Vanderbilt Journal of Transnational Law

Volume 26
Issue 4 *Issue 4 - November 1993*

Article 3

11-1993

Due Process Rights of Parents and Children in International Child Abductions

Dorothy C. Daigle

NOTES

Due Process Rights of Parents and Children in International Child Abductions: An Examination of the Hague Convention and its Exceptions

ABSTRACT

Rising divorce rates in recent years have led to increasingly frequent abductions of children by one parent away from the other parent. Often, abducting parents move the children to different jurisdictions in which the parents believe they can obtain a more favorable decision on custody. To remedy this problem, twenty-nine nations joined in 1980 to adopt the Hague Convention on the Civil Aspects of International Child Abduction. This Convention mandates the immediate return, upon request, of the abducted child to the state of habitual residence of the child. The Convention includes several limited exceptions to this mandate, applicable at the discretion of the judicial body of the requested state in certain circumstances. The Convention is subject to criticism because the exceptions focus on the well-being of the abducted child rather than on the custody rights of the parents. United States laws on child custody guarantee parents custody hearings that comport with due process requirements. The legal systems of other states, however, do not always provide this basic fairness. This Note examines the Convention, its exceptions, and the judicial application of those exceptions. The Author concludes that, although United States Courts must remain faithful to the Convention's purpose of allowing custody decisions to be made by the state of the child's habitual residence, courts must be willing to invoke the Convention's exceptions in cases in which the abducting parent will not be given, or has

not been given, a custody hearing that is consistent with United States notions of due process.

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I. INTRODUCTION

The rising divorce rate in the United States and the increased mobility of the world's population have wreaked havoc in the arena of matrimonial law.[1] For example, the already difficult situation of a divorce is complicated for a child when one parent interferes with the custodial right of the other parent by wrongfully removing the child to a new jurisdiction.[2] Often, a parent does this in hopes of receiving legal custody of the child under a different judicial system. Courts have contributed to the confusion by exercising jurisdiction in custody matters on tenuous grounds and by modifying custody decrees issued in matters previously

1. Sheikh v. Cahill, 546 N.Y.S.2d 517 (Sup. Ct. 1989). "While in many situations the increase in mobility leads to a vitality in society, in the arena of matrimonial law and more particularly custody or visitation, the increase in mobility has created major problems." *Id.*

2. Robin Jo Frank, Comment, *American and International Responses to International Child Abductions*, 16 N.Y.U. J. INT'L L. & POL. 415, 415-17 (1984).

litigated by the parties in other forums.[3]

To combat these problems, representatives from twenty-nine nations[4] met in October 1980 at the Fourteenth Session of the Hague Convention on Private International Law and unanimously approved the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention or Convention).[5] In 1988, Congress enacted the Hague Convention for the United States by passing the International Child Abduction Remedies Act (ICARA).[6]

The Hague Convention's objective is to restore the custody arrangement to its status before the abduction.[7] The Convention accomplishes its goal through "the prompt return of children wrongfully removed to or retained in any Contracting State."[8] Ideally, under the Convention,

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3. *Id.*

4. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M. 1501, *reprinted in* 51 Fed. Reg. 10494, 10498 (1986) [hereinafter Hague Convention]. The 29 nations at the convention were Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom, the United States, Venezuela, and Yugoslavia. *Id.* at 1501.

5. Although all 29 nations approved the Convention, each must deposit an instrument of ratification, acceptance, or approval with the Ministry of Foreign Affairs of the Kingdom of the Netherlands before the Convention will enter into force in the approving nation. *Id.* art. 37. Article 38 of the Convention provides that nations other than the 29 that originally approved the Convention also may accede in the same manner, with the Convention entering into force on the first day of the third calendar month following deposit of the instrument. *Id.* art. 38. At this time, 19 of the Convention's original 29 signatories have ratified the Convention: Argentina, Australia, Austria, Canada, Denmark, France, the Federal Republic of Germany, Ireland, Israel, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, the United States, and Yugoslavia. Belize, Burkina Faso, Ecuador, Hungary, Mexico, New Zealand, Poland, and South Africa, which were not original signatories, have recently ratified the Convention. *See* MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST, SELECTED INTERNATIONAL CONVENTIONS IC-35, 37 (1993) [hereinafter INTERNATIONAL LAW DIGEST].

6. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 (1988) [hereinafter ICARA].

7. E. Pérez-Vera, *Hague Conference on the Private International Law, Convention on the Civil Aspects of International Child Abduction: Convention and Recommendation adopted by the Fourteenth Session and Explanatory Report* 14/426, 17/429 [hereinafter Pérez-Vera Report]. Elisa Pérez-Vera was the official Hague Conference Reporter for the Convention, and her explanatory report is recognized as the official history of and commentary on the Convention.

8. Hague Convention, *supra* note 4, art. 1.

courts should refrain from rendering a judgment on the merits of the custody dispute and merely return the child to the place of habitual residence to permit the courts in that jurisdiction to adjudicate custody matters.[9] The Hague Convention, however, does provide certain limited exceptions to the prompt return of the child.[10] If courts invoke the Convention's exceptions too frequently, they will defeat the Convention's purpose of allowing the courts in the jurisdiction of the child's habitual residence to decide the merits of the custody dispute.

This Note examines the circumstances in which the Convention's exceptions are used and should be used by courts. In Part II, the Note discusses the scope of the Hague Convention, the drafters' objectives, and the Convention's implementation procedures. Part III examines the Convention's application by United States courts. Part IV describes the various exceptions to the Hague Convention and explains how United States courts have applied these exceptions. Finally, Part V addresses the potential for violations of due process when United States courts apply the Hague Convention. The Note concludes that courts must be willing to invoke the Article 20 exception in order to protect the due process rights of both parents and children.

II. PURPOSE AND OBJECTIVES OF THE HAGUE CONVENTION

The Hague Convention on the Civil Aspects of International Child Abduction has two primary objectives: (1) to secure the prompt return of children wrongfully removed to, or retained in, any Contracting State; and (2) to ensure that rights of custody and of access under the law of one Contracting State are enforced effectively in the other Contracting States.[11] The need for the application of the Convention arises when an

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9. Pérez-Vera Report, *supra* note 7, at 18/340.

10. Hague Convention, *supra* note 4, arts. 13, 20.

11. Hague Convention, *supra* note 4, art. 1. Each Contracting State must establish a Central Authority that serves as a clearinghouse for processing claims under the Convention. *Id.* arts. 6-10. President Reagan designated the Office of Citizens Consular Services in the State Department, Bureau of Consular Affairs, as the United States Central Authority. Exec. Order No. 12,648, 3 C.F.R. 579 (1988), *reprinted in* 24 WEEKLY COMP. PRES. DOC. 1038 (Aug. 11, 1988). *See* Dana R. Rivers, Comment, *The Hague International Child Abduction Convention and the International Child Abduction Remedies Act: Closing Doors to the Parent Abductor*, 2 TRANSNAT'L LAW. 589, 632 (1989). According to Article 7 of the Convention, the Central Authority must "take all appropriate measures" to find an abducted child. Hague Convention, *supra* note 4, art. 7. The drafters wanted to be flexible in allowing each Central Authority enough room to act within the law of the state in which it operated while still working within the spirit of the duty of cooperation imposed by the Convention. Pérez-Vera Report, *supra* note 7, at 41/453.

adult attempts to establish artificial jurisdictional links to the state to which the child has been abducted to help obtain custody of the child.[12] Specifically, the Hague Convention targets situations in which one parent flees with the child to the parent's native state or state of preferred residence, hoping to gain an advantage in a custody hearing over the child.[13]

By requiring the automatic return of the child without considering the child's best interests, the Convention seeks to prevent authorities in the requested state from making value judgments about the state and culture from which the child has been snatched.[14] Thus, the international abductor derives no legal advantage from the abduction to or retention in another Contracting State.[15] In extraordinary circumstances, however, the Convention offers affirmative defenses to the return of the child.[16]

When a court orders that a child be returned to the child's habitual residence, it makes no determination regarding custody.[17] Some states,

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Thus, the Convention permits each Contracting State to determine the duties of its own Central Authority. *Id.* Additional general responsibilities of the Central Authority include protecting the child from harm, exchanging social background information regarding the child when appropriate, providing general legal information on the law of its State, initiating judicial proceedings, facilitating or providing legal aid when appropriate, providing administrative arrangements for the safe return of the child, and maintaining contact with other Central Authorities in order to carry out the policies of the Convention. Rivers, *supra*, at 628-29. *See* Ronald Reagan, Letter of Transmittal, Hague International Child Abduction Convention, Text and Legal Analysis, 51 Fed. Reg. 10494, 10511-513 (1986) [hereinafter Legal Analysis]. When a court finds that a wrongful removal has occurred, then the refuge state must demand that the abducting party immediately return the child to its habitual residence. Hague Convention, *supra* note 4, art. 12.

12. Pérez-Vera Report, *supra* note 7, at 16/428.

13. *See, e.g.*, Renovales v. Roosa, No. FA910392232S, 1991 WL 204483 (Conn. Super. Ct. Sept. 27, 1991) (mother, a United States citizen, retained children in Connecticut following a traditional family vacation, although family had been living in Spain and father remained in Spain).

14. *See* Pérez-Vera Report, *supra* note 7, at 19/431. Situations involving abductions to and from states with radically different values and views on child custody will give rise to the most use and abuse of the Convention's exceptions. *Id.*

15. *Id.* The principle implicit in the Convention is that any debate on the merits of the custody rights should occur before authorities in the state that was the child's habitual residence prior to the abduction. *Id.* at 18/430.

16. *See, e.g.*, *Renovales*, 1991 WL 204483, at *2. The Convention's exceptions are discussed *infra*, part IV.

17. Legal Analysis, *supra* note 11, at 10495. The Hague Convention specifically states that "[a] decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue." Hague Convention, *supra* note 4, art. 19. *See also* Sheikh v. Cahill, 546 N.Y.S.2d 517, 522 (Sup. Ct. 1989) (New York court did not permit the father to challenge a foreign custody decree,

however, have refused to sign the Convention because they believe that it may not always be in the abducted child's best interests to be returned.[18] These states believe that long term custody questions should be decided within their own jurisdictions.[19] Thus, they refuse to sign the Convention and find themselves becoming havens for child abductors.[20]

For the Convention to apply, the circumstances of the abduction must fulfill several requirements. First, the Convention only applies between two or more Contracting States, and the child must have habitually resided in the Contracting State from which he was abducted.[21] Second, both Contracting States must have implemented the Convention before the wrongful removal or retention.[22] Third, the child must have been wrongfully removed or retained.[23] Neither the parents nor the child must meet any nationality requirements for the Convention to apply, nor must they be citizens of the state in which they live or to which the child has been abducted.[24] Once the child turns sixteen, however, the Convention

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but emphasized that it was not making a determination on custody by returning the child to the United Kingdom.)

18. *Israel Adopts Convention on Child Abduction*, JERUSALEM POST, Dec. 3, 1991. Israel, in particular, hesitated to create a situation which would obligate the Israelis to return a Jewish child to another country. *Id.; see also Is Israel a Haven for Child-Abductors*, JERUSALEM POST, Aug. 9, 1990. Israel was reluctant to ratify the Convention because of the Convention's perceived emphasis on the rights of the parents. *Id.* Israel argued that Israeli law viewed the child's best interests, rather than the parents' rights, as the deciding factor. *Id.* Israel's legislature, the Knesset, adopted the Convention when its members realized that there were many more Israeli parents who sought the return of their Jewish children who had been kidnapped and taken abroad than there were foreign Jewish parents who used Israel as a haven for abductions. *Id.*

19. For example, because Muslims consider the father the primary parent, Muslim countries seldom cooperate in returning abducted children. *Fighting the Child Snatchers*, INDEPENDENT (London), Jan. 3, 1990, at 11. Muslim fathers may be genuinely distressed about their children's futures in single-parent homes in foreign states, particularly Western states. *Id.* However, in accordance with Muslim beliefs, they justify the abduction of a child into a Muslim state as being in the child's best interests. *Id.* Burkina Faso, a small Middle-Eastern state, recently broke this trend by becoming the first Muslim state to ratify the Hague Convention. *Turning point: A Story of Struggle and Change*, GAZETTE (Montreal), Dec. 14, 1992, at D3.

20. *Is Israel a Haven for Child Abductors, supra* note 18.

21. Hague Convention, *supra* note 4, art. 4.

22. *Id.* art. 35.

23. *Id.* art. 3. "The removal or the retention of a child is to be considered wrongful where - (a) it is in breach of rights of custody . . . under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised . . ." *Id. See also* Legal Analysis, *supra* note 11, at 10503 (defining "wrongful removal").

24. *See Swiss Citizen Living in U.S. Must Return Child to New York:* Aubrey v.

ceases to apply, even if the wrongful removal or retention took place before the child reached the age of sixteen.[25] Finally, if more than a year passes between the abduction and the commencement of legal proceedings, then the court may deny the child's return to the state of habitual residence if it appears that the child has become settled in a new home.[26]

Because the Convention applies only between states that have implemented it, the Convention founders when a parent removes a child to a state that is not a contracting member. In one instance, a mother abducted her daughter to Poland, then a non-Contracting State, despite the fact that the father had legal custody in the United Kindgom.[27] Under Article 35, the father could do nothing until the mother moved the child to a country that had signed the Convention.[28] Once the mother brought the girl to the United States, the father applied for her return under the Convention, and New Jersey honored his request.[29]

III. APPLICATION OF THE HAGUE CONVENTION IN THE UNITED STATES

Few United States courts have decided cases involving the Hague Convention.[30] In *David S. v. Zamira S.*,[31] the court set out the various standards of proof required by the Convention, pursuant to the Interna-

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Aubrey, N.Y. L.J., Sept. 16, 1991, at 21.

25. *Id.* No real dispute arose over this age limit even though it is a more restrictive concept of "the child" than that accepted by other Hague Conventions. The drafters reasoned that "a person of more than sixteen years of age generally has a mind of his own which cannot easily be ignored either by one or both of his parents, or by a judicial or administrative authority." Pérez-Vera Report, *supra* note 7, at 38/450.

26. Hague Convention, *supra* note 4, art. 12.

27. *Little-Known Treaty Is Invoked in Custody Fight*, N.J. L.J., Mar. 7, 1991, at 3 (discussing Gregory Lauder-Frost v. Joanna Lauder-Frost, FD-16-3525-91, decided Feb. 11, 1991). The mother left her husband in the United Kingdom and moved with the couple's one year old daughter to the mother's native country of Poland. The father visited the daughter numerous times in Poland, but he could not bring her back to the United Kingdom because Poland was not obligated to honor the British custody order. *Id.* Poland was not a signatory to the Hague Convention at the time of the abduction, but has signed the Convention recently. *See* INTERNATIONAL LAW DIGEST, *supra* note 5, at 37.

28. *See supra* note 22 and accompanying text.

29. Once the father located his daughter in New Jersey, the matter was resolved within four days. *Little-Known Treaty is Invoked in Custody Fight, supra* note 27, at 3.

30. When courts have applied the Convention, they have dealt only with issues such as whether a child was "wrongfully removed" within the definition of the Convention or whether any of the Article 13 exceptions apply.

31. 574 N.Y.S.2d 429 (Fam. Ct. 1991) (mother's removal of child from Canada was wrongful when the husband had an equal right to custody).

tional Child Abduction Remedies Act.[32] For a court to apply the Convention, the petitioner first must prove by a preponderance of the evidence that the removal was wrongful.[33] If the petitioner succeeds, then the respondent must show by clear and convincing evidence that the child should not be returned under the exceptions in Article 13(b) or Article 20 to prevent return of the child.[34] Under the exceptions in Article 12 and Article 13(a), the respondent only has to prove by a preponderance of the evidence that the child should not be returned.[35]

Determining which country is the child's habitual residence and whether the parent wrongfully removed the child can be a difficult task.[36] *Friedrich v. Friedrich*[37] exemplifies this difficulty.[38] In *Friedrich*, a mother took her son from Germany to the United States a few days after the mother and father informally separated.[39] In a heated argument, the father told the mother to leave the apartment, and he pro-

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32. *Id.* at 431-32 (construing ICARA, *supra* note 6).

33. ICARA, *supra* note 6, § 11603(e)(1)(A); Hague Convention, *supra* note 4, art. 3; *David S.*, 574 N.Y.S.2d at 432.

34. *See, e.g.*, Renovales v. Roosa, No. FA 910392232 S, 1991 WL 204483 (Conn. Super. Ct. Sept. 27, 1991) (required clear and convincing evidence that the children would be subject to grave risk of harm if they were returned to their father, whom the mother claimed abused the boys); Sheikh v. Cahill, 546 N.Y.S.2d 517, 521 (Sup. Ct. 1989) (requiring clear and convincing evidence showing that return would pose a grave risk of exposure to physical or psychological harm or that child would be placed in an intolerable situation).

35. ICARA, *supra* note 6, § 11603(e)(2)(B); *David S.*, 574 N.Y.S.2d at 432. Article 12 of the Convention provides that if proceedings under the Convention commence more than one year from the date of the child's removal, then the Central Authority may refuse to return the child if parties demonstrate that the child is settled in his new environment. For a further discussion of the exceptions to the automatic return of the child, see *infra* part IV.

36. Often, for example, both parents have obtained custody decrees in their native states. *See, e.g.*, Horlander v. Horlander, 579 N.E.2d 91 (Ind. Ct. App. 1991) (father filed for divorce and custody in Indiana and mother filed in France); Sheikh v. Cahill, 546 N.Y.S.2d 517 (Sup. Ct. 1989) (father obtained custody decree in New York and mother obtained one in the United Kingdom.). The court in *David S.* raised the interesting question of whether the child could be wrongfully removed if the non-custodial parent had visitation rights but did not have custody. 574 N.Y.S.2d at 429. However, the court refused to rule on this issue because of the "contemptuous conduct" of the custodial parent and a subsequent award of equal custody by a Canadian court. *Id.* at 432.

37. 983 F.2d 1396 (6th Cir. 1993).

38. *See id.*; *see also* Mazerole v. Mazerole, No. 30 85 06, 1992 WL 155458 (Conn. Super. Ct. June 29, 1992) (child who lived in Canada for six months and became a Canadian citizen was still a "resident" of Connecticut when mother had no intention of child becoming a Canadian citizen).

39. Friedrich v. Friedrich, 983 F.2d 1396, 1399 (6th Cir. 1993).

ceeded to move her belongings—along with their child's—into the hallway.[40] The trial court found that the mother did not wrongfully remove her son because at the time of removal the son was a "habitual resident" of the United States,[41] and that by placing the son's belongings in the hallway, the father relinquished his custody rights over his son.[42]

The appellate court overturned the trial court's ruling, noting that the Convention narrowly defined the term "wrongful removal," leaving no room for ad hoc determinations or balancing of the equities.[43] Under Article 3 of the Convention, a removal is wrongful if it violates the custody rights granted to a parent by a court in the state of the child's habitual residence.[44] The parent also must be exercising its custody right at the time of removal.[45]

Thus, the court had to determine the "habitual residence" of the child to decide if the parent wrongfully removed the child. Neither the Convention nor United States case law defined "habitual resident."[46] A person can have only one habitual residence, regardless of citizenship.[47] The *Friedrich* court emphasized that courts should not look at the parent's future intentions to determine habitual residence, but rather to the child's past.[48] The appellate court explained that changes in parental affection and responsibility do not alter habitual residence.[49] According to the court, to allow anything other than geography and the passage of

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40. *Id.*

41. *Id.* at 1398. The child was a United States citizen, had been to the United States, and the mother intended to return there to live permanently. *Id.*

42. *Id.* at 1400.

43. *Id.*

44. Hague Convention, *supra* note 4, art. 3. See *supra* note 23 for the text of Article 3.

45. Hague Convention, *supra* note 4, art. 3.

46. Friedrich v. Friedrich, 983 F. 2d 1396, 1400 (6th Cir. 1993). British courts, however, have found that no real difference exists between habitual residence and ordinary residence and have cautioned against turning the phrase into a term of art with so many technicalities that it undermines the purpose of the Convention. *Id.* at 1401 (referring to In re Bates, No. CA 122.89, High Court of Justice Family Div'n Ct., Royal Ct. of Justice, United Kingdom (1989)).

47. *Id.* The court distinguished habitual residence, a factual determination, from domicile, a matter of law. *Id.*

48. *Id.* The court rejected as sufficient evidence of habitual residence the mother's argument that she intended to return to the United States with her son when she was discharged from the military. *Id.*

49. *Id.* at 1402. Mrs. Friedrich contended that her son's habitual residence changed from Germany to the United States when his German father removed the child's belongings from the apartment and the mother, a United States citizen, became the primary caretaker. *Id.*

time to alter the habitual residence would undermine the purpose of the Convention and permit parents simply to characterize the child's abduction or wrongful removal as an alteration of habitual residence.[50]

United States courts have made an effort to apply the exceptions to the Convention when necessary, while maintaining the overall spirit of the Convention and its objective of returning abducted children. The courts have required clear and convincing proof that the exceptions apply and have relied on a restrictive definition of the Convention's terms. Nonetheless, the exceptions provide opportunity for abuse of the Convention by courts and should be examined in more detail to prevent abuses.

IV. Exceptions to the Hague Convention

A. *Provisions of Exceptions*

The Convention includes exceptions to enable judges to refuse to return a child under certain circumstances.[51] However, these exceptions do not apply automatically, nor do they impose any affirmative duties upon judges.[52] Although these exceptions were crucial to the Convention's ratification, the drafters of the Convention recognized that any exception to the immediate return of the child had to be drawn narrowly.[53] In particular, the drafters hoped to avoid having one country refuse to return a child because of its subjective value judgments of another country.[54] Moreover, the drafters feared that broad exceptions could undermine the express purpose of the Convention and render it ineffective.[55]

Articles 13 and 20 of the Convention contain the exceptions to the return of the child. Article 13 allows the petitioned state not to return the child if the party opposing the return proves that (1) custody rights were not being exercised by the requesting party at the time the child

50. *Id.* Although the court concluded that ties with the United States were sufficient for legal residence, the ties were still not strong enough to establish habitual residence within the meaning of the Convention. *Id.* Rather, the court focused on the child's customary residence prior to removal. *Id.*

51. Pérez-Vera Report, *supra* note 7, at 48/460.

52. *Id.*

53. Legal Analysis, *supra* note 11, at 10509. The Convention might never have been adopted without the inclusion of Article 20, in particular. Some states thought the exception was necessary for extreme circumstances not covered by Article 13. *Id.* at 10510.

54. *Id.*

55. *Id.* The drafters believed that courts would fulfill the Convention's objectives by applying the exceptions only in clearly meritorious cases, where the person objecting to the return has met the burden of proof. *Id.*; *see also* discussion of Convention's purpose, *supra*, part II.

was wrongfully removed or retained, or the requesting party consented to or subsequently acquiesced in the removal or retention;[56] or (2) there is a grave risk that return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.[57] Article 13 also gives courts the discretion to refuse to return the child if the child objects to his return and the court finds that he has reached an age and degree of maturity that would make it appropriate to consider his views.[58]

Under Article 20, a court may refuse to return a child if return would "violate the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms."[59] This final exception represents a compromise by the signatory parties over whether the Convention should include a "public policy" exception.[60] Because the scope of public policy provisions is difficult to define and policies vary among states, public policy provisions are unusual in conventions involving private international law.[61] As a result, this exception has proven the most difficult and the most controversial to apply.

B. *Application of Article 13 by United States Courts*

United States courts consistently have interpreted Article 13's exceptions narrowly and have hesitated to invoke them to prevent the immediate return of the child. In narrowly construing this Article, courts have questioned what type of evidence should be permitted in an Article 13 inquiry. Recently, a New Jersey state court considered whether it should take into account the child's best interests in an Article 13 proceeding. In *Tahan v. Duquette*,[62] a father moved his child to the United States, away from the custody of the mother in Quebec. Because a previous appellate court had determined that the child's habitual residence was Quebec,[63] the court held that the father had to return him to Quebec for

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56. Hague Convention, *supra* note 4, art. 13(a).

57. *Id.* art. 13(b).

58. *Id.* art. 13. *See also* Legal Analysis, *supra* note 11, at 10496 (Secretary of State George Schultz's letter submitting the Convention to the United States Senate and presenting an overview of the Convention's provisions).

59. Hague Convention, *supra* note 4, art. 20.

60. *See* Pérez-Vera Report, *supra* note 7, at 21/433. The Commission rejected other formulations before settling on this one. *Id.* at 22/434. *See* discussion *infra* note 81.

61. *Id.*

62. 613 A.2d 486 (N. J. Super. App. Div. 1992).

63. *See* Duquette v. Tahan, 600 A.2d 472 (N.J. Super. App. Div. 1991). On the first appeal, the court held that the Hague Convention applied and remanded the case for the limited purpose of determining whether any of the exceptions to the Convention

custody proceedings.[64] The father protested that the appellate court should allow the child to remain with him pursuant to Article 13(b), which concerns the physical or psychological harm of placing the child in an intolerable situation.[65]

Earlier, the New Jersey trial court had ruled that an inquiry into the physical or psychological harm of returning a child to the home state should not cover factual material more suited for the plenary custody hearing in the child's home state.[66] The trial court interpreted the Convention to require that a court focus exclusively on the jurisdiction involved rather than on the individuals in an Article 13(b) inquiry.[67] The trial court stated the belief that the Convention reserved jurisdiction over factual inquiries regarding custody issues to the courts of the child's habitual residence.[68]

The New Jersey appellate court agreed that factual evidence such as psychological profiles of the child and parents or other evidence regarding the nature and quality of lifestyle and relationships weighed heavily on the determination of custody,[69] and thus should be left to the determination of the home jurisdiction. Nonetheless, the appellate court determined that Article 13(b) clearly required more than a cursory evaluation of the home jurisdiction's civil stability and its availability to decide the matter.[70] The appellate court recognized that the court in the petitioned state should have the power to evaluate the surroundings to which the child is to be sent and the basic personal qualities of the child's caretakers without necessarily delving into complex psychological issues, parenting qualities, or life experiences.[71] The court thought that to preclude

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applied. Tahan v. Duquette, 613 A.2d 486, 488 (N.J. Super. App. Div. 1992).

64. *Tahan*, 613 A.2d at 488.

65. *Id.* Article 13(b) provides that the court does not have to return the child if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Hague Convention, *supra* note 4, art. 13(b).

66. *Tahan*, 613 A.2d at 488. The trial judge reasoned that to consider that type of information would "usurp the jurisdictional prerogatives reserved by the Convention to the courts of Quebec." *Id.* at 488-89.

67. *Id.* at 489. The trial court suggested limiting the Article 13(b) inquiry to an examination of the internal strife or unrest in the jurisdiction that might place the child at risk. *Id.*

68. *Id.* at 488-89.

69. *Id.* at 489.

70. *Id.* The court believed that if the Convention's drafters intended the trial court's restrictive interpretation of Article 13(b) requirements, they would have stated that intention more clearly. *Id.*

71. *Id.*

any focus on the people involved would be too narrow and mechanical.[72] The Convention supports the New Jersey appellate court's interpretation, declaring in the last paragraph of Article 13 that the judicial and administrative authorities may consider information regarding the social background of the child.[73]

On the other hand, a Connecticut court willingly evaluated evidence regarding psychological profiles, family relationships and structure, and the father's abusiveness in *Renovales v. Roosa*.[74] The court permitted each parent to introduce expert psychological evidence on the anticipated effect on the children if they were returned to Spain, the place of habitual residence.[75] The court focused on the necessity of providing clear and convincing evidence that the children would be subject to a grave risk of physical or psychological harm, or placed in an intolerable situation.[76] In practice, therefore, Article 13 gives courts leeway to examine factors regarding the child's best interests, despite the urgings of the Convention's drafters not to do so. Neither the *Roosa* opinion nor the *Tahan* opinion indicates why the courts reached different interpretations of the Convention and the evidence admissible in an Article 13 inquiry.

C. *Purpose and Application of Article 20*

Petitioners have had even less success invoking Article 20 than Article 13.[77] The Convention's drafters limited the Article 13 exceptions to a factual consideration of the child's interests in the hopes of prohibiting one state from making a strict value judgment of another state.[78] Some

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72. *Id.* The court, however, did not provide any strict guidelines regarding which evidence should be examined and which should not, although it did suggest that determinations of psychological make-up, parenting qualities, and the impact of life experiences should be excluded. *Id.*

73. Hague Convention, *supra* note 4, art. 13.

74. No. FA 910392232 S, 1991 WL 204483 (Conn. Super. Ct. Sept. 27, 1991). In *Roosa*, the mother refused to return the children, claiming that the father's abusiveness caused them to suffer grave harm. *Id.* at *2. The mother alleged that the father was both physically and psychologically abusive of the oldest son, hitting him and forcing him to eat excessively until he developed a vomiting reaction and began having nightmares. *Id.* She assumed that the father would treat the youngest son the same once he was older. *Id.*

75. *Id.*

76. *Id.* at *3.

77. Article 20 provides that "[t]he return of the child under the provision of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Hague Convention, *supra* note 4, art. 20.

78. Pérez-Vera Report, *supra* note 7, at 22/434. Article 13 permits a factual examination, although United States courts have differed on the extent of factual evidence

contracting states, however, felt that another exception was necessary to cover extreme circumstances not covered by Article 13.[79] Other states worried that such an exception would be interpreted so broadly that it would undermine the Convention's purpose.[80] Thus, in light of the diminished role of the internal law of the refugee state under the Convention, Article 20 represents a compromise among the drafters.[81]

In order to invoke Article 20, the Central Authority in the petitioned state must demonstrate that returning the child would violate the state's protective principles of human rights.[82] The drafters designed Article 20 to apply only in the most extreme circumstances.[83] The drafters of the Convention adamantly insisted that the public policy exception should be limited to principles accepted by the law of the requested state, either through internal legislation, customary international law, or treaties.[84]

To refuse the return of a child, the petitioned state must show that its "fundamental principles" prohibit the return.[85] The simple fact that the return would be manifestly incompatible with these principles will not suffice.[86] Courts must balance this exception with a mutual respect for the cultural differences among states that often provide the foundation for family law in each state.[87] States should avoid invoking Article 20's

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allowed. *See supra* part IV.B.

79. Legal Analysis, *supra* note 11, at 10510.

80. *Id.*

81. Pérez-Vera Report, *supra* note 7, at 22/434. Originally, the Article 20 exception read that contracting states could refuse to return the child if that return would be "manifestly incompatible with the fundamental principles of the law relating to the family and children in the state addressed." *Id.* at 22/434. This formulation was rejected because it implicitly permitted the refusal to return the child to be based on purely legal arguments arising from the internal law of the requested state. *Id.* The emphasis on the internal law of a contracting state found in the original Article 20 was at first a source of serious disagreement among the delegates to the Convention. *Id.* However, the delegates ultimately agreed that the new formulation provided "the surest guarantee of the success of the Convention." *Id.*

82. *Id.*

83. Legal Analysis, *supra* note 11, at 10510. The text of the Legal Analysis says the provision should be invoked only on the "rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process." *Id.* Even without this explicit exception in the Convention, many states would have been bound by their individual constitutions to follow such a rule. A.E. Anton, *The Hague Convention on International Child Abduction*, 30 INT. & COMP. L.Q. 537, 551 (1981).

84. Pérez-Vera Report, *supra* note 7, at 50/462.

85. *Id.*

86. *Id.*

87. John M. Eekelaar, *International Child Abduction by Parents*, 32 U. TORONTO L.J. 281, 314 (1982). Eekelaar recognizes that family law in different states reflects

exception simply because one state operates a system of preferred custody of one parent over the other.[88]

The drafters of the Convention recognized the potential for abuse of Article 20 and hoped that in practice its application would be consistent and limited. To give effect to these goals of the drafters, experts on the Convention have suggested that courts impose two limiting factors on Article 20:

> (1) the return of the child must violate an actual law of the requested country rather than merely be incompatible with the country's policies or culture, and (2) a country should not invoke the public policy exception in applying the Convention any more frequently than it does in its own domestic judicial decisions.[89]

Without these limitations, the provision would permit discriminatory application, violating one of the most widely recognized fundamental principles in internal laws.[90] With the application of these limiting factors, however, automatically returning the child under the Convention may deprive both the parent and the child of due process. Therefore, the Hague Convention could conflict with United States constitutional guarantees.

V. Due Process Implications of the Hague Convention in the United States

A. *United States Courts Look to ICARA for Internal Law*

The limiting factors of Article 20 require the violation of an actual law of the requested state before that state may invoke Article 20. The United States, however, has not expressed specifically which internal laws should be relied on when applying Article 20. As the implementing legislation for the Hague Convention, the International Child Abduction Remedies Act serves as a source of internal law. For example, in the recent case of *Klam v. Klam*,[91] a federal district court looked to ICARA for the applicable United States law in applying the Hague Convention.

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cultural patterns. Understandably, the determination of a child's future should be based on the cultural practices of the child's home state. Concern arises when these practices will affect the child's future exercise of basic human rights and fundamental freedoms. This is the situation to which the Article 20 exception is addressed. *Id.*

88. *See id.; see also* Legal Analysis, *supra* note 11, at 10510.

89. Rivers, *supra* note 11, at 628.

90. Pérez-Vera Report, *supra* note 7, at 50/462.

91. 797 F. Supp. 202 (E.D. N.Y. 1992).

In *Klam,* a German citizen petitioned the court for a warrant in lieu of habeas corpus, requesting that his children, who had been living with their mother in New York, be brought before the court for proceedings pursuant to the Hague Convention.[92] According to ICARA, "[n]otice of an action . . . shall be given in accordance with the applicable law governing notice in interstate child custody proceedings."[93]

ICARA further provides that no court may "order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied."[94] In the United States, interstate child custody proceedings fall within the Uniform Child Custody Jurisdiction Act (UCCJA),[95] and the Parental Kidnapping Prevention Act (PKPA).[96] Each of these Acts instructs that, before any decision may be made on child custody, "reasonable notice and opportunity to be heard shall be given" to the parties.[97] Thus, to satisfy the Constitution's due process requirements, these statutes give both sides the opportunity to be heard in a plenary hearing regarding the best interests of the child.[98]

B. *UCCJA: Requirements of Due Process*

UCCJA is the internal legislation which would have the most impact on Article 20 motions because it addresses the jurisdiction of courts to decide custody disputes.[99] Before Congress enacted UCCJA, the United States Supreme Court decided in *May v. Anderson*[100] that a custody

92. *Id.* at 203.

93. ICARA, *supra* note 6, § 11603(c).

94. *Id.* § 11604(a)-(b); *see also Klam,* 797 F. Supp. at 206 (German father did not make a sufficient showing under State law to have the children removed from their mother in New York).

95. 9 U.L.A. 123 (1968) [hereinafter UCCJA].

96. 28 U.S.C. § 1738A (1980) [hereinafter PKPA]. The PKPA could be considered a United States internal version of the Hague Convention. The Act requires states of the United States to enforce child custody determinations made by courts of other states. *Id.* ¶ (a). A court must recognize the determination of another court only if that court had jurisdiction under the law of the state in which it is located. *Id.* ¶ (c)(1).

97. UCCJA, *supra* note 95, § 4; PKPA, *supra* note 96, § 1738A(e); *see also Klam,* 797 F. Supp. at 205 (noting that the UCCJA and the PKPA provisions on notice are substantially similar and therefore relying on both).

98. *Klam,* 797 F. Supp. at 205; *see also* In the Matter of the Application of Felix C., 455 N.Y.S.2d 234 (Fam. Ct. 1982).

99. Pérez-Vera Report, *supra* note 7, at 22/434.

100. 345 U.S. 528 (1953). In *May,* the parents separated and the mother took the children from Wisconsin to Ohio with the consent of her husband. *Id.* at 530. After a few weeks, she informed her husband that she would not return to Wisconsin, at which

hearing required either in personam jurisdiction over an absent parent or minimum contacts between that parent and the forum state.[101] When it drafted UCCJA, Congress turned its back on the due process ramifications of *May v. Anderson* and instead regarded custody jurisdiction as in rem jurisdiction.[102] Recently, however, the United States Supreme Court has moved toward greater procedural protection for both non-resident parties[103] and parental rights.[104]

Under the Hague Convention and ICARA, proceedings do not consider the merits of the custody suit, but only determine whether the child

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time he filed suit in Wisconsin seeking both an absolute divorce and custody of the children. *Id.* The wife was personally served with a summons and petition, but made no appearance at the Wisconsin hearing. *Id.* at 530-31. The wife later contested the validity of the Wisconsin custody decree, which awarded custody of the children to the husband, on the grounds that the court had no jurisdiction over the wife. *Id.* at 529, 531. Relying on the Wisconsin decree, the husband filed a petition for a writ of habeas corpus to have the children returned to him. *Id.* at 532.

101. A plurality of the Court in *May* held that an *ex parte* custody decree could not be enforced against an absent parent unless the court had in personam jurisdiction over that parent. *Id.* at 534. Although the opinion in *May* is rather murky, many scholars say that its "only logical construction" is that due process requires in personam jurisdiction over both parents. Helen Garfield, *Due Process Rights of Absent Parents in Interstate Custody Conflicts: A Commentary* In re Marriage of Hudson, 16 IND. L. REV. 445 (1983); *see also* Homer H. Clark, Jr., *The Supreme Court Faces the Family,* FAM. ADVOC., SUMMER 1982, at 20, 22; Geoffrey C. Hazard, Jr., May v. Anderson: *Preamble to Family Law Chaos,* 45 VA. L. REV. 379, 383-84 (1959).

102. Garfield, *supra* note 101, at 446.

103. *Id.* at 468; *see, e.g.,* Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977) (both holding that minimum contacts are now required for all types of suits). In *Kulko,* the mother signed an agreement in New York giving custody of the children to their father. *Kulko,* 436 U.S. at 87. She lived in California and the children visited her on vacations. *Id.* The mother later commenced an action in California to modify the custody decree. *Id.* at 88. The children's father appeared specially, protesting that he did not have sufficient minimum contacts with California for the California court to exercise in personam jurisdiction over him. *Id.* The United States Supreme Court decided that any exercise of jurisdiction over the father by the California courts would violate due process. *Id.* at 91. The court held that the mere fact that the father sent his daughter to California to live with the mother was not sufficient to establish minimum contacts. *Id.* at 101.

104. Garfield, *supra* note 101, at 468; *see, e.g.,* Santosky v. Kramer, 102 S.Ct. 1388 (1982) (no parent can have parental rights terminated without the opposing party's meeting the clear and convincing evidence standard of proof); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father has due process right to a hearing before being deprived of the custody of his children). Although United States courts have deemed a parent's interest in custody of a child to be fundamental, this interest is not immune from state intervention. Care and Protection of Robert, 556 N.E.d 993, 997 (Mass. 1990).

was wrongfully abducted or retained.[105] However, under UCCJA the hearings may actually determine who will have custody of the child.[106] Under United States due process requirements, parties to a custody hearing must have notice and an opportunity to be heard during the proceedings. [107] Thus, because the Convention proceedings determine only whether the child has been wrongfully removed or retained,[108] the Convention does not gurantee a custody hearing which meets due process requirements.

Although UCCJA permits a court to make a decision on the merits of a child custody case, courts have not gone as far as interpreting UCCJA as allowing this jurisdiction under the Hague Convention. In one New Jersey case, the mother of the child abducted her daughter from the

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105. Hague Convention, *supra* note 4, art. 19; ICARA, *supra* note 6, § 11601(a)(4).

106. *See* UCCJA, *supra* note 95, §§ 1, 4. Under UCCJA, a state has jurisdiction to allow its courts to determine custody if: (1) the state is the home state of the child at the commencement of the proceedings, or was the home state within the preceding six months and the parent continues to reside there, (2) it is in the child's best interest for that court to decide custody, (3) the child is physically present in the state and was abandoned or (4) it appears that no other state has jurisdiction. *Id.* § 4.

107. In *Stanley v. Illinois*, the United States Supreme Court specifically held that a parent has a due process right to a hearing before custody issues are determined. 405 U.S. 645 (1972). Furthermore, the Court held that to deny a parent a hearing is to deny equal protection of the laws when all other parents whose custody is challenged receive a hearing. *Id.* In *Stanley*, the children's natural mother died and the state assumed custody of the children without giving the natural father, who was unwed at the time, any opportunity for a custody hearing. *Id.* at 646-49. The Court recognized that a parent's interest in the companionship, care, custody, and management of his children warrants more deference and protection than a mere economic liberty or property interest. *Id.* at 651. Earlier, the Court had declared that the rights to conceive and raise one's children were "[r]ights far more precious . . . than property rights." May v. Anderson, 345 U.S. 528, 533 (1953); *see also* Meyer v. Nebraska, 262 U.S. 390 (1923) (right to decide child's education); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate). The Court held denying unwed fathers a fitness hearing that was accorded to all other parents whose custody was challenged constituted a denial of equal protection. *Stanley*, 405 U.S. at 651. In addition to protection under the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments, the Court has also protected the integrity of the family unit under the Ninth Amendment, recognizing that certain fundamental personal rights are protected by the Constitution even though they are not explicitly set forth. *Id.; see also* Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (noting that the Ninth Amendment expressly recognizes that "there are fundamental personal rights such as [procreation], which are protected from abridgment by the Government though not specifically mentioned in the Constitution.").

108. The Convention defines wrongful removal and retention very narrowly. *See* Hague Convention, *supra* note 4, art. 3.

United Kingdom to New Jersey, and argued that New Jersey had a vested interest in the case under UCCJA and that custody should be decided under New Jersey law.[109] The judge found, however, that the Hague Convention pre-empts UCCJA.[110] Because British courts had awarded custody to the father, the New Jersey court refused to interfere and ordered that the child be returned to the United Kingdom to live with her father.[111]

UCCJA and the Convention also conflict because UCCJA requires that the absent parent receive reasonable notice and an opportunity to be heard.[112] Section 4 of UCCJA provides that parties must have reasonable notice and an opportunity to be heard before any decree may be made.[113] Notice may be given by personal service,[114] by mail,[115] or as directed by the court,[116] which in certain circumstances may include publication.[117] Whether the parties have had the opportunity to be heard presents the real problems in reconciling the requirement of UCCJA with the demands of the Convention. Under UCCJA, the custody decree's validity turns on whether proper notice was given, but the Convention does not make an issue of notice requirements.

In *Horlander v. Horlander*,[118] the court found that under UCCJA, a state must recognize a custody decree of a foreign nation only if all affected parties received reasonable notice and an opportunity to be heard.[119] In this case, a wife who had been living in Indiana moved with her children to her native country of France and filed for divorce and custody of the children.[120] At about the same time, her husband began similar proceedings in Indiana.[121] The parties disputed whether the

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109. *Little-Known Treaty Is Invoked in Custody Fight, supra* note 27 (discussing Gregory Lauder-Frost v. Joanna Lauder-Frost, FD-16-3525-91, decided Feb. 11, 1991).

110. *Id.*

111. *Id.*

112. UCCJA, *supra* note 95, § 4.

113. *Id.* "Before making a decree . . . reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child." *Id.*

114. *Id.* § 5(a)(1)-(2).

115. *Id.* § 5(a)(3).

116. *Id.* § 5(a)(4).

117. *Id.* § 5.

118. 579 N.E.2d 91 (Ind. Ct. App. 1991).

119. UCCJA, *supra* note 95, § 23; *Horlander*, 579 N.E.2d at 96. The court relied on the intent of the original drafters of the UCCJA as expressed in their comments. *Id.*

120. *Horlander*, 579 N.E.2d at 93.

121. *Id.* The children had been born and spent all of their lives in Indiana. The father still lived there. *Id.*

courts in Indiana or in France had subject matter jurisdiction over the custody determination.[122] Because the French court had not rendered a decree giving the father notice or an opportunity to be heard, Indiana courts were not bound to recognize the French ruling.[123]

The appellate court in *Horlander* decided that the trial court abused its discretion and violated UCCJA's policy when it found France to be a more convenient forum.[124] The appellate court refused to examine whether the trial court's findings violated the Hague Convention's policy.[125] The *Horlander* opinion indicates that if the French court had issued a custody decree and had not given the father appropriate due process consideration, then the court would not have returned the child under the Convention. This potential conflict between UCCJA and the Hague Convention may present an appropriate situation for United States courts to invoke the Article 20 exception.

The Indiana case of *In re Marriage of Hudson*[126] shows how a decision on jurisdiction can affect a parent's due process rights. In *Hudson*, the father forcibly seized and removed his children from the mother and took them to Spain on the same day that she filed for custody in Indiana.[127] Because these events occurred before the ratification of the Hague Convention, the Indiana trial court applied UCCJA and awarded custody of the children to the mother.[128] On appeal, the father contended that the Indiana court did not have jurisdiction over him and thus violated his due process rights by removing custody of his children without a fair hearing.[129] The appellate court in *Hudson* decided that UCCJA did not require in personam jurisdiction.[130] Therefore, the court did have

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122. *Id.* at 95-96.

123. *Id.* at 96. Because the French action was pending at the time Horlander instituted the Indiana action, no custody decree had issued. *Id.* Nonetheless, the Indiana court indicated that if the French court had awarded custody, and Mr. Horlander had been given notice and an opportunity to be heard, the Indiana court would be bound to recognize the French decree. *Id.* Because the French court had not issued any decree at all yet, the discussion of whether the court would have recognized a French decree was purely dicta. *See id.*

124. *Id.* at 98-99. "By not following the act and by incorrectly finding France a more convenient forum, the Indiana court's dismissal of Karl's petition not only was an abuse of discretion but also conflicts with the policy of the UCCJA." *Id.* at 99.

125. *Id.*

126. 434 N.E.2d 107 (Ind. App. 1982), *cert. denied* 459 U.S. 1202 (1983).

127. *Id.* at 110. The father was serving in the United States military in Spain at the time. *Id.*

128. *Id.* at 110.

129. *Id.* at 114.

130. *Id.* at 119. The court performed an extensive analysis of the jurisdictional re-

jurisdiction over the father necessary to make the custody ruling, despite the fact that he did not have the opportunity to be heard.[131] The fact that the father had been involved in child-snatching may have facilitated the court's finding that his due process rights were not violated.[132]

In *Hudson*, the Indiana court proceedings focused on whether the court had jurisdiction over the absent parent in order to decide custody. By stretching the limits of jurisdiction, the court could deprive a parent of custody without necessarily providing him with due process. The primary focus of the Hague Convention is not jurisdiction because the purpose of its proceedings is to determine whether the child was wrongfully removed, not to determine custody issues. However, the fact that the court removed custody from the father without giving him an opportunity to be heard bears significantly on the Convention.

Ironically, the holding in *Hudson* could prove beneficial if an abductor sought refuge with the child in the United States.[133] Under the jurisdictional rules of the UCCJA, the abductor could get a custody ruling from the state where he established residency that would be binding on the other spouse as long as the spouse received notice and opportunity to be heard.[134] The Convention seeks to prohibit these circumstances by requiring the immediate return of the child to its habitual residence and by forbidding the abductor to seek a custody hearing.[135] The most interesting situation arises, however, when the abductor seeks a hearing in the United States because of failure to receive one in the foreign country. In that case, the United States either would have to deprive the parent of

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quirements in custody proceedings in reaching its conclusion. The court reasoned that "[t]he paramount issue in custody proceedings is the best interest of the child, not the feuding parents." *Id.* at 118-19.

131. *Id.* at 118.

132. *See* Garfield, *supra* note 101, at 448. The United States Supreme Court held in *Stanley v. Illinois*, 405 U.S. 645 (1972), that a parent has a due process right to a custody hearing. In *Hudson*, however, perhaps because the father had snatched the children away from the mother, the court did not lean over backwards to determine that he had a due process right to a custody hearing. Although no case such as this has yet come before the United States Supreme Court, in light of the ruling in *Stanley*, it seems to be unlikely that the Court would dismiss the complex due process questions so perfunctorily. The Supreme Court might not be as willing to deny a parent the right to a custody hearing after it explicitly declared parents had such a right in *Stanley*.

133. Garfield, *supra* note 101, at 474.

134. The UCCJA contains a discretionary "clean-hands" provision which allows a court to decline jurisdiction if child-snatching is involved. UCCJA, *supra* note 95, § 8. Because this section is discretionary, the court might take jurisdiction if it liked, in which case any custody decree would be binding. Garfield, *supra* note 101, at 474 n.174.

135. *See supra* notes 13-17 and accompanying text.

a child without giving the parent a fair hearing or would have to invoke an exception to the Convention's requirements. Because of these problems, some scholars believe that the United States Supreme Court would reject the holding and rationale of *Hudson*.[136]

The compelling story of Betty Mahmoody and her daughter, Mahtob, highlights concerns about the Convention.[137] In 1984, Mahmoody accompanied her daughter, who had been raised in the United States, and her Iranian-born husband on what was supposed to be a two-week vacation to Iran.[138] Once in Iran, however, her husband refused to leave.[139] He informed them that under Islamic law, Mahmoody and her daughter were Iranian citizens and that he was their absolute master.[140] After eighteen months, Mahmoody risked execution to escape with her daughter.[141] At the time, the Hague Convention was not in effect in either the United States or Iran.[142] If it had been, Mahmoody's husband could have requested the immediate return of the child through the Convention. For the past eighteen months his daughter had been a habitual resident of Iran, and he had exercised his custody rights over her. Thus, the Convention would have forced Mahmoody to return the child, forfeiting her rights to a custody hearing and risking death if she attempted to accompany her daughter back to Iran.[143]

One suggestion put forth for dealing with the jurisdictional and due process problems of the UCCJA is that any *ex parte* decree should be enforced, even against an absent parent, but that the absent parent still should be entitled to an original custody hearing, rather than a modification hearing.[144] The advantage of this approach would be to guarantee

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136. Garfield, *supra* note 101, at 475. However, the Supreme Court would have strong reasons for wanting to uphold a statute as widely adopted and supported as the UCCJA. *Id.*

137. Their story was the subject of a book by Mahmoody entitled "*Not Without My Daughter*," which was subsequently made into a movie starring Sally Field.

138. Cheryl Cornacchia, *Turning point: A Story of Struggle and Change*, GAZETTE (Montreal), Dec. 14, 1992, at D3.

139. *Id.*

140. *Id.*

141. *Id.*

142. The Convention became effective in the United States in 1988. *See* ICARA, *supra* note 6. Iran still has not signed the Hague Convention. *See supra* note 4.

143. Betty Mahmoody has formed a support group and parents' network to promote awareness of international parental abduction and to provide counselling for those who have been victims. This group may be contacted by writing to One World: For Children, PO Box 124, Corunna, Mich. 48817, or by phoning (517) 725-2392. M.L. Elrick, *Mother's Mission Behind Screen's 'Daughter'*, CHI. TRIB., Jan. 11, 1991, at CN1.

144. *See* Garfield, *supra* note 101, at 480-481; John J. Sampson, *What's Wrong*

each parent the right to an original custody hearing while recognizing the validity of the *ex parte* decree.[145] Thus, if the child has been snatched, it will be returned to the other parent until a proper custody hearing can be held.

However, under the Hague Convention the problem remains that both parties may not receive fair treatment, or even a hearing. If the Convention requires a parent to relinquish custody of the child with full knowledge that the parent will not receive an opportunity to be heard, the Convention violates the internal law of the United States established by UCCJA. UCCJA prohibits a child from being removed from parental custody unless the parent has received notice and an opportunity to be heard.

Not every international abduction case results in a parent being deprived of due process guarantees. In *Sheikh v. Cahill*,[146] a mother abducted her daughter from the United States to the United Kingdom. The father then began custody hearings in the United Kingdom, even though he had a custody decree from the United States.[147] In so doing, he submitted himself to the jurisdiction of the British court and had to abide by its decision.[148] Significantly, the father still obtained a fair hearing on custody, even though the result was not in his favor.[149] Because he had an opportunity to be heard, no violation of United States law occurred. The true problems with the Convention arise only when one of the parties never receives an opportunity to be heard in a fair proceeding.

C. *Right of the Child to Remain in the United States*

1. Express Preference of a Mature Child

One facet of the due process issue is whether a child has a constitutional right to remain in the United States if the child expresses a desire not to return to the state of habitual residence.[150] In *Bergstrom v. Berg-*

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with the UCCJA?, FAM. ADVOC., Spring 1981, 28, 30. In a modification hearing, the non-custodial parent bears the burden of proving changed circumstances. Garfield, *supra* note 101, at 481. An original custody hearing involves a de novo review of the best interests of the child. *Id.*

145. Garfield, *supra* note 101, at 482.

146. 546 N.Y.S.2d 517 (Sup. Ct. 1989)

147. *See also* Alan Kohn, *Order Child Returned to Mother in London; International Abduction Pact Interpreted*, N.Y. L.J., Sept. 26, 1989, at 1.

148. *Sheikh*, 546 N.Y.S.2d at 519.

149. *Id.*

150. The Convention addresses this situation in Article 13 which provides that a

strom,[151] a young girl sued to restrain her divorced mother from taking her to live in Norway. A federal district court in North Dakota held that a child of eight years and ten months could intelligently exercise her right as a citizen to remain in the United States, but the Eighth Circuit overturned this decision on other grounds.[152]

The religious upbringing of the child is often an issue in child custody cases, and courts often recognize the child's religious convictions as a valid reason for honoring the child's preference to remain with a particular parent. Although the First Amendment prohibits a court from preferring the religious convictions of one parent over another,[153] a court may honor the request of a mature child who expresses a custodial preference based on religious convictions without offending the Establishment Clause.[154]

2. Children Do Not Have a Fundamental Right to Remain in the United States

The Third Circuit Court of Appeals has held that a citizen child, an infant born in the United States, was not entitled to a stay of her alien parents' deportation even though their deportation would deprive her of

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court may consider the express preference of a child who has reached an appropriate age or degree of maturity. Hague Convention, *supra* note 4, art. 13.

151. 623 F.2d 517 (8th Cir. 1980).

152. *Id.* at 519. The Eighth Circuit refused to rule on the constitutional issue of whether she had a right as a citizen to remain in the United States because it decided that the custody decision was a factual matter better resolved by the state court. *Id.* at 520. The court believed that it should avoid ruling on constitutional issues except under strict necessity. *Id.* The pending state court claim on custody could alleviate any need for the federal court to decide the constitutional issue, and thus the issue was not ripe for adjudication. *Id. See also* Zaubi v. Hoejme, 530 F. Supp. 831, 838 (W.D. Pa. 1980) (holding that custody decisions should be made by state courts on factual determinations rather than by federal courts on constitutional grounds).

153. *E.g.* Harris v. Harris, 343 So. 2d 762 (Miss. 1977) (mother's religious belief in snake handling was not enough to remove custody of her child when there was no showing that the child would be exposed to being bitten by a snake); Smith v. Smith, 367 P.2d 230 (Ariz. 1961) (en banc) (mother not shown to be unfit for custody because of her religious beliefs regarding saluting the flag and participating in Christmas plays at school); McLaughlin v. McLaughlin, 132 A.2d 420 (Conn. Super. Ct. 1957) (father based claim for custody on antenuptial agreement that said children would be reared in his religious faith, but court found religious views offered no grounds for removing children from custody of one parent in favor of the other unless the welfare of the child was at risk); *see also* Leonard P. Strickman, *Marriage, Divorce and the Constitution,* 15 FAM. L.Q. 259, 334-35 (1982).

154. Strickman, *supra* note 153, at 335.

her right as a United States citizen to reside in the United States.[155] In this case, *Acosta v. Gaffney*, the parents, in protesting their deportation order, argued that their deportation would unconstitutionally deprive their daughter of the equal protection to which she was entitled as a United States citizen.[156] The court, however, reasoned that an infant's right as a citizen to remain in the United States was purely theoretical because an infant is incapable of exercising such a right.[157] Additionally, the United States Supreme Court held in *Hintopoulos v. Shaughnessy*[158] that alien parents may be deported even though deportation may result in severe economic detriment to their United States citizen child.[159]

Courts have held that United States citizens have a fundamental right to reside wherever they wish, whether in the United States or abroad.[160] This right is purely theoretical for a young child because the child would be incapable of maturely making this decision.[161] The Third Circuit did recognize that the parents could permit their daughter to remain in the United States with foster parents.[162] This option would be the parents' decision regarding custody, however, rather than a decision by their daughter to remain in the United States.[163]

Courts have followed similar reasoning in child custody cases. Most of these cases turn on whether the child has the ability to make mature decisions. In *Tischendorf v. Tischendorf*,[164] the Minnesota Supreme Court found that a child did not have an independent constitutional right to remain in the United States if a custody decree judicially determined that it would be in the child's best interests to visit his father in Germany.[165] The court recognized that while children do possess constitu-

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155. Acosta v. Gaffney, 558 F.2d 1153 (3d Cir. 1977). The parents had overstayed the period of their authorized visit and were being deported by the Immigration and Naturalization Service. *Id.*

156. *Id.* at 1155.

157. *Id.* at 1157.

158. 353 U.S. 72 (1957).

159. *Id.*; *see also Acosta*, 558 F.2d at 1158.

160. *Id.* at 1157; *see also* Schneider v. Rusk, 377 U.S. 163, 168 (1964) (naturalized United States citizen who lived in Germany for past eight years did not automatically lose her United States citizenship because native born citizens were free to reside abroad indefinitely without forfeiting their citizenship); Kent v. Dulles, 357 U.S. 116, 125 (1958) (citizens may not be denied the right to travel without due process of law, even if they allegedly have communistic beliefs and associations).

161. *Acosta*, 558 F.2d at 1157.

162. *Id.*

163. *Id.* at 1158.

164. 321 N.W.2d 405 (Minn. 1982).

165. *Id.* The child's mother, who lived in the United States, had custody over the

tional rights, some of these rights do not become effective until a child reaches a sufficient age of maturity to exercise them intelligently.[166] The dissent in *Tischendorf* contended that if the boy were not mature enough to exercise his constitutional rights, then a guardian ad litem should be appointed for him.[167]

In *Schleiffer v. Meyers*,[168] the Seventh Circuit enforced a Swedish custody decree requiring that a ten-year old American citizen return to Sweden to live with his mother, who had custody.[169] The court acknowledged that while parents have a constitutional right to direct the upbringing of their children,[170] children themselves have constitutional rights independent of their parents' rights.[171] However, these rights are not always equivalent to those afforded adults.[172]

In *Schleiffer*, the father had petitioned the Swedish court for a divorce and was fully represented when the court awarded custody to the mother.[173] In determining the custody issue, the court did not give much

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child, and the father, who lived in West Germany, had visitation rights. *Id.* at 407.

166. *Id.* at 410; *see also* Acosta v. Gaffney, 558 F.2d 1153 (3d Cir. 1977) (infant child had no constitutional right to remain in the United States).

167. *Tischendorf*, 321 N.W.2d at 413 (Yetka, J., dissenting).

168. 644 F.2d 656 (7th Cir. 1981).

169. This case arose before the Hague Convention came into effect in the United States in 1988. *See* ICARA, *supra* note 6.

170. *Schleiffer*, 644 F.2d at 660; *see also* Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Meyer v. Nebraska, 262 U.S. 390, 401 (1923).

171. *Schleiffer*, 644 F.2d at 660; *see also In re* Winship, 397 U.S. 358 (1970) (12 year old boy charged with an act that would be a crime if committed by an adult deserves the same due process and fair treatment that an adult would receive); *In re* Gault, 387 U.S. 1 (1967) (15 year old boy taken into custody for making lewd telephone calls still had a constitutional guarantee of due process in juvenile hearings).

172. *Schleiffer*, 644 F.2d at 660.

173. *Id.* at 661. In determining whether a hearing to remove a child from parental custody meets due process standards, courts generally apply the test formulated by the United States Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976). Care and Protection of Robert, 556 N.E. 2d 993, 996 (Mass. 1990). In *Robert*, the court applied the test set forth in *Mathews* to a custody case, listing the three factors comprised in the *Mathews* test: (1) the private interest that is affected by the official action, (2) the risk of erroneously depriving a party of such interest through the procedures used, and the likely value of any additional procedural safeguards, and (3) the Government's interest, such as the functional, financial, and administrative burdens that the additional procedures would entail. *Id.* at 996. Two important aspects of the Mathews test require a determination of the private interest at stake and the risk of erroneously depriving a party of this interest. Thus, a significant consideration in the due process analysis under these factors is the permanency of the potential loss. Santosky v. Kramer, 455 U.S. 745, 758 (1982) (finding a balancing of the private interests of a parent in child custody issues "strongly

weight to the son's expressed desire to reside in the United States.[174] Because the child retained his United States citizenship, he retained his freedom to choose his place of residence upon becoming mature enough to leave his custodial parent.[175] Also, the court noted that he would be living in a free country.[176] Thus, the court did not find that awarding the mother custody in Sweden denied the child his constitutional rights.

Although the court did not find that the child had a right to reside in the United States, he did have a strong claim that forcing his return to Sweden would amount to a de facto deportation from the United States.[177] This de facto deportation would violate his constitutional rights to travel and to choose a residence.[178] Although such a right undoubtedly belongs to adults, the court found that it is not an absolute right for children.[179] In a concurring opinion, however, another judge found that in certain instances a child still deserves constitutional protections even when affording those protections could subvert the normal parental role.[180] Although recognizing that a child's right to constitutional protections at the expense of parental control could produce uncertain results, the concurrence thought that grave and irrevocable consequences arose in this case.[181]

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favors heightened procedural protections"). Most often, parental custody in international cases will not be lost irretrievably because the child always will have the option of returning to the United States when mature enough to make such decisions independently. *Id.* at 761.

174. *Schleiffer*, 644 F.2d at 662.

175. *Id.*

176. *Id.* It is unclear whether the court insinuated here that the decision might have been different had Sweden not been a "free country." *See also* Zaubi v. Hoejme, 530 F. Supp. 831 (W.D. Pa. 1980). In *Zaubi*, a Pennsylvania state court refused to rule on the claimed right of two children as United States citizens to reside within the United States rather than be removed to Denmark by their mother. *Id.* The court refused jurisdiction on the grounds that it would disrupt state policy as set forth in UCCJA. *Id.* at 836-37. However, the court did suggest that courts may consider the nation to which the child would be removed when the child makes a claim to live in the United States. *Id.* at 837 (citing Bergstrom v. Bergstrom, 623 F.2d 517 (8th Cir. 1980)).

177. *Schleiffer*, 644 F.2d at 662.

178. *Id.*; *see* Kent v. Dulles, 357 U.S. 116, 125 (1958).

179. *Schleiffer*, 644 F.2d at 662-63; *see* Acosta v. Gaffney, 558 F.2d 1153 (3d Cir. 1977). Courts take solace in the fact that any deportation of the child only postpones—not completely bars—the child's residency in the United States. *See id.* at 1158.

180. *Schleiffer*, 644 F.2d at 666 (Cudahy, J., concurring); *see also* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 72-75 (1976) (right of a pregnant minor to an abortion without parental consent).

181. *Schleiffer*, 644 F.2d at 666 (Cudahy, J., concurring).

Situations in which a custody decision could have grave and irrevocable consequences could exist, however, and may call for courts to exercise the Article 20 exception to the Hague Convention. For example, sending an African-American child to South Africa could be a situation in which the court might be forced to recognize the right of a child to determine residence.[182] Considering the unstable political situation and frequent occurrences of racial violence in South Africa, a court might have difficulty justifying sending a young, African-American citizen to be raised there.

Courts might also be more willing to invoke the Article 20 exception in cases involving child refugees. While there are many benefits that result from determining a child's future based on the cultural practices of the place of habitual residence, certain circumstances may prevail in a state that would "seriously endanger his future exercise of basic human rights and fundamental freedoms, or those of the parent who would accompany him."[183] These circumstances seem particularly likely in the case of child refugees.[184] If Article 20 is construed narrowly, some academics say, the child, not the abductor, must be faced with an intolerable situation at home for the Article to apply.[185]

VI. CONCLUSION

When a child becomes a pawn in an international custody game, the Hague Convention effectively returns matters to status quo before removal or abduction by returning the child to the country of habitual residence and allowing the courts there to determine custody matters. As a deterrent to international abductions, the Convention extinguishes any legal advantage of removing the child to a potentially friendlier jurisdiction. As with any agreement, situations will arise that call for exceptional responses. The Hague Convention anticipates these instances by providing certain exceptions. These exceptions endow judges with the discretion to ignore the confines of the Convention and to act in the perceived best interests of the child. Nonetheless, these exceptions must strike a balance between allowing authorities sufficient discretion to react

182. South Africa, the Convention's most recent signatory, signed the Hague Convention on January 29, 1993. *South Africa Signs International Conventions on Social Issues, Human Rights,* BBC SUMMARY OF WORLD BROADCASTS, Feb. 1, 1993, at 601.

183. *Id.*

184. *Id.*

185. *See* Anton, *supra* note 83, at 551. *Cf. In re* Walter Polovchak, 454 N.E.2d 258 (Ill. 1983) (court ordered 12 year old boy to return to the Ukraine with his parents, although the United States Attorney suggested that any decision on final custody respect the supremacy of the United States obligations under the Refugee Act of 1980).

to exceptional situations and prohibiting them from making subjective value judgments on a foreign culture or country.

The Article 13 exceptions seek to provide relief in those factual circumstances in which the child will be placed in grave danger or at risk of intolerable harm. Often times courts have difficulty distinguishing evidence that leads to a judgment about the child's particular family situation and evidence that leads to a judgment about the culture of the foreign country. The Convention adamantly desires to avoid reliance on the latter in applying Article 13. However, with judges uncertain about what evidence they may permit into their courtrooms, parties have flexibility to bring in certain cultural differences disguised as the attributes of the factual family situation. Therefore, courts must watch closely for abuse in this area.

The Article 20 exception is surrounded by even more uncertainty than Article 13. If courts allow parties to invoke Article 20 too frequently, they will completely undermine the purpose of the Hague Convention. However, by limiting the exception to the internal law of the country, any abuse will be curtailed. Arguably, United States internal law centers around due process requirements. To order the return of a child to a foreign country, knowing that the parent will not receive an opportunity to be heard in a custody hearing, blatantly violates the due process requirements of the United States Constitution and statutory law such as UCCJA. United States courts cannot ignore due process requirements in order to fulfill the goals of the Hague Convention.

United States internal law requires that a parent receive due process and a fair opportunity to be heard before the parent loses custody of a child. The automatic return provisions of the Hague Convention may in some circumstances violate these rights. The Article 13 exception allows a court to refuse to return a child when the return would seriously endanger the child's best interests. Courts should be willing to invoke the Article 20 exception when the parents are in danger of losing their fundamental rights, as well as their child. The Hague Convention, in its emphasis on the rights of the child, may trample on the rights of the parents who have one of the most fundamental interests at stake—custody of their child. Ideally every country would afford parents a fair hearing before removing a child, but that is simply not the case. Thus, United States courts must ensure that its citizens' rights are protected. Courts should not hesitate to invoke the Article 20 exception to protect the fundamental rights of parents and children to due process.

As part of ICARA, parents should be entitled to a hearing regarding whether they will receive a fair opportunity to be heard in a foreign country before the child is returned to that country. Of course, as long as

parents receive notice and an opportunity to be heard, then courts should follow the Convention and return the child to its country of habitual residence for custody proceedings. Due process does not guarantee a parent custody; rather, it guarantees a fair opportunity to be heard in a custody dispute. Courts must be careful not to confuse valid due process arguments with value judgments of another country's system of custody. Nonetheless, if a court finds that a parent will not receive a custody hearing, it should refuse to return the child under the Convention and permit the custody proceedings to be held in a jurisdiction that will give both parents an opportunity to be heard.

The Hague Convention has given courts discretion to act in the child's best interests in compelling circumstances. If individuals can show that they will not receive due process as required by United States law, courts should exercise the discretion provided to them by Article 20 to ensure that they receive the protection of human rights and individual freedoms guaranteed to citizens by the United States Constitution.

Dorothy Carol Daigle