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Domestic Violence by Proxy: A Framework for Considering a Child's Return Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction's Article 13(b) Grave Risk of Harm Cases Post *Monasky*

by

Andrew A. Zashin*

The 1980 Hague Convention on the Civil Aspects of International Child Abduction (“Convention”) is the leading treaty used to return wrongfully removed or retained children to their habitual residence. The Convention’s focus is on establishing a cooperative system between contracting states to ensure the swift return of these children. In most cases, if a petitioning parent can establish that a child under age sixteen is removed or retained from their habitual residence, and that removal or retention violates the petitioning parent’s rights of custody under the laws of the habitual residence, the child “shall” be promptly returned to the habitual residence if the petition was brought within a year of the removal or retention.¹ A central tenet posits that a child’s “habitual residence” is the best location to make substantive custody determinations.

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¹ See generally Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (hereinafter “1980 Convention”).

However, the Convention contains several narrow exceptions to the presumptive immediate return of a child to the child's habitual residence which allow the country in which the child is located to reject a return petition under various circumstances. One of these exceptions is Article 13(b), the "grave risk of harm" exception. Under Article 13(b), the requested state can deny a return request if "there 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."²

Parents frequently try, without success, to use Article 13(b) to avoid a return in cases of abuse, domestic violence, or regional turmoil. Those U.S. cases in which a return was denied on this basis tend to evidence relatively dire circumstances. Despite the historic lack of success, parents continue to try—and attempt to do so creatively. This year, the U.S. Supreme Court considered the case of an abused mother, together with its first foray into defining "habitual residence." While announcing a case-by-case habitual residence standard based upon the specific facts and circumstances, and despite noting the impact of abuse in habitual residence determinations, the Court declined to clarify the confusion about exactly when harm is grave enough to merit the 13(b) exception to return.³ In doing so, the Court likely sparked a much wider conversation and debate about the Convention and, specifically, Article 13(b), particularly regarding how trial courts should distinguish between meritorious situations of abuse and those cases attempting to raise every possible defense, no matter how tenuous.

On one side, it is the judiciary's job to protect children from abusive or otherwise dangerous situations. On the other, the extreme measure of removing or retaining a child from one parent is not something that can be taken lightly. The manner in which facts are presented is becoming even more important to ensure that justice is achieved and the interests and safety of children are protected. The inherent nature of these competing positions creates a zero-sum game.

One thing seems clear: attempts to use and expand the 13(b) exception will not abate and this issue requires serious attention.

² See *id.* art. 13(b).

³ *Monasky v. Taglieri*, 140 S. Ct. 719 (2020).

Monasky v. Taglieri, while remembered most as the landmark decision defining habitual residence in Hague cases in the United States, is yet another case that presents the Article 13(b) grave risk of harm exception to return.⁴ In fact, the 13(b)

⁴ *Monasky* is one of the most important family law cases in American jurisprudence, and certainly the most important international family law case. *Monasky* is only one of four Convention cases the U.S. Supreme Court has ever heard. The others are, *Lozano v. Alvarez*, 572 U.S. 1 (2014), *Abbott v. Abbott*, 560 U.S. 1 (2010), and *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973). It is the most important, since it deals with the Convention's entry point and fundamental issue, the definition of "habitual residence." The Convention is explicit in Article 4 that the terminal point, the end date of its application to children, is sixteen years old. Habitual residence is mentioned throughout the Convention, however, nowhere in the Convention is the term "habitual residence" defined. If the Convention's drafters wanted to define habitual residence, they would have done so. They did not.

Taglieri argued that every child must have a habitual residence; *Monasky* argued that in some circumstances children, specifically infants and children with cognitive disabilities, may not have a habitual residence at all if they have not formed sufficient connection with the signatory nation. The plain language of the Convention does not address this issue. The Convention is explicit about when the date the Convention's application terminates for children, sixteen years old, but the Convention is intentionally silent about defining habitual residence, suggesting that in some cases, like A.M.T.'s, an eight-week-old infant has not habituated to anything but the child's primary caretaker(s). *Monasky* argued that, in some cases, there is no habitual residence and the Convention simply does not apply. She asserted that this outcome is not a catastrophe by any means—when this happens, the law of the country where the child is, which must be a Hague Treaty co-signer in the first place, applies.

In *Monasky*, the U.S. Supreme Court announced a new "totality of the circumstances" standard to determine the habitual residence of all children. Prior to *Monasky*, different circuits had used different definitions of habitual residence. Some circuits, such as the Ninth Circuit, utilized a "shared parental intent" standard, focused on where the parents intended the child to be raised. *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001). Others, such as the Sixth Circuit, adopted an "acclimatization" standard focused on where the child was acclimatized and where the child viewed as "home." *Robert v. Tesson*, 507 F.3d 981, 993 (6th Cir. 2007). Some circuits, such as the Third and Eighth Circuits, used a hybrid approach that considered both shared parental intent and acclimatization in different ways. *Feder v. Evans-Feder*, 63 F.3d 217 (3d Cir. 1995); *Barzilay v. Barzilay*, 600 F.3d 912 (8th Cir. 2010). Although *Monasky* created a uniform legal standard among American circuit courts, scholars have commented that "[d]espite the court [sic] finally defining habitual residence, it remains unseen whether the new totality-of-the-circumstances definition will cause 1980 Convention litigation to become more or less costly, complicated and time-consuming." Melissa A. Kucinski, *The Future of Litigating an Interna-*

issues were not just dealt with as “stand alone” arguments. Counsel for *Monasky* wrapped those arguments into the habitual residence “intent” arguments.⁵ As a matter of determining habitual residence, it stands to reason and the *Monasky* Court found,⁶ that domestic violence is a necessary factor in determining whether someone intends to be habitually resident in a place with a spouse who is violent towards them or their children. *Monasky* was not only a 13(b) case, but given the fact pattern, it provided the Court with an opportunity to address the specific grave risk of harm to minors who may or may not have been in harm’s way, although one of the parents was absolutely a victim of domestic violence. Questions like these are fairly common, but few victims actually get their day in court because of the time and expense of litigation.⁷

Although the Article 13(b) question was not certified before the Supreme Court, *Monasky* is a high-profile example of the same arguments presented in so many other cases in so many other courts. Moreover, Article 13(b) defenses float in orbit around the discussions of habitual residence cases. One cannot separate undisputed violence from the habitual residence considerations. If parental intent, or any sort of intent, were to be used at all for the basis of determining habitual residence, then one must consider the issue of violence. When considering violence, one must naturally consider, either directly or indirectly, the essential the elements of a 13(b) analysis. Necessarily, it is only logical that one’s intent must consider the violence that a parent experiences in a place where that parent habituates. Given the facts at hand, the *Monasky* case provided the Court with an opportunity to speak to the issue – which the Court once again denied.

tional Child Abduction Case in the United States, 33 J. AM. ACAD. MATRIM. LAW. 31, 38 (2020).

⁵ See generally Brief for Petitioner, *Monasky v. Taglieri*, 140 S. Ct. 719 (No. 18-935).

⁶ “In accord with decisions of the courts of other countries party to the Convention, we hold that a child’s habitual residence depends on the totality of the circumstances specific to the case.” *Monasky*, 140 S. Ct. at 723.

⁷ See generally Andrew A. Zashin, Christa G. Heckman & Amy M. Keating, *United States as a Refuge State for Child Abductors: Why the United States Fails to Meet Its Own Expectations Relative to the Hague Convention*, 28 J. AM. ACAD. MATRIM. LAW. 249 (2015).

This article offers a new approach for analyzing the 13(b) grave risk of harm defense, specifically as it relates to victims of domestic violence and their children, that is both practical and clear, and rooted in principles that are grounded in American jurisprudence that will result in more consistent rulings. Part I of this article provides background to the text of the Hague Convention, including the purposes of the text, the systematic return of a child to his or her habitual residence, the Article 13(b) grave risk of harm exception, and the role of undertakings. In Part II, the facts of the *Monasky* case are introduced, as well as its procedural history relative to Article 13(b). Then, Part III discusses previous 13(b) cases and considers when victims of domestic violence are victims by proxy, applying a tort law principle for guidance. Finally, this article concludes with the author's proposed framework in the interest of judicial economy and expediency in future 13(b) cases, so as to not waste the resources of the courts or litigants, but rather to benefit the court, the parties, and the child(ren) involved. This proposal serves the interests of justice and the policy set forth in the articles of the Convention itself for a swift resolution.

I. The Hague Convention

The Hague Convention convened in response to the growing concern over international child abductions, and specifically, to reduce the risk of harm to minor children wrongfully retained or removed as well as the distress to parents wrongfully deprived of their children. The Convention only applies if three standards are met: first, the minor child is aged sixteen or younger; second, the minor child was habitually residing in a contracting state prior to the time of removal; and third, the petitioning parent was exercising his or her custody rights at the time of the child's removal or retention. Primarily, the Convention aimed to construct a cohesive system of cooperation between signatory countries to ensure the swift return of children abducted by a parent.

The underlying purpose of the articles of the Convention were to maintain the overall status quo, while still protecting affected children from the harmful effects of wrongful removal or retention. Thus, the articles have created a system that does not seek to make substantive determinations of custody rights, but rather to establish a collaborative mechanism for securing the

prompt return of a wrongfully removed or retained child to the country of his or her habitual residence – the forum that is presumed capable of making the best determination of the child’s interests. The articles establish an overriding preference to return a removed or retained child to his or her state of habitual residence. Moreover, an equal preference exists that the institutions of the child’s habitual residence should make the custody determination, so long as the petition and proceedings for the child’s return have begun within one year of the date of wrongful removal or retention. Together, these provisions further the objective to promote cooperation between signatory countries. When followed, the Convention assists in deterring parents from attempting to forum shop principally to obtain the most favorable legal determination on custody issues.

Within the articles of the Convention exist several explicit exceptions to the rule that one must immediately return an abducted child to the country from which the child was abducted, and thereby allow judicial and administrative authorities to reject a custodial parent’s petition for return. This article will focus on the exception written in Article 13(b), known widely as the “grave risk of harm” exception. This exception allows a country to which a child is taken the power to deny a request to return an abducted child “if the person, institution, or other body which opposes its return establishes that 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.”⁸ Respondent parents must prove by clear and convincing evidence that a grave risk of harm will fall upon a child if the child is returned to the home country.⁹

The articles of the Convention, however, do provide for the return of a child even if there is a potential grave risk of harm, in the event that “sufficient protection was afforded.”¹⁰ Undertak-

⁸ 1980 Convention, *supra* note 2, at art. 13; *See also* Andrew A. Zashin, *Bus Bombings and a Baby’s Custody: Insidious Victories for Terrorism in the Context of International Custody Disputes*, 21 J. AM. ACAD. MATRIM. LAW. 121, 126 (2008).

⁹ Olivia Claire Dobard, Comment, *The Supreme Court Addresses International Child Abduction Under The Hague Convention*, 32 J. AM. ACAD. MATRIM. LAW. 435, 444 (2020).

¹⁰ *Simcox v. Simcox*, 511 F.3d 594, 605 (6th Cir. 2007) (citing *Walsh v. Walsh*, 221 F.3d 204, 221 (1st Cir. 2000)).

ings are “enforceable conditions of return designed to mitigate the risk of harm occasioned by the child’s repatriation.”¹¹ Do undertakings completely eliminate the need for the grave risk of harm defense? Undertakings do not eliminate the need for the defense, since they work in parallel to its evaluation. Even though undertakings can exist in conjunction with the defense, courts still have no controlling guidance as to when undertakings may apply.

The concept of undertakings is a judicial creation and is not included or defined in the text of the Convention itself.¹² Some

¹¹ *Simcox*, 511 F.3d at 605 (2007) (citing *Feder v. Evans-Feder*, 63 F.3d at 226 (3d Cir. 1995) and holding “[I]n order to ameliorate any short-term harm to the child, courts in the appropriate circumstances have made return contingent upon ‘undertakings’ from the petitioning parent.”); *Baran v. Beaty*, 479 F. Supp. 2d 1257, 1272 (S.D. Ala. 2007). *See also Simcox*, 511 F.3d at 606 (“Clearly, then, undertakings are not appropriate in all cases, and a court ‘must recognize the limits on its authority and must focus on the particular situation of the child in question in order to determine if the undertakings will suffice to protect the child.’”).

¹² *See Baran v. Beaty*, 526 F.3d 1340, 1349 (11th Cir. 2008) (“There is a long-standing tradition in English speaking countries of protecting children from harm through court orders which require parents or guardians to take steps to ensure children’s safety.”); *id.* at 1349 (“The concept of court-ordered conditions on the return of children has been imported to Hague Convention cases by courts in the United Kingdom, Canada, Australia, and the United States.”). *See also id.* 1, 22-23 (1st Cir. 2002) (“The concept of ‘undertakings’ is based neither in the Convention nor in the implementation of legislation of any nation. Rather, it is a judicial construct, developed in the context of British family law.”); *Danipour*, 286 F.3d at 22 (“The Department of State’s view of undertakings, to which we accord great weight, is that they should be limited in scope. The Department’s view of undertakings is expressed in a letter to the British government, written in response to British concerns about American courts’ failure to enforce consistently British undertakings: Undertakings should be limited in scope and further the Convention’s goal of ensuring the prompt return of the child to the jurisdiction of habitual residence, so that the jurisdiction can resolve the custody dispute. Undertakings that do more than this would appear questionable under the Convention, particularly when they address in great detail issues of custody, visitation, and maintenance.”); *Simcox*, 511 F.3d at 605 (“Even when confronted with a grave risk of harm, some courts have exercised the discretion given by the Hague Convention on the Civil Aspects of International Child Abduction . . . to nevertheless return the child to the country of habitual residence, provided sufficient protection was afforded.”). *See generally Walsh*, 221 F.3d 204. RAY BEAUMONT & PETE E. McELEVY, *THE HAGUE CONVENTION INTERNATIONAL CHILD ABDUCTION* 157-58 (1999) (discussing legal origins of undertakings).

argue that undertakings subvert the convention itself, and that the doctrine is unfair and inequitable in its application in several ways. Most problematic is the fact that undertakings assume that there is a credible danger in the habitual residence of the child. Nonetheless, the court in which the taking parent has brought the child and where the Hague proceedings have occurred have decided to return that child to his or her place of habitual residence, with certain safeguards. This “half-measure” is a problem, “Many scholars see undertakings as a compromise, but in fact, they open the door for the abuser to continue to manipulate and control the abductor.”¹³ Also, “the aims of the Convention are to protect the child, and sending the child back to the country where the abuse occurred blatantly contradicts that aim. Yet, that is precisely what undertakings accomplish.”¹⁴ Moreover, undertakings issued by a U.S. court may or may not be enforceable in the other country after the child is returned, rendering them worthless . . . While the United States may have means of recognizing and enforcing foreign court orders under the Uniform Custody Jurisdiction and Enforcement Act, foreign countries do not necessarily have the same streamlined processes.¹⁵

In *Saada v. Golan*,¹⁶ the mother was the taking parent who would not return her child to Italy, arguing that such a return presented a grave risk not just to the mother, but also the child.¹⁷ The trial court agreed with the mother that violence did occur

¹³ Kyle Simpson, Comment, *What Constitutes a “Grave Risk of Harm?”: Lowering the Hague Child Abduction Convention’s Article 13(b) Evidentiary Burden to Protect Domestic Violence Victims*, 24 *GEO. MASON L. REV.* 841, 861 (2017).

¹⁴ *Id.* at 862; See also Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abductions*, 33 *COLUM. HUM. RTS. L. REV.* 275, 341 (2002) (“The Second Circuit. . . emphasized that undertakings might allow the children to be returned notwithstanding the risk of harm.”). As Respondent Narkis Golan argued in her petition for a writ of certiorari in the Supreme Court of the United States, “The ameliorative measures framework adopted by certain circuit courts have affectively gutted the grave risk exception.” Brief for Respondent, Narkis Aliza Golan, Petitioner v. Isacco Jacky Saada, 930 F.3d 533 (2d Cir. 2019), *cert. pending*, No. 20-1544 (U.S. Jan. 29, 2021).

¹⁵ See Kucinski, *supra* note 5, at 49.

¹⁶ 930 F.3d. 533 (2d Cir. 2019).

¹⁷ See Kucinski, *supra* note 5, at 49-50.

and that there was risk, but that the risk could be ameliorated with undertakings that amounted to tens of thousands of dollars, legal fees, housing, and that the father would stay away from the mother and only visit with the child with mother's consent. The Second Circuit noted on appeal that "once a child is returned to his or her habitual residence, the U.S. court would lack jurisdiction to redress a parent's non-compliance with the 'carefully crafted conditions' of the child's return."¹⁸

It is important to note two things about *Saada*. First, both litigants were able to find or afford private counsel in the United States to take their cases, a luxury that so many litigants simply cannot manage.¹⁹ Second, the undertakings ordered by the district court were tremendously expensive. What if the left behind parent, here the father, was not able to afford those undertakings? Would he then be "denied the justice" of having his child returned to his habitual residence? So the question must be asked, do undertakings only work for the lucky? And for the rich?²⁰

This article proposes a comprehensive framework for when undertakings may be applicable and for when a 13(b) grave risk of harm defense applies.

II. The *Monasky*²¹ Case: The First of Its Kind, but Same as It Ever Was²² — How Did We Get Here? — *Monasky* Goes to the Supreme Court

Michelle Monasky, an American citizen, met Domenico Taglieri, an Italian citizen, while they were conducting medical research at a university in Illinois. The two married in September 2011. After Taglieri was unable to find further employment in the

¹⁸ *Id.* at 50.

¹⁹ See Zashin et al., *supra* note 7, at 262-63.

²⁰ See generally Zashin et. al., *supra* note 7.

²¹ See generally *Monasky*, 140 S. Ct. 719.

²² ONCE IN A LIFETIME, TALKING HEADS (Sire Records 1981). Talking Head's Lead Singer, David Byrne, explained the lyric, "same as it ever was" meant that "we operate half-awake or on autopilot and end up . . . and haven't really stopped to ask ourselves, how did I get here?" NATIONAL PUBLIC RADIO (Mar. 27, 2000).

United States as a researcher, he returned to Italy in January 2013, and his wife joined him the summer of the same year.

Soon after the couple moved to Italy, their marriage began to deteriorate. By March of 2014, Taglieri had begun to physically abuse his wife, striking her on the face in an episode that he later described dismissively as “a not welcome touch.”²³ His slapping continued and “got harder”²⁴ over time. Taglieri told Monasky’s parents that he would “smack [her] in the face” because of her acne and that he was “not ashamed of it” because he “d[id] it for her own good.”^{25,26}

As time passed, the abuse escalated from physical and emotional abuse to include sexual abuse, as well. He “‘forced himself upon [Monasky] multiple times’” and “‘forced [her] to have sex that he knew [she] didn’t want to have.’”²⁷ During one assault, he climbed on top of his wife and told her: “‘spread your legs, or I will spread them for you.’”²⁸ As a result of the continued sexual assaults and despite her express unwillingness to have a child with him, Monasky became pregnant in May of 2014.

The following month, Taglieri decided to move, alone, to Lugo, a town more than 165 miles away from the couple’s apartment in Milan. The distance further strained the parties’ marriage. Two months later, Monasky began to “contact[] American divorce lawyers,” “inquire[] about American health care and child care options,” and “appl[y] for jobs in the United States.”²⁹ However, after a near-miscarriage during the first tri-

²³ Joint Appendix at 106, *Monasky v. Taglieri*, 420 S. Ct. 719. *See also* Pet. App. 75a.

²⁴ Joint Appendix at 130, *Monasky v. Taglieri*, 420 S. Ct. 719. *See also* Pet. App. 75a.

²⁵ Joint Appendix at 97, *Monasky v. Taglieri*, 420 S. Ct. 719. *See also* Joint Appendix 124–25, *Monasky v. Taglieri* 420 S. Ct. 719_.

²⁶ *See* Tr. 364:10-372:5, Stipulations, Ex. EE, DDD, EEE, Tr. 364:13-366:8, 447 – 457:1-3, 565:23-25, 566-567:1-3, Jt. Ex. 2, Ex. 10, Tr. 364:18, 372:2-3.

²⁷ Pet. App. 104a n.3 (quoting Joint Appendix at 152, *Monasky v. Taglieri* 420 S. Ct. 719).

²⁸ *Id.*

²⁹ Joint Appendix at 28-29, *Monasky v. Taglieri*, 420 S. Ct. 719. *See also* Joint Appendix 189-90, *Monasky v. Taglieri*, 420 S. Ct. 719 (Aug. 6, 2014 e-mail from Monasky to her mother stating “I’d like to look into getting a U.S. divorce. . . . I want to go home.”).

mester, she was barred by physicians from traveling for the remainder of her pregnancy due to the risk of premature labor.

As the pregnancy progressed, Taglieri began “slapping [Monasky] more frequently”³⁰ during his visits to Milan, and “control[ling] every dollar [Monasky] spen[t].”³¹ In response, she repeatedly raised the prospect of divorce with her husband and told him that she intended to return to the United States with the baby after she was born.

When Monasky was nine months pregnant, her husband “smacked the hell out of”³² her head and days later, when Monasky declined a physician’s recommendation to induce labor during a routine check-up, her husband grew angry. Taglieri refused to take his wife back to the hospital when she started having contractions later that day. Monasky was compelled to take a taxi, alone, in the middle of the night to the hospital and A.M.T. was ultimately born by cesarean section.³³ Alas, Taglieri’s attitude toward his newborn daughter proved to be no different from his attitude toward his wife. He screamed at his crying newborn daughter to “shut up” and threatened to “shove [formula] up her ass”³⁴ and continuously argued with his wife.³⁵

During the weeks following A.M.T.’s birth, Monasky repeatedly communicated to her husband her desire for a divorce and began planning her return to the United States with A.M.T.

Out of necessity, Monasky traveled to Taglieri’s home in Lugo so that she could have help in caring for A.M.T. and complete a passport application process the two had jointly initiated after the child’s birth. Throughout her temporary stay in Lugo, she continued to reiterate to Taglieri that she was divorcing him and returning to the United States with A.M.T. The couple also

³⁰ Joint Appendix at 130, *Monasky v. Taglieri*, 420 S. Ct. 719.

³¹ *Id.* at 189.

³² *Id.* at 195.

³³ See Ex. DDD, EE, Pg. 12:6-8, in which Taglieri stated he “refused” to go with his wife to the hospital several times, due to his extreme anger, and Tr. 362:17-19, 450:14-20, 453-25, 454:1-16, in which he stated that he told his wife to take a taxi.

³⁴ Joint Appendix at 95, 139-40, *Monasky v. Taglieri*, 420 S. Ct. 719; See also *id.* 231.

³⁵ See Ex. TT, Tr. 245:13-14, 248:15-20, 548:13-16, in which Taglieri argued with his wife, telling her that she was the “son of the devil” after leaving the hospital and that she deserved to suffer.

discussed their impending divorce—and her return to the United States—with their families.

A few months later, during the middle of yet another fight involving the well-being of the child, Taglieri raised his hand as if to strike Monasky. He paused and headed into the kitchen, where Monasky heard what sounded like Taglieri “picking up [a] knife and putting it . . . back.”³⁶ After Taglieri left for work, Monasky took A.M.T. to the police, who placed them in a social-services safe house for domestic-violence victims. For the next two weeks, they remained in protective care in three different locations, until they left for the United States. On the date of their departure, A.M.T. was only eight weeks old.

Taglieri filed a Hague Convention petition in the U.S. District Court for the Northern District of Ohio seeking an order returning A.M.T. to Italy, to which Monasky raised the Article 13(b) grave risk of harm defense. In response, the district court credited Monasky’s “deeply troubl[ing]” allegations of her exposure to Taglieri’s physical abuse. But the district court found “no evidence” that Taglieri ever abused A.M.T. or otherwise disregarded her well-being.³⁷ After a bench trial, the district court granted Taglieri’s petition.

At the time of trial, the Sixth Circuit had not addressed the standard for determining the habitual residence of infants under the Hague Convention. Expressly noting the absence of binding precedent, the district court created its own legal standard and presumed that an “infant will normally be a habitual resident of the country where the [parents’] matrimonial home exists.”³⁸ The district court concluded that Monasky “lacked definitive plans as to *how* and *when*” to leave Italy and thus had not “disestablish[ed]” A.M.T.’s presumptive habitual residence in Italy.³⁹ The court therefore issued an order directing A.M.T.’s return to Italy.

As it relates to the grave risk of harm defense, the Northern District of Ohio found Monasky’s testimony [and the evidence presented] with respect to the domestic abuse to be credible. Nevertheless, the court conclude[d] that Monasky ha[d] failed to

³⁶ Joint Appendix at 147–49, *Monasky v. Taglieri* 420 S. Ct. 719. *See also* Pet. App. 81a.

³⁷ *Monasky v. Taglieri*, 420 S. Ct. at 729.

³⁸ Pet. App. 90a.

³⁹ Pet. App. 93a, 97a (emphases added).

demonstrate, by clear and convincing evidence, that returning [the minor child to its habitual residence] would “expose her to a grave risk of physical or psychological harm or otherwise place [the minor child] in an intolerable situation.”⁴⁰ While the court discussed the troubling nature of the alleged abuse, it did not conclude that Monasky met the threshold so as to qualify the risk of harm as “grave.”⁴¹

Upon review at the U.S. Supreme Court, the Court did not address the issue of the Article 13(b) grave risk of harm exception further than the district court, because Monasky⁴² did not challenge those dispositions.⁴³

III. Spouse and Child: A Consideration of When Victims Are Victims by Proxy

To clarify how and when courts should allow a respondent parent to use the 13(b) defense to prevent a child’s return to his or her place of habitual residence, it is essential to first determine who exactly is in harm’s way – the parent or the child. Thereafter, the court must determine the gravity of the harm. Courts have unsuccessfully wrestled with whether child return orders

⁴⁰ *Taglieri v. Monasky*, No. 1:15-CV-00947, 2016 U.S. Dist. LEXIS127474 (S.D. Ohio Sept. 14, 2016).

⁴¹ *Id.* at 28. *Simcox*, 511 F.3d at 604 (“While the court is deeply troubled by, and in no way discounts the seriousness of the physical abuse Monasky suffered—regardless of the frequency, severity, or duration—the Sixth Circuit has instructed that the grave risk exception is “to be interpreted narrowly.”) The court echoed the words of a sister district court that noted: “Much has been written regarding the difficulty victims of domestic abuse face in litigating ICARA cases. Compounding this is the inherent difficulty of attempting [to] prov[e] rape and domestic abuse allegations in court. Unfortunately, this leaves the Court in the uncomfortable position of both understanding why there is little proof of these allegations, and still requiring more under the law. *Pliego v. Hayes*, 86 F. Supp. 3d 678, 703 (W.D. Ky. 2015) (internal citations omitted) (finding no grave risk exception where the respondent, who the court deemed credible, testified in detail regarding several occasions of physical and sexual abuse by the petitioner). Constrained by the requirements of the law, the court concludes that Monasky has failed to demonstrate by clear and convincing evidence that issuing an order of return would place A.M.T. at a grave risk of harm.”

⁴² In a strategic move by her counsel.

⁴³ *Monasky*, 420 S. Ct. at 729.

present reasonable risks of harm, genuine risks of harm, or grave risks of harm.

In tort law, a principle exists to assist litigants and courts in determining the moment in which the distress of a person is actionable. This is called the “zone of danger” rule.⁴⁴ The zone of danger can extend to include others, so it is “a geographical area near an accident or incident causing injury, within which a person would be in danger of the same injury.”⁴⁵ This rule is used in negligent infliction of emotional distress cases to determine whether bystanders to tortious events will have claims through the witness effect.⁴⁶ Similar to its function in tort law, this principle can provide greater guidance and clarity when making the essential determination of when a risk of harm meets the threshold of “grave” in international child abduction cases under the Hague Convention, which is to say that it is so severe that the risk of harm rises to the level of legally preventing a child’s repatriation. When does the grave risk become “grave” in a domestic violence setting? When is the threat of harm to the child enough? The court must inquire as follows: 1) are the children in such proximity to danger they themselves are in danger of sustaining the same injuries as the abused spouse, 2) were the children actually harmed and, if so, how badly, 3) if the children were returned to their habitual residence, would the violence happen again, and 4) is the legal system of habitual residence unable to protect the children even with undertakings.

In *Dobos v. Dobos*,⁴⁷ a petitioning parent, the father, claimed the respondent parent, the mother wrongfully removed the parties’ minor children from Hungary to the United States. The mother raised the grave risk of harm defense, testifying that it was necessary due to a pattern of abuse and the domestic violence against her, and therefore by extension, towards her children. While the question of an altercation was substantiated, the court concluded that because any abuse was only directed towards the mother, she had not proven by clear and convincing

⁴⁴ *Zone of Danger Rule*, WOLTERS KLUWER BOUVIER LAW DICTIONARY (desk ed. 2012).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Dobos v. Dobos*, No. 1:08cv307, 2009 U.S. Dist. LEXIS 127474 (S.D. Ohio Jul. 9, 2009).

evidence that a grave risk of harm would fall upon the minor children if they were ordered to return to their country of habitual residence.⁴⁸ Instead, the Court employed a series of undertakings to ensure safe return for the minor children.

Monasky can be seen as yet another example of the same pattern of violence displayed in the *Dobos* case; the most extraordinary difference is that *Monasky* worked its way up to the U.S. Supreme Court. In *Monasky*, as in *Dobos* before it, violence to a spouse generally speaking was not enough to establish a grave risk of harm to a child without concrete, substantial harm or a threat thereof to the minor child in particular. Both cases exhibit a fact pattern in which a parent is clearly a victim of domestic violence and the minor child is not him or herself a victim, but may or may not be in harm's way.

Numerous courts have attempted to bring order to the confusion and set standards for distinguishing between the differences between "risk of harm" and "grave risk of harm." Sadly, these cases endlessly go back and forth. While some courts have aligned in their analysis of more severe fact patterns (e.g., agreeing that sexual abuse to a child is sufficient to create the grave risk of harm),⁴⁹ the courts have continuously met cases of domestic violence with confusion and dissonance.⁵⁰

⁴⁸ Which was stipulated to be Hungary.

⁴⁹ "The United States Department of State's legal analysis of Article 13(b) provides the following example of an intolerable situation: A review of deliberations on the Convention reveals that 'intolerable situation' was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an 'intolerable situation' is one in which a custodial parent sexually abuses a child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an 'intolerable situation' and subjected to a grave risk of psychological harm." See *Blondin v. Dubois*, 238 F.3d 153, 162 (2d Cir. 2001).

⁵⁰ See also *Reyes Olguin v. Cruz Santana*, No. 03 CV 6299, 2005 WL 67094, at *7 (E.D.N.Y. Jan. 13, 2005), in which the court held that there was a grave risk of harm upon the child's return to Mexico based upon psychological trauma, and *McManus v. McManus*, 354 F. Supp. 2d 62, 70 (D. Mass. 2005), where the court concluded that the psychological harm to the child would not meet the grave risk of harm threshold because the abuse was sporadic. In *Krishna v. Krishna*, No. C97-0021 SC, 1997 WL 195439 (N.D. Cal. Apr. 11,

Two cases that illustrate the inconsistent approaches courts have taken when tackling similar fact patterns are *Lopez v. Alcala*⁵¹ and *Wigley v. Hares*.⁵² In *Lopez*, the court determined that while some physical abuse to the minor children did exist, the level of harm evidenced did not rise to the threshold so as to create a grave risk of harm if the minor children were to be returned to their habitual residence of Mexico.⁵³ In *Wigley*, however, the court determined that even though no abuse existed between either spouse or the children, the psychological harm of return to the children would be so grave as to meet the grave risk of harm threshold.

In *Simcox v. Simcox*,⁵⁴ the court outlined three categories into which Hague cases fell relative to situations of abuse. The first category contained “cases in which abuse is relatively minor” where “it is unlikely that the risk of harm caused by return of the child will rise to the level of a ‘grave risk’ or otherwise place the child in an ‘intolerable situation’ under Article 13(b).”⁵⁵ In these cases, the court suggested that regardless of undertakings, there was no discretion to refuse return of the minor child.

The second category detailed by the court contained cases in which the “risk of harm is clearly grave” and stated that these cases make undertakings “likely . . . insufficient to ameliorate

1997), the court determined that the psychological stress from the relationship between the minor child’s parents was so severe as to meet the grave risk of harm threshold. But in *Tabacchi v. Harrison*, No. 99 C 4130, 2000 U.S. Dist. LEXIS 1518 (N.D. Ill. Feb. 10, 2000), the court determined that the grave risk of harm defense failed due to violence being directed to the spouse, rather than the minor child. See generally Kilpatrick Stockton LLP & National Center for Missing and Exploited Children, Inc., *Litigating International Child Abduction Cases Under the Hague Convention 50-57* (2007).

⁵¹ 547 F. Supp. 2d 1255 (M.D. Fla. 2008).

⁵² 82 So. 3d 932 (Fla. Dist. Ct. App. 2011).

⁵³ “Even if this Court took all of the children’s testimony as true, it does not rise to the level of an intolerable situation. [The minor child] indicated that his father hit him twice, and that he never saw his father hit [minor child]. . . . This evidence only indicates that Lopez has used corporal punishment to discipline the children in the past. . . . Ultimately the alleged abuse in this case is not so severe that it rises to the level of intolerable situation. . . .” *Lopez*, 547 F. Supp. 2d at 1261-62.

⁵⁴ 511 F.3d 594 (6th Cir. 2007).

⁵⁵ *Id.*

the risk of harm”⁵⁶ as a result of the lack of deterrence and difficulty in enforcement.⁵⁷

The third category contained cases that fall somewhere in the middle of these two extremes, where “abuse is substantially more than minor, but is less obviously intolerable.”⁵⁸ These are the cases in which the court states undertakings may be helpful.

As they exist now, grave risk cases can create a spectrum of harm,⁵⁹ based on the fact patterns, and where cases fall on the spectrum can illuminate the zone of danger. On one end of the spectrum are cases similar to *Walsh v. Walsh*,⁶⁰ evidencing a grave risk of harm due to the psychological and physical abuse endured by a minor child, and on the other are cases where no abuse to the minor child or spouse exist, but where a respondent parent argues that factors relative to the environment of the habitual residence create a grave risk of harm.⁶¹ While courts have

⁵⁶ *Id.*

⁵⁷ The extremes of physical and psychological abuse against a child were illustrated in *Walsh v. Walsh*. In this case, the court found that the violence exhibited by the petitioning parent was so severe and that the minor child was so affected that the court determined that it rose to the level of grave, accepting the defense to the return of the minor child (refusing return of child after the minor child witnessed abuse to the minor child’s parent, experienced severe abuse and violence herself, as well as anxiety and other physical side effects of enduring the severe abuse). *Walsh*, 221 F.3d 204.

⁵⁸ *Simcox*, 511 F.3d 594.

⁵⁹ See generally *Blondin*, 238 F.3d at 162. (“In other words, at one end of the spectrum are those situations where repatriation might cause inconvenience or hardship, eliminate certain educational or economic opportunities, or not comport with the child’s preferences; at the other end of the spectrum are those situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation. The former do not constitute a grave risk of harm under Article 13(b); the latter do.”)

⁶⁰ 221 F.3d 204.

⁶¹ See *In re Ariel Adan*, 437 F.3d at 397, in which the court found that the return of a child where money is short or where educational or other opportunities are limited did not meet the threshold of grave risk of harm. See also *Mendez Lynch v. Mendez-Lynch*, 220 F. Supp. 2d 1347 (M.D. Fla. 2002), in which the court found that economic or civil disorder in the minor children’s home country did not meet the threshold to pose a grave risk of harm to minor children. And see *In re D.D.*, 440 F. Supp. 2d 1283 (M.D. Fla. 2006), where the court found that to meet the grave risk of harm threshold, a fact pattern requires more than taking a minor child from their primary caregiver

looked to *Simcox*⁶² for guidance, it is time to reconsider *Simcox* and expand upon one of its greatest ideas – the possibility of creating a hierarchy of risk – from which judge and lawyers can create a model to measure how to evaluate and execute remedies consistent with the 1980 Hague Convention’s Article 13(b) grave risk of harm defense to return.

With *Monasky*, the Supreme Court had a chance to address this most important issue. Unfortunately, it did not.

IV. Conclusion – “A Modest Proposal” To Help Children in Grave Risk of Harm⁶³

To save children from unnecessary litigation and further the purposes of Article 13(b), numerous courts have attempted to address what exactly “grave risk of harm” means. *Simcox* offered the idea of a hierarchy of risk. This idea has merit. If wedded⁶⁴ to the well-established tort law zone of danger concept, the resultant framework represents a comprehensive guide to resolving 13(b) claims under the 1980 Hague Convention.

If minor children in cases such as those described above fall within the concept of a “zone of danger,” these matters should be addressed in a similar fashion to litigants in tort law situations.⁶⁵ Melding the *Simcox* matrix to the well accepted common law zone of danger concept, a court considering a respondent’s 13(b) petition should follow this proposed inquiry: 1) are the children in question in such proximity to the danger; 2) that they themselves are in danger of the same injuries as the parent who is the

⁶² *Simcox*, 511 F.3d 594.

⁶³ JONATHAN SWIFT, A MODEST PROPOSAL (1729).

⁶⁴ Author’s note: pardon the domestic relations pun.

⁶⁵ Those familiar with the evolution of tort law jurisprudence might note that “foreseeability” has replaced or merged with the concept of the zone of danger over time. This fact, however, is irrelevant in the context we are discussing. The zone of danger is a formulation familiar to lawyers and jurists that could bring order to the chaos of protecting children from the collateral danger of domestic violence in 13(b) situations. *See also* REST. 3D OF THE LAW, TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § 48, Comment (“Many courts refer to the requirements of this Section – contemporaneous perception of the accident and a close family relationship – as indications that the emotional distress is both genuine and foreseeable. Some courts state that the actual test is foreseeability and that a person can recover even if the formal requirements are not satisfied.”).

direct victim of violence; 3) and if returned to their habitual residence the children would be put in grave risk of harm or an otherwise intolerable situation; 4) for which the legal system of the habitual residence cannot protect the children even if appropriate undertakings are employed.

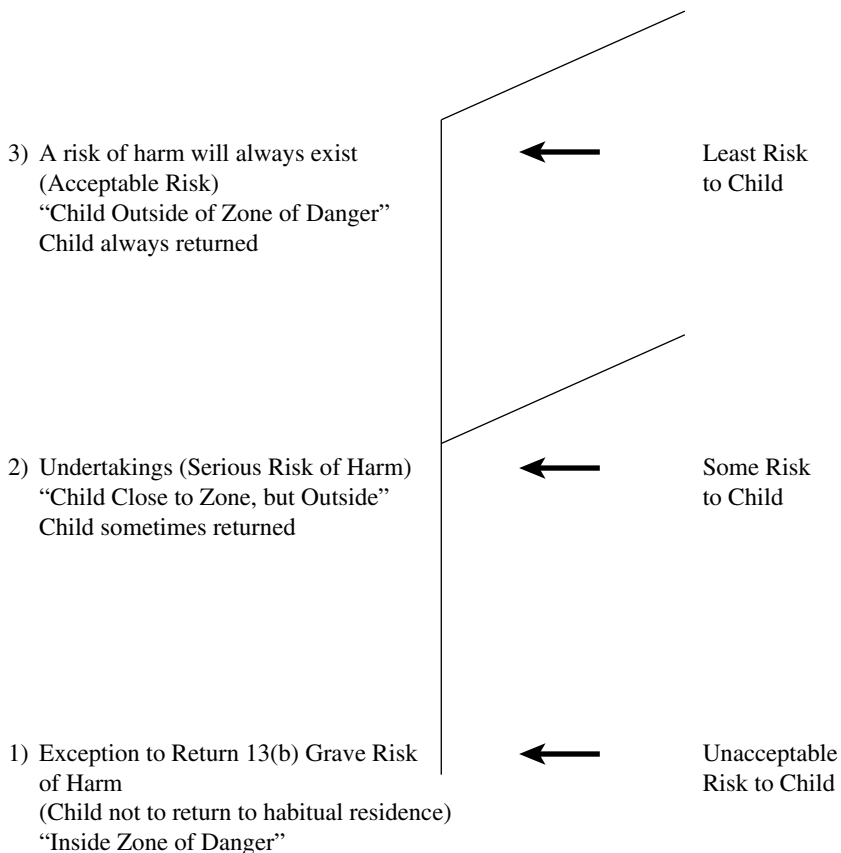
It is important to note that this framework considers potential psychological risk but also recognizes the potential of that risk being mitigated by undertakings. Moreover, this model eliminates from the outset the ability of a respondent from “gaming the system” by claiming that grave risk of harm is inchoate or is somehow “on the horizon.” These claims are too often used in the United States to financially burden the left behind parent and win the case for the respondent from the outset.⁶⁶

The ultimate question under this framework, if the issue had been a certified question, is should the United States have accepted a 13(b) petition to prevent Monasky’s daughter from returning to Italy? To answer that question, it is essential to keep in mind that the real-life circumstances presented in the *Monasky* case were horrible. The child at issue was an infant. Moreover, Monasky’s daughter was not harmed nor was she even capable of cognizing harm. For these reasons, the fact pattern in *Monasky* makes it an excellent test case.

If one were to graph out the *Simcox* hierarchy and overlay this new *Monasky* grave risk of harm matrix on top of it, the concept would look something like the following illustration titled “Grave Risk of Harm Exception to Return a Child to His or Her Place of Habitual Residence.”

⁶⁶ See generally Zashin et al., *supra* note 7.

Grave Risk of Harm Exception to Return a Child to His or Her Place of Habitual Residence



The third prong of the illustration demonstrates a situation similar to the *Silverman v. Silverman*⁶⁷ case. The opinion reads that, while there was general unrest throughout the country of Israel, there were not specific indications that a grave risk of harm would befall children should they be ordered to return.⁶⁸

⁶⁷ 338 F.3d 886 (8th Cir. 2003).

⁶⁸ *See id.* (“The district court found that the current situation in Israel constitutes a ‘zone of war,’ warranting application of the ‘grave risk’ exception. In *Freier v. Freier*, 969 F. Supp. 436, 443 (E.D. Mich. 1996), the district court found that Israel in 1996 was not a ‘zone of war’ under Article 13(b). In so finding, the court determined that the fighting was fifteen to ninety minutes from the children’s home, no schools were closed, businesses were open, and

Essentially, the day to day lives of the public at large continued on as normal. Thus, there is risk, but it is the risk of everyday life in a co-signing state. It is a reasonable risk, where no undertakings are necessary. The risk the taking parent complained of in *Silverman*, which falls into the third prong of the illustration, might be argued by one who left a large city in the United States and settled in a rural co-signing country. Logically, the argument must fail.

Considering the second prong, it resembles a case like *Dobos*, one where concerns for the children's safety can be remediated with the implementation of undertakings. Presuming, of course, that the American court is satisfied with both the sufficiency of the undertakings and just as important, the willingness and ability of the co-signing country's legal system to implement and enforce them.

Finally, the first prong of the illustration is the most troublesome. When should a court not return a child to his or her habitual residence? That question turns on the issue of "domestic violence by proxy." *Monasky* is a good test case to define this term and a perfect test case for this framework, even though the child was not harmed. One might argue that the infant, A.M.T., was not harmed by proxy or otherwise, however, that assertion is weak in light of the objective facts. A.M.T. had only lived with her mother. She was only eight weeks old when she was removed. Her mother did not speak Italian. Her parents had separated before the child's birth. Her parents had clearly discussed divorce, had lived in the United States previously, and had discussed returning there. Thus, there was no clarity on the issue of parental intent. Her only caregiver, her mother, was alone in Italy. Her mother was an abused woman. The issue of domestic violence was substantiated and her mother even won compensation and damages for that abuse in the United States. The dis-

the mother was able to travel to and from the country. *Id.* No subsequent case has found that Israel is a 'zone of war' under the Convention. In fact, there does not appear to be another case that finds any country a "zone of war" under the Convention. Nor does the district court cite any evidence that these children are in any more specific danger living in Israel than they were when their mother voluntarily moved them there in 1999. Rather, the evidence centered on general regional violence, such as suicide bombers, that threaten everyone in Israel.").

strict court that ordered the child's return was aware of this. It is reasonable to argue that no undertakings could reasonably protect a child of this age from her father who felt that it was his right to use violence inside his family. In light of the foregoing, it is illogical to argue that A.M.T. was not a subject of domestic violence "by proxy." Sadly, upon returning to Italy, this little girl was placed in similar danger to the actual harm, both physical and psychological,⁶⁹ that her mother faced.⁷⁰

From the start, if lawyers were to assemble their cases and present their arguments to courts in accordance with the proposed framework detailed above, and the courts were similarly receptive to this proposal, outcomes would change radically. In *Monasky*, where the violence against the mother was not in dispute, and the imbalance of marital and financial power was so great, returning the infant to Italy was unconscionable. Thus, in this case, the 13(b) grave risk of harm defense would have been employed successfully.

Although *Monasky v. Taglieri* did not turn on 13(b), the Supreme Court could have still addressed this important issue. Too many courts have gotten this wrong. To further the spirit and purpose of the convention, lawyers and jurists in the United States must do better to protect the most vulnerable among us, children, who cannot protect themselves, and whose parents may have only their self-interests at heart.

⁶⁹ As referenced in the text of the Hague Convention itself.

⁷⁰ See Simpson, *supra* note 13, at 841-864, 857.