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The United States as a Refuge State for Child Abductors: Why the United States Fails to Meet Its Own Expectations Relative to the Hague Convention

by
Andrew A. Zashin, Christa G. Heckman
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I. Introduction: Identifying the Problem

America, even when it's wrong, it's right.

—James Baker, former Secretary of State
in the G.H.W. Bush Administration

The United States is a refuge state for child abductors; in the United States, the abductor almost always wins. That sentence may surprise some readers. After all, in the United States, we believe that we are a progressive, enlightened society and a leader in the world concerning human rights. We believe we have a superior form of government in our democracy. We believe that we are at the forefront of forward-thinking law and policy—essentially, that we do things better than other nations. The James Baker quote above reminds us of that.

The reality is very different. The evidence, both empirical and statistical, tells another story. Practical and legal impediments in international and domestic laws as well as the practical aspects of family law courts throughout the United States make it very difficult for a Left Behind Parent (“LBP”) to have his or her child returned from the United States to the country of origin. Moreover, the statistics that *do* exist concerning children ab-

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ducted to the United States (and each child's potential return) are insufficient; they represent only a small fraction of cases that are reported and pursued by the LBP.

The U.S. Department of State statistics reported that 487 cases brought under The Hague Convention on the Civil Aspects of Child Abduction (hereinafter "the Hague")¹ "closed" in 2013 (i.e., a disposition made by the court, the child voluntarily returned, or a failure to prosecute).² Of these cases, 220 were either ordered returned after a Hague proceeding or voluntarily returned.³ This sounds like positive progress.

A closer examination, though, reveals serious concerns. One may ask if the Hague Convention, as applied in the United States, is even worth the significant resources currently devoted to it. Irrespective of the merits, only 46% of children abducted to the United States were returned, based on these 2013 statistics.⁴ So, in matters in which the LBP has the ability and resources to bring a Hague action, that parent's odds of having the child returned are not overly favorable.

The available statistics concerning abducted children, moreover, inherently fail to tell the whole story. These statistics are not accurate markers of what happens in real life. This sample size (487 closed cases) only represents cases that have been *reported* to the U.S. Department of State. This group misses a vast number of children abducted to the United States in a variety of other situations, including but not limited to the following: children abducted from non-Hague signatory states where the LBP cannot bring a Hague action to have his or her child returned; LBP's who do not have the skills, ability, or substantial resources needed to initiate a Hague action in the United States; and cases that *could* or *should* be brought as Hague actions that are actually litigated in American state courts as relocation cases.

¹ Hague Convention on the Civil Aspects of International Child Abduction Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 49. The United States became a signatory to this treaty on December 23, 1981.

² U.S. Dept. of State, Bureau of Consular Affairs, Office of Children's Issues Data, <http://travel.state.gov/content/childabduction/en/legal/compliance/Data.html>.

³ *Id.*

⁴ *Id.*

These cases slip through the cracks of our legal system every day. There are no metrics at the intersection of Hague and United States' internal state law. There cannot be any. Who would count? And how would they be counted? To put the situation in perspective, the population of the state of Ohio in 2009 was approximately 11,500,000 people⁵ out of the United States' approximately 350,000,000 people.⁶ In that same year, there were approximately 25,000 divorces or dissolutions in Ohio filed involving children.⁷ In addition, there were approximately 8,000 new filings and reactivations of custody cases in Ohio in 2009.⁸ And Ohio is only one of fifty states. By contrast, there are 487 reported closed cases involving child abduction in the *entire* United States in 2013.⁹ The staggering gap between these numbers suggests that many abducted children are just not being counted.

The United States has become a refuge state for child abductors for several reasons. There are significant systemic failures that make it very difficult for the LBP to have the access and resources to mount an appropriate Hague action. In the event that a LBP can, in fact, do so, the existing structure is slow-moving, inefficient, and populated by judicial officers without sufficient knowledge and experience to address these complex issues. In addition to these systemic issues, the United States exhibits a cultural bias that causes its courts to make custody determinations in circumstances where the child should be returned to his or her habitual residence pursuant to the terms of the Hague. The paradigm exhibited by the Baker quote above leads to the belief that the United States is in a position to determine custody superior to that of the child's habitual residence.

This paper asserts that the only way true progress can be made regarding this problem is for the United States to acknowl-

⁵ *Ohio- Population Data, 2009 STATE PROFILES*, <http://hab.hrsa.gov/stateprofiles/2009/states/oh/State-Population-Data.htm>.

⁶ *United States Census Bureau, VINTAGE 2009: NATIONAL TABLES*, https://www.census.gov/popest/data/historical/2000s/vintage_2009/

⁷ *2009 Ohio Courts Statistical Summary*, THE SUPREME COURT OF OHIO, (Aug. 2010), Page 34, Fig. 1. And Table 1; <http://www.supremecourt.ohio.gov/Publications/annrep/09OCS/summary/Trend.pdf>.

⁸ *Id.* at 35, Fig. 2.

⁹ U.S. Dept. of State, Bureau of Consular Affairs, Office of Children's Issues Data, *supra* note 2.

edge that this serious problem actually exists. One has to look beyond the feel-good statistics and congratulatory press releases to see that the existing system, including the application of the Hague Convention on Child Abduction, fails LBP. Until the nature and scope of the problem is identified and examined, the United States will continue to be a refuge state for child abductors.

II. Hague Background and Overview

Cause we'll put a boot in your ass. It's the American way.

—Toby Keith, American country music singer

The Hague Convention was expressly designed to protect children from the harmful impact of their wrongful removal by establishing procedures to ensure a child's prompt return.¹⁰ The stated public policy of both the Hague Convention and United States internal law (UCCJEA) is to deter child abduction.¹¹ Abductors should not be rewarded for their actions.¹² To achieve this, the Hague seeks to deter abductions of children in the first place.¹³ Its fundamental purpose is to deter parents from engaging in forum shopping and to prevent parents from securing an advantage in an anticipated or actual custody dispute by crossing international borders in search of a more sympathetic court.¹⁴

The U.S. Department of State represents that the "Right of return is the core of the Convention."¹⁵ Articles I and II of the Hague Convention favor prompt return of wrongfully removed

¹⁰ *Souratgar v. Fail*, 720 F.3d 96, 102 (2d Cir.2013).

¹¹ See, Andrew A. Zashin, Christopher R. Reynolds & Amy M. Keating, *Filling the Gaps with Public Policy: the Application of the Hague Convention Protocol in US Courts in the Absence of a Co-Signing State*, 28 INT'L J.L. POL'Y & FAM 121-134 (2014).

¹² *Id.*

¹³ *Barzilay v. Barzilay*, 600 F.3d 912 (8th Cir. 2010).

¹⁴ *Redmond v. Redmond*, 724 F.3d 729 (7th Cir.2013); *Hofmann v. Sender*, 716 F.3d 282 (2d Cir.2013); *Selo v. Selo*, 929 F. Supp. 2d 718 (E.D. Mich. 2013).

¹⁵ U.S. Dept. of State, *The Hague Convention on the Civil Aspects of International Child Abduction Legal Analysis*, 51 Fed. Reg. 10494 (1986), available at http://travel.state.gov/content/dam/childabduction/Legal_Analysis_of_the_Convention.pdf.

or retained children and expeditious handling of their cases.¹⁶ Hague implementation in the United States involves both executive and judicial functions. The executive function is spearheaded by the U.S. Department of State Office of Children's Issues (OCI), which is the "Central Authority" that has primary executive responsibility for handling incoming cases under the Hague in which a parent abducts a child into the United States.¹⁷ As the Central Authority, OCI's principal charge is to secure the return of the child. According to Section 11603(a) of International Child Abduction Remedies Act ("ICARA"),¹⁸ state courts and federal district courts have concurrent original jurisdiction of actions arising under the Hague.¹⁹ The Hague's procedures are "not designed to settle international custody disputes," but, rather "to restore the status quo prior to any wrongful removal or retention."²⁰

In addition to the Hague, the United States has created a body of internal state law to determine which forum has jurisdiction to make a custody determination. Almost every state has adopted a version of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").²¹ The UCCJEA has evolved to address custody jurisdiction forum issues in an increasingly mobile society. The underlying purposes and policies of the UCCJEA and the Hague are remarkably similar and simple:

¹⁶ Text of Convention on the Civil Aspects of International Child Abduction 25 October 1980, www.hcch.net.

¹⁷ U.S. Dept. of State, *supra* note 15; see also Shani M. King, *The Hague Convention and Domestic Violence; Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence*, 47 *FAM. L.Q.* 299 (2013).

¹⁸ ICARA, 42 U.S.C. § 11601 (2012).

¹⁹ Federal district courts have "federal question" subject matter jurisdiction under 28 U.S.C.A. § 1331; this is concurrent with state court subject matter jurisdiction pursuant to 42 § U.S.C.A. 11603(a). As a result, Hague cases under ICARA may be heard in either state or federal courts.

²⁰ *Baxter v. Baxter*, 423 F.3d 363, 267 (3d Cir. 2005).

²¹ Forty-nine states, the District of Columbia, Guam and the U.S. Virgin Islands have adopted the UCCJEA. The only state that has not adopted it is Massachusetts. See Vermont Enacts the Uniform Child Custody Jurisdiction and Enforcement Act (Uniform Law Commission 2011), available at <http://www.uniformlaws.org/NewsDetail.aspx?title=Vermont%20Enacts%20the%20Uniform%20Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> (visited October 5, 2015).

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both seek to minimize and deter jurisdictional conflict for the child's benefit. The UCCJEA seeks to avoid jurisdictional conflict and competition, to deter abductions of children, and to prevent forum shopping.²² It is very important to note that the text of the UCCJEA explicitly states that foreign nations are treated as "states."²³

The UCCJEA emphasizes the "home state" of the child as being the appropriate forum to have custody jurisdiction, given that this geographic locus has the best access to evidence concerning the child's best interest. The Hague seeks to return a child to his or her "habitual residence."²⁴ While the term "habitual residence" is not formally defined—and there is significant literature on how to define this term—it is a fact-intensive determination that considers geographic location and the passage of time.²⁵ For both the Hague and the UCCJEA, the pivotal determination concerning *where* a custody matter should be decided focuses on the nexus between geographic location and some period of time.²⁶ This emphasis seeks to ensure that the jurisdiction with optimum access to relevant facts and information about the

²² *Upton v. Wallace*, 3 A.3d 1148 (D.C. 2010); *Mulatu v. Grisha*, No. CA2011-07-051, 2011-Ohio-6226 (2011); *In re Lewin*, 149 S.W.3d 727 (Tex. 2004). See also DAVID A. BLUMBERG, *THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT: A FOCUSED INTRODUCTION* (2013).

²³ OHIO REV. CODE § 3127.04. (2015).

²⁴ *Guzzo v. Cristofano*, 719 F.3d 100 (2d Cir. 2013).

²⁵ Jeff Atkinson, *The Meaning of Habitual Residence Under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children*, 63 OKLA. L. REV. 647, 648-49 (2011). In some borderline cases, policy considerations have also been considered in determining "habitual residence." See Rhona Shuz, *Policy Considerations in Determining the Habitual Residence of a Child and the Relevance of Context*, 11 J. TRANSNAT'L L & POL'Y, (2001).

²⁶ The UCCJEA provides four types of initial jurisdiction. The first and most important type of initial jurisdiction is "home state" jurisdiction. The term "home state" is defined as "the state in which a child lived with a parent. . .for at least six consecutive months immediately preceding the commencement of a child custody proceeding and, if a child is less than six months old, the state in which the child lived from birth." If there is a "home state" of a child or was the home state of the child within six months before the commencement of the proceeding, that place is the appropriate jurisdiction to make an initial custody determination concerning that child; all other types of jurisdiction only apply if a "home state" has declined to exercise that jurisdiction or the child does not have a "home state."

child makes the custody determination.²⁷ While “habitual residence” and “home state” are not one and the same, both terms share the same conceptual core; both seek to determine which jurisdiction has the most significant connection to the child at issue. That jurisdiction has exclusive jurisdiction over the custody matter.²⁸

Both the Hague and the UCCJEA agree that an abducting parent cannot benefit from his or her actions. The Hague seeks to secure the prompt return of children wrongfully removed to, or retained in, any signatory state.²⁹ The Hague does not require *mens rea*; the removal or retention may be wrongful even if the abducting party is unaware of the existence of custody rights of the other party. The important point is that the Hague focuses on the conduct and actions of the removing parent. If that conduct constitutes a wrongful removal or retention, it cannot stand; that parent cannot benefit from his or her actions.

The UCCJEA contains a similar provision, stating that if a court has jurisdiction because the parent seeking to evoke its jurisdiction has engaged in “unjustifiable conduct,” the court shall decline to exercise its jurisdiction unless specific exceptions apply.³⁰ The Comments to Section 208 of the Model UCCJEA state that the focus of the section is the *conduct* of the parent in question and that abducting parents will not receive an advantage for their conduct,³¹ showing legislative intent concerned

²⁷ State *ex rel.* Morenz v. Kerr, 818 N.E.2d 1162 (Ohio 2004).

²⁸ OHIO REV. CODE § 3127.16 (2015). This court maintains exclusive jurisdiction “until the court or a court of another state determines that the child, the child’s parents, and any person acting as a parent do not presently reside in this state.” *Id.*

²⁹ Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 1, at art. 1(a). The Hague defines “wrongful” as a breach of custody rights under the laws of the child’s habitual residence immediately before the removal or retention. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 1, at art. 3.

³⁰ “Comments to Section 208 of the UCCJEA, drafted by the National Conference of Commissioners on Uniform State Laws (1997) (“conduct by a parent or that parent’s surrogate that attempts to create jurisdiction in this state by removing the child from the child’s home state, secreting the child, retaining the child, or restraining or otherwise preventing the child from returning to the child’s home state in order to prevent the other parent from commencing a child custody proceeding in the child’s home state.”).

³¹ *Id.*

with the wrongful conduct of the abducting parent and with preventing that parent from being rewarded. The “unjustifiable conduct” provision in the UCCJEA echoes the “wrongful” retention and removal language of the Hague with a focus on the following: an abducting parent’s wrongful removal or retention of a child should not be rewarded, forum shopping should be deterred, and the child’s status quo should be maintained.

The objectives of the Hague and of American internal law are clear concerning the need for a prompt determination of the appropriate forum for a child custody determination. An abducting parent cannot have his or her actions rewarded; the jurisdiction with the best access to information and evidence about the child should make a custody determination for that child. The Hague and the UCCJEA articulate both the national and international public policy—collectively, we believe that an abducting parent’s actions, subject to very specific exceptions, are *wrong* and should be remedied by courts. More importantly, the child’s status quo should be restored, which includes the child’s relationship with the LBP. American public policies take a bold stance against abducting parents and reflect a spirit of international cooperation. Yet, despite this lofty language, the practical reality falls short. Simply put, the United States is failing. As detailed in the rest of this article, the United States is failing to meet the standards of and the spirit of the Hague as well as its own internal law.

III. Statistics Show that a Very Small Number of Children Abducted to the United States Are Returned.

There are three kinds of lies: lies, damned lies, and statistics.

*—Mark Twain, American author and humorist
(often also attributed to Benjamin Disraeli,
former British Prime Minister)*

The U.S. Department of State logs and publishes statistics relative to the Hague and child abductions; these statistics attempt to address abductions into the United States as well as the compliance (or non-compliance) of other Hague signatory na-

tions regarding children abducted out of the United States.³² Other institutions, frequently non-profit organizations, have also attempted to have parents report abducted children and/or to generate statistics on abducted children.³³ However, none of the entities that claim to keep statistics on child abduction to the United States capture the whole picture. In fact, these statistics show the problems inherent in this *kind* of statistic. Statistics concerning compliance are skewed to show the United States in the best possible light for a variety of reasons, both conscious and unconscious. The fact that these statistics, by their nature, are insufficient helps the United States to feel “good” about its Hague Compliance records and to focus its attention on other Hague signatory nations with poorer compliance.³⁴ These statistics allow the United States to portray positive image without having to consider the many children abducted to the United States who will never be included in any reported statistic at all.

First, one has to consider the reported statistics. The U.S. Department of State Office of Children’s Issues (“OCI”) is the central authority for the Hague and provides statistics and information through its website.³⁵ It is important to note that the Hague signatory state data provided reflect abductions reported to the OCI, *not* the number of Hague applications filed with a Central Authority during that given period.³⁶ In 2013, the OCI reported that 487 cases brought under the Hague “closed” in 2013 (i.e. disposition made by court, child voluntarily returned, or failure to prosecute).³⁷ Of these cases, 220 were either ordered returned after a Hague proceeding or voluntarily re-

³² U.S. Department of State, Bureau of Consular Affairs, travel.state.gov.

³³ Best known is, perhaps, the National Center for Missing and Exploited Children, www.missingkids.com.

³⁴ These authors acknowledge that there are many Hague signatory nations that have a poor record of Hague compliance and who can be viewed as worse “offenders” than the United States. Nothing in this article is intended to minimize that fact; however, this article is focused on the United States’ true compliance with the spirit of the Hague in an effort to point out the depth of a compliance problem that we are largely ignoring.

³⁵ Bureau of Consular Affairs, Office of Children’s Issues, *Statistics*, <http://travel.state.gov/content/childabduction/English/legal/compliance/statistics.html>.

³⁶ *Id.*

³⁷ *Id.*

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turned.³⁸ Of the 94 voluntary returns, only one child was returned to a non-Hague signatory state.³⁹ Considering this information without a closer look at each individual circumstance, only 46% of children abducted to the United States were returned based on these 2013 statistics. This is not new, as the overall return rate for reported 2008 cases was below 50%.⁴⁰ In more than half of cases, the abducting parent was not compelled to return the child. From the viewpoint of a LBP who has brought a Hague action, those are not favorable odds at the outset.

Interestingly, 2013 is the only year in which the OCI provided data for “closed” cases. It does provide some information about incoming abductions: 290 incoming abductions reported in 2010, 256 incoming abductions reported in 2011, 344 incoming abductions reported in 2012, and 364 incoming abductions reported in 2013 (representing 518 children).⁴¹ The highest incidences of reported abductions to the United States in 2009 were: Mexico (75); United Kingdom (31); and Canada (29).⁴² The OCI states that its statistics reflect the number of incoming cases (abduction and access) that were *reported* during the calendar year.⁴³ By its own admission, the OCI is only capturing those cases in which a child’s abduction was reported to them; this takes for granted that a LBP has the knowledge and resources to navigate the U.S. Department of State and file a report of the

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Robert E. Rains, *Possession Is 9/10 of the Law: The Need for Strict Procedural Rules in Hague Abduction Convention Cases*, 9 J. COMP. L. 253 (2014); see also Nigel Lowe, *A Statistical Analysis of Applications Made in 2008 Under the Hague Convention 25 October 1980 on the Civil Aspects of International Child Abduction* (Nov. 2011), available at <http://hcch.net/upload/wop/abduct2011pd08be.pdf>; Nigel V. Lowe & Victoria Stevens, *Global Trends in the Operation of the 1980 Hague Abduction Convention*, 46 FAM. L.Q. 41 (2012).

⁴¹ U.S. Dept. of State, Bureau of Consular Affairs, Office of Children’s Issues, *supra* note 2. Significant Congressional time and resources are spent relative to statistics concerning Hague when the reported information concerns a very small number of children.

⁴² See James D. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide of Judges* (2012), [http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/\\$file/hagueguide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/hagueguide.pdf/$file/hagueguide.pdf).

⁴³ U.S. Dept. of State, Bureau of Consular Affairs, Office of Children’s Issues, *supra* note 2.

abduction. Additionally, it presumes that the LBP has sufficient knowledge to report that the child was abducted *to* the United States from his or her country of origin. There is no way to measure unreported cases of abduction.

The OCI's statistics on "closed" cases misses a vast number of children abducted to the United States in a variety of other situations. First, many LBPs do not have the skills, ability, or substantial resources needed to even bring a Hague action in the United States. This article will go into further detail concerning these systemic and practical obstacles later on;⁴⁴ however, a LBP who does not have these skills and/or resources cannot possibly be a part of these statistics. Many LBPs may not have the skills and guidance needed to report their children as abducted or missing with the OCI, assuming that LBP even *knows* that his other child has been abducted into the United States. If a LBP has enough information to know that much, he or she probably has sufficient knowledge and resources (both financial and otherwise) as well as competent and experienced legal guidance to successfully bring a Hague action. On top of all of that, to initiate the Hague action, the LBP must have information about the abducting parent's whereabouts for service and other purposes. The substantial barriers involved in bringing a Hague action in the United States imply that a large number of abducted children from Hague signatory nations never make the "closures" statistics for Hague actions—if they make the "reported" statistics at all.

Next, absent reported instances of voluntary returns, children abducted from non-Hague signatory states would not be represented in these statistics. In this instance, the LBP cannot bring a Hague action to have his or her child returned from the United States. While those children may be "reported" to the OCI as abducted children, the LBP is without any ability to institute a Hague action for that child's return. That LBP is left with a limited number of legal options to have his or her child returned from the United States.⁴⁵

Finally, many cases that *could* or *should* be brought as a Hague action are actually litigated in U.S. state courts as reloca-

⁴⁴ See *Infra* at notes 58-87.

⁴⁵ See Zashin, Reynolds & Keating, *supra* note 11.

tion cases. While these cases deal with similar factual circumstances, state court cases involving international “relocation”—which may actually be abduction to the United States—will never be included in the OCI statistics. A LBP may make his or her way to a family law attorney in the United States; however, that attorney may have little to no experience with Hague cases. Since that attorney primarily practices in state courts (and not necessarily the litigation of Hague cases in state courts), that attorney may view the case as a domestic relations case with an international component. In other words, that attorney may frame the case as a case in which the LBP wants to “relocate” the child back to the country of origin instead of pursuing it as a Hague action; the case may never be framed as an “abduction” matter at all. There are no metrics that measure the intersection of state court domestic relations cases (that involve an international component and “relocation”) with Hague actions.⁴⁶ As a result, these cases slip through the proverbial cracks of the legal and political system. These complex and “gray” cases do not appear in Hague statistics. The three categories above illustrate the inherent failure of Hague compliance statistics as a barometer of “progress.”

In 2008, the Centre of International Family Law Studies at Cardiff University Law School conducted three statistical surveys of the operations of the Hague—applications made in 1999, 2003, and 2008.⁴⁷ In conducting the study, Cardiff sent questionnaires to the then 81 contracting states; only six actually completed the survey.⁴⁸ In his article, *Possession Is 9/10 of the Law: The Need for Strict Procedural Rules in Hague Abduction Convention Cases*,⁴⁹ Professor Robert Rains analyzes and addresses these sobering statistics from the Cardiff study concerning the length of Hague actions in the United States.⁵⁰ The United States reported an average of 207 days from when the Central Authority

⁴⁶ The authors have done research on this topic and have been unable to find any statistics or metrics that try to measure this intersection.

⁴⁷ Lowe, *supra* note 40; *see* Lowe & Stevens, *supra* note 40; *see also* Rains, *supra* note 40.

⁴⁸ Rains, *supra* note 40.

⁴⁹ *Id.*

⁵⁰ *Id.* at 257-59.

received an application to the date it sent it to court.⁵¹ The United States ranked poorly as to the number of 2008 applications stilled pending as of June 30, 2010 – of the 154 applications reported worldwide, 34 were in the United States.⁵² As further addressed later in this article, delay is often a significant factor in the outcome of custody litigation – working in favor of whichever party has actual physical possession of the child.⁵³ As a result, the OCI statistics on “closure” in 2013 likely include Hague actions begun in prior years – years the LBPs have missed with their children.

There are some statistics concerning children abducted to the United States, but both OCI and other non-profit organizations are also very concerned with statistics that involve abductions *from* the United States.⁵⁴ OCI reports that the United States’ outbound child abduction rate declined by 12.23% in 2013.⁵⁵ Despite this, the vast majority of nations worldwide report that incidents of international parental child abduction, as defined by the Hague, are continuing to surge at pandemic rates.⁵⁶ OCI’s statistics show that inbound abductions have risen in the last several years, though perhaps not at “pandemic” rates.⁵⁷ Putting aside these authors’ overall skepticism of statistics, if we assume that the outbound abductions are in decline but that worldwide abductions are rising at alarming rates, this further suggests that a significant number of children are being ab-

⁵¹ *Id.*

⁵² *Id.*

⁵³ See *infra* discussion in text at notes 59-69.

⁵⁴ For example, the National Center for Missing and Exploited Children. This observation is not intended to be a criticism of the important work done by both the OCI and non-profit organizations concerning children abducted from the United States and prevention of those abductions. This is important and meaningful work. That said, this work—by definition—does not include children abducted to the United States.

⁵⁵ 2014 Department of State’s Hague Compliance Report to Congress.

⁵⁶ *Id.*; See also *Parental Child Abductions from UK Double in a Decade*, BBC News, Dec. 12, 2013, <http://www.bbc.com/news/uk-25343314>; *Parental Child Abduction Is a Worldwide Problem*, Foreign & Commonwealth Office of the United Kingdom, Dec 12, 2012, <https://www.gov.uk/government/news/parental-child-abduction-is-a-worldwide-problem>.

⁵⁷ U.S. Dept. of State, Bureau of Consular Affairs, Office of Children’s Issues, *supra* note 2.

ducted into the United States with only a small number of those abductions actually reported.

In the end, what do any of these statistics about Hague actions in the United States and/or about children abducted to the United States tell us? They tell us nothing. The statistics that exist try to paint an encouraging picture about Hague compliance, but the majority of optimism falls on the side of reducing the number of children abducted *from* the United States, not *to* it. For LBPs trying to have a child returned from the United States through a Hague action, the statistics that do exist are not overly sunny. In the end, though, we have to acknowledge that *all* of the existing numbers fail to count large segments of abducted children. Countless children whose abductions are never reported because the LBP does not have the knowledge and resources to do so, children whose abductions cannot be reported because the LBP does not have information about the child's whereabouts, children abducted from non-Hague signatory nations, and children whose abductions are mistakenly treated as "relocation" in a state court action, are lost in the abyss between Hague actions and state domestic relations law. The statistics are inherently flawed. One cannot rely on them to believe that the problem of the United States acting as a refuge for abducting parents is not real.

IV. Why Abducted Children Are Not Returned and Challenges Faced by the LBP

Inequality is as dear to the American heart as liberty itself.

—*William Dean Howells, American author and literary critic*

[T]here is always inequity in life It's very hard . . . to assure complete equality. Life is unfair.

—*John F. Kennedy, former President of the United States*

When a parent abducts a child, the LBP faces incredible obstacles. To start, the emotional toll is doubtless debilitating. Not only that, but the legal and financial challenges are daunting, at

best, and insurmountable, at worst. These challenges are among the toughest a parent can face.

Surprisingly few victims of international child abduction are actually returned to their country of origin. This is, doubtless, a bold and surprising – even controversial – statement. After all, is it not the intent of the Hague to see that custody proceedings take place in the child’s home state? Indeed, except in specific limited circumstances, the Hague is intended to do just that.

However, very real, practical problems combine to prevent the Hague’s intended application. Not only are many judges, particularly in state family law courts where Hague cases are far less likely to be brought, unfamiliar with the precepts of the Hague, but even when hearing officers do show familiarity with the treaty, bias often operates to keep children in the United States. Very often the LBP is unsure of how to get help in these cases, and some may lack access to basic legal services.⁵⁸ Even when they do determine where to go for aid, LBPs face procedural inefficiencies that frequently operate to keep an abducted child in the United States for far longer than appropriate. Consider, next, the number of domestic relations practitioners who are inexperienced in international law, and who default to state law remedies simply because that is what they know. Finally, there are very real cost concerns associated with a Hague action. Not only do professionals with experience in international family law matters tend to command higher hourly rates and retainer fees, but even simple passage to the United States to bring and maintain an action at all may be out of reach for some LBPs.

A. Systemic Inefficiencies

It is no secret to practitioners that the American judicial system is overburdened and plagued with inefficiencies, and horror stories abound of matters taking years upon years. The Hague stresses expediency. However, “fast” in an American court may differ from “fast” in other jurisdictions. The United States reported an average of 207 days from the time the Central Authority received a Hague application until the date it was sent to

⁵⁸ See Janet Chianone, Linda Girdner & Patricia Hoff, *Issues in Resolving Cases of International Child Abduction by Parent*, JUV. JUST. BULL. 6-9 (Dec. 2001).

court.⁵⁹ While around seven months may sound rather quick, contrast that the average resolution time in Finland is 75 days, in Iceland, 73 days, and in Denmark, a mere 44 days.⁶⁰

Clearly America must do better. The longer these cases extend, the longer the abducting parent actually has possession of the abducted child. And, the longer the abducting parent has possession, the harder it becomes for the LBP to obtain custodial rights with no clear, demonstrable harm to the child.⁶¹ That is why in international abduction cases the old legal axiom that “possession is nine-tenths of the law” rings true. The person who has the child is, for better or worse, the person most likely to keep the child.⁶²

Procedural issues within the Hague itself often contrive to favor the abductor and, worse, actively encourage delay. For example, Article 4 of the 1980 Hague Convention specifically provides that the treaty no longer applies when an abductee reaches 16 years of age. This obstacle is apparent in matter of *Abbott v. Abbott*.⁶³

On the surface, it might sound like the LBP prevailed in *Abbott*. In this matter, the child’s father sought to have the child returned to Chile from the United States. Under Chilean law, the mother had custodial rights, while the father had visitation rights and a *ne exeat*⁶⁴ right to prevent the child’s removal from Chile. After losing in the lower courts, the U.S. Supreme Court found in favor of the father. But, sadly, the child’s return was never actually required. Litigation took so long that the minor child aged out of the Hague.⁶⁵

Then, of course, there is Article 12 of the 1980 Hague Convention, which provides:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings

⁵⁹ Rains, *supra* note 40, at 258.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *In re Application of Adan*, 437 F.3d 381 (3rd Cir. 2006), see also *Holder v. Holder* 305 F.3d 854 (9th Cir. 2002); *Holder v. Holder* 392 F.3d 1009 (9th Cir. 2004), see also *Gaudin v. Remis*, 415 F.3d 1028 (9th Cir. 2005).

⁶³ See, 560 U.S. 1 (2010).

⁶⁴ A court order that forbids a person involved in a legal matter to leave the country or state where the court has jurisdiction. Thelawdictionary.org.

⁶⁵ *Abbott*, 560 U.S. 1 at 1.

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before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.⁶⁶

Under the first paragraph of Article 12, a wrongfully abducting parent could clearly attempt to capitalize on delay, as well as concealment of the child. The recent U.S. Supreme Court matter of *Lozano v. Montoya Alvarez*⁶⁷ addressed this very issue. In *Lozano*, the mother and father had resided together in London before the mother left with the child, first to a women's shelter, and finally to New York. The father was unable to locate the mother and the minor child for more than 16 months. Once he did locate them he filed his Hague petition, but this happened well after the one year cutoff for automatic return. The lower court denied his petition, finding that the child was, due to the passage of more than a year, settled in New York. Ultimately, the U.S. Supreme Court found that principles of equitable tolling, while commonplace in American jurisprudence, do not apply to this international treaty.⁶⁸

Then, of course, Article 13 of the Hague Convention provides that a child who "objects to being returned and has attained an age and degree of maturity" may have his or her views taken into account, and need not need not be returned.⁶⁹ This provides additional incentive to drag out the process until the

⁶⁶ Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 1, at art. 12.

⁶⁷ *See*, 134 S. Ct. 1224 (2014).

⁶⁸ While the Supreme Court took great pains to clarify that steps taken explicitly to conceal a child's whereabouts can cut across his or her settlement into a new home, it is clear that concealment *can*, and *does* work to the advantage of the abducting parent.

⁶⁹ Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 1, at art. 13.

child is old enough to make his or her own decision in the hope that the child will be so entrenched in his new life, and so estranged from the LBP, that his desire will certainly be to remain in his new home state.

B. *Inexperienced Practitioners*

Beyond the systemic inefficiencies, LBPs face a practical issue in finding competent counsel. Of course, most generally, custody matters in the United States fall under the purview of state law.

While there is no shortage of competent counsel in state matters – for example, a quick internet search shows hundreds of family law practitioners in Northeast Ohio, alone – few family law cases ever end up in federal courts, meaning the vast majority of the thousands of practitioners throughout the country have no experience in federal courts, where Hague cases would most typically be brought. And, as the old saying goes, “when all you have is a hammer, everything looks like a nail.” That is, an inexperienced practitioner may fail to recognize a Hague matter as such, and file it instead as a state relocation case.⁷⁰

Even to an experienced practitioner, well versed in his or her state’s laws regarding child custody, it can be tempting to stick with the familiar tried and true methods that have served well in other matters. After all, relocation looks like relocation, whether it is across state borders or international ones.

Consider a hypothetical scenario in which a mother, father, and their children come to Ohio from a Hague signatory state for the father’s short-term work assignment.⁷¹ The mother presumes that, after the father’s two year work term ends, the family would return to their life in their home country. Approximately a year after moving to Ohio, the father informs the mother that he has fallen in love with another woman and wants a divorce. A divorce action is filed and litigated in Ohio state court. During the course of the litigation, the mother argues that she should be per-

⁷⁰ Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendment to ICARA*, 38 *TEX. INT’L L.J.* 41 (2003).

⁷¹ The authors had some involvement in this domestic relations matter. For privacy reasons throughout this article, names and specific details of certain unreported cases will not be used.

mitted to return to her home country with the children; however, her claim is treated as a request to relocate with the children from their Ohio “home.” The family ultimately remains in Ohio because the mother cannot prevail on her relocation request.

Under the circumstances, the mother—and her counsel—arguably *should* have treated this as a Hague case from the outset. The mother could and should have filed a Hague action arguing that family’s country of origin, not Ohio, was the habitual residence of the children and therefore the appropriate jurisdiction to make a custody determination. Prior to the father’s change of plans, the family had intended to return to their country of origin and never intended to permanently reside in Ohio. Assuming the mother would have successfully argued that her country of origin was the habitual residence of the children, she would have been able to return to there and have custody determined there. This would have been a significant strategic advantage because, under Hague principles, the habitual residence has jurisdiction to determine custody. Instead, the mother’s counsel presumably directed her to litigate her matter in Ohio state court; it is difficult to prevail on a request to relocate children out of the country.

While this case is not an “abduction” case per se, it is an example of how blurred the intersection between Hague actions and state domestic relations law can be. It is also an example of a case where, either as a result of her counsel’s inexperience or lack of Hague knowledge, the children’s opportunity to return to their habitual residence was prejudiced by legal counsel’s strategic mistake.

While the authors acknowledge the Hague may be imperfect, it remains the best line of defense for a LBP. Even with an average processing time of 207 days for Hague cases, at around seven months this is still often quicker than state courts, and in many ways the Hague provides a more powerful remedy than do UCCJEA laws given that Hague’s mechanism for a return to the child’s habitual residence.

C. *Inexperienced Judges and Judicial Interpretation*

Even when highly experienced legal professionals can be found, the experience of the hearing officer—or lack thereof—can certainly have a tremendous impact on the outcome of a

matter. The vast majority of family law matters are brought in state courts, under state laws. Most cases simply are not international matters. And, even in the federal court system, Hague cases are not common. Thus, there are a limited number of judges with experience in Hague matters, and even those judges who have seen them have probably only presided over a few, at most.⁷² The Hague Conference *Guide to Good Practice* strongly encourages treaty partners to provide for the concentration of Hague return cases in a limited number of courts; however, the United States has no such concentration.⁷³

In addition, irrespective of experience, judicial interpretation varies from jurisdiction to jurisdiction. For example, while Article 13 contemplates heavy consideration of a mature child's wishes,⁷⁴ U.S. federal courts do not uniformly apply this provision. While the child's level of acclimatization and past experiences may be taken into account, the circuit courts have failed to specifically designate as an important factor that child's opinion as to his or her habitual residence.⁷⁵ Yet, even the primary standard for consideration often varies and splits do emerge. For example, the Third, Sixth, and Eighth Circuits have developed a standard that focuses on objective signs of a child's adjustment to the new locale, while the Second and Ninth Circuits have found it more appropriate to focus on the last shared subjective intentions of the child's parents.⁷⁶ Then, in the matter of *Redmond v.*

⁷² Jeremy Morely, *U.S. Hypocrisy Concerning International Child Abduction*, INT'L B. ASS'N NEWSL., Sept., 2010, available at <http://www.international-divorce.com/us-hypocrisy-concerning-international-child-abductions>. This article states that most judges in the United States who "might be called upon to handle The Hague cases have never done so previously. It is more usual than not for a judge in The Hague case to report that, 'This is my first Hague case', and then to ask the lawyers to provide special support for that reason."

⁷³ *Id.*

⁷⁴ Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 1, at art. 13.

⁷⁵ Samantha Rumsey, Law School Student Scholarship Paper 560, *The Case for Considering a Child's Opinion in Determining Habitual Residence in Hague Convention on the Civil Aspects of International Child Abduction Cases* (2014), copy on file with authors.

⁷⁶ See, e.g., *Barzilay v. Barzilay*, 600 F.3d 912, 919 (8th Cir. 2010); *Gitter v. Gitter*, 396 F.3d 124, 133 (2d Cir. 2005); *Mozes v. Mozes*, 239 F.3d 1067, 1069 (9th Cir. 2001); *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir. 1995); *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993).

Redmond,⁷⁷ the Seventh Circuit explicitly indicated that the parents' last shared intent is not a "fixed doctrinal test for determining a child's habitual residence;" instead, the determination of habitual residence is "a practical, flexible, factual inquiry that accounts for all available relevant evidence and considers the individual circumstances of each case."⁷⁸

In addition, there is a circuit split in the United States concerning the "grave risk of harm" exception relative to another nation's ability to protect a child. The Sixth Circuit has considered a grave risk of harm exception valid "when the court in the country of habitual residence for whatever reason, may be incapable or unwilling to give the child adequate protection."⁷⁹ The Seventh Circuit has declined to follow this interpretation on the basis that this language does not appear in the Hague itself and that it is an unrealistic standard.⁸⁰ The Eleventh Circuit has similarly rejected this position, determining that it was not contemplated by the Hague and that requiring evidence of the legal and social systems of another nation creates problems of proof.⁸¹ These varying interpretations of critical Hague provisions show the extent to which different results are reached in different courts with different hearing officers, and the additional layer of uncertainty created for the LBP.

D. *Procedural Inefficiencies*

In addition to the other obstacles facing a LBP, there are many procedural inefficiencies within the Hague proceeding. Initially, the LBP has potential obstacles properly serving the abducting parent with process; the LBP has to have sufficient information about the whereabouts of the abducting parent, which can be problematic if the abducting parent has taken affirmative steps to avoid detection. Additionally, ambiguity in the Hague Service Convention forces the LBP and his or her counsel to decide whether to serve the other party through the country's central authority, which can be time-consuming and cumbersome, or to utilize service by mail, return receipt requested,

⁷⁷ 724 F.3d 729 (7th Cir. 2013).

⁷⁸ *Id.* at 737.

⁷⁹ *Friedrich*, 78 F.3d at 1069.

⁸⁰ *Van de Sande v. Van de Sande*, 431 F.3d 567, 571 (7th Cir. 2005).

⁸¹ *See, Baran v. Beaty*, 526 F.3d 1340 (11th Cir. 2008).

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which is quicker and simpler but could be subject to challenge.⁸² Finally, the LBP may have challenges obtaining the necessary discovery to present a case, especially if the evidence must be obtained outside the United States.⁸³

E. *Cost Concerns*

No small amount of financial resources is required to bring a Hague action. Attorneys experienced in Hague matters tend to have sophisticated practices and higher billing rates, and these types of matters are not completed quickly. It is certainly common to bring in experts such as forensic psychologists, at significant additional cost. Further, the travel costs alone can be prohibitive. A LBP from another nation must not only secure a visa to travel to the United States, but must also pay travel costs of perhaps well over \$1,000 per trip to be present for hearings and other court appearances. All of this means that these cases often cost well into the six figures – often well more than an average LBP can afford.

There are many examples of difficult and costly Hague cases.⁸⁴ One such case involves children abducted to the United States by the mother from Hungary. The father, the LBP, instituted a Hague action in the Southern District of Ohio in April of

⁸² Carolyn A. H. Sayers, *Service of Process Pursuant to the Hague Convention and the Article 10 Controversy*, L. A. B. ASS'N CNTY. NEWSL., available at http://www.lacba.org/Files/Main%20Folder/Sections/International%20Law/Files/News7_09_CAHS_Hague_Convention.pdf.

⁸³ Gareth T. Evans & Farrah Pepper, *Court Holds U.S. Discovery Rules Trump French Law and Hague Convention*, 9 BNA (2009), available at <http://www.gibsondunn.com/publications/Documents/Evans-Pepper-CourtHoldsUS-DiscoveryRules.pdf>; See DAVID Q. ICHEL, PETER J. KAHN, THEODORE EDELMAN, CURRENT APPROACHES TAKEN IN U.S. LITIGATION TO COMPLY WITH POTENTIALLY CONFLICTING U.S. DISCOVERY OBLIGATIONS AND EU AND OTHER FOREIGN DATA PRIVACY STATUTES (2012). See also The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (HCCH.net); Marissa L.P. Caylor, *Modernizing the Hague Evidence Convention: A Proposed Solution to Cross-Border Discovery Conflicts During Civil and Commercial Litigation*, available at <http://128.197.26.36/law/central/jd/organizations/journals/international/volume28n2/documents/MarissaCaylorArticlePgs341-288.pdf> Christopher K. Tahbaz, *International Discovery: Around the World in Ninety Minutes*, available at http://www.mcmillan.ca.Files/BHarrison_AroundtheWorldinNinetyMinutes.pdf, see also.

⁸⁴ *Dobos v. Dobos*, S.D. Ohio, Western Division, 1:08-CV-307 (2009).

2008. While the mother did raise a “grave risk of harm” defense,⁸⁵ the facts were clear that Hungary was the habitual residence of the children and that the mother had wrongfully removed the children from Hungary. The Hague case proceeded to trial in May of 2009. A decision requiring the return of the children to Hungary was issued in July of 2009; the children were finally physically returned to Hungary in approximately December of 2009. While the father’s Hague action was ultimately successful, it took approximately twenty months and significant financial resources for attorney fees and other professional fees before the children were ordered returned to their habitual residence. In this case, the father had a relatively “clean” Hague action with minimal complicating factors; even under those circumstances, it cost the father significant funds and over twenty months of time to obtain the correct result. The father was only successful because he had the knowledge, skills, resources, and experienced counsel to present his case.

F. Abductions to the United States from Non-Hague Signatory States

As described previously in this article, when a child is abducted from a non-Hague signatory state, a LBP cannot utilize the Hague at all⁸⁶. That parent has limited legal options to secure the return of his or her child. It remains a large gap in the American legal system. However, the UCCJEA can be used to effectuate a return to the child’s “home state” tantamount to a return under Hague.⁸⁷

The hypothetical scenario used to illustrate this point involves a dual citizen female child, age six the time of abduction. The child’s father is a Japanese national and her mother is American.⁸⁸ Other than at least annual trips to the United States to

⁸⁵ The mother alleged that the father had committed domestic violence against her; however, the mother never alleged any violence directed toward the children.

⁸⁶ See *supra* discussion at note 1-9.

⁸⁷ See Zashin, Reynolds & Keating, *supra* note 11.

⁸⁸ The mother was one-quarter Japanese, having a grandmother who emigrated to the United States from Japan. The father and mother married in the United States. However, within months of marrying, the couple moved to Tokyo (where the father had been living and working since 1990).

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visit the mother's family, the child had spent the overwhelming majority of her life in Japan with her parents. Her permanent residence had always been in Japan. The child has extended paternal family in Japan, attended school in Japan, and was fully integrated into her life in Japan.

In 2011, without the father's knowledge or consent, the mother abducted the child from Japan and fled to the United States. The mother admittedly engaged in efforts to conceal her and the child's location after leaving Japan.⁸⁹ After several months of searching and hiring a private investigator, the father ultimately learned that the mother was living with the child near Columbus, Ohio in the United States since mid-August 2011.

Because Japan was not a signatory of the Hague,⁹⁰ the father filed a series of legal proceedings in Ohio in early January 2012. He was unable to file a Hague proceeding. In the course of the litigation, the father attempted to utilize internal U.S. law to effectuate a return tantamount to a return under the Hague.⁹¹ After several layers of state court litigation, the Ohio court finally agreed with the father's arguments concerning subject matter jurisdiction and acknowledged the validity of a Japanese custody order that had been issued while the Ohio proceedings dragged on. The father was able to return to Japan with the child.

On its face, this case study would seem to be a strange one for these authors to present; however, the reader should consider the larger picture. From the time the child was abducted until the day the father was able to return with her to Japan, more than two and a half years later, the father was engaged in litiga-

⁸⁹ The mother first flew to Florida, then within a month drove to Ohio with the child. She left no indication for the father that she had left Japan or where she was going. The mother further admitted that while she could have sent the father an email or otherwise communicated to him or his family that she and the child were safe, she made no such effort.

⁹⁰ All parties in the Ohio litigation agree that if Japan had been subject to the Convention in January 2012, the case would have functionally been over before it started and the child would have been immediately returned to her habitual residence in Japan.

⁹¹ At trial in Ohio, the father argued that Ohio was without subject matter jurisdiction to determine the child's custody and requested that the Ohio court issue an order determining Japan to be the child's home state and permitting the father to arrange for the child's return for further proceedings in the Japanese courts.

tion in Ohio. In the course of the Ohio litigation, the father spent substantial funds on attorney and professional fees (i.e. forensic psychologists, guardian ad litem, etc.). The father was fortunate enough to have the financial and other resources necessary to pursue this litigation, far more than the average LBP. Moreover, the father had the skills necessary to find experienced attorneys, well-versed in Hague, who were able to successfully argue a novel and complex legal position. The state court judge assigned to the father's case understood and accepted the father's counsel's arguments. If any of these variables had been different—sufficient funds, resources, skills, experienced and creative counsel, judge who correctly applied the law—the father might not have been successful and the abducting mother might have won. Even with all of these variables in his favor, the father's fight took over two and a half years and funds totaling in the six figures.

V. Cultural Bias – How Enlightened Is the United States?

Brennan and Marshall's torch-bearers today mostly sit on courts in Canada and South Africa and Israel and Europe. Those places don't have centuries-old constitutions, and as a result, judges there tend not to care about originalism. They talk and write unapologetically about dignity, equality, and the human spirit. And many of them don't think judicial restraint is a paramount virtue or worry that they're imposing their values from on high.

—Aharon Barak, former President of the Supreme Court of Israel and law professor

[W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.

—Antonin Scalia, Associate Justice of the U.S. Supreme Court

The United States' autonomy and resistance to the influence of other nations prevents it from appreciating its failures and lim-

itations relative to children abducted to the United States. U.S. citizens look to the Hague and read its provisions, and then interpret them through their own lens. U.S. citizens believe their nation is applying its provisions to the letter, even as it often fails to recognize its own bias toward retaining jurisdiction over the well-being of the children. Without even realizing it, the United States' belief that its laws and policies are superior lead judges (both federal and state) to determine that the United States is in a "better" position to determine custody than the child's habitual residence, often in contravention of Hague principles.

The Hague framework, in its effort to extend to tribunals the amount of discretion necessary to make sound decisions for abducted children, actually creates room for the domestic interests of signatory states to operate.⁹² Nowhere is this more pronounced than in the application of available defenses to return under the Hague, defenses which are too often used imprudently to prevent the return of abducted children and to allow instead adjudication of the merits of the custody matter in the United States.

A. *Grave Risk of Harm*

Authorities are not bound to order the return of a child if it is established that there is a "grave risk of harm that his or her return would expose the child to a physical or psychological harm or otherwise place the child in an intolerable situation."⁹³ In the United States, under ICARA,⁹⁴ a grave risk of exposure to physical or psychological harm or "placing the child in an 'intolerable situation'" must be proved by clear and convincing evidence.⁹⁵

⁹² See generally, Linda J. Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, NYU Pub. L. & Legal Theory Working Papers, Paper 18 (2006), available at http://lsr.nellco.org/nyu_plltwp/18.

⁹³ Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 1, at art. 13(b), see also King, *supra* note 17.

⁹⁴ International Child Abduction Remedies Act, 42 U.S.C. §11601 (later transferred to 22 U.S.C. . § 9001).

⁹⁵ See King, *supra* note 17, at 301 (citing ICARA, 42 U.S.C. at § 11603(e) (later transferred to 22 U.S.C. § 9003).)

One case that illustrates this issue is *Silverman v. Silverman*.⁹⁶ In this case, the parties were dual citizens of the United States and Israel. The couple decided to raise their children in Israel, but the mother began having reservations about a permanent relocation.⁹⁷ The family sold their home in Minnesota and moved possessions and pets to Israel, living first with family, then in an apartment. The parents found jobs and enrolled the children in school. The parties' relationship became tumultuous.⁹⁸ After residing in Israel for approximately a year, the father allowed the mother to travel to the United States with the children for a summer trip, and round trip tickets were purchased. Once in the United States, the mother filed for divorce and custody in Minnesota and served the father in Israel. The father moved to dismiss the custody action under the Hague (in state court). He filed a Request for Return with the National Center for Missing and Exploited Children and a Hague petition in the Minnesota district court, though he secured a good attorney in Israel.

While the father's Hague action was pending, the Minnesota state court, using only Minnesota state law, granted the mother temporary custody. The federal district court subsequently ruled against the father's petition finding that Minnesota was the children's habitual residence and, even if that were not the case, the grave risk of harm exception would apply because Israel is a "zone of war" based on media outlets' reporting. Despite having

⁹⁶ 338 F.3d 886 (8th Cir. 2003). Andrew A. Zashin, one of the authors, wrote a prior paper thoroughly examining this matter in the context of the risk of harm exception. Andrew A. Zashin, *Bus Bombings and a Baby's Custody: Insidious Victories for Terrorism in the Context of International Custody Disputes*, J. AM. ACAD. MATRIM. LAW (2008).

⁹⁷ She was having an affair and not sure about future of the marriage.

⁹⁸ After nine months of living in Israel, the mother returned to Minnesota to file a bankruptcy petition. When she returned to Israel, the father had obtained a restraining order preventing her from leaving, and he confronted her about the affair. The parties subsequently agreed to reconciliation and obtained dismissal of the restraining order. The mother alleged that the father used force and coercion against her. Later on, the Eighth Circuit Court of Appeals noted no violence against the children, and that the mother was physically violent toward the father. The mother engaged an Israeli attorney and was advised she would not get custody in rabbinical court, so she should file in civil court. The father learned she was talking to an attorney and filed for divorce in Israel, but subsequently dismissed the action.

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secured experienced counsel, the father's case was presented to hearing officers whose significant cultural bias caused them to inappropriately apply the law.

Ultimately, the United States Court of Appeals for the Eighth Circuit sitting en banc ruled that the children were habitually resident in Israel.⁹⁹ Subsequently, the United States District Court for the District of Minnesota made an order specifying the modalities of the children's return.¹⁰⁰ However, the return occurred only after a lengthy procedural history involving a state and a federal court case, Minnesota and Israeli attorneys well-versed in Hague matters, a petition to grant certiorari to the Supreme Court of the United States that was ultimately denied, and nearly *four* years. The father spent many years, and presumably substantial funds, because several layers of his case were heard by hearing officers who exhibited cultural bias. These hearing officers determined that the United States—and not the children's habitual residence—should determine custody because Israel was categorized as a “zone of war” since it was located in the Middle East.

B. Domestic Violence

More often than not, cases involving allegations of domestic violence in the home state are retained by a U.S. court, even when the home state is perfectly capable of protecting the child during an appropriate hearing on custodial issues.

In the matter of *Danaipour v. McLarey*,¹⁰¹ for example, the mother left Sweden with two daughters, aged 3 and 7. The father filed a Hague petition. There was no dispute that the children were habitual residents of Sweden under Hague provisions, nor was there a factual dispute about the father's custodial rights to the children. The wrinkle was that the mother alleged that the father sexually abused the children, and she argued that their ordered return to Sweden would cause them tremendous psychological harm.

The trial court found no evidence of immediate abuse and, thus, found this argument unpersuasive. The trial court further

⁹⁹ *Id.*

¹⁰⁰ 2003 U.S. Dist. LEXIS 15788 (D. Minn. Aug. 28, 2003).

¹⁰¹ 286 F.3d 1 (1st Cir. 2004).

recommended the children be returned to Sweden, where the question of whether the abuse actually occurred, as well as the question of parenting rights to children, would be decided. The mother then appealed this matter to the First Circuit, which found that a trial court *must* make a definitive determination as to whether the abuse occurred before the children could be returned to Sweden. Most specifically, regarding the grave risk analysis, the First Circuit found that:

First, we start with the context in which the grave risk analysis must take place. Of great significance to us is the policy of this county in enforcing the Hague Convention with regard to the type of risk alleged: sexual abuse of a young child. The policy, as articulated by the Department of State, is to view sexual abuse as an intolerable situation.¹⁰²

And found further that:

Second, the Convention assigns the task of making the ‘grave risk’ determination to the court of the receiving country; here, this task includes the obligation to make any subsidiary factual findings needed to determine the nature and extent of any risk asserted as a defense to returning the child. The treaty does not give the courts of the country of habitual residence jurisdiction to answer the grave risk question; their jurisdiction is determined by the law of their own country. The district court’s implicit determination that, in the circumstances of this case, the children could be returned without first determining whether they had been sexually abused was inconsistent with United States policy with regard to the Hague Convention, which holds that sexual abuse by a parent constitutes an intolerable situation and subjects the child to grave risk.¹⁰³

Thus, the First Circuit remanded the case back to the trial court for further proceedings to determine whether abuse actually occurred in order to determine whether the child’s return to Sweden was appropriate.

C. United States’ alleged Supremacy

The *Danaipour v. McLarey* decision is exemplary of the wider United States’ jurisprudence involving the “grave risk of harm” question. Too often, the mere existence, or even alleged existence, of a risk of harm leads courts to retain abducted children here in the United States with no investigation of whether a

¹⁰² *Id.* at 14-15.

¹⁰³ *Id.*

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return will actually result in harm. That is certainly not to say that these authors are advocating children be returned to an abusive situation. However, rather than simply assuming an attitude that “we are obligated to find jurisdiction here if we can in order to protect a child from an abusive situation in his home state,” perhaps the question we should be asking is what will happen to the child if he or she is returned on a case-by-case basis? True, many non-signatory states have been known to take rather lax views on heinous crimes such as child abuse and sexual abuse. However to suggest that the United States is the only signatory state capable of keeping a child from the hands of his or her abuser is fallacious. While, in these types of cases a court may ultimately determine that the LBP should have his or her parental rights significantly limited or even terminated, the judicial process in the home state should be given an opportunity to work, and abducting parents should not be rewarded for trying to circumvent this process.

A rather glaring example of this phenomenon is found in *In re Application of Adan*.¹⁰⁴ In this matter, the child was born in Argentina to unmarried parents. The mother was a naturalized United States citizen, and the father was an Argentinian citizen. They resided together in New Jersey as a family for approximately three months, before returning to Argentina for about three years. Then, the father allegedly began sexually abusing the child. After discovering the abuse, the mother filed a complaint against the father in the Argentinian family court and obtained a 90-day temporary restraining order against him. The mother alleged that the father violated the restraining order and the Argentinian police would not enforce it. Shortly before the expiration of the temporary restraining order, the mother brought her daughter to the United States and obtained a restraining order from a New Jersey court. The father then filed a Hague petition. The district court issued a one-sentence order with no findings of fact, indicating that neither witness was credible and that the child should be returned for further adjudication in Argentina. The judge found that “this matter is best determined by Argentinian courts because it is all interwoven with a

¹⁰⁴ 437 F.3d 381 (2006).

struggle, as I said, for custody and determination of domestic abuse, which is not the purpose of the Convention.”¹⁰⁵

On appeal, the Third Circuit held:

We are well aware that the Convention requires the “prompt return of children wrongfully removed” and that we must act “expeditiously” in doing so. Hague Convention, arts. 1(a), 11, 19 I.L.M. at 1501-02. The desire for a swift resolution to this matter cannot, however, outweigh our duty to see that the law is properly applied.

The court went on to state:

If . . . the District Court concludes that [the father] has satisfied his burden of proving that he had valid custody rights over [the daughter] under Argentine law at the time [the daughter] was removed, and was actually exercising those rights, the District Court must then: (1) make detailed, written findings of fact on all allegations of abuse and harm visited upon [the mother] and [daughter] by [the father], and on the protective efficacy of the Argentine courts and police, evaluating the witnesses’ complete testimony and all other evidence in the record; (2) consider the totality of circumstances related to the alleged child abuse, rather than simply considering and explaining away each allegation in isolation; and (3) if the Court decides that [the mother] has not satisfied her burden of proving a grave risk of harm and the inability of Argentine authorities to protect the child, carefully tailor an order designed to ameliorate, as much as possible, any risk to [the daughter]’s well-being.¹⁰⁶

While the matter was up on appeal, the mother petitioned for a stay of the order to return to Argentina, as well as for reconsideration of the decision. Both were denied. On remand, the trial court still found return was appropriate. Upon further appeal, the Third Circuit again reversed and remanded the case, this time with instructions to dismiss the petition. The end result was that the United States superimposed itself in this situation – a situation in which the abuse could have been doubtless been more than adequately addressed in an Argentinian court – and the abductor got to keep the child in the United States.

Certainly, these are but a few examples in a sea of many. Further, experienced practitioners reading this article can doubtless point to one or more successful returns. However, the truth is that more often than not children who are abducted to the United States remain here in the United States. In all but the

¹⁰⁵ *Id.* at 398.

¹⁰⁶ *Id.*

simplest of cases, the returns are less common than are victories of the LBP.

VI. Conclusion

The United States has to be honest about the problem of returning abducted children within its borders before anyone can propose real solutions. The United States must acknowledge that, through its failings and its failure to fully and objectively consider this problem, it has become a refuge state for child abductors. Its failure to enforce its own laws or the structural impediments to enforcing them allows the abductors to win the majority of the time.

Thus far, this issue has not been fully appreciated or understood. The magnitude of the problem is lost in statistics that do not accurately reflect real life. The existing statistics reflect a poor return rate of less than 50%. Yet those statistics are still optimistic inasmuch as they miss a vast number of children abducted to the United States in which: 1) the LBP does not have the skills or resources to bring a legal challenge, both financial and otherwise; 2) the LBP is from a non-Hague signatory state with few legal options available; or 3) the LBP does not get proper counsel and chooses to fight the legal battle as a relocation case in state court. The majority of cases of child abduction to the United States fall through the cracks of the American and international legal and political systems.

Assuming a LBP can bring a Hague action in the United States, he or she faces many obstacles to having the child returned. The LBP faces significant systemic failures in which the LBP does not have the knowledge base to be directed to the few experienced attorneys in the United States who can adequately address the issues, the LBP finds his or her case in the “wrong” jurisdiction devoid of experienced judges who understand the Hague and how it should be applied, and/or the LBP finds the case in a jurisdiction where the case is delayed and not heard for many months or years. In addition, the LBP faces a cultural bias that often shifts into beliefs that the United States is a “better” place for custody to be determined than the child’s habitual residence. Debunking or correctly assessing the meaning of American compliance statistics may help to erode the belief that the

United States handles important matters—like Hague abduction determinations— better than its Hague partner nations.

By failing to live up to the spirit of the Hague, the United States also fails to meet its own internal public policy goals as well. The Hague and internal U.S. law, specifically the UCCJEA, have overlapping public policy reasoning. They both assert that the United States and the signatories of the Hague believe that child abduction should be deterred, that child abductors should not be rewarded, and that child custody should be determined by the jurisdiction with the best access to evidence and information about the child. To be consistent with these principals, the United States must be more effective at implementing the Hague. Moreover, the United States must be more effective and service a larger demographic of abducted children to justify the significant resources devoted to it.

It is beyond the scope of this article to analyze the costs associated with running the apparatus necessary to comply with the Hague Convention. One can reasonably conclude, however, that the costs allocated are far disproportionate to the number of children serviced by that apparatus every year. Based on the foregoing facts and analysis, one can only imagine that the actual expense is staggering in comparison to the number of children serviced. Therefore, more cost-effective and beneficial ways need to be established to handle these types of cases that comport with both the letter and spirit of the treaty. Simply put, any solution must result in the uniform establishment of tightened timelines for the adjudication of Hague cases at the federal level but also for Hague-type relocation/abduction cases that, for whatever reason, are adjudicated at the state level.

While we acknowledge that there is a significant amount of time and analysis required to fashion appropriate solutions, we offer the following ideas as potential springboards. We believe that many of these ideas should be implemented in concert with each other to address the multi-dimensional problems that presently exist.

- Designated judges in federal court: All Hague cases would be heard in federal court exclusively. Each district court would have one judge designated to hear any Hague case brought in that district. That judge would engage in special training, with at least one in-depth session and

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then ongoing training for updates and new developments.¹⁰⁷ A well-trained and prepared judiciary would address issues identified in this article, including issues of efficiency, uniformity and understanding of the issues. Given the small number of Hague cases presently reported, this special docket should not bog down the federal court system.

- Accelerated Docket: Hague cases would be on an accelerated docket with specific timelines; while this would be similar to Brussels II¹⁰⁸, the timelines would not have to be identical. The court should be more willing to grant continuances for the LBP than the abductor parent.¹⁰⁹ This would address the concerns raised about significant time lags rewarding the abductor parent.
- Judicial Training: In addition to federal court judicial training suggested above, we also propose that all state court domestic judges (or judges who deal with domestic relations cases even if they are not specifically designated as domestic relations judges in their state court system) attend some training relative to Hague, UCCJEA, and general custody jurisdiction training. While it would not be as in-depth and comprehensive as the federal court judge training, this training would help educate state court judges about these issues. State court judges would then be better prepared to address these issues in their own courtrooms and know when these cases must be transferred to federal court.
 - Federal court judges: If the judges are well-educated on these topics, this will help police practitioners; it will allow judges to be better equipped to discard poor arguments from uneducated practitioners. Creating a

¹⁰⁷ Organizations such as the AAML, IAML, ABA, or state bar associations can be involved so that judges can learn at the requisite level of sophistication to truly help litigants.

¹⁰⁸ Brussels II Regulation (EC) No. 2201/2003; this is a European Union Regulation on conflict of law issues in family law between member states, in particular those related to divorce, child custody and international child abduction.

¹⁰⁹ See Rains', *supra* note 40, among others, that advocate for an accelerated docket.

different culture around these cases could weed out practitioners who are not willing to take the time to know the appropriate laws.

- **State court judges:** Better-educated state court judges will be in a better position to spot custody jurisdiction issues and abduction issues in particular. They will be able to better determine if there is a Hague issue and to remove that case if appropriate. If there is not a Hague issue, they will have other tools at their disposal to manage it. If they are trained to utilize the UCCJEA to effectuate a return to a non-Hague state,¹¹⁰ they have another tool at their disposal to address abductions to the United States.
- **Jurisdictional Issues Addressed Before Substance:** Courts should require and enforce stricter enforcement of the rules that require hearings on jurisdictional issues (i.e. have the jurisdictional issues addressed) before the court moves on to substance and custody issues. If jurisdictional issues are addressed quickly and efficiently, the appropriate court will then be in a position to address the merits of the custody matter; the abducting parent will not be provided with a significant advantage when the abducted-to court begins to investigate the merits and begin to cement the case in that jurisdiction. Additional education for state court and federal court judges will also assist courts in addressing jurisdictional issues as a preliminary matter.
- **Attorney Training:** The district courts would offer continued legal education trainings for attorneys on Hague and custody jurisdiction issues. The trainings would be offered at a reasonable cost to encourage attorneys to become better educated on these issues. They would be offered a few times per year for accessibility.¹¹¹

¹¹⁰ As addressed earlier in this paper and referenced in a prior article by these authors, the UCCJEA can be used to effectuate a return similar to a Hague return under the appropriate factual circumstances. *See supra* discussion in text at notes 86-91; *see also* Zashin, Reynolds & Keating, note 11.

¹¹¹ Federal and state bar associations along with other organizations (such as IAML or AAML) could sponsor these trainings. Potentially, these organiza-

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This article asks that the many dimensions of this problem be explored so that any potential solutions that come afterward can assist the many LBPs who need it. Our tone may seem harsh, but we believe that stark honesty is necessary to direct attention to this massive problem. Pretending that the United States is making progress will never improve the situation. The above solutions should be further developed once additional research has been performed to understand the complexities of the problem or establish metrics for how many of these problems exist. While other nations' ideas about better implementations of Hague should be considered (i.e. Brussels II), the unique aspects of the United States' current problem must be explored to have any chance of constructing viable solutions. We do advocate that the conversation about children abducted to the United States must move toward improving how this country implements the Hague and making American processes more efficient. This country must recognize the need to view child abduction issues differently. The United States is not the worst offender concerning implementation of the Hague, but it must do better. As it stands now, the United States remains a refuge state for child abductors; Americans cannot be satisfied with that conclusion.

tions could offer a certification for attorneys who complete a requisite amount of training.