father had beat the daughter frequently, threatened her life, twisted a piece of electrical cord around her neck, and threatened to throw his son out the window. 78 F. Supp. 2d 283, 285 (S.D.N.Y. 2000). The expert testified that the daughter suffered from post-traumatic stress disorder. *Id.* at 291. In *Walsh v. Walsh*, the court denied the father's petition for return, finding, among other things, that the father had repeatedly beaten his twenty-year-old son from a prior relationship and that the younger children had frequently witnessed the father's violent assaults. 221 F.3d 204, 220 (1st Cir. 2000). The expert testified that the child suffered from post-traumatic stress disorder. *Id.* at 211. *See also Re* G (abduction: psychological harm), [1995] 2 F.C.R 64 (holding that the mother had a history of psychiatric illness and would likely become psychotic if obliged to return). *But see* K v. K, [1998] 3 F.C.R 207 (indicating that the court rejected psychologist's testimony that the battered mother's current psychiatric symptoms would be greatly exacerbated by a return, which would impair her ability to be an effective parent).

Often the focus is on the post-traumatic stress disorder ("PTSD") experienced by the child. *See Blondin III*, 78 F. Supp. 2d at 290-91 (describing the testimony of Albert Solnit regarding PTSD experienced by the child); *Walsh*, 221 F.3d at 211 (describing testimony of a licensed social worker regarding PTSD experienced by a child); *Rodriguez*, 33 F. Supp. 2d at 461 (describing testimony of licensed psychologist regarding PTSD experienced by the child); Ostevoll v. Ostevoll, No. C-1-99-961, 2000 WL 1611123, at *15 (S.D. Ohio Aug. 16, 2000) (describing the uncontroverted testimony of two psychologists regarding PTSD experienced by the child).

but it can convey messages that are antithetical to a feminist understanding of the situation. For example, in the context of battered women's self-defense cases, much of the expert testimony focuses on the "passive, victimized aspects of battered women's experiences—their 'learned helplessness'—rather than explaining homicide as a woman's necessary choice to save her own life."[164] Schneider also asserts that expert testimony often moots women's own voice in the courtroom:[165] "Courts may find experts so useful in cases involving women that they regard expert testimony not as a complement to women's own voices, but as a substitute for them."[166]

The risks from expert testimony are similar in the context of a Hague Convention proceeding. Expert testimony often focuses on the woman's dysfunction from the battery, and the harm this dysfunction can cause her children, instead of focusing on the direct harm children experience from witnessing battery. Perhaps more importantly, expert testimony often moots the woman's own voice. The courts often focus on the psychologist's testimony and virtually ignore the women's testimony or the children's testimony about their fear of the batterer.[167] Furthermore, without a psychologist's diagnosis of post-traumatic stress disorder ("PTSD"), courts seem less willing to credit a woman's testimony about how the violence affects her, her children, or her assessment of their safety.

Expert testimony might be helpful in other, and perhaps less problematic ways, but it is rarely introduced for these other purposes. For example, expert testimony might educate the judge about the effects of domestic violence on children.[168] Expert testimony might help educate the judge about the credibility of the victim: "[T]he jury [or judge] may not understand that the battered woman's prediction of the likely extent and imminence of violence is

164. SCHNEIDER, *supra* note 1, at 80.

165. *Id.* at 82.

166. *Id.* at 138.

167. *See generally* Weiner, *Navigating the Road*, *supra* note 33, at 353-60 (discussing the issues focused on by the court in *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001 ("*Blondin IV*")).

168. Mok v. Cornelisson, [2000] N.Z.F.L.R. 582 (Fam. Ct.) (crediting evidence that child showed symptoms of disordered attachment and post-traumatic stress disorder). However, such education is not always successful. *See* S v. S, [1999] N.Z.F.L.R. 625 (High Ct. Auckland) (reversing trial court's finding that article 13(b) was satisfied, even though the appellate court accepted the testimony of one psychologist indicating that the father's violence against the mother had indirectly affected the children and that the father might be violent in the future, and from another psychologist indicating that the mother suffered from post-traumatic stress disorder and would suffer major risks to her heath and well-being if she returned to the child's habitual residence).

particularly acute and accurate."[169]

Asking individual litigants to educate judges is a burdensome proposition and a piecemeal solution. Judges adjudicating Hague Convention petitions should be trained specifically on the topic of domestic violence. While judicial training becomes more complicated with the dispersion of decisionmakers and the variety of languages spoken,[170] mechanisms exist that could facilitate training. For example, the Hague Conference now publishes a judges' newsletter and encourages judicial conferences on the Hague Convention. The Permanent Bureau could encourage Member States to implement their own internal training on this issue, justified in part by States' obligations under the U.N. Declaration on the Elimination of Violence Against Women.[171] Until judges are educated about domestic violence, however, advocates will have to weigh the pros and cons of relying upon experts in their cases.

D. Legal Representation

All of the substantive and practical challenges for battered women in Hague Convention cases are compounded by insufficient access to experienced lawyers. This concern is not limited to Hague proceedings. Professor Schneider explains that although battered women now have remedies available "on the books," they have no assured access to lawyers to represent them. Many battered women do not have the money to retain a lawyer.[172] Moreover, few lawyers are sensitive to their particular problems.[173] "Lack of skilled legal representation to assist in these necessarily interrelated matters has a deleterious impact on battered women's lives and safety."[174]

---

169. SCHNEIDER, *supra* note 1, at 131.

170. In the United States, ICARA gives state and federal courts concurrent jurisdiction over these matters, although some countries allow only a limited number of judges to hear these cases. *See generally* Weiner, *Navigating the Road*, *supra* note 33, at 284-85 (explaining that Great Britain and Germany have judges who are specifically designated to adjudicate Hague petitions).

171. *See* Declaration on the Elimination of Violence Against Women, *supra* note 17 (stating, that, "states should pursue by all appropriate means and without a delay a policy of eliminating violence against women and, to this end, should . . . . [d]evelop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices, or other interventions").

172. SCHNEIDER, *supra* note 1, at 95.

173. *See id.* (explaining that those who are willing to advocate for battered women often lack legal training).

174. *Id.* at 96.

This problem is multiplied in the context of Hague proceedings. Article 26 of the Hague Convention obligates States Parties to make available free legal representation to *petitioners*.[175] The United States submitted a reservation to article 26,[176] although most other nations have not. Consequently, in most countries, the petitioners (i.e., batterers) receive free counsel. However, the respondents (i.e., battered women) do not. In countries that offer free legal representation to petitioners, petitioners' counsel usually will have more experience.[177]

Even in the United States, battered women who are respondents may be disadvantaged in finding competent counsel compared to batterers who are petitioners. This is explainable, in part, because a prevailing petitioner may recover attorney fees, unless such an award is "clearly inappropriate,"[178] while no such provision exists for a prevailing respondent.[179] In addition, the National Center for Missing

175. Hague Convention on Child Abduction, *supra* note 32, at art. 26. Article 26 states, in relevant part:

> Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers.

Id.

176. The United States reservation was permitted by article 26, which states:

> [A] Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Id.

177. For example, England provides free legal representation and also has a centralized system "with a panel of experienced practitioners in London." International Centre for Missing and Exploited Children, Report and Recommendations to the Fourth Special Commission on the Hague Convention on the Civil Aspects of International Child Abduction (2001).

178. *See* ICARA, 42 U.S.C. § 11607(b)(3).

179. *Id.*; *see, e.g.,* Freier v. Freier, 985 F. Supp. 710 (E.D. Mich. 1997) (awarding prevailing petitioner attorney's fees and costs); Distler v. Distler, 26 F. Supp. 2d 723 (D. N.J. 1998) (holding that fees should be awarded to prevailing petitioner). This provision is consistent with the Hague Convention, which states in article 26:

> Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

See Hague Convention on Child Abduction, *supra* note 32, at art. 26.

and Exploited Children ("NCMEC")[180] is required by federal regulations to assist only applicants in securing information about attorneys, and no comparable mandate exists in relation to respondents.[181] Although the NCMEC will offer referrals to the few respondents who call the organization, the NCMEC normally does not make direct contact with the attorneys as it would for petitioners.[182]

Ideally, the battered woman's attorney would do more than merely mount a good defense for her in the Hague proceeding. If the court orders the child returned, the advocate must consider safety measures for her client in case the client returns with her child to the child's habitual residence. The lawyer must also try to ensure that her client's child is not removed from her. The risk of separation exists for a number of reasons. The woman might face a custody contest in the child's country of habitual residence. Experience in the United States indicates that batterers are two times more likely to seek sole custody of their children than other fathers.[183] The court

180. Exec. Order No. 12,648, 53 Fed. Reg. 30,637 (Aug. 11, 1988). In the United States, the Central Authority is the Office of Children's Issues in the U.S. Department of State. However the National Center for Missing & Exploited Children ("NCMEC") has a cooperative agreement with the U.S. Department of State to handle cases in which children have been abducted to the United States. The Department of State sets the policies that the NCMEC follows. The International Division of the NCMEC provides a variety of services, including the following: a victim reunification program (funding travel for indigent left-behind parents in order to reunite with their children); a Voice of America Child Alert (regarding particular cases); a networking program to connect law enforcement officers; a networking program to connect left-behind parents; and international photo distribution on its website. *See generally* NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, INT'L DIV., SERVICES (last visited Oct. 26, 2002), *available at* http://www.missingkids.org/.

181. *See* 22 C.F.R. § 94.6(e) (2002). This provision directs the NCMEC to do the following:

> Assist applicants in securing information useful for choosing or obtaining legal representation, for example, by providing a directory of lawyer referral services, or pro bono listing published by legal professional organizations, or the name and address of the state attorney general or prosecuting attorney who has expressed a willingness to represent parents in this type of case and who is employed under state law to intervene on the applicant's behalf.

Id.

182. Interview with Kathleen Ruckman, Supervising Attorney, National Center for Missing and Exploited Children, International Division (Apr. 9, 2002) (on file with author); Letter from Kathleen Ruckman, Supervising Attorney, National Center for Missing and Exploited Children, International Division, to Merle H. Weiner, Associate Professor, University of Oregon School of Law (May 1, 2002) (on file with author).

183. *See* AM. PSYCHOL. ASS'N PRESIDENTIAL TASK FORCE ON VIOLENCE & THE FAMILY, ISSUES AND DILEMMAS IN FAMILY VIOLENCE (last visited Oct. 26, 2002), *available at* http://www.apa.org/pi/pii/familyvio/issues5.html; *see also* Mahoney, *supra* note 43, at 44 ("Batterers use the legal system as a new arena of combat when they seek to keep their wives from leaving."). "Men who pursue custody have a better than even

adjudicating the Hague case may even give temporary custody of the child to the left-behind parent. Alternatively, the child's habitual residence might take the child into custody if it thinks the child's safety is threatened by remaining with his or her mother, i.e., the potential victim of further violence.[184] Similarly, separation may occur if the battered woman is prosecuted and jailed upon her return, since some countries criminalize child abduction.[185] Any of these outcomes would devastate many battered women since separation from their children is their chief fear.[186]

If the mother chooses for reasons of her own safety not to return with her child to the child's habitual residence, her advocate must be creative in obtaining her participation from abroad in any custody proceedings. The advocate must also work to secure her client rights of access if she loses custody, and to insure that any access rights are exercised in a place where the mother feels safe. While many of these tasks will best be accomplished by helping a client identify and retain effective legal representation in the child's habitual residence, finding competent counsel abroad is time consuming and requires its own set of skills.

In short, a battered woman in a Hague proceeding needs counsel who is savvy about the Hague Convention, the collateral custody and access issues, the dynamics of domestic violence, and the mechanics of locating competent foreign counsel if needed. Finding and affording such counsel can be problematic for a woman facing a Hague Convention petition.

---

chance of gaining custody. Even violent men are frequently successful in custody suits. In one study, fifty-nine percent of the judicially successful fathers had physically abused their wives; thirty-six percent had kidnapped their children." *Id.* at 44-45.

184. *See* Conclusions and Recommendations of the Fourth Meeting of the Special Commission, *supra* note 97, ¶ 1.13.

> To the extent permitted by the powers of their Central Authority and by the legal and social welfare systems of their country, Contracting States accept that Central Authorities have an obligation under Article 7(h) to ensure appropriate child protection bodies are alerted so they may act to protect the welfare of children upon return in certain cases where their safety is at issue until the jurisdiction of the appropriate court has been effectively invoked.

Id.

185. International Centre for Missing and Exploited Children, Report and Recommendations to the Fourth Special Commission on the Hague Convention on the Civil Aspects of International Child Abduction 8 (2001) (noting that child abduction is a crime in some states in Mexico).

186. *See* SCHNEIDER, *supra* note 1, at 52 (discussing Sally Merry's ethnographic study of treatment of domestic violence in Hawaii, which states that fear of losing their children is one reason battered women do not assert their rights).

E. Linking Gender Inequality and Domestic Violence

Finally, one of the major challenges of Hague Convention advocacy on behalf of domestic violence victims is making clear the conceptual link between violence and gender discrimination, and then making it matter. Public international law has recognized domestic violence as a form and cause of gender subordination.[187] Domestic violence inhibits equality,[188] and inequality contributes to the prevalence of domestic violence.[189] Consequently, a State's failure to address domestic violence is a human rights violation.[190]

Professor Schneider's book suggests that the connection between domestic violence and gender inequality has been "to a large degree . . . lost, or at least undermined domestically."[191] Similarly, this connection has been lost in the context of the Hague Convention. Battery, and its images, are still extremely personal. Battery is never discussed or conceptualized of as an issue of gender subordination. In fact, women's inequality is rarely, if ever, discussed, either in relation to domestic violence or otherwise.

There probably has been scant attempt to frame domestic violence

---

187. *See id.* at 27-28.

188. Coomaraswamy, *supra* note 148 ("Equality, political, social and economic participation, and development are all seriously undermined by the continuing and growing prevalence of violence against women generally and domestic violence specifically."). *See* CEDAW General Recommendation No. 19, *supra* note 16, ¶ 1 ("Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."); *see also* Declaration on the Elimination of Violence Against Women, *supra* note 17, at pmbl. The preamble states: "violence against women is an obstacle to the achievement of equality," that "opportunities for women to achieve legal, social, political and economic equality in society are limited, inter alia, by continuing and endemic violence," and that "violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men." *Id.*

189. Laws that "trap women in abusive relationships . . . include prohibitions and restrictions on divorce, a father's right of child custody, property distribution that favors males, discriminatory citizenship laws, laws proclaiming women perpetual minors, and restrictions on women's access to the legal system." *See* Armatta, *supra* note 121, at 787.

> In a study of ninety societies, four factors were predictive of societies with high rates of domestic violence: (1) male control of family wealth; (2) male domestic authority; (3) divorce restrictions for women; and (4) violent conflict resolution throughout the culture. 'When these four conditions are present in a society and in families, the likelihood is strong that wife beating will occur in a majority of households in the society.'

Id. at 841 (citing DAVID LEVINSON, FAMILY VIOLENCE IN CROSS-CULTURAL PERSPECTIVE 88 (1989)); *see generally* Ann D. Jordan, *Human Rights, Violence Against Women, and Economic Development (The People's Republic of China Experience)*, 5 COLUM. J. GENDER & L. 216, 244-45 (1996) (citing JOHANNA MARIA RICHTERS, WOMEN, CULTURE AND VIOLENCE: A DEVELOPMENT, HEALTH AND HUMAN RIGHTS ISSUE 150 (1994)).

190. *See* SCHNEIDER, *supra* note 1, at 46.

191. SCHNEIDER, *supra* note 1, at 6.

in this manner, in part, because the Convention's framework is not particularly conducive to these arguments. Article 20 would be the most likely provision under which these arguments might be relevant: a defense to return exists if return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."[192] Yet this provision has been narrowly interpreted,[193] and it is seldom invoked successfully.[194]

One could imagine information about the relationship between gender inequality and battery finding an audience among participants seeking to reform the Convention at the policy-making level. Reform efforts are ongoing. For example, the fatherhood initiative in this country is being mirrored by an access initiative at the Hague Conference on Private International Law. The Permanent Bureau at the Hague recently was asked to report on the desirability of a protocol to "provide in a more satisfactory and detailed manner than Article 21 . . . for the effective exercise of access/contact between children and their custodial and non-custodial parents."[195] There are also new efforts regarding mediation.[196] Advocates for battered women obviously should be involved with these and other

192. Hague Convention on Child Abduction, *supra* note 32, at art. 20.

193. The U.S. Department of State explains that "this exception, like the others, was intended to be restrictively interpreted and applied, and is not to be used, for example, as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed." 51 Fed. Reg. 10,510 (Mar. 26, 1986). *See also* Elisa Pérez-Vera, *supra* note 36, ¶ 118. The Pérez-Vera report states:

> [S]o as to be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject-matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles.

Id.

194. "The Special Commission notes that there have been very few reported cases in which a return order has been refused on the basis of Article 20, and that no such cases were reported in the Statistical Analysis of Applications made in 1999." *See* Conclusions and Recommendations of the Fourth Meeting of the Special Commission, *supra* note 97, ¶ 4.5.

195. *See id.*

196. *See id.* ¶ 1.10. The following was recommended:

> Contracting States should encourage voluntary return where possible. It is proposed that Central Authorities should as a matter of practice seek to achieve voluntary return, as intended by Article 7(c) of the Convention, where possible and appropriate by instructing to this end legal agents involved, whether state attorneys or private practitioners, or by referral of parties to a specialist organization providing an appropriate mediation service.

Id.

initiatives, although none appear to be.[197]

The challenge is for feminists to gain entrance into the decision-making circle, and to emphasize the present injustice of the Hague Convention when applied to battered women who try to escape abusive relationships. Participants must be told how the Hague Convention itself helps perpetuate battery and gender subordination when courts' grant batterers' petitions for the return of their children. Particular attention must be focused on the fact that the Hague Convention has become a substantial barrier to some women's ability to escape domestic violence. The Hague Convention's purpose is to dissuade abduction, and the number of women who have been dissuaded by the Hague Convention from leaving an abusive relationship will never be known definitively. When a victim of violence is dissuaded, the Hague Convention perpetuates violence, harms women and children, and contributes to gender subordination generally.

This last challenge is formidable, since subtle gender bias has existed in the context of the Hague Convention since its inception. At the time it was drafted, women abductors were invisible to reformers. The gender bias has continued in the twenty-five years or so of the Convention's operation as countless domestic violence victims have had their children taken from them and returned to the place where the mothers were battered.[198] Individual judges have made admirable attempts to ameliorate the Convention's impact on domestic violence victims, but these efforts are too piecemeal. The Hague Conference on Private International Law and the States Parties to the Hague Convention on Child Abduction need to recognize the systemic injustice being inflicted and need to address

197. I recently sent a letter to William Duncan articulating some of my concerns with respect to increasing the enforceability of access rights. In short, I expressed my general concern that any reform effort consider the fact that most abductors are mothers and many allege they have been the victims of domestic violence. In this context, I highlighted the following points: (1) If the underlying access awards are problematic in terms of the custodial parent's or child's safety, then enhancing their enforcement is problematic too. It is currently unclear whether all States Parties consider relevant the fact of domestic violence when making access orders. (2) Even if courts have considered the domestic violence in fashioning the access order, the abducted-to state must be able to satisfy any safety provisions contained in the order before access is enforced. (3) Finally, there needs to be some ability for women who have custody and then relocate to change access if access would threaten their or their children's safety. Requiring that courts in the abducted-to nation enforce an access order, and that modification only occur in the habitual residence, would place an extreme hardship on these victims and potentially threaten the safety of many.

198. Admittedly, male abductors have also had their children returned swiftly and with little opportunity to stop it. However, the different position of the noncustodial fathers and the battered women render any statements about equal treatment hollow.

it. Opening eyes that have been closed for such a long time will take remarkable resolve, for sometimes those who are committed to a particular law—and here a law with a noble and important purpose—can find it painful to see the truth.

V. CONCLUSION

Elizabeth Schneider has always been a firm believer in the importance of praxis.[199] Therefore, on this occasion of celebrating her work, and particularly her book *Battered Women and Feminist Lawmaking*,[200] it is appropriate to call attention to the promise transnational litigation offers to advocates of praxis. At a most basic level, these cases involve real women who face injustice under the current legal regime. Helping them is important work. Yet their cases also offer tremendous vehicles for effecting social change. Their cases potentially reinforce or encourage adherence to public international norms. Their cases provide a wonderful opportunity to engage in cross-border education and information sharing, as information travels literally around the world and then infiltrates other legal topics and discourses in a particular country. These cases illustrate how decisions in the public realm make possible domestic violence in the private realm.

Yet these are not easy cases for advocates of battered women's interests. The challenges of telling effective stories, gathering critical information, relying on expert testimony, and finding available and competent legal counsel are real. The need to emphasize the link between gender inequality and domestic violence is made difficult by the Convention's doctrinal structure and by the absence of domestic violence advocates from the rooms where policy is made.

On balance, however, the challenges are worth confronting, and hopefully overcoming, because the potential benefits are so large.

---

199. Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 600 (1986). Professor Schneider states:

> The fundamental aspect of praxis is the active role of consciousness and subjectivity in shaping both theory and practice, and the dynamic interrelationship that results. As Karl Klare has explained, lawmaking can be a form of praxis; it can be constitutive, creative, and an expression of 'the embeddedness of action-in-belief and belief-in-action.'

Id.; *see also* SCHNEIDER, *supra* note 1, at 7-8.

200. *See* SCHNEIDER, *supra* note 1.