Notes

RELEVANCE AND FAIRNESS: PROTECTING THE RIGHTS OF DOMESTIC-VIOLENCE VICTIMS AND LEFT-BEHIND FATHERS UNDER THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

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ABSTRACT

Thirty years ago, the international community took a hard line against international parental kidnapping. The Hague Convention on the Civil Aspects of International Child Abduction allows parental child abduction only in rare circumstances, such as when returning the child would create a "grave risk" of harm. Recently, mothers who have abducted their children when fleeing domestic violence have successfully pled this grave-risk exception, demonstrating the Convention's relevance to the realities of domestic violence. This Note welcomes that development, but argues that the rights of left-behind parents, who increasingly are fathers, must also be taken into account. Left-behind fathers, whether guilty of domestic violence or not, face significant challenges litigating their cases in the United States, and an overbroad interpretation of the grave-risk exception would only heighten these challenges. To remain fair, the Convention can—and must—consider the rights and realities of left-behind fathers.

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INTRODUCTION

The phrase "child abduction" conjures up haunting images of strangers kidnapping children from their parents. Yet far more prevalent are cases in which the children's parents are themselves the abductors.[1] Parental child abduction, also called family abduction or parental kidnapping, occurs when one parent takes a child across state lines and retains the child without the consent of the other parent.[2] Often, parental abductors do not just cross state lines; many take their children across international borders.

The problem of international parental kidnapping is particularly acute for the United States. More children are abducted into or out of the United States than any other party[3] to the Hague Convention on the Civil Aspects of International Child Abduction (Convention),[4] the international treaty that governs child abductions between contracting states. In 2009, 1,194 children were abducted from the United States, and 486 children were abducted into the United States from abroad.[5] It is thus unsurprising that cases of international parental kidnapping frequently seize headlines.[6]

When the Convention was drafted, the paradigmatic abductor was thought to be a noncustodial father, and issues of domestic

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1. In 1999, there were 56,500 reported cases of family child abduction in the United States, whereas there were only 12,100 cases of nonfamily child abduction. Andrea J. Sedlak, David Finkelhor, Heather Hammer & Dana J. Schultz, *National Estimates of Missing Children: An Overview*, NISMART (Off. Juv. Just. & Delinq. Prevention, D.C.), Oct. 2002, at 6, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/196465.pdf.

2. *See id.* at 4 (defining "family abduction").

3. NIGEL LOWE, HAGUE CONFERENCE ON PRIVATE INT'L LAW, A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2003 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: PART II—NATIONAL REPORTS 479 (2007 update) (2008), *available at* http://hcch.e-vision.nl/upload/wop/abd_pd03ef2007.pdf.

4. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 98.

5. These numbers represent only abductions between the United States and other contracting states. OFFICE OF CHILDREN'S ISSUES, U.S. DEP'T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 68 (2010), *available at* http://travel.state.gov/pdf/2010ComplianceReport.pdf.

6. For example, the case of Sean Goldman, who was abducted to Brazil by his mother five years ago and only recently returned to his father in the United States, attracted considerable media attention. *See, e.g.*, Sharon Cotliar & Dom Phillips, *'I Want My Son Back*,*'* PEOPLE, Mar. 23, 2009, at 137; Kirk Semple & Mery Galanternick, *Boy and Father Back in U.S. After Reuniting in Brazil*, N.Y. TIMES, Dec. 25, 2009, at A27.

violence had not yet become salient in the public eye.[7] Presently, however, the majority of international parental child abductors are custodial mothers, many of whom are fleeing from or claim to be fleeing from violent relationships.[8] When petitioned to return their children pursuant to the Convention, these fleeing mothers frequently seize upon Article 13(b) of the Convention, which allows a judge to deny return when it would pose a "grave risk" of harm to the child.[9] This invocation of Article 13(b) has proven effective. Recent case law has begun to reflect an interpretation of Article 13(b) that is sensitive to domestic-violence victims and their children—even when the violence was directed solely at the fleeing mother, not the child.[10] Similarly, scholars have urged an interpretation of Article 13(b) that protects those fleeing from violent relationships.[11] As a result, the Convention, through the interpretation of Article 13(b)'s grave-risk exception, has largely—though not entirely—adapted to the realities of interparental violence.[12]

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7. *See* PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 8–9 (1999) (citing studies from the 1970s and 1980s indicating that between 71 and 75 percent of abductors were male); Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 611–14 (2000) (noting that the media and legislators did not become aware of the role of domestic violence in motivating abductions until the early 1990s).

8. Nigel V. Lowe & Katarina Horosova, *The Operation of the 1980 Hague Abduction Convention—A Global View*, 41 FAM. L.Q. 59, 67–68 (2007) (noting that 68 percent of all abductors are mothers).

9. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, art. 13(b), 1343 U.N.T.S. at 101.

10. *See, e.g.*, Baran v. Beaty, 526 F.3d 1340, 1346 (11th Cir. 2008) (affirming a finding of grave risk of harm when the violence was directed solely at the abducting mother, not the child); Van De Sande v. Van De Sande, 431 F.3d 567, 570–71 (7th Cir. 2005) (finding grave risk of harm when the violence was directed solely at the abducting mother and only threats were made against the child); Miltiadous v. Tetervak, 686 F. Supp. 2d 544, 553–54 (E.D. Pa. 2010) (finding grave risk of harm based on spousal abuse).

11. *See, e.g.*, Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529, 532–35 (2004) (arguing that a narrow interpretation of the grave-risk exception does little to protect domestic-violence victims or their children); John Caldwell, *Child Abduction Cases: Evaluating Risks to the Child and the Convention*, 23 N.Z. U. L. REV. 161, 164 (2008) (noting the trend among "a number of legal academics" who advocate for a broader interpretation of Article 13(b)); Weiner, *supra* note 7, at 651–62 (arguing that a broader interpretation of the grave-risk exception would better protect domestic-violence victims).

12. This Note uses the phrase "interparental violence" interchangeably with "domestic violence" to refer to violence directed against the adult parent, not the child. Although cases in which physical violence is directed toward the child could also be termed "domestic violence," those cases more clearly fall within the ambit of Article 13(b) and are beyond the scope of this Note.

Yet fleeing parents and their children are not the only constituency whose rights merit protection in abduction cases. Parents whose children are abducted also enjoy rights under the Convention. Whether or not these left-behind parents, who increasingly are fathers,[13] are guilty of domestic violence, they are entitled at least to a fair hearing to seek the return of their children—especially given that the outcome of a Convention hearing will determine the key question of where custody is litigated. Left-behind fathers seeking to litigate their cases in the United States currently face considerable logistical challenges, including access to counsel. These challenges will be magnified if Article 13(b) is interpreted too broadly. If the grave-risk exception is not carefully interpreted, Convention disputes will acquire some of the features of custody disputes, such as inquiry into the child's best interests, that allow gender stereotypes to color outcomes. Blurring the standard appropriate for custody cases—best interests of the child—with the one reserved for Convention cases—grave risk of harm—will only undermine the rights of left-behind fathers.

Part I of this Note introduces the purposes of the Convention, the requirements for a prima facie case of abduction, and possible defenses. Part II describes how domestic violence, even if directed solely at the fleeing parent, may be grounds for a refusal to return the child under Article 13(b) of the Convention because of the well-known effects of exposure to domestic violence on children. It also suggests that fleeing mothers should be subject to a slightly lighter evidentiary burden when making claims under Article 13(b). Part III, however, balances the rights of left-behind fathers against the rights of fleeing mothers and stresses that left-behind fathers face formidable logistical challenges that will be exacerbated if Article 13(b) is interpreted too loosely. Gender bias evident in custody disputes and in Supreme Court decisions threatens to afflict Convention cases if Article 13(b) is not interpreted carefully. Fortunately, the domestic abduction framework offers solutions to ward off this danger and protect the rights of left-behind fathers.

Recent interpretations of Article 13(b) have rightly recognized the gravity of interparental violence by adapting the Convention to provide refuge for fleeing mothers and their children. Any interpretation of Article 13(b), however, must take into account the

13. *See infra* notes 61–62 and accompanying text.

precarious and unique situation of left-behind fathers. The rights and realities of left-behind fathers as well as those of domestic-violence victims must be protected in international family-law disputes if the Convention is to remain both relevant and fair.

I. STRUCTURE AND PURPOSE OF THE CONVENTION

The Hague Convention on the Civil Aspects of International Child Abduction, which has been incorporated into federal law,[14] has two key objectives: to deter child abduction and to provide for the swift return of abducted children.[15] To serve these aims, the Convention creates a "qualified summary-return mechanism,"[16] whereby judges must order the return of abducted children unless any of five exceptions apply. The most relevant exception here—and the one that is most commonly pled worldwide[17]—is the grave-risk exception under Article 13(b). The Convention's purpose and design illustrate the need to interpret Article 13(b) judiciously in order to protect the rights of both fleeing mothers and left-behind fathers.

A. Purpose of the Convention

Before the Convention entered into force, it was exceedingly difficult to recover a child abducted internationally by a parent.[18]

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14. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11611 (2006). Although the Convention was drafted in 1980, and ratified by the United States in 1986, it did not become effective until 1988, when Congress incorporated it into federal law. JAMES D. GARBOLINO, INTERNATIONAL CHILD CUSTODY CASES: HANDLING HAGUE CONVENTION CASES IN U.S. COURTS 14 (3d ed. 2000).

15. Specifically, the Convention's twin objectives are "[t]o secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "[t]o ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, art.1, 1343 U.N.T.S. at 98; *see also* ELISA PÉREZ-VERA, HAGUE CONFERENCE ON PRIVATE INT'L LAW, EXPLANATORY REPORT (1981), *reprinted in* 3 ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION: ENLÈVEMENT D'ENFANTS ¶ 25, at 426, 432 (1982), *available at* http://hcch.e-vision.nl/upload/expl28.pdf (identifying the two objectives of the Convention as the prevention of abduction and the swift return of children). The Pérez-Vera Report is the highly influential official report that accompanied the Convention. *See* Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,503 (Mar. 26, 1986) (identifying the Pérez-Vera Report as the "official history and commentary on the Convention and . . . a source of background on the meaning of the provisions of the Convention").

16. BEAUMONT & MCELEAVY, *supra* note 7, at 29.

17. Caldwell, *supra* note 11, at 161.

18. BEAUMONT & MCELEAVY, *supra* note 7, at 3.

Even if the child could be located in a foreign country, courts in that country were reluctant to order the child's return without lengthy proceedings, which made it less likely that return would actually benefit the child.[19] In a world in which individual mobility and international marriage were on the rise,[20] it soon became apparent that an international, cooperative response would be necessary to combat the growing problem of parental child abduction.

The Convention provides that response by creating an international legal framework common to all contracting states[21] that both deters parental abduction and ensures the swift return of children who are wrongfully abducted.[22] The Convention is rooted in the fundamental idea that abduction harms children.[23] Abducting children uproots them from familiar surroundings,[24] puts them at risk of serious emotional and psychological problems,[25] and strains or even breaks their bonds with their left-behind parents.[26] The effects of abduction, unfortunately, outlive the abduction itself; even if returned, many abducted children continue to have significant emotional and physical problems.[27] The left-behind parents of

19. *Id.*

20. *Id.* at 2.

21. At the time of publication of this Note, there are eighty-two contracting states to the Convention. *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, *Status Table*, HAGUE CONF. ON PRIVATE INT'L L., http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24 (last visited Dec. 18, 2010).

22. *See* International Child Abduction Remedies Act § 2(a)(3)–(4), 42 U.S.C. § 11601(a)(3)–(4) (2006) (recognizing that international cooperation is necessary to deter international child abduction and that the Convention provides a framework for swift return); *supra* note 15 and accompanying text.

23. International Child Abduction Remedies Act § 2(a)(1), 42 U.S.C. § 11601(a)(1) ("The international abduction or wrongful retention of children is harmful to their well-being."); Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, pmbl., 1343 U.N.T.S. at 98 ("The States signatory to the present Convention . . . [d]esiring to protect children internationally from the harmful effects of their wrongful removal or retention . . . [h]ave resolved to conclude a Convention . . . .").

24. TREVOR BUCK, INTERNATIONAL CHILD LAW 131 (2005).

25. *The Human and Social Cost of International Parental Child Abduction*, U.S. DEPARTMENT OF STATE, http://travel.state.gov/abduction/solutions/solutions_3872.html (last visited Jan. 9, 2011).

26. Julia Alanen, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 U. MIAMI INTER-AM. L. REV. 49, 57 (2008). For this reason, the action of abduction itself can be considered a form of domestic violence. *Id.* at 74.

27. Geoffrey L. Greif, *A Parental Report on the Long-Term Consequences for Children of Abduction by the Other Parent*, 31 CHILD PSYCHIATRY & HUMAN DEV. 59, 67–70 (2000)

abducted children similarly suffer emotional stress and turmoil,[28] which can continue long after the children are returned.[29] As Congress recognized when it incorporated the Convention into domestic law, only international cooperation can effectively minimize these harms.[30]

The interests of children thus lie at the heart of the Convention.[31] Yet its novelty is that the Convention seeks to respond to the interests of children *collectively*.[32] Instead of allowing a detailed best-interests-of-the-child analysis in every case, the Convention permits only the narrow inquiry of whether the child's removal was wrongful.[33] If the abduction was wrongful, and if the abducting parent fails to prove an exception that justifies the abduction,[34] the child will be returned forthwith to her country of habitual residence so that the merits of the underlying custody dispute can be litigated there.[35]

Thus, Convention cases are not custody cases.[36] Rather, the Convention establishes a legal mechanism for determining where the

(describing various postrecovery symptoms of abducted children); *id.* at 67 (finding that 42 percent of abducted children in the sample continued to have "significant problems" over time).

28. MAUREEN DABBAGH, THE RECOVERY OF INTERNATIONALLY ABDUCTED CHILDREN 14 (1997) (describing the intense emotional strain under which left-behind parents labor); MARILYN FREEMAN, REUNITE INT'L, INTERNATIONAL CHILD ABDUCTION: THE EFFECTS 29–31 (2006), *available at* http://www.reunite.org/edit/files/Library - Reunite Publications/ Effects Of Abduction Report.pdf (describing the symptoms of left-behind parents, ranging from physical sickness to shock to suicidal thoughts).

29. Greif, *supra* note 27, at 68 (finding that some left-behind parents' feelings of rage, depression, and anxiety continue for up to a decade after the abduction).

30. International Child Abduction Remedies Act § 2(a)(3)–(4), 42 U.S.C. § 11601(a)(3)–(4) (2006).

31. The preamble to the Convention states that "the interests of children are of paramount importance in matters relating to their custody." Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, pmbl., 1343 U.N.T.S. at 98.

32. BEAUMONT & MCELEAVY, *supra* note 7, at 29; *see also* PÉREZ-VERA, *supra* note 15, ¶ 24, at 431 ("[T]he struggle against the great increase in international child abductions must always be inspired by the desire to protect children . . . .").

33. BEAUMONT & MCELEAVY, *supra* note 7, at 29; *see also* Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, art. 3, 1343 U.N.T.S. at 98–99 (defining wrongful removal).

34. *See infra* notes 46–52 and accompanying text.

35. BEAUMONT & MCELEAVY, *supra* note 7, at 29–30; 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, 44 (2003).

36. International Child Abduction Remedies Act § 2(b)(4), 42 U.S.C. § 11601(b)(4) (2006); PÉREZ-VERA, *supra* note 15, ¶ 19, at 430.

ultimate question of custody will be decided.[37] By permitting the judge in a Convention proceeding to decide only the limited question of wrongful removal, rather than the broader question of custody, the Convention prevents judges hearing abduction cases from allowing their own subjective beliefs—a product of their own culture, community, and country—to influence decisions that are better made in the child's country of habitual residence.[38] The Convention's sharp focus on the sole question of wrongful removal was necessary to change the mentality of judges accustomed to employing an individualized, best-interests-of-the-child approach whenever confronted with disputes involving children.[39]

B. Structure and Operation of the Convention

The Convention provides a civil remedy that enables left-behind parents to obtain access to,[40] or secure the return of, their wrongfully removed or retained children.[41] As long as the left-behind parent has custodial rights and did not consent to the child's relocation, demonstrating a wrongful removal is not typically burdensome. First, either a state or federal court[42] must determine where the child was "habitually resident" at the time of the removal.[43] Second, the court must determine whether the removal breached the custody rights of

37. *See* Silberman, *supra* note 35, at 44 ("The Convention remedy can best be thought of as a 'provisional' remedy because it does nothing to dispose of the merits of the custody case. Additional proceedings are generally contemplated in the state of the child's habitual residence after the child is returned.").

38. PÉREZ-VERA, *supra* note 15, ¶ 22, at 431.

39. BEAUMONT & MCELEAVY, *supra* note 7, at 29. In contrast, the Convention on the Rights of the Child provides that "[i]n *all* actions concerning children . . . the best interests of the child shall be a primary consideration." Convention on the Rights of the Child, art. 3, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added).

40. This Note focuses on the return of children under the Convention and therefore does not discuss rights of access. In any case, the vast majority of petitions under the Hague Convention are for return, not access. *See* Lowe & Horosova, *supra* note 8, at 63 (noting that in 2003 there were 1369 return applications and only 250 access applications).

41. The term "children" is defined as minors less than sixteen years of age. Once a child turns sixteen, the Convention no longer applies. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, art. 4, 1343 U.N.T.S. at 99.

42. International Child Abduction Remedies Act § 4(a), 42 U.S.C. § 11603(a) (2006).

43. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, art. 3(a), 1343 U.N.T.S. at 98. Though the term "habitually resident" was left undefined by the Convention, an extensive national and international jurisprudence has identified several factors relevant to its determination. *See* KILPATRICK STOCKTON LLP, THE NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, LITIGATING CHILD ABDUCTION CASES UNDER THE HAGUE CONVENTION 12–13 (2007) (identifying factors that determine habitual residence).

the left-behind parent and whether the left-behind parent was exercising those rights at the time of the removal.[44] If the left-behind parent proves these elements by a preponderance of the evidence,[45] then the removal was wrongful. The burden then shifts to the abducting parent to show why the court should nonetheless deny the petition for the child's return.

Faced with a prima facie case for return, the abducting parent may plead any of five "discretionary exceptions" to resist the return of the child:[46] (1) the child has become "settled" in her new location after at least a year;[47] (2) the left-behind parent has consented to or acquiesced in the removal;[48] (3) the child, of sufficient age and maturity, objects to the return;[49] (4) the return would violate human rights and fundamental freedoms;[50] and (5) the return would expose the child to "grave risk" of harm.[51] Even if an abducting parent successfully pleads an exception, discretion ultimately rests with the judge whether to deny the return, allowing the child to stay.[52] Thus, although return is mandatory if the abducting parent cannot show that an exception applies, return is discretionary when the abducting parent successfully pleads an exception. All of the exceptions were drawn narrowly so that they would not undermine the Convention's aim of returning children.[53]

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44. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, art. 3(a)–(b), 1343 U.N.T.S. at 98–99.

45. International Child Abduction Remedies Act § 4(e)(1)(A), 42 U.S.C. § 11603(e)(1)(A).

46. *See* Jeanine Lewis, Comment, *The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity*, 13 TRANSNAT'L LAW. 391, 408 & n.153, 409 (2000) (noting that the phrase "discretionary exception[]" accurately describes what are often termed "defenses" under the Convention).

47. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, art. 12, 1343 U.N.T.S. at 100.

48. *Id.* art. 13(a), 1343 U.N.T.S. at 101.

49. *Id.* art. 13, 1343 U.N.T.S. at 101.

50. *Id.* art. 20, 1343 U.N.T.S. at 101.

51. *Id.* art. 13(b), 1343 U.N.T.S. at 101.

52. *See* PÉREZ-VERA, *supra* note 15, ¶ 113, at 460 ("[T]he very nature of these exceptions gives judges a discretion—and does not impose upon them a duty—to refuse to return a child in certain circumstances.").

53. *See* BEAUMONT & MCELEAVY, *supra* note 7, at 135–38 (stating that the defenses were "restrictively drafted" so that the Convention's return mechanism would function effectively). The existence of these exceptions demonstrates that, although deterring abduction is in the collective interest of children, abduction may be justified, or return unacceptably harmful, in some individual cases. *See* PÉREZ-VERA, *supra* note 15, ¶ 25, at 432 ("[I]t has to be admitted

The last of these exceptions, contained in Article 13(b) of the Convention, is commonly referred to as the grave-risk exception. Article 13(b) states that a child's return may be denied 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."[54] Fleeing parents who allege domestic violence in Convention proceedings most often rely on Article 13(b),[55] and thus its interpretation is key in balancing the rights of fleeing mothers and left-behind fathers.

II. DOMESTIC VIOLENCE UNDER THE CONVENTION

Worldwide, Article 13(b) is the most litigated of the Convention's five exceptions.[56] At first blush, the disagreement about the proper interpretation of Article 13(b) is somewhat curious: Congress, the State Department, and the Convention's drafters all intended that Article 13(b) be interpreted narrowly.[57] Indeed, the 13(b) exception "was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests";[58] it could only be met by a grave risk, such as that implicated by child sexual abuse.[59] Otherwise, by providing an overly broad exception to the Convention's rule of return, Article 13(b) would undermine the

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that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected.").

54. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, art. 13(b), 1343 U.N.T.S. at 101.

55. Roxanne Hoegger, *What if She Leaves? Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 BERKELEY WOMEN'S L.J. 181, 187 (2003).

56. Caldwell, *supra* note 11, at 161.

57. *See* International Child Abduction Remedies Act § 2(a)(4), 42 U.S.C. § 11601(a)(4) (2006) ("Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies."); Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,509 (Mar. 26, 1986) ("[I]t was generally believed that courts would understand and fulfill the objectives of the Convention by narrowly interpreting the exceptions . . . ."); BEAUMONT & MCELEAVY, *supra* note 7, at 135–38 (noting that Article 13(b) was drafted in an intentionally restrictive manner).

58. Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10,510. As the Ninth Circuit has stated, "[t]he exception 'is not license for a court in the abducted-to country to speculate on where the child would be happiest.'" Cuellar v. Joyce, 596 F.3d 505, 509 (9th Cir. 2010) (quoting Gaudin v. Remis, 415 F.3d 1028, 1035 (9th Cir. 2005)).

59. Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. at 10,510.

Convention's twin goals of deterring child abductions and returning children swiftly.[60]

The reason for the uncertainty surrounding Article 13(b) becomes clearer, however, when one recognizes that the restrictive approach to the grave-risk exception was adopted when the prototypical abductor was believed to be a noncustodial male, frustrated at being denied custody of his children.[61] This belief does not appear to reflect current reality. In 2003, the latest year for which comprehensive statistics are available, 68 percent of all abductors were female, and 85 percent of female abductors were primary or joint-primary caretakers.[62] At the same time, there is now both public acknowledgement of and empirical support for the fact that some custodial mothers who abduct their children are motivated by fears of domestic violence.[63] Although the reasons for this demographic shift remain unclear,[64] the drafters of the Convention likely did not imagine this pronounced change in the profile of the average abductor.[65] Indeed, the Convention itself, its implementing legislation, and the guidelines from the State Department do not mention domestic violence.[66] Thus, fleeing parents, typically mothers,[67] are

60. *See* BEAUMONT & MCELEAVY, *supra* note 7, at 135–39 (noting the difficulties in drafting and interpreting Article 13(b) due to the sometimes-competing interests of children and caretakers).

61. *See id.* at 8–9 (citing studies from the 1970s and 1980s indicating that between 71 and 75 percent of abductors were male).

62. Lowe & Horosova, *supra* note 8, at 67–68.

63. *See* Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*, 11 VIOLENCE AGAINST WOMEN 115, 120 (2005) (noting that one-third of all Convention cases made reference to familial violence, and 70 percent of those cases included reference to adult domestic violence); Weiner, *supra* note 7, at 611–14 (noting that the media and legislators started to become aware of the role of domestic violence in motivating abductions, perhaps as a result of a greater public awareness of domestic-violence issues generally, as early as 1993).

64. *See, e.g.*, BEAUMONT & MCELEAVY, *supra* note 7, at 10 (suggesting that the declining percentage of male abductors could be due to the increased success of males who seek custody rights, and who are thus no longer motivated to abduct, or to the stronger deterrent effect that the Convention has on fathers).

65. Caldwell, *supra* note 11, at 162.

66. Admittedly, at least one delegate who helped draft the Convention considered the situation of mothers fleeing domestic violence. BEAUMONT & MCELEAVY, *supra* note 7, at 136 (describing the United Kingdom delegate's observation that the final phrase of Section 13(b) was important to protect fleeing mothers). Yet this was not the paradigmatic case that the Convention sought to address, and the Convention did not deal explicitly with the problem. *See id.* at 135–36 (noting various other situations in which the final clause of Article 13(b) could be invoked).

asking courts to apply Article 13(b) to a situation that the Article's framers did not consider. Under these circumstances, disagreement as to the application and scope of Article 13(b) is unsurprising.

The demographic shift in the identity of the typical child abductor has prompted many scholars to call for an interpretation of Article 13(b) that protects domestic-violence victims and their children.[68] And though they have not done so uniformly, many courts have recognized that sufficient evidence of domestic violence—directed solely at the fleeing parent—can be grounds to deny a petition for return.[69] These outcomes find support both in policy, given the well-known effects of interparental violence on children,[70] and in the text of the Convention, in the "psychological harm" component of Article 13(b).[71] Despite what some scholars have suggested,[72] it is unnecessary to venture into novel interpretations of Article 13(b) to meet the needs of domestic-violence victims. The wiser course is for courts to seize upon the psychological harm component of Article 13(b), as many have done, and to lighten, if they have not already, a component of the evidentiary burden for fleeing parents attempting to show grave risk. Doing so will allow

67. Either parent in an intimate relationship can perpetrate domestic violence. But the common case under the Convention is violence by fathers against mothers, and thus this Note focuses on that scenario. *See* Alanen, *supra* note 26, at 78 (noting that men who abduct their children "[r]arely, if ever" claim domestic violence under the Article 13(b) grave-risk exception).

68. *See, e.g.*, Bruch, *supra* note 11, at 532–35 (arguing that a narrow interpretation of Article 13(b) does little to protect domestic-violence victims or their children); Caldwell, *supra* note 11, at 164 (noting that "a number of legal academics" advocate for a broader interpretation of Article 13(b) that would protect domestic-violence victims); Weiner, *supra* note 7, at 704 (noting that courts have failed to appreciate how witnessing domestic violence should qualify as "grave risk").

69. *Compare* Whallon v. Lynn, 230 F.3d 450, 460–61 (1st Cir. 2000) (ordering the return of a child partly on the ground that the father's physical and verbal abuse was directed at the mother, not the child), *with* Baran v. Beaty, 526 F.3d 1340, 1346 (11th Cir. 2008) (denying the return of a child based on a grave risk of physical or psychological harm when the physical and verbal abuse was directed primarily at the mother, not the child), Van De Sande v. Van De Sande, 431 F.3d 567, 570–72 (7th Cir. 2005) (finding a grave risk of harm when the violence was directed solely at the abducting mother and only threats were made against the child), *and* Miltiadous v. Tetervak, 686 F. Supp. 2d 544, 553–54 (E.D. Pa. 2010) (finding a grave risk of harm based on spousal abuse).

70. *See infra* Part II.A.

71. *See infra* Part II.B.

72. Merle H. Weiner, *Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases*, 58 AM. U. L. REV. 335, 348–52 (2008).

domestic-violence victims to continue to use Article 13(b) effectively, while not impinging on the rights of left-behind fathers.

A. Domestic Violence and its Effects on Children

It is widely accepted that interparental violence creates an unhealthy environment for a child[73] and heavily influences custody determinations.[74] But given that the Convention does not decide issues of custody and provides only narrow discretionary exceptions to the rule of return,[75] it is not self-evident that interparental violence should qualify as a grave risk of psychological harm under Article 13(b). Yet the enduring effects of interparental violence on children, as well as the overlap between interparental violence and child abuse, demonstrate that credible evidence of such violence meets the high standard of grave risk.

Exposure to interparental violence has profound effects on children's development.[76] Almost one hundred published studies have demonstrated links between childhood exposure to interparental violence and problematic behavior, either as a child or later as an adult.[77] Children exposed to interparental violence tend to exhibit higher rates of depression, anxiety, aggression, and fighting than children who are not exposed.[78] Those children may also have a difficult time focusing on schoolwork, thus hindering their intellectual

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73. *See* B.B. ROBBIE ROSSMAN, HONORE M. HUGHES & MINDY S. ROSENBERG, CHILDREN AND INTERPARENTAL VIOLENCE: THE IMPACT OF EXPOSURE 17–18 (2000) (describing the negative effects of interparental violence on the emotional climate of the family).

74. Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 26 (2002) (noting that "many states have a rebuttable presumption against an award of joint custody if domestic violence has occurred, and many of these states also presume that an award of sole custody to a perpetrator of domestic abuse is not in the child's best interests").

75. *See supra* notes 33–35, 57–59 and accompanying text.

76. Katherine M. Kitzmann, Noni K. Gaylord, Aimee R. Holt & Erin D. Kenny, *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 J. CONSULTING & CLINICAL PSYCHOL. 339, 347 (2003) ("Overall, the results of the current meta-analysis provided robust evidence that exposure to interparental aggression is associated with significant disruptions in children's psychosocial functioning, at least in the short term.").

77. Shetty & Edleson, *supra* note 63, at 126 (listing studies documenting the present and future effects of domestic violence on children).

78. John W. Fantuzzo & Wanda K. Mohr, *Prevalence and Effects of Child Exposure to Domestic Violence*, FUTURE CHILD., Winter 1999, at 21, 27; Kitzmann et al., *supra* note 76, at 345 (noting that "about 63% of child witnesses . . . far[ed] more poorly than the average child who had not been exposed to interparental violence").

development.[79] Even infants who witness interparental violence may exhibit measurably higher levels of stress, as well as severe attachment problems to the abused parent—typically the mother.[80]

Moreover, violence in a male's family is the single strongest predictor of abuse in later adult relationships.[81] The cycle-of-violence theory posits that children who are exposed to violence are more likely to perpetrate violence themselves.[82] Specifically, scholars have demonstrated that exposure to violence during childhood predicts the development of negative ideas about gender and interpersonal violence, which in turn predicts the use of violence by boys when they become adults.[83] As a result, battering rates are three times higher among men who witnessed interparental violence as children.[84]

Finally, children may carry with them the effects of violence in the form of anxiety and distress long after the violence has subsided.[85] Witnessing interparental violence in childhood has been linked to poorer adult social adjustment and higher rates of adult depression.[86] Thus, merely removing the child from the violent situation may not be sufficient to end its harmful effects.

In addition to the well-documented psychological effects of abuse, there is "considerable overlap" between interparental violence and child abuse.[87] One analysis, which collected studies reviewing the relationship between partner-directed and child-directed violence,

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79. Fantuzzo & Mohr, *supra* note 78, at 27.

80. PETER G. JAFFE, NANCY K. D. LEMON & SAMANTHA E. POISSON, CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 25 (2003) (noting the physical responses of infants who witness domestic violence); G. Anne Bogat, Erika DeJonghe, Alytia A. Levendosky, William S. Davidson & Alexander von Eye, *Trauma Symptoms Among Infants Exposed to Intimate Partner Violence*, 30 CHILD ABUSE & NEGLECT 109, 119–21 (2006) (finding that nearly half of infants exposed to intimate partner violence had at least one trauma symptom).

81. Deborah Reitzel-Jaffe & David A. Wolfe, *Predictors of Relationship Abuse Among Young Men*, 16 J. INTERPERSONAL VIOLENCE 99, 108 (2001) ("[S]tudies have for many years found violence in one's family of origin to be the most consistent indicator of abuse in men's adult relationships.").

82. JAFFE ET AL., *supra* note 80, at 27.

83. Reitzel-Jaffe & Wolfe, *supra* note 81, at 108.

84. *Id.* at 101.

85. JAFFE ET AL., *supra* note 80, at 29–30 (noting that even if there is no threat of present violence, "any association with the past . . . can create significant anxiety and distress" among children who have witnessed domestic violence).

86. *Id.* at 26–27.

87. Anne E. Appel & George W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 J. FAM. PSYCHOL. 578, 596 (1998).

found an average co-occurrence of 41 percent;[88] other studies have found a co-occurrence of between 30 percent and 60 percent.[89] Thus, when one parent violently abuses the other, there is a strong possibility that the child is also subject to abuse—a fact that some courts have seized upon to buttress their refusals to return children under Article 13(b).[90]

Courts must make individualized findings in each Convention case as to whether there is "specific evidence" of grave risk of harm to the child upon return;[91] they may not rely merely on studies and statistics to make Article 13(b) determinations. Nonetheless, the data suggest that when there is evidence of serious interparental violence, judges are on firm ground in refusing returns based on grave risk. Article 13(b) remains a high bar. But the documented effects on children of witnessing interparental violence and the overlap of interparental violence and child abuse allow courts, when presented with sufficient evidence, to confidently refuse return even when the violence is strictly interparental.[92]

B. The Meaning of Psychological Harm under Article 13(b)

Even though the Convention does not use the phrase "domestic violence," its language is broad enough to meet the needs of domestic-violence victims and their children. Article 13(b) states that the return of a child may be denied if "[t]here is a grave risk that [the child's] return would expose the child to physical or *psychological harm* or otherwise place the child in an intolerable situation."[93] It is the psychological harm component that provides the strongest textual support for protecting victims of violence and their children.

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88. *Id.* at 581.

89. Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 VIOLENCE AGAINST WOMEN 134, 136 (1999).

90. *E.g.*, Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045, 1057–58 (E.D. Wash. 2001) ("Spousal abuse, found by the Court in this case, is a factor to be considered in the determination of whether or not the Article 13(b) exception applies because of the potential that the abuser will also abuse the child.").

91. Baxter v. Baxter, 423 F.3d 363, 374 (3d Cir. 2005).

92. *E.g.*, Walsh v. Walsh, 221 F.3d 204, 220 (1st Cir. 2000) (finding grave risk and refusing to return a child based partially on the grounds that "children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser" and that there is a well-documented overlap between partner and child abuse).

93. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, art. 13(b), 1343 U.N.T.S. at 101 (emphasis added).

Many courts have recognized the crucial link between exposure to domestic violence and psychological harm. In *Baran v. Beaty*,[94] the Eleventh Circuit affirmed the lower court's refusal to return a child to Australia, even though there was no evidence that the abusive father had ever intentionally harmed the child.[95] That the father had been verbally and physically abusive toward the mother was sufficient to show that there would be a grave risk of harm if the child were returned.[96] Similarly, in *Van De Sande v. Van De Sande*,[97] the Seventh Circuit reversed a lower court's return order, noting that the lower court had been "unduly influenced" by the fact that most of the abuse was directed at the mother, not the children.[98] Finally, in *Walsh v. Walsh*,[99] the First Circuit found that the father's history of domestic violence constituted a grave risk of harm, even though the child was only witness to, not the target of, the violence.[100]

Nonetheless, as Professor Merle Weiner observes, "[s]ome courts are unable to appreciate the connection between domestic violence against the parent and the physical or psychological well-being of the child."[101] Weiner posits that one solution is to breathe life into the "intolerable situation" language of Article 13(b).[102] She notes that U.S. courts focus unduly on the restrictive grave risk of physical or psychological harm components of Article 13(b)[103] and urges courts to seize upon the pliable "intolerable situation" language to deny return in cases of interparental violence.[104]

This argument misses the mark. First, there is a risk that "intolerable situation," a phrase whose content is still undefined by American case law, will create an unacceptably broad exception to the Convention. In some foreign jurisdictions, courts have interpreted

94. Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008).

95. *Id.* at 1346.

96. *Id.*

97. Van De Sande v. Van De Sande, 431 F.3d 567 (7th Cir. 2005).

98. *Id.* at 570.

99. Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000).

100. *Id.* at 220.

101. Weiner, *supra* note 72, at 356; *see also id.* at 356 n.94 (citing federal district court cases in which domestic violence was considered irrelevant to the question of grave risk).

102. *Id.* at 345–52.

103. *Id.* at 345–46. It is widely acknowledged that courts tend to conflate the Article 13(b) exceptions. *See* BEAUMONT & MCELEAVY, *supra* note 7, at 139 & n.32 (noting that courts often combine the Article 13(b) exceptions and citing examples).

104. Weiner, *supra* note 72, at 356.

"intolerable situation" in so sweeping a manner[105] as to undercut the Convention's purpose of deterring child abduction by providing for the swift return of abducted children.[106] In the same vein, a recent revision to Swiss law[107] defines "intolerable situation" quite broadly, allowing Swiss judges to refuse return when it is "manifestly not in the child's best interests,"[108] a standard that does not rise to the level of grave risk.[109] This best-interest standard permits an abducting parent to use newfound ties in the destination country—such as having recently given birth or gotten married—to resist a return order.[110] Such a broad interpretation of Article 13(b) allows courts to consider

105. *See, e.g.*, P.F. v. M.F., [Jan. 13, 1993] S.C. (Ir.) (unreported), *available at* http://www.hcch.net/incadat/fullcase/0102.htm (finding that a father's financial irresponsibility was evidence that the children would be placed in an intolerable situation if returned, and denying the father's petition partly on that ground); *In re* O (Child Abduction: Undertakings), [1994] 2 Fam. 349 (U.K.) (noting that a disruption in the children's customary lifestyle could result in an intolerable situation).

106. *See* BEAUMONT & MCELEAVY, *supra* note 7, at 153 (criticizing an impermissibly broad interpretation of "intolerable situation").

107. Loi fédérale sur l'enlèvement international d'enfants et les Conventions de La Haye sur la protection des enfants et des adultes [LF-EEA] [Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults] Dec. 21, 2007, RS 211.222.32 (Switz.), *available at* http://www.admin.ch/ch/f/rs/211_222_32/index.html, http://www.admin.ch/ch/e/rs/2/211.222.32.en.pdf (unofficial English translation).

108. Andreas Bucher, *The New Swiss Federal Act on International Child Abduction*, 4 J. PRIVATE INT'L L. 139, 162 (2008).

109. The new legislation alters the traditional, restrictive grave-risk-of-harm inquiry by defining "intolerable situation" according to a broad three-part conjunctive test: whether a return would be "manifestly [contrary to] the child's best interests," whether the abducting parent cannot "reasonably be required" to return to the country of origin, and whether temporary "placement in foster care [would be] manifestly [contrary to] the child's best interests." *See id.* at 162–63 (reprinting the text of the Swiss legislation). This definition of "intolerable situation" has the potential to expand broadly the scope of Article 13(b). First, according to Professor Andreas Bucher, an advocate of the law, the legislation allows judges to take into account the newfound ties of a fleeing parent to the destination country. *Id.* at 158. But considering these ties cuts against the spirit of the Convention, which allows judges to evaluate only whether a *child* has become well settled, and then only after one year. *See* Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, art. 12, 1343 U.N.T.S. at 100 (establishing that judges can consider the child well settled in the new environment if more than a year passed between the abduction and the filing of the Convention petition). Second, Bucher argues that taking a child away from the primary caretaker and placing the child in foster care for the purposes of litigating a custody dispute could only be considered in "utterly exceptional circumstances." Bucher, *supra* note 108, at 159. Thus, under Bucher's analysis, the third part of the "intolerable situation" test rings hollow, given that temporary placement in foster care would almost always be manifestly contrary to the child's best interests.

110. Bucher, *supra* note 108, at 158.

factors better suited to a custody dispute, entailing far-reaching consequences for left-behind fathers.[111]

Second, even if fears of a loose interpretation of "intolerable situation" are overblown,[112] it is simply not necessary to parse the language of the Convention to protect children from the effects of interparental violence. The Convention explicitly allows judges to refuse returning a child to a situation in which there is a grave risk of psychological harm.[113] If courts fail to appreciate the link between interparental violence and psychological harm to children, then there is a need for more education on the psychological effects caused y exposure to interparental violence, not a need for creating a new exception to the Convention or invigorating a seldom-used one.[114] Victims of spousal abuse, in addition to providing evidence of the abuse itself, must emphasize the abundant scientific literature describing the psychological harm to children who are exposed to interparental violence. As previously noted, several circuits have

111. *See infra* Part III.B.1–3.

112. *See* BEAUMONT & MCELEAVY, *supra* note 7, at 140 (noting that Article 13(b) is "without doubt the most strictly regulated of all of the exceptions and has been upheld in only a handful of cases" (footnotes omitted)). In addition, contracting states evidenced their intent to interpret Article 13(b) narrowly by recently rejecting a Swiss amendment that would have broadened the Convention's Article 13(b) exceptions. *See* PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, REPORT ON THE FIFTH MEETING OF THE SPECIAL COMMISSION TO REVIEW THE OPERATION OF THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND THE PRACTICAL IMPLEMENTATION OF THE HAGUE CONVENTION OF 19 OCTOBER 1996 ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN ¶¶ 163–165, at 45–46 (2007), *available at* http://www.hcch.net/upload/wop/abd_2006_rpt-e.pdf ("A majority of experts also insisted that the Article 13(1) *b*) exception should be interpreted narrowly and cautioned that the Swiss proposal created an additional ground for refusal . . . ."). Notably, the Swiss Parliament later adopted a national law similar to what Switzerland proposed. Weiner, *supra* note 72, at 339, 343.

113. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, art. 13(b), 1343 U.N.T.S. at 101.

114. The Special Commission to Review the Operation of the Hague Convention, at its most recent meeting of contracting states, feared "that the Swiss proposal created an *additional* ground for refusal." *See* PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, *supra* note 112, ¶ 165, at 46 (emphasis added). Although it is not typically necessary to rely on the "intolerable situation" language of Article 13(b) in interparental violence cases, courts could rely on this language in at least some other cases. *See id.* ¶ 166, at 46 (acknowledging that the phrase "intolerable situation" could be used in cases "where the return of a child would not necessarily create a grave risk, but where it would still be inappropriate to order the return"). Some authors have suggested that an intolerable situation could arise, for example, in the case of separation of siblings. Weiner, *supra* note 72, at 348.

refused to return children based on interparental violence.[115] Courts should draw upon the "psychological harm" language in the Convention to recognize the effects of interparental violence on children.

C. An Adjustment to the Fleeing Parent's Evidentiary Burden

In addition to appreciating the link between interparental violence and psychological harm to children, an adjustment to the fleeing parent's burden to show grave risk under Article 13(b) would ensure that proving grave risk is not unduly burdensome. In some circuits, fleeing parents who claim to have been victims of domestic violence must show by clear and convincing evidence that the country to which the child would be returned is unable or unwilling to protect the child.[116] Thus, to succeed under Article 13(b), domestic-violence victims must gather evidence showing that the country of origin would fail to protect the child upon return. Though technically dicta, this formulation has been repeated by other circuits.[117] The effect of this requirement is to make it more difficult for fleeing parents to establish Article 13(b) exceptions.[118] At first glance, this approach seems reasonable: it reflects the view that American courts trust—or ought to trust—that courts in other contracting states are equally capable of protecting children, unless proven otherwise.[119] Such trust, it might be said, lies at the heart of international comity.

Yet this evidentiary requirement is unnecessary and burdensome, and it does little to further international comity. First, as other circuits have recognized, neither the Convention nor its

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115. *See supra* notes 94–104 and accompanying text.

116. *See In re* Adan, 437 F.3d 381, 395 (3d Cir. 2006) (stating that the abductor must show that courts in the country of habitual residence are unable or unwilling to protect the child); Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996) ("[W]e believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger *prior* to the resolution of the custody dispute . . . . Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, *when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection*." (second emphasis added)).

117. *See, e.g.*, Blondin v. Dubois, 238 F.3d 153, 162 (2d Cir. 2001) (quoting with approval the requirement that the abductor must show that the country of habitual residence is unable or unwilling to protect the child).

118. *See Friedrich*, 78 F.3d at 1068 ("When we trust the court system in the abducted-from country, the vast majority of claims of harm [under Article 13(b)] . . . evaporate.").

119. *See id.* ("[W]e acknowledge that courts in the abducted-from country are as ready and able as we are to protect children.").

implementing legislation mandate the examination of foreign legal systems.[120] Second, requiring the abductor to put forth such evidence creates difficult problems of proof, as the evidence of systemic deficiencies is most readily available in the country from which the abductor fled.[121] And third, finding grave risk without inquiring into the capacities of foreign legal systems does not offend any principle of international comity. As Judge Richard Posner has written, "If handing over custody of a child to an abusive parent creates a grave risk of harm to the child, . . . the child should not be handed over, however severely the law of the parent's country might punish such behavior."[122] To acknowledge that even the most robust and well-resourced legal systems suffer from enforcement gaps is not to denigrate mutual trust and comity; it is simply to embrace reality.[123] Thus, a fleeing parent who seeks to demonstrate that returning a child would create a grave risk of psychological harm should not carry the additional burden of demonstrating systemic deficiencies.

D. An Example of How Article 13(b) Protects Domestic-Violence Victims

By recognizing the well-known effects of interparental violence on children and by relieving the fleeing parent of the burden to show systemic weaknesses, courts have successfully used Article 13(b) to deny petitions for return in cases of interparental violence. Contrary to what some scholars have urged,[124] it has not been necessary to create new or dust off seldom-used exceptions to the Convention. The Eleventh Circuit case of *Baran v. Beaty* exemplifies how Article 13(b) is sufficiently protective of domestic-violence victims.[125]

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120. *See* Baran v. Beaty, 526 F.3d 1340, 1348 (11th Cir. 2008) (declining "to impose on a responding parent a duty to prove that her child's country of habitual residence is unable or unwilling to ameliorate the grave risk of harm"); Van De Sande v. Van De Sande, 431 F.3d 567, 571 (7th Cir. 2005) ("[T]o define the issue not as whether there is a grave risk of harm, but as whether the lawful custodian's country has good laws or even as whether it both has and zealously enforces such laws, disregards the language of the Convention and its implementing statute; for they say nothing about the laws in the petitioning parent's country.").

121. *Baran*, 526 F.3d at 1348.

122. *Van de Sande*, 431 F.3d at 571.

123. *Id.* at 570–71 ("There is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as in domestic relations.").

124. *See supra* notes 101–04 and accompanying text.

125. *Baran*, 526 F.3d at 1352.

An Australian father, Mr. Baran, petitioned for the return of his son Samuel from the United States.[126] Ms. Beaty, Samuel's mother, conceded that she had wrongfully removed Samuel but argued that returning him would pose a grave risk under Article 13(b).[127] Beaty claimed that Baran had a severe alcohol problem and that he physically and verbally abused her during her pregnancy with Samuel and, after she gave birth, in Samuel's presence.[128]

The district court sided with Beaty, ruling that returning Samuel to Australia would pose a grave risk of harm.[129] Baran appealed, arguing that he had never abused Samuel, and that grave risk could only be shown if there was evidence of violence toward the child, not just the mother.[130] The Eleventh Circuit disagreed. It found that the evidence of psychological and physical harm to Beaty created a grave risk of harm to Samuel upon his return.[131] The court explicitly noted that it was irrelevant that there was no evidence of intentional abuse of Samuel;[132] the effects of witnessing his mother's abuse would have created a grave risk if Samuel had been returned to his father. In making its decision, the court did not find it necessary to read deeply into the "intolerable situation" language of 13(b).[133] And the court did not require Beaty to adduce evidence regarding the state of social services in Australia, recognizing that so doing would create difficult problems of proof.[134] Accordingly, *Baran v. Beaty* exemplifies how Article 13(b) has been used appropriately to protect domestic-violence victims, and how the Convention has adapted to fit the modern-day context.

III. LEFT-BEHIND FATHERS AND DOMESTIC VIOLENCE

Although Article 13(b) was drafted when most child abductors were fathers and before domestic violence was a salient public concern,[135] it has been interpreted to protect victims of domestic

126. *Id.* at 1341–42.

127. *Id.* at 1345.

128. *Id.* at 1345–46 (quoting Baran v. Beaty, 479 F. Supp. 2d 1257, 1270–71 (S.D. Ala. 2007)).

129. *Baran*, 479 F. Supp. 2d at 1275–76.

130. *Baran*, 526 F.3d at 1346.

131. *Id.*

132. *Id.*

133. *See supra* text accompanying notes 106–07.

134. *Baran*, 526 F.3d at 1348.

135. *See supra* notes 63–67 and accompanying text.

violence and their children. When interpreting Article 13(b), however, it is crucial to bear in mind that there is another constituency whose rights merit protection—left-behind fathers.[136] An overbroad interpretation of Article 13(b) would not only undercut the Convention's twin goals of deterring child abduction and swiftly returning abducted children,[137] it would also jeopardize the rights of left-behind fathers.

Left-behind fathers face significant challenges litigating in the United States under the Convention, both in securing legal representation and in litigating their cases once they have representation. Allegations of domestic violence exacerbate these challenges. As many left-behind fathers contend, once domestic-violence allegations are made against them, their "rights and remedies seem abruptly to dissolve as system actors become complacent or even facilitate the kidnapper."[138] The odds, they feel, are against them from the moment of the abduction.

The disadvantages faced by left-behind fathers will become only more pronounced if Article 13(b) is not interpreted with care. An unhinged interpretation of Article 13(b)—one that is not grounded in specific evidence of a grave risk of psychological harm upon return—will increase the potential for Convention proceedings to assume the attributes of traditional custody contests. Inquiries regarding the child's best interests or who would be the better custodial parent, irrelevant in Convention disputes, would become relevant if not determinative.[139] This risk is real: at least one contracting state has

136. This discussion focuses on left-behind fathers, not left-behind parents generally, because the majority of left-behind parents are fathers. Lowe & Horosova, *supra* note 8, at 67. Further, Article 13(b) exceptions based on interparental violence are almost exclusively asserted by mothers against fathers—meaning that the parties faced with countering domestic-violence allegations are predominantly left-behind fathers. *See* Alanen, *supra* note 26, at 78 (noting that men who abduct their children "[r]arely, if ever" claim domestic violence under the Article 13(b) grave-risk exception). This does not mean that men are not victims of domestic violence, but only that they do not make allegations of domestic violence in Convention cases.

137. *See supra* notes 60–72 and accompanying text.

138. Alanen, *supra* note 26, at 73. There is evidence that some fathers feel this way in the national context, as well. *See* JOCELYN ELISE CROWLEY, DEFIANT DADS: FATHERS' RIGHTS ACTIVISTS IN AMERICA 159 (2008) (describing how, in the domestic context, some fathers feel that once an allegation is made, they "can do little to protect themselves from the resulting quagmire of investigations from law enforcement and social service agencies").

139. *See supra* text accompanying notes 37–38. Grave-risk inquiries and custodial determinations are markedly distinct. *See* Foster v. Foster, 654 F. Supp. 2d 348, 362 (W.D. Pa. 2009) ("It is important to stress that, under the Hague Convention, I am not charged . . . with resolving issues germane to a custody dispute. If I were, this would be in basketball parlance, a

passed legislation that broadens the Article 13(b) inquiry to include at least some elements of a custody determination.[140] And as some circuit court decisions demonstrate, it is only through careful and constant policing of Article 13(b)'s interpretation by district courts that the lines between Convention disputes and custody disputes remain distinct.[141]

Admittedly, because Convention proceedings do not determine custody, left-behind fathers who do not prevail in their Convention cases can still litigate to obtain custody of their children. Yet the stakes for a left-behind father in a Convention case are nonetheless high. When a judge refuses a child's return on grounds of grave risk of harm due to domestic violence—whether warranted or not—a left-behind father will have to fight for custody rights in a foreign jurisdiction that has already found allegations against him credible. Whatever difficulties the father faced during the Convention proceeding will only become more formidable during a subsequent custody proceeding. For instance, although a foreign left-behind father is eligible for free legal assistance in Convention cases, he is not eligible for such assistance in custody cases.[142] Further, a left-behind father litigating for custody in the United States will confront stereotypes that continue to mark traditional custody disputes—stereotypes that the Supreme Court has failed to roundly reject.[143] A finding of grave risk in a Convention proceeding can thus have a great impact on the ultimate custody determination.

Although interpreting the grave-risk exception under Article 13(b) to protect victims of domestic violence is a welcome development, an overly broad interpretation threatens to undermine the legitimate rights and interests of left-behind fathers, whether or

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'slam dunk.'"). Yet if these inquiries are blurred, evidence that is relevant to custody would also be admitted to resist return petitions.

140. New Swiss legislation allows for a refusal of return when return would be "manifestly not in the child's best interests" and permits an abducting parent to use newfound ties in the abducted-to country to resist a return order. Weiner, *supra* note 72, at 343; *see also supra* notes 111–14 and accompanying text.

141. *See infra* text accompanying notes 197–208.

142. *Compare* 45 C.F.R. § 1626.10(e) (2009) (establishing that a foreign national who files a Convention petition is eligible for legal aid), *with id.* § 1626.5 (2009) (setting forth an exhaustive list of categories of foreign nationals who are eligible for legal aid services, which does not include foreign parents seeking custody).

143. *See infra* Part III.B.2–4.

not they are guilty of domestic violence.[144] To strike the proper balance, judges must be sensitive to the precarious situation of left-behind fathers. In this vein, judges should consider the domestic legal framework that governs child abductions between U.S. states—a framework that preserves the rights of left-behind fathers more fully than the Convention.[145]

A. Logistical Hurdles of Litigating a Convention Case in the United States

1. *Challenges Faced by All Left-Behind Parents.* Foreign left-behind parents litigating their Convention cases in the United States face considerable cost-related and logistical challenges. Although Article 26 of the Convention provides that contracting states cannot require the left-behind parent to pay legal fees incurred as a result of litigation under the Convention,[146] the United States has opted out of this provision.[147] Left-behind parents without means to pay legal fees in Convention cases in the United States must rely on legal aid or other pro bono legal services,[148] which may, but are not required to, assist them.[149] Although cost may be an issue for both parents, it is the left-behind parent who bears the initial burden of filing a petition in court through an attorney. And the left-behind parent must do so within one year; otherwise, he opens himself to an argument that the

144. Left-behind fathers who are correctly found to present a grave risk to their children may not evoke sympathy, but even convicted batterers deserve to "have a competent court determine the nature and extent of the parent-child relationship." Alanen, *supra* note 26, at 84. This determination could range from court-mandated anger-management therapy to a termination of parental rights. *Id.* Custody rights, which come in various shapes and sizes, do not automatically dissolve simply because one parent is abusive. *Id.*

145. *See infra* Part III.C.

146. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, art. 26, 1343 U.N.T.S. at 102.

147. *See* International Child Abduction Remedies Act § 8(b)(1), 42 U.S.C. § 11607(b)(1) (2006) (establishing that the United States bears no responsibility for the legal costs of the left-behind parent).

148. *See id.* § 8(b)(2), 42 U.S.C. § 11607(b)(2) (requiring that left-behind parents bear the costs of litigating Convention cases, unless legal aid covers the costs).

149. Publicly funded legal aid services are permitted to represent litigants under the Convention, even if they are not American citizens. But legal aid services are not *required* to do so. 45 C.F.R. § 1626.10(e) (2009).

child has become "settled in its new environment,"[150] making his case that much more difficult.[151]

That the United States has entered a reservation to Article 26 and otherwise has no comprehensive legal aid system[152] places applicants whose children have been abducted into the United States at a serious disadvantage. This disadvantage is exacerbated by the fact that half of all incoming cases in 2009 originated in countries with modest levels of economic development. In 2009, there were 324 new incoming Convention cases, representing 486 children abducted into the United States.[153] Of these 324 cases, 156 (or 48 percent) originated from countries in which the per capita Gross Domestic Product (GDP) is less than twelve thousand dollars.[154] At the same time, the cost of litigating a Convention case can range from forty-five to fifty-five thousand dollars, not including the cost of an appeal.[155] Thus, most applicants from countries with lower levels of economic development will simply be unable to litigate their cases without

150. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, art. 12, 1343 U.N.T.S. at 100. Often called the "well-settled defense," this exception is only available in cases in which the child has been removed for more than a year. KILPATRICK STOCKTON LLP, *supra* note 43, at 41. Courts have determined that tolling begins when the petition is filed in court, not merely when it is submitted to the Central Authority, making the task of obtaining counsel to file the petition within one year from the date of abduction an urgent matter. *See* Muhlenkamp v. Blizzard, 521 F. Supp. 2d 1140, 1152 (E.D. Wash. 2007) (establishing that tolling begins when the petition is filed in court).

151. These cases are more difficult due to both the availability of the "well-settled defense" and the fact that fleeing parents must only demonstrate that the child has become well-settled by a preponderance of the evidence. International Child Abduction Remedies Act § 4(e)(2)(B), 42 U.S.C. § 11603(e)(2)(B).

152. Silberman, *supra* note 35, at 60.

153. OFFICE OF CHILDREN'S ISSUES, *supra* note 5, at 68.

154. Countries that are contracting states to the Convention, that were sources of new incoming Convention applications in 2009, and in which the GDP per capita is less than twelve thousand dollars, include Argentina, Belize, Bosnia-Herzegovina, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Macedonia, Mexico, Panama, Peru, South Africa, Turkey, Venezuela, Ukraine, and Uruguay. *Compare id.* (listing all contracting states that filed new incoming applications in 2009), *with Social Indicators: Indicators on Income and Economic Activity*, UNITED NATIONS STAT. DIVISION, http://unstats.un.org/unsd/demographic/products/socind/inc-eco.htm (last updated June 2010) (listing the GDP per capita of all countries in 2008).

155. Telephone Interview with Stephanie P. Cassano, Former Legal Projects Coordinator, Nat'l Ctr. for Missing & Exploited Children (Nov. 23, 2009). For four and a half years, Stephanie Cassano was responsible for placing incoming Convention cases with pro bono attorneys in the United States. This figure represents Cassano's conversations with pro bono coordinators at large law firms accustomed to taking on Convention cases.

substantial legal assistance.[156] International family law expert Stephen Cullen remarks that obtaining competent, affordable legal representation is the biggest challenge that left-behind parents face when litigating their cases in the United States.[157] The lack of legal aid can dishearten a left-behind parent[158] and has been the subject of criticism from abroad.[159] Attempts to increase funding to legal aid organizations and private attorneys willing to take on Convention cases have stalled in Congress.[160]

Thus, although the American media seizes upon high-profile cases in which parents have shelled out hundreds of thousands of dollars to litigate their Convention disputes,[161] the more typical case involves a left-behind parent from a country outside the United States who cannot afford to obtain American counsel.[162] In contrast, many other contracting states, comparable to the United States in economic development, offer free, comprehensive legal assistance for left-behind parents. For example, the United Kingdom, despite having entered a reservation to Article 26, provides counsel through legal aid without means or merits testing.[163] Similarly, Australia, New Zealand, and Ireland provide free legal aid to Convention applicants.[164]

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156. In the author's experience, the vast majority of applicants from Mexico and South America are unable to pay for legal services.

157. Telephone Interview with Stephen J. Cullen, Principal, and Kelly A. Powers, Associate, Miles & Stockbridge, P.C. (Nov. 4, 2009). Cullen has been litigating international child abduction cases for twenty years and is attorney adviser to the United States Delegation to the Hague Special Commission.

158. FREEMAN, *supra* note 28, at 42.

159. *See, e.g.*, BLANCA GÓMEZ BENGOECHEA, ASPECTOS CIVILES DE LA SUSTRACCIÓN INTERNACIONAL DE MENORES: PROBLEMAS DE APLICACIÓN DEL CONVENIO DE LA HAYA DE 25 DE OCTUBRE 1980, at 128–30 (2003) (noting that the combination of a lack of comprehensive legal aid and the Article 26 reservation is particularly problematic for applicants whose children are abducted into the United States).

160. For example, a bill introduced in the House in 2008 would have created a program to provide funding to those willing to take on Convention cases. At the time of publication of this Note, there has been no action upon this bill since July 28, 2008. International and Parental Child Abduction Remedies Assistance Act, H.R. 6095, 110th Cong. § 4(a) (2008).

161. The case of Sean Goldman, who was only recently returned to his father in the United States after a five-year retention in Brazil, attracted considerable media attention. *See supra* note 6. Sean's father reports spending over four hundred thousand dollars in litigation costs. BRING SEAN HOME FOUND., http://bringseanhome.org (last visited Jan. 9, 2011) (soliciting donations to cover Sean's father's legal costs).

162. Telephone Interview with Stephen J. Cullen & Kelly A. Powers, *supra* note 157.

163. Silberman, *supra* note 35, at 60 & n.126 (noting the Article 26 reservation of the United Kingdom); *International Parental Child Abduction: United Kingdom*, U.S. DEPARTMENT OF STATE, http://travel.state.gov/abduction/country/country_533.html (last visited Jan. 9, 2011)

Once they secure legal representation, left-behind parents may continue to find themselves at a disadvantage due to geography. It can be difficult, costly, and sometimes impossible for left-behind parents to travel to the United States for a Convention hearing. Although the presence of the left-behind parent is not required by the Convention, attorneys typically try to have their client travel to the United States if possible. As Cullen remarks, "[w]e always try somehow to get the [left-behind parent] here. But the judges are not just used to doing this all under the affidavit. In most other countries, it's all done by affidavit."[165] The United States is indeed an outlier in this regard. In the United Kingdom and New Zealand, for instance, it is "commonly accepted" that evidence will be submitted in affidavit form, and left-behind parents would "certainly not be expected to travel abroad" for the purposes of a Convention hearing.[166] American judges, in contrast, are accustomed to seeing both parties before them. And though some judges may be amenable to telephonic or satellite testimony, many state judges lack the resources to take remote testimony.[167] Thus, left-behind parents and their attorneys must coordinate to arrange travel to the United States.[168] If the left-behind parent is fortunate enough to be represented by a law firm providing pro bono representation, then the firm may cover travel expenses;[169] if not, the left-behind parent may not be able to afford the cost of travel. Additionally, the left-behind parent may face immigration barriers that make travel to the United States impossible.[170]

(noting that the United Kingdom provides free legal assistance for return petitions under the Convention).

164. *International Parental Child Abduction: Australia*, U.S. DEPARTMENT OF STATE, http://travel.state.gov/abduction/country/country_507.html (last visited Jan. 9, 2011); *International Parental Child Abduction: New Zealand*, U.S. DEPARTMENT OF STATE, http://travel.state.gov/abduction/country/country_1477.html (last visited Jan. 9, 2011); *International Parental Child Abduction: Republic of Ireland*, U.S. DEPARTMENT OF STATE, http://travel.state.gov/abduction/country/country_499.html (last visited Jan. 9, 2011).

165. Telephone Interview with Stephen J. Cullen & Kelly A. Powers, *supra* note 157.

166. Caldwell, *supra* note 11, at 186.

167. Telephone Interview with Stephen J. Cullen & Kelly A. Powers, *supra* note 157.

168. KILPATRICK STOCKTON LLP, *supra* note 43, at 91–93 (outlining the logistics of arranging travel to the United States for left-behind parents).

169. *Id.* at 92.

170. In the author's experience, it is not uncommon that left-behind parents have previously entered the United States illegally and are therefore unable to procure a tourist visa to attend the hearing. Furthermore, the Convention does not require that a contracting state admit a left-behind parent, even if only for the purposes of attending a Convention hearing. *Possible*

2. *Specific Challenges Faced by Left-Behind Fathers.* Though all left-behind parents face challenges when litigating in the United States, left-behind fathers face additional, unique logistical obstacles. For example, even when legal aid is potentially available, pro bono counsel are frequently disinclined to litigate on behalf of a client accused of domestic violence.[171] Large, well-resourced law firms that routinely consider taking on Convention cases often decline those involving domestic-violence allegations because expected public relations or marketing benefits might not accrue.[172] Moreover, cases that involve allegations of domestic violence, if decided in favor of the left-behind father, are likely to be appealed—making these cases more expensive for, and thus less attractive to, pro bono counsel who might otherwise be interested.[173] The Office of Children's Issues at the State Department maintains a list of attorneys with experience in Convention cases who may be willing to work on a free or reduced-fee basis,[174] but it does not actively place cases with attorneys.[175] Thus, women who abduct their children into the United States likely enjoy a comparative resource advantage, especially given the network of agencies that assist women in cases of domestic violence.[176]

Further, it is common for abducting parents to devalue the importance of the left-behind parent in the child's life—perhaps even more common than for parents locked into a traditional custody

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Solutions—Using the Hague Abduction Convention, U.S. DEPARTMENT OF STATE, http://travel.state.gov/abduction/solutions/hagueconvention/hagueconvention_3854.html (last visited Jan. 9, 2011) ("The Convention does not confer any immigration benefit. Anyone seeking to enter the United States who is not a United States citizen must fulfill the appropriate entry requirements . . . .").

171. Telephone Interview with Stephanie P. Cassano, *supra* note 155.

172. *Id.*

173. *Id.*

174. *Finding an Attorney*, U.S. DEPARTMENT OF STATE, http://travel.state.gov/abduction/incoming/legalaid/legalaid_4309.html (last visited Jan. 9, 2011).

175. *See* 22 C.F.R. § 94.6(e) (2010) (noting that the State Department may "[a]ssist 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").

176. Telephone Interview with Stephen J. Cullen & Kelly A. Powers, *supra* note 157. In Cullen's experience, abducting mothers who make accusations of domestic violence are typically able to find legal aid "immediately," whereas left-behind fathers are not able to do so. *Id.* For example, the National Domestic Violence Hotline, in operation twenty-four hours a day, provides referrals to agencies in all fifty states for those who allege domestic violence. NAT'L DOMESTIC VIOLENCE HOTLINE, http://www.thehotline.org (last visited Jan. 9, 2011).

battle.[177] One commentator has even suggested that "a parent, by the very act of abduction, is likely to be at significantly increased risk to make false and unrealistic allegations that the other parent poses potential harm to the child."[178] Whether or not unsubstantiated claims are more likely in the abduction context is uncertain;[179] what is clear is that without legal aid, many left-behind fathers are left to contest domestic violence allegations on their own. And if a father loses a Convention hearing on domestic-violence grounds, his chances of gaining even limited rights during a custody proceeding drop precipitously, because whatever obstacles he faced in the Convention context will only loom larger in the custody context. For example, although obtaining legal aid services may be difficult, a foreign left-behind father is at least permitted to receive such aid for the purposes of a Convention hearing; he is not permitted to receive legal aid services, however, for the purposes of a custody proceeding.[180] Thus, although all foreign left-behind parents face logistical hurdles in litigating the Convention cases, fathers confront unique challenges, especially when they are accused of domestic violence.

B. Gender Stereotyping

Article 13(b) permits only a restricted inquiry—whether there is "specific evidence" of a grave risk of harm to the child upon return.[181] It is not an invitation to consider the broader range of factors relevant to a custody determination,[182] such as where the child would be

177. Janet R. Johnston & Linda K. Girdner, *Early Identification of Parents at Risk for Custody Violations and Prevention of Child Abductions*, 36 FAM. & CONCILIATION CTS. REV. 392, 395 (1998).

178. Glen Skoler, *A Psychological Critique of International Child Custody and Abduction Law*, 32 FAM. L.Q. 557, 577 (1998).

179. As there is conflicting data on the percentage of domestic-violence allegations that are unsubstantiated in custody disputes overall, it would be difficult to demonstrate whether unsubstantiated claims are higher in the abduction context. *See* Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 395 n.76 (2008) (citing studies showing disparate percentages of unsubstantiated domestic-violence allegations in custody cases).

180. *See supra* note 142 and accompanying text.

181. Baxter v. Baxter, 423 F.3d 363, 374 (3d Cir. 2005).

182. International Child Abduction Remedies Act § 2(b)(4), 42 U.S.C. § 11601(b)(4) (2006) ("The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.").

happiest,[183] who would be the better parent,[184] or the relative strengths of the parental bonds.[185] In short, Article 13(b) is "not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests."[186] One reason for this restrictive interpretation is that an overly broad interpretation of the grave-risk exception would undermine the Convention's goal of swiftly returning abducted children.[187] But there is an equally compelling reason to avoid a best-interests inquiry: determining the child's best interests threatens to invite the type of gender stereotyping prevalent in custody disputes.

In traditional custody contests, in which the child's best interests are appropriately the focal point, gender biases—real and perceived—continue to color outcomes and disfavor fathers.[188] Thus, if Convention cases begin to consider the child's best interests through a loose interpretation of Article 13(b), as at least one contracting state has done[189] and some district courts are prone to do,[190] they too will be affected by gender biases. Left-behind fathers accordingly may have to contend with gender bias at two stages: at Convention proceedings, if Article 13(b) is interpreted too loosely, and again at custody proceedings. Although gender biases are unfair to both sexes, left-behind fathers, especially those accused of domestic violence, already face unique logistical challenges in litigating their cases that may not be present for fleeing mothers.[191] And, unfortunately, the Supreme Court has failed to squarely reject

183. Friedrich v. Friedrich, 78 F.3d 1060, 1068 (6th Cir. 1996) ("The exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest.").

184. Whallon v. Lynn, 230 F.3d 450, 459 (1st Cir. 2000) ("Courts are not to engage in a custody determination or to address such questions as who would be the better parent in the long run.").

185. *See* Richard A. Gardner, *Guidelines for Assessing Parental Preference in Child-Custody Disputes*, 30 J. DIVORCE & REMARRIAGE 1, 2 (1999) (noting that evaluating the strength of the parent-child psychological bond is the heart of a best-interests analysis in a custody dispute).

186. Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986).

187. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 4, art. 1, 1343 U.N.T.S. at 98; BEAUMONT & MCELEAVY, *supra* note 7, at 29; *see also* PÉREZ-VERA, *supra* note 15, ¶ 34 (explaining that the exceptions to return "are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter").

188. *See infra* Part III.B.2.

189. *See supra* notes 107–10 and accompanying text.

190. *See infra* Part III.B.1.

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

gender stereotyping in its jurisprudence,[192] creating the risk that lower courts will rely at least in part upon gender stereotyping as a basis for deciding Convention cases. The causal chain is straightforward: an unhinged interpretation of Article 13(b) allows for a best-interests inquiry, and a best-interests inquiry is often shaped by gender stereotypes. If Article 13(b) is not interpreted with care, the perception and reality of gender bias that afflict custody determinations will also afflict Convention proceedings.

1. *The Judicial Tendency to Conflate Grave Risk with Best Interests*. Despite Article 13(b)'s narrow ambit, which demands "specific evidence" of a grave risk of harm upon return in order to refuse to return a child,[193] some courts have broadened their inquiries to consider factors relevant to custody and best interests.[194] Indeed, the risk of launching into a best-interests inquiry looms large enough to affect strategic litigation decisions. Convention expert Lawrence Katz explains that he always goes to federal court because "[f]ederal courts treat cases differently; generally speaking, state courts will turn it into a best-interest case."[195] As family and custody issues are the province of state law, state court judges are more likely than their federal counterparts to see the Convention and custody cases as analogous and thus to be drawn into a detailed best-interests analysis.[196]

Yet the risk of conflating best-interests and grave-risk inquiries occurs in federal court as well. In *England v. England*,[197] a mother abducted her child from Australia into the United States. The district court refused to order the child's return, finding that returning the child to Australia just to determine custody could result in her ultimately being sent back to the United States to live with her mother, and that "such movement back and forth poses a serious threat to her psychological welfare."[198] The district court noted that it

192. *See infra* Part III.B.4.

193. Baxter v. Baxter, 423 F.3d 363, 374 (3d Cir. 2005).

194. *See infra* text accompanying notes 206–13.

195. Telephone Interview with Lawrence Katz, Attorney, Law Offices of Attorney Lawrence S. Katz (Nov. 17, 2009). Lawrence Katz is an International Academy of Matrimonial Lawyers fellow and has been litigating Convention cases since 1995.

196. *See* KILPATRICK STOCKTON LLP, *supra* note 43, at 64 (noting that state court judges, as opposed to federal judges, "are accustomed to making 'best interest of the child' determinations").

197. England v. England, 234 F.3d 268 (5th Cir. 2000).

198. *Id.* at 271.

arrangement,[207] it is largely irrelevant in determining whether there is sufficient evidence of grave risk in a Convention proceeding.[208] Moreover, this broadening of Article 13(b) to include questions of best interests and custody is not simply legal error; it also invites the type of gender stereotyping that characterizes many custody contests.

2. *Historical Gender Bias in Child Custody and Current Gender Roles.* Though fathers were given exclusive custody rights to their legitimate children early in American history, by the 1920s a preference for awarding custody to mothers had become widespread.[209] This "tender-years doctrine" gave legal imprimatur to the belief that mothers were better suited to raise young children than were fathers.[210] In some states, this presumption continued until the mid-1970s.[211] Even as other states replaced the tender-years presumption with the best-interests-of-the-child test, however, there was typically little difference between the two standards in practice.[212] Because society expected little of fathers in raising children, and expected much of mothers, it was not surprising that judges generally viewed maternal custody as "best" for the child.[213]

Today, the best-interests test remains the dominant standard in custody cases, despite an acknowledgement that it is more aspirational than administrable.[214] And though states have tried to statutorily define the criteria used to determine best interests,[215] stereotypical gender roles continue to inform the content of the

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207. *See* Joan B. Kelly & Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 FAM. REL. 352, 353 (2003) (noting that visitation arrangements that do not take into account the abrupt departure of one parent after divorce and are not "attuned to children's developmental, social, and psychological needs" may increase postdivorce stress for children).

208. *See* Walsh v. Walsh, 221 F.3d 204, 220 n.14 (1st Cir. 2000) ("We disregard the arguments that grave risk of harm may be established by the mere fact that removal would unsettle the children who have now settled in the United States. That is an inevitable consequence of removal.").

209. Joan B. Kelly, *The Determination of Child Custody*, FUTURE CHILD., Spring 1994, at 121, 122.

210. Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 897 (1998).

211. Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 962 (2005).

212. McNeely, *supra* note 210, at 903.

213. *Id.*

214. Bartlett, *supra* note 74, at 15–16.

215. *Id.* at 16.

criteria. Simply put, what is "best" for the child is still implicitly defined by the roles that society expects mothers and fathers to play, both during and after their relationship. When a relationship ends, mothers are expected to be primary caretakers and choose their children above all else, or else risk social stigma as failures.[216] But, as Professor Solangel Maldonado notes, the expectations surrounding postdivorce fathers are much more ambiguous: although fathers are expected to provide child support, they get mixed messages from society and from the law about their proper role in childrearing.[217] Fathers, by and large, are expected to maintain some type of visitation schedule with their children, but most forms of visitation involve them only minimally in childrearing.[218] Thus, a father's postdivorce role is "primarily economic"[219] with light childrearing duties.[220]

This type of gender stereotyping, affecting both mothers and fathers, has not been lost on the Supreme Court, which has recognized that "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men."[221] These "mutually reinforcing stereotypes"[222] shape the content of best-interests inquiries and affect the perceptions of all system actors—judges, fathers, mothers, and lawyers.[223]

3. *Gender Bias in Custody Disputes—Real and Perceived*. The perception of gender bias in custody disputes and other aspects of family law has given impetus to the fathers' rights movement, which

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216. Maldonado, *supra* note 211, at 984; *see also* McNeely, *supra* note 210, at 901 ("Woe to the mother who did not choose to selflessly and altruistically place her children above all else, for she would be deemed a failure as a mother, and as a woman.").

217. Maldonado, *supra* note 211, at 939.

218. *Id.* at 976–77 (describing how many fathers consider even the most generous visitation schedules—one weeknight per week, along with alternating weekends and holidays—far from sufficient to maintain a parental relationship).

219. *Id.* at 940.

220. McNeely, *supra* note 210, at 914 (noting that the role of the postdivorce father is limited to "financial provider and insignificant caretaker").

221. Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

222. *Id.*

223. *See generally* Maldonado, *supra* note 211, at 967–75 (describing how stereotypes and perceived biases may affect all actors in a custodial dispute).

has generated academic commentary,[224] activism,[225] and a plethora of self-help resources dedicated to custody-seeking fathers.[226] Many fathers' rights advocates allege that custody laws, informed by an underlying belief that men have only a limited role in childrearing, are skewed against them.[227] The evidence, albeit qualified, demonstrates that at least some of their claims are merited.

In the late 1980s and early 1990s, over thirty states created task forces to research the extent of gender bias in their custody systems.[228] Many states found that, despite neutral custody laws, some judges are still influenced by societal beliefs that mothers are better parents than fathers.[229] Summarizing the voluminous task force studies, one researcher concluded that "[t]he majority of states found that courts unjustly presume men to be inferior parents to women."[230] The remnants of this preference for mothers may very well affect custody decisions, as women continue to receive primary residential—that is, physical—custody of children in the vast majority of cases.[231]

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224. *See generally* THE FATHERHOOD MOVEMENT: A CALL TO ACTION (Wade F. Horn, David Blankenhorn & Mitchell B. Pearlstein eds., 1999) (collecting essays by leaders in the fatherhood movement).

225. *See, e.g.*, CROWLEY, *supra* note 138, at 36–38 (describing the emergence of modern fathers' rights activist groups); FATHERS & FAMILIES, http://www.fathersandfamilies.org (last visited Jan. 9, 2011) (noting that the organization "seek[s] better lives for children through family court reform").

226. *See* JULIA LUYSTER, A FATHER'S RIGHT TO CUSTODY (2009) (offering resources and support for fathers seeking custody and visitation rights); FATHER'S RIGHTS, http://www.fathersrightsinc.com (last visited Jan. 9, 2011) (same); FATHERS & DADS FOR EQUAL CUSTODY RIGHTS, http://www.fathersrights.org (last visited Jan. 9, 2011) (same); FATHERS RIGHTS FOUND., http://www.fathers-rights.com (last visited Jan. 9, 2011) (same).

227. Maldonado, *supra* note 211, at 967.

228. Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 3 n.1 (1996).

229. *See* Maldonado, *supra* note 211, at 968. Professor Maldonado calls specific attention to both the Massachusetts and Georgia task forces. *Id.* The Massachusetts task force found that "stereotypes about fathers may sometimes affect case outcomes." *Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745, 748 (1990). The Georgia task force interviewed many witnesses who testified that judges believe that mothers are better parents than fathers are. Ga. Comm'n on Bias in the Judicial Sys., Supreme Court of Ga., *Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System*, 8 GA. ST. U. L. REV. 539, 658 (1992).

230. Swent, *supra* note 228, at 60.

231. *See* Maldonado, *supra* note 211, at 966 (noting that "sole *residential* custody to one parent (usually the mother) is still the most common custodial arrangement after divorce"); McNeely, *supra* note 210, at 916 (noting that women receive primary residential custody 90 percent of the time).

Postdivorce fathers are typically granted visitation rights,[232] leading to sharp differences in the quality and quantity of parenting time.[233]

Notably, judges decide only 5 percent of all custody disputes; in the remainder of cases, parents voluntarily enter into custody agreements without judicial intervention.[234] And when parents strike a custodial agreement rather than litigate, they overwhelmingly agree to award sole physical custody to the mother.[235] These statistics are striking because when fathers choose to litigate for sole or joint physical custody, they are successful more often than not.[236] The question then remains: why do fathers fail to litigate?

In answering this question, what may be more relevant than actual gender bias is the perception that bias exists. Fathers may feel that the system is biased, even when it is not, and therefore may not seek custody.[237] Attorneys, half of whom believe that the assumption that young children belong with their mothers is always or usually made in resolving child custody cases,[238] may reinforce fathers' perceptions by suggesting to their clients that the chances of succeeding are minimal.[239] And most pointedly, as Professor Maldonado notes, many fathers may have internalized the social expectations that fatherhood does not extend beyond economic support.[240] That is, the same stereotypes that affect judges in custody

232. Maldonado, *supra* note 211, at 946.

233. It is common for divorced fathers to receive visitation only every other weekend. McNeely, *supra* note 210, at 905 n.87. Even then, this visitation schedule may not translate into actual parenting time, as many divorced fathers fail to exercise their visitation rights. Maldonado, *supra* note 211, at 946–47. Further, the time that visiting fathers *do* spend with their children is often dedicated to entertaining them, rather than parenting them. *Id.* at 948–49.

234. Maldonado, *supra* note 211, at 973.

235. *Id.* at n.259 (citing a study which found that couples agreed to sole maternal custody in 86 percent of cases).

236. *Id.* at 973–74, 974 n.261.

237. *See Gender and Justice in the Courts*, *supra* note 229, at 660 (describing the testimony of witnesses who stated that fathers were dissuaded from seeking custody because they thought it would be futile).

238. Douglas Dotterweich & Michael McKinney, *National Attitudes Regarding Gender Bias in Child Custody Cases*, 38 FAM. & CONCILIATION CTS. REV. 208, 212 tbl.1 (2000). The perception of gender bias is different among males than among females: 56 percent of male attorneys and 34 percent of female attorneys believe that custody awards are made based on the presumption that young children belong with their mothers. *Id.*

239. Maldonado, *supra* note 211, at 974.

240. *Id.* at 974–75.

decisions may dissuade fathers from seeking physical custody in the first place.[241]

Thus, to the extent that Convention proceedings become intertwined with custody matters and best-interests inquiries—a distinct risk of an unhinged interpretation of Article 13(b)—left-behind fathers are at a greater risk of gender biases among system actors, including themselves, that will make litigating their cases even more difficult.

4. *Mixed Messages from the Supreme Court.* The Supreme Court has spoken out of both sides of its mouth on the matter of gender stereotyping. Though the Court has rejected gender stereotyping as an administrative proxy, it has, at other times, reinforced a detached, highly circumscribed notion of fatherhood.

In *Stanley v. Illinois*,[242] a father named Peter Stanley had lived with his three children intermittently for eighteen years, though he had never married their mother.[243] When the mother died, the children automatically became wards of the state, because state law presumed Stanley, an unmarried father, unfit as a parent.[244] Stanley—unlike married, divorced, or widowed fathers—would have to prove his parental fitness in a separate proceeding.[245] Illinois argued that it was permissible to require unmarried fathers to clear this extra legal hurdle, because the state was entitled to rely on a presumption of the parental unfitness of unmarried fathers.[246] The Supreme Court flatly rejected this argument. It noted that, although "[p]rocedure by presumption is always cheaper and easier than individualized determination," "the Constitution recognizes higher values than speed and efficiency."[247] In other words, even if it were true that most

241. To claim that the perception of gender bias disadvantages fathers is not to deny that gender bias unfairly affects mothers as well. *See id.* at 970–71 (arguing that women are held to higher parenting standards than men when custodial disputes are litigated). The internalization of bias or stereotypes has a disproportionate effect on fathers, however, insofar as it discourages them from pressing for custody rights. Social expectations for postdivorce mothers create pressure for them to seek custody. *See supra* text accompanying note 216. Conversely, social expectations for postdivorce fathers, which minimize their postdivorce childrearing role, create no such pressure. *See supra* text accompanying notes 219–22.

242. Stanley v. Illinois, 405 U.S. 645 (1972).

243. *Id.* at 646.

244. *Id.* at 646–47.

245. *Id.* at 647–48.

246. *Id.* at 653 n.5.

247. *Id.* at 656–57.

unwed fathers are unfit, the state could not rely on stereotyping to lighten its own administrative burden. In this light, *Stanley* can be read as a clear refutation of gender stereotyping.[248]

More recently, however, the Court has embraced gender stereotyping. In *Nguyen v. INS*,[249] the Court considered a federal statute that distinguished between unmarried citizen fathers and unmarried citizen mothers.[250] Under the statute, a child born abroad to a citizen mother became a citizen at birth, whereas a child born abroad to a citizen father had to be legally acknowledged by him prior to turning eighteen—or else the child could not claim citizenship through the father.[251] Nguyen, the twenty-two-year-old son of an American soldier in Vietnam, faced deportation as a result of criminal charges.[252] Though Nguyen had lived with his father in Texas since he was six years old, he was at risk of deportation because his father had not legally acknowledged his paternity as required by the statute.[253]

The Court upheld the statute as a valid expression of two governmental interests, the second of which directly relates to gender stereotyping.[254] The Court held that the differential treatment in the statute ensured that there was an opportunity for the child to develop

248. *Stanley* is not without its critics. Indeed, the Court did not reject the contention of the state that unwed fathers were presumably poor parents; it held only that the presumption could not be relied upon to alleviate administrative burdens. *Id.* at 654. And Chief Justice Burger, in his dissent, went so far as to embrace the validity of the presumption. *Id.* at 665–66 (Burger, C.J., dissenting). For a critical view of *Stanley* and other "core" fatherhood cases, see Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271, 1297–1307 (2005).

249. Nguyen v. INS, 533 U.S. 53 (2001). The Supreme Court recently heard oral argument in a case related to *Nguyen*. The petitioner in *Flores-Villar v. United States*, No. 09-5801 (U.S. argued Nov. 10, 2010), challenged the longer residency requirements imposed on unmarried American men whose children are born abroad and who seek to pass citizenship onto their children. Petitioners did not seek to overrule *Nguyen*, but to distinguish it. Brief for Petitioner at 5, *Flores-Villar*, No. 09-5801, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/09-5801_Petitioner.pdf.

250. 8 U.S.C. § 1409 (2006).

251. *Compare id.* § 1409(a)(4)(B) (requiring citizen fathers to acknowledge paternity under oath prior to the child's eighteenth birthday), *with id.* § 1409(c) (imposing no requirement of acknowledgment upon citizen mothers).

252. *Nguyen*, 533 U.S. at 57.

253. *Id.* at 57–58.

254. The first governmental interest was assuring that a parent-child relationship in fact exists; it is easy to verify the mother's status, by virtue of her having given birth, but it is harder to verify the father's status. *Id.* at 66–67. This is a curious holding, as there are ample gender-neutral ways of affirming parentage. *See id.* at 80–81 (O'Connor, J., dissenting) (describing various gender-neutral means of achieving the goals of the statute).

a relationship consisting of genuine ties to the parent—and thus to the United States—rather than just a formal or legal relationship.[255] The Court explained that mothers, by virtue of giving birth, automatically create the opportunity for a "real, meaningful relationship" to develop between them and their children.[256] For fathers, it is a different story:

> The same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father. Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity. This fact takes on particular significance in the case of a child born overseas and out of wedlock. One concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries.[257]

In so holding, the Court relied upon an image of men as detached, irresponsible figures, absent from their children's lives, whereas mothers, simply by giving birth, are predisposed to nurture and develop a genuine relationship with their children.[258] But why does the opportunity to develop a genuine relationship not inhere in the father as well, if he is present in his child's life from a young age? Justice O'Connor, in a sharp dissent, answered that question:

> There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms. . . . [T]he goal of a "real, practical relationship" thus finds support not in biological differences but instead in a stereotype—*i.e.*, "the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children."[259]

By upholding the statute, the Court aided the concretization of the stereotype that fathers are simply less interested in the lives of their children.[260] This stereotype is similar to that ascribed to postdivorce

255. *Id.* at 66–67 (majority opinion).

256. *Id.* at 65.

257. *Id.*

258. Dowd, *supra* note 248, at 1282.

259. *Nguyen*, 533 U.S. at 87–89 (O'Connor, J., dissenting) (quoting Miller v. Albright, 523 U.S. 420, 482–83 (1998) (Breyer, J., dissenting)).

260. Once again, the stereotypes are mutually reinforcing. The effect of painting unmarried men as detached and distant is to relieve them of all responsibility, placing the responsibility of

fathers, whose expected role involves the provision of economic support and minimal parental responsibilities.[261]

Thus, the message from the Supreme Court has been mixed. In its earlier decision, the Court rejected gender stereotypes when employed simply to ease administrative burdens. More recently, the Court has upheld a facially discriminatory statute by relying on those very same gender stereotypes. And when the Supreme Court relies on gender stereotypes, it helps to ensure their continued acceptance and use by lower courts. If Convention cases veer into best-interests inquiries through an overly broad interpretation of Article 13(b), judges and lawyers will be tempted to reproduce the Court's reliance on gender stereotypes when litigating and deciding Convention cases.

C. Fathers' Rights in the Domestic Context under the UCCJEA

Fathers, of course, are not left behind only when mothers cross international borders; fathers can also be left behind in the domestic context. And interparental violence is a motivating factor in abductions between U.S. states as well.[262] Although the domestic and international contexts are different—the international context poses issues of language, culture, and legal training that are absent in the domestic context—it is instructive to compare briefly how the domestic legal framework handles the rights of left-behind fathers in cases of interstate abduction. The domestic framework, more so than the Convention, protects the rights of left-behind fathers—suggesting that judges should be particularly sensitive to the situation of foreign left-behind fathers. These greater protections also suggest that the Convention, to the extent possible, should adopt some of the features of the domestic legal framework.

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),[263] drafted in 1997 and now adopted by forty-eight states,[264] governs child abductions and custody disputes between most

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nonmarital children entirely upon the shoulders of women. *See id.* at 92 (noting that placing responsibility for nonmarital children on women is "paradigmatic of a historic regime").

261. *See supra* notes 217–20 and accompanying text.

262. Deborah M. Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence After the Violence Against Women Act of 2000*, 13 COLUM. J. GENDER & L. 101, 101 (2004).

263. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT, 9 U.L.A. 649 (1997).

264. Only Massachusetts and Vermont have yet to adopt the UCCJEA into their state codes. *See A Few Facts About the Uniform Child Jurisdiction & Enforcement Act*, UNIFORM L.

American states.[265] Key to the UCCJEA is its emphasis on home state priority.[266] A "home State" is defined as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding."[267] As long as the left-behind parent files a custody petition in the home state within six months of the abduction, the custody case will remain in the home state—thus defeating any attempt at forum shopping.[268]

The UCCJEA parallels the Convention in many respects. Like the Convention, the UCCJEA seeks to avoid the harmful effects on children caused by jurisdictional conflict and forum shifting;[269] to deter child abduction by discouraging the use of the interstate system to litigate child custody;[270] to promote cooperation among states, whereby ultimate custody decisions are rendered by the state best positioned to do so;[271] and to avoid best-interests-of-the-child inquiries by judges in jurisdictions to which the abductor has fled.[272] Despite these similarities, however, the UCCJEA does a better job of protecting the rights of left-behind fathers in two key respects: judicial communication and the taking of out-of-state evidence.

COMMISSION, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uccjea.asp (last visited Jan. 9, 2011) (listing states that have adopted the UCCJEA).

265. Celia Guzaldo Gamrath, *UCCJEA: A New Approach to Custody Jurisdiction and Interstate Custody and Visitation*, 92 ILL. B.J. 204, 204 (2004).

266. *See* UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 201 cmt. 1, 9 U.L.A. at 672 (describing the provision establishing home-state jurisdiction).

267. *Id.* § 102(7), 9 U.L.A. at 658.

268. *See id.* § 208 cmt., 9 U.L.A. at 684 ("Most of the jurisdictional problems generated by abducting parents should be solved by the prioritization of home State . . . . For example, if a parent takes the child from the home State and seeks an original custody determination elsewhere, the stay-at-home parent has six months to file a custody petition under the extended home state jurisdictional provision of Section 201, which will ensure that the case is retained in the home State.").

269. *Id.* § 101 cmt., 9 U.L.A. at 657.

270. *Id.*

271. *Id.* The home state under the UCCJEA is analogous, though not identical, to the country of habitual residence under the Convention. In both cases, it is presumed that ultimate decisions regarding custody are best made in the jurisdiction from which the child was taken. In the UCCJEA context, that presumption is expressed through the jurisdictional preferences noted previously. In the Convention context, that presumption is expressed through the rule of return.

272. *Id.* prefatory note, 9 U.L.A. at 652. ("The UCCJEA eliminates the term 'best interests' in order to clearly distinguish between the jurisdictional standards and the substantive standards relating to custody and visitation of children.").

1. *Judicial Communication.* The UCCJEA allows judges in the refuge state to exercise temporary emergency jurisdiction in the event of domestic-violence allegations, thus protecting the fleeing parent and the child.[273] After exercising such jurisdiction, however, the refuge-state judge, if aware that a custody proceeding has already been commenced in the home state, must communicate with the judge in the home state.[274] At the same time, the home-state judge, if on notice that a custody proceeding has been commenced in the refuge state, must communicate with the refuge-state judge.[275] The purpose of these mutually obligatory provisions is to protect the safety and rights of the parents and the child, and to resolve the emergency.[276] These provisions are critical in domestic-violence cases because they create a "template for communication" that "ensur[es] that the courts have input from both parties."[277]

There is enthusiasm for increased judicial communication in Convention cases,[278] along the lines of what the UCCJEA already requires. The Special Commission charged with reviewing the operation of the Convention recently reaffirmed its support for direct judicial communication,[279] an implicit recognition that the UCCJEA is a good model to follow.[280] Increased transnational communication in Convention cases would allow courts to "suggest and produce settlements between the parents to facilitate the return process, to remove practical obstacles to return, [and] to help to ensure that the

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273. *Id.* § 204(a), 9 U.L.A. at 676.

274. *Id.* § 204(d), 9 U.L.A. at 677.

275. *Id.*

276. *Id.*

277. Goelman, *supra* note 262, at 140–41.

278. *E.g.*, *Special Focus: Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks, EC-HCCH Joint Conference, Brussels, 15–16 January 2009*, JUDGES' NEWSL. (The Hague Conference on Private Int'l Law, the Hague, Neth.), Autumn 2009, *available at* http://www.hcch.net/upload/news2009.pdf (collecting essays by judges in support of and evidencing the use of judicial communication).

279. *See* SPECIAL COMM'N, HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS AND RECOMMENDATIONS OF THE FIFTH MEETING OF THE SPECIAL COMMISSION TO REVIEW THE OPERATION OF THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND THE PRACTICAL IMPLEMENTATION OF THE HAGUE CONVENTION OF 19 OCTOBER 1996 ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN ¶ 1.6.3, at 9 (2006), *available at* http://www.hcch.net/upload/concl28sc5_e.pdf (concluding that contracting states should encourage judicial communication).

280. Telephone Interview with Stephen J. Cullen & Kelly A. Powers, *supra* note 157.

prompt return may be effected in safe and secure conditions for the child."[281]

Although these benefits of judicial communication would redound to all parties generally, they would be particularly helpful for left-behind fathers. With open judicial communication, judges could be more confident that their return orders would ensure the safety of the child,[282] and accordingly there would be less need for protracted proceedings involving allegations under Article 13(b) and less risk that judges would impermissibly consider best interests. English family-law judge Andrew Moylan has documented his use of judicial communication to facilitate returns in cases that involved grave-risk allegations,[283] and some American judges have indicated their support of this approach.[284] Ultimately, "[d]irect international judicial communications may reduce the number of decisions refusing return"—which would benefit left-behind fathers immensely.[285]

There are some barriers to judicial communication in the international context that do not exist domestically. American judges may be hesitant to communicate with their foreign counterparts due to differences in language, legal cultures, or individual judicial philosophies.[286] As a result, there is currently a low level of cross-border judicial communication in Convention cases.[287] Nonetheless, increased judicial communication is a goal toward which judges should aspire, and from which left-behind fathers would benefit.

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281. Philippe Lortie, *Background to the International Hague Network of Judges*, *reprinted in* JUDGES' NEWSL., *supra* note 278, at 36, 38.

282. *Id.*

283. Andrew Moylan, *Experience of a Judge from England & Wales*, *reprinted in* JUDGES' NEWSL., *supra* note 278, at 17, 18–19 (describing a case in which judicial communication facilitated a prompt return from England to Malta, even though Article 13(b) allegations were raised).

284. *E.g.*, Panazatou v. Pantazatos, No. FA 960713571S, 1997 WL 614519, at *3 (Conn. Super. Ct. Sept. 24, 1997) (indicating the judge's intention "to arrange a conference call to a Judge in Greece similar to conference calls in this country under our Uniform Child Custody Act [predecessor to the UCCJEA]" in order to resolve a Convention case in which grave risk of psychological harm was alleged under Article 13(b)).

285. Lortie, *supra* note 281, at 36, 38.

286. James Garbolino, *The Experience of Judges from the United States of America with Direct Judicial Communication*, *reprinted in* JUDGES' NEWSL., *supra* note 278, at 24, 35.

287. *Id.* at 31.

2. *Interstate Discovery Provisions.* The UCCJEA also encourages and facilitates interstate discovery.[288] In the case of domestic-violence allegations, for instance, a court that assumes jurisdiction may order that the testimony of a witness be taken in another state.[289] The UCCJEA specifically contemplates the use of telephonic or audiovisual testimony, and courts are directed to cooperate with one another when choosing the location for taking depositions or testimony.[290] These provisions are especially appropriate in domestic-violence cases, in which the safety of the parents or the child might otherwise be in jeopardy.[291] At the same time, these mechanisms help to ensure that left-behind fathers are able to testify and be deposed, thus allowing them to share their side of the story.

These discovery provisions would be welcome in the context of the Convention. Foreign left-behind fathers, who may find it difficult to travel to the United States for a hearing,[292] would be able to testify remotely. And American judges, unaccustomed to ruling on the basis of affidavits alone,[293] might be more likely through remote testimony to weigh carefully the interests of the left-behind father and thus feel more comfortable returning a child. Just as direct judicial communication benefits left-behind fathers by facilitating returns, so would increased use of technology for discovery and testimonial purposes.

Despite the UCCJEA provisions, there has been some reluctance on the part of judges to use technology to obtain information from other states in domestic abduction cases.[294] And if there is reluctance in the domestic context, in which a framework for communication exists, it is likely there would be even more reluctance in Convention cases, in which no such framework exists. American judges are simply more accustomed to having both parties

288. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 111, 9 U.L.A. 668 (1997).

289. *Id.* § 111(a), 9 U.L.A. at 668.

290. *Id.* § 111(b), 9 U.L.A. at 668.

291. *Id.* § 210 cmt., 9 U.L.A. at 688.

292. *See supra* notes 169–70 and accompanying text.

293. *See supra* text accompanying note 165.

294. Goelman, *supra* note 262, at 142.

present in the courtroom, and they may not be comfortable with, or may simply lack the resources to conduct, remote testimony.[295]

Even if it is not possible to incorporate all of the UCCJEA's provisions regarding judicial communication and interstate discovery into the Convention, it is an important model toward which to strive. Recent efforts to enhance judicial communication and cooperation under the Convention[296] are welcome insofar as these measures would better protect the rights of left-behind fathers. In the meantime, judges assigned to international-abduction cases must be sensitive to the disadvantages that foreign left-behind fathers face—disadvantages that largely do not exist in the domestic context under the UCCJEA.[297]

CONCLUSION

Interparental violence motivates, and will continue to motivate, cross-border child abductions by fleeing mothers. Article 13(b) of the Convention, and specifically the grave-risk-of-psychological-harm exception, is the vehicle through which fleeing mothers resist the return of their children under the Convention. If courts understand and appreciate the well-documented link between exposure to domestic violence and psychological harm, Article 13(b) will go a

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295. *See supra* note 167 and accompanying text. In the author's experience, some judges are reluctant to take remote testimony across international borders—especially telephonic testimony—due to difficulties in verifying the identity of the speaker or ensuring that he is properly under oath. Other courts may simply lack the resources. *See* Dionisio Núñez Verdin, *Future Use of Information Technology for Direct Judicial Communications*, *reprinted in* JUDGES' NEWSL., *supra* note 278, at 178, 181 (noting that "most courts lack" sufficient technological resources for direct judicial communications in child abduction cases).

296. *See* Garbolino, *supra* note 286, at 24, 31–32 (describing efforts of judges in the last decade to use direct judicial communication to resolve cases under the Convention).

297. It is true that in some international child abduction cases, attorneys may file under the UCCJEA, rather than the Convention, as the UCCJEA treats a child custody order from a foreign tribunal like a child custody order from any other state. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 105(a), 9 U.L.A. 662 (1997). But attorneys for left-behind fathers often have no choice but to file under the Convention. First, to file under the UCCJEA, a left-behind father needs a formal child custody order that complies with the procedural requirements of the UCCJEA. Conversely, the Convention requires only proof of "custody rights"—a much broader standard which can arise under operation of law, not just through a formal custody decree. *Compare* KILPATRICK STOCKTON LLP, *supra* note 43, at 95 (discussing how a left-behind parent must have an order awarding custody to file under the UCCJEA), *with id.* at 20–22 (discussing how a left-behind parent can have "custody rights" under the Convention without a formal decree, sometimes merely by showing proof of parentage). Second, petitions under the UCCJEA must be filed in state court, where many Convention practitioners are loath to file. *See supra* notes 264–65 and accompanying text.

long way toward protecting victims of domestic violence and their children. To enhance this protection, courts that still require a fleeing parent to show how the country of habitual residence is unable or unwilling to protect the child should abandon this requirement.

At the same time, it is necessary to understand the precarious position of left-behind fathers, whether they are batterers or not. Although a Convention hearing does not determine custody, the stakes for left-behind fathers are nonetheless high. Many left-behind fathers must rely on legal aid in the United States, yet obtaining pro bono legal assistance for Convention cases, especially those in which there are allegations of domestic violence, is a daunting task. At the very least, increased funding for legal aid organizations willing to take on such cases—a prospect that Congress has considered but not decisively acted upon—is necessary to equalize the playing field. Furthermore, although the urge to protect victims of domestic violence and their children is wholly understandable, courts must not imbue Convention proceedings with the attributes of custody disputes, as doing so will allow gender stereotypes to complicate the proceedings and further weaken the protection of left-behind fathers' rights. Instead, the Convention should follow the lead of the UCCJEA, which does a better job protecting the rights of left-behind fathers.

The Convention can remain both relevant to the modern context of domestic violence and fair to left-behind fathers. And although by no means a perfect solution, it continues to be the best hope for combating the vexing problem of international child abduction.