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Introduction

Many parents worry when their child leaves for a few days or travels far from home. But imagine if your child were taken to a country 15,000 miles away and kept away for years, or even forever. Thousands of parents are now living this nightmare - more than 10,000 American

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children are abducted to a foreign country each year.[1] For the parents left behind after an international child abduction, each morning brings another day of worry, anxiety and a faint hope that they will see their child again. International parental abductions have become an epidemic in today's world.[2] Thousands of children are kidnapped and taken to foreign countries by a parent or close family member.[3] Many of these abductions arise during custody disputes or divorce proceedings.[4] Due to the recent increase in transnational marriages and advances in personal mobility, a parent is more likely, and able, to take his or her child to another country after a divorce or estrangement.[5]

Traditionally, the parents who are left behind after an international kidnapping faced nearly insurmountable hurdles in order to get their child back. Parents were forced to navigate an unfamiliar, often hostile, legal system that was drafted in a foreign language and derived from a foreign culture. Often, a parent had no guarantee that the foreign country would act to return their children.[6] In addition, international *parental* abductions generally are not criminal acts under foreign law and thus carry no legal sanction.[7] Because courts viewed parental

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[1] *See* Susan Mackie, *Comment: Procedural Problems in the Adjudication of International Parental Child Abduction*, 10 TEMP. INT'L & COMP. L.J. 445, 446 (1996) (citing statistics stating that of the 350,000 child abductions that occur each year, more than 10,000 involve American children held in foreign countries by a parent).

[2] See Rania Nanos, *The Views of a Child: Emerging Interpretation and Significance of the Child's Objection Clause under the Hague Convention Abduction Convention*, 32 BROOKLYN J. INT'L LAW, 437, 437 n.1 (1996) (citing statistics showing the soaring rate of child abduction in recent years).

[3] *Id.*

[4] *See* Mackie, *supra* note 1, at 445 (stating that child abductions during divorce or separation proceedings may result from a desire for sole custody, from a misguided attempt to reunite the family, or from spite against the aggrieved parent).

[5] *See* PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 2 (P.B. Carter QC ed., Oxford University Press 1999) (1999) (Citing modern socio-legal and technological developments, and increased divorce and international marriage rates, as origins for the growth of international parental abductions).

[6] Foreign countries are generally under no legal obligation to enforce child custody awards granted in another country. *Id.* at 3.

[7] *Id.*

kidnappings as technically 'legal,' courts were often reluctant to become involved in returning the child.[8]

The Hague Convention on International Child Abduction offers hope to many such parents. The Convention creates a procedure to promptly return abducted children[9] to their country of habitual residence, where the national courts can later institute custody proceedings.[10] The Hague Convention simplifies the often-convoluted process of effecting return by guaranteeing a simple civil procedure. Under this treaty, a left-behind parent may file a civil suit against the abducting parent in the country to which his children were abducted or to a Central Authority.[11] If successful, the courts of the country to which the children were abducted will order the children returned to their home country.[12]

Countries and courts have praised the Convention for providing the swift return of abducted children,[13] but it has also come under increased criticism.[14] The Convention requires courts to balance the child's best safety and welfare interests against the need for swift return. Many commentators, however, have criticized the Convention for giving

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[8] *See* BEAUMONT, *supra* note 5, at 3 (outlining reasons why parents left behind after an international parental abduction had very little chance of recovering the child from a non-Hague Convention foreign country).

[9] *See generally* Hague Conference on Private International Law: Hague Convention on the Civil Aspects of International Child Abduction of 1980, 19 I.L.M. 1501 (1980) [hereinafter *Hague Convention*].

[10] BEAUMONT, *supra* note 5, at 28.

[11] *Id.*

[12] *Id.*

[13] *See, e.g.*, Lynda R. Herring, *Comment, Taking Away the Pawns: International Parental Abduction & the Hague Convention*, 20 N.C. J. INT'L L. & COM. REG. 137, 140 (1998) (stating that the Hague Convention has proved to be an effective weapon in deterring child abductions and securing the prompt return of abducted children).

[14] *See generally, e.g.*, Thomas A. Johnson, *The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans,* 33 N.Y.U. J. INT'L L. & POL. 125 (2000) (criticizing noncompliance by many countries, and "blind compliance" to the treaty by the U.S.); Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction,* 33 COLUM. HUM. RTS. L. REV. 275 (2002) (criticizing inconsistent application of treaty provisions).

insufficient consideration to the best interests of the child.[15] Typically, the child's best interest is of paramount importance in most custody proceedings.[16] However, under the Hague Convention, the courts are required to return children promptly, with only a cursory investigation into whether a return order should be issued.[17] In this way, the Convention strives to maintain children's best *overall* interests by deterring international abductions.[18] By having a simple, certain rule, the treaty allows the expeditious handling of child abduction cases, but sacrifices a degree of judicial discretion and flexibility.[19]

However, the Convention's approach has created a possible tension between protecting a child's individual interests and the treaty's overall interest in preventing abductions; a tension that has not fully been resolved. This tension has become even more evident in recent years as developments such as the Children's Rights Convention[20] and domestic violence treatises[21] call for even more consideration of children's

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[15] *See, e.g.* Sharon C. Nelson, *Turning Our Backs on the Children: Implications of Recent Decisions Regarding the Hague Convention on International Child Abduction*, 20 U. ILL. L. REV. 669, 672 (2001) (criticizing court's narrow interpretation of defenses to return under the Hague Convention, and arguing for a broader interpretation of treaty provisions to better protect the best interests of abducted children),

[16] *See* Brian S. Kenworthy, *Note: The Un-Common Law: Emerging Differences Between the United States and the United Kingdom on the Children's Rights Aspects of the Hague Convention on International Child Abduction,* 12 IND. INT'L & COMP. L. REV. 329, 347 (2002) (stating that "U.S. courts often use the 'best interests' standards in resolving many domestic law custody disputes").

[17] *See* BEAUMONT, *supra* note 5, at 28, 29 (emphasizing the Convention's change from the traditional approach used in abduction proceedings; the primary goal is no longer a detailed investigation of the best interests of the child, but rather a preemptory exam into whether a return order should be issued).

[18] *See* BEAUMONT, *supra* note 5, at 29 (stating that the Convention seeks to further the interests of children collectively by promptly returning wrongfully removed children).

[19] *Id.* at 30.

[20] *See* United Nations Convention on the Rights of the Child, U.N. GAOR, 45th Sess., 61st plen. mtg. at art. 12, 1577 U.N.T.S. This treaty requires nations to recognize the human rights of children, including the right to have their views heard and considered in custody proceedings.

[21] *See, e.g.* Merle H. Weiner, *International Child Abduction and the Escape From Domestic Violence,* 69 FORDHAM L .REV. 593, 662-63 (2000) (arguing

individual rights and wishes in legal proceedings. Nowhere is this tension between individual rights and collective interests more evident than in the Hague Convention's Child's Objection Clause.

The Child's Objection Clause allows a court to consider the objection of an abducted child of sufficient age and maturity to being returned to the country of his habitual residence after an international abduction.[22] If successful, this clause allows the child to stay in the country to which he was abducted[23] and prevents the child's return to his habitual residence.[24] The Clause, controversial since its inception,[25] has become even more divisive, with some commentators calling for a broader interpretation,[26] while others call for its complete revocation.[27] Meanwhile, different countries and judges have interpreted the Clause in wildly varying ways, creating a situation that is at best, uncertain, and at worst, chaotic.

Given the countervailing policy interests and contradictory case law, how much weight should judges give to a child's objection? This article will examine how American courts have interpreted the Child's Objection Clause in the past and consider the policy reasons for both narrow and broad interpretations of the provision. Finally, this article will argue for a more structured analysis to promote a uniform consideration of these policy objectives.

Part I will concentrate generally on the Hague Convention with an overview of the treaty's provisions and the history behind its

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that courts should be more open to considering the child's preference when he or she expresses the desire to stay with a parent who is a victim of domestic violence, due to the child's possible fear of the other parent).

[22] Hague Convention on the Civil Aspects of International Child Abductions, Oct. 25, 1980, art. 13(b), T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

[23] *Id.*

[24] *Id.*

[25] *See* BEAUMONT, *supra* note 5, at 177 (stating that "the debates surrounding Art. 13(b) [the Child's Objection Clause] were without doubt among the most divisive of the [conference] session").

[26] *See* Kenworthy, e.g. *supra* note 16.

[27] *See* Brenda J. Shirman, *International Treatment of Child Abduction and the 1980 Hague Convention*, 15 SUFFOLK TRANSNAT'L L. REV. 188, 219 (1991) (arguing that the exception allowing deference to the child's wishes should be removed to eliminate the possibility of undue influence by the abducting parent).

inception. Part II of this note concentrates specifically on the Child's Objection Clause and reviews the legislative history of this clause, and United States case law interpreting this provision. Part III examines the various policy arguments for and against the current interpretation of the Child's Objection Clause and evaluates whether those policy interests are adequately considered under the current system. Finally, Part IV concentrates specifically on how the courts can more effectively consider children's objections in order to further both children's rights and the objectives of the Hague Convention.

I. Hague Convention on International Child Abduction

A. Overview of the Adoption of and Policies behind the Treaty

For many parents, getting their child back after an international abduction becomes a nightmarish ordeal; parents left behind normally need to take their case to the country in which the abductor lives in order to get their child back.[28] This often led to nearly insurmountable hurdles of time, distance, and cultural barriers that made it difficult to obtain an order returning the child.[29] Therefore, when one parent abducted a child to a foreign country, that parent received a legal advantage and an inherently favorable forum for legal and custody proceedings. [30] Signatory nations adopted the Hague Convention primarily to curtail the

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[28] *See* BEAUMONT, *supra* note 5, at 3.

[29] *See id.* (stating that "[i]t is clear that prior to the entry in force of the Hague Convention ... there were very limited chances of recovering an abducted child".)

[30] *See* Explanatory Report of the Convention on the Civil Aspects of Child Abduction, Elisa Perez-Vera, Acts and Documents of the XIVth Session, Volume I, 1982, 426, at 429, ¶ 13,14 [hereinafter Perez-Vera Report] (stating that "the person who removes the child...hopes to obtain the right of custody from the authorities of the country to which the child has been taken. ...the abductor will hold the advantage, since it is he who has chosen the forum in which the case is to be decided...[which] he regards as more favorable to his own claims"). Ms. Perez-Vera is the official reporter for the Hague Convention, and her report is considered to be "the official history and commentary on the Convention and is a source of background on the meaning of provisions." Text and Legal Analysis of the Hague International Child Abduction Convention, 51 Fed. Reg. 10,494, 10,506 (1986).

tide of international parental abductions by removing the jurisdictional advantages received by a parent who abducts his or her child.[31]

The Hague Convention creates a simpler and more effective procedure to solve and deter international child abductions.[32] The Convention allows left-behind parents to seek the immediate return of their abducted children to their country of habitual residence, barring certain narrow exceptions.[33] Hague Convention cases are civil proceedings that the left-behind parent institutes, either in the country to which the abducted child was taken, or by filing with a Central Authority of the Hague Convention.[34] This court-ordered return is not a decision

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[31] *See also* Perez-Vera Report at 429, ¶ 16. (stating that the Convention acts to deter abductions by depriving the abductor of any of practical or jurisdictional benefits). The Hague Convention is limited in scope to abductions by a parent, guardian, or a close relative. Abductions by a third-party or stranger are generally regarded as a criminal matter to be dealt with by the criminal justice system, while abductions by a family member are most often treated as civil matters. BEAUMONT, *supra* note 5, at 1.

[32] *See* Public Notice 957, Hague International Child Abduction Convention; Text and Legal Analysis by the Dept. of State, 51 Fed. Reg. 10493, 10496 (1986) [*hereinafter* Text and Legal Analysis] (discussing how implementation of the Hague Convention procedures will deter future international abductions).

[33] *See* Hague Convention on the Civil Aspects of International Child Abductions, Oct. 25, 1980, art. 1, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Convention] (stating that "[t]he objects of the present Convention are – a[.] to secure the prompt return of children wrongfully removed to or retained in any Contracting State"). *See also* Hague Conference on Private International Law: Final Act, Oct. 25, 1980, 19 I.L.M. 1501. *See also* Perez-Vera Report, *supra* note 30, at 429, ¶ 16 ("The Convention ... places at the head of its objectives the restoration of the *status quo*, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State'"). For a discussion of defenses preventing return, see *infra* Part I(B)(2).

[34] Perez-Vera Report, *supra* note 30, at 428-29, ¶ 13, 14. The Hague Convention requires that all signatory countries maintain a Central Authority office. Herring, *supra* note 13, at 150. The Central Authority acts to facilitate parental abduction proceedings, locate abducted children, and provide legal information and counsel. *Id.* Under Art. 8 of the treaty, a petitioning parent may choose to file either in the abducted-to nation, or the Central Authority of his or her own country. If filed in the petitioning parent's own Central Authority, the petition is then forwarded to the Central Authority of the abducted-to nation. *Id.*

on the merits of any parental custody dispute or a determination of the best interests of the child. Instead, actual child custody proceedings begin once the child is returned to his or her country of habitual residence.[35] Thus, the Convention removes the incentive for parents to remove the child to another country with a more favorable legal system in order to obtain custody.[36]

The Hague Convention on International Child Abduction was adopted in 1980 by a unanimous vote of states present at the conference,[37] and entered into force in 1983 after France, Portugal, and Canada ratified the treaty.[38] Although the United States signed the treaty in 1981,[39] the treaty did not become law in the U.S. until the passage of

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[35] *See* Perez-Vera Report, *supra* note 30, at 430, ¶ 9. (stating that the Convention's emphasis on prompt removal will allow a final decision on the merits of a custody case to be made in the child's country of habitual residence). Article 19 of the Hague Convention also makes clear that Hague proceedings are not meant to be a determination on the merits of custody claims. Hague Convention, *supra* note 33, art. 19., T.I.A.S. at 11,672, 1343 U.N.T.S. at 91. The court in the abducted-to nation decides merits of the abduction claim only. See *id.* It is not within the power of the court to make a final determination of custody. *See* Hague Convention, art. 16, T.I.A.S. No. 11,670, at 5, 1343 U.N.T.S. at 101.

[36] See Hague Convention, *supra* note 33, at page 1.

[37] The conference participants at the Hague's Fourteenth Session on Private International Law included Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Finland, France, Greece, Ireland, Israel, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Venezuela, and Yugoslavia. Perez-Vera Report, *supra* note 30, at 426, ¶ 1.

[38] Text and Legal Analysis, Oct. 5, 1985, 51 Fed. Reg. at 10496 (March 25, 1986).

[39] *Id.*

the International Child Abduction and Recovery Act in 1988.[40] The Convention is now in force in sixty-eight countries.[41]

The treaty applies only to abductions to a Contracting State;[42] abductions to a non-Contracting state are instead handled according to the domestic laws of that country. The treaty does not deal with an abduction's criminal aspects, instead it sets the guidelines for recovering the abducted children via a civil lawsuit.[43]

B. Making a Case under the Hague Convention

1. Prima Facie Case for Return

If one parent abducts his or her child to a signatory country of the Hague Convention, the parent left behind may file a civil action for

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[40] *See* International Child Abduction Remedies Act, 42 U.S.C. 11601-11610 (1994). [hereinafter ICARA]. *See generally The International Child Abduction Act, Hearing on H.R. 2673 and H.R. 3971, Before the Subcomm. on Admin. Law and Governmental Relations of the Comm. on the Judiciary*, 100th Cong. (1988) (hearing before Congress in which numerous international law experts and groups testify in favor of approving the act).

[41] The Hague Convention applies in the following countries: Argentina, Australia, Austria, Bahamas, Belarus, Belgium, Belize, Bosnia and Herzegovina, Brazil, Burkina Faso, Canada, Chile, China, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark (except the Faroe Islands and Greenland), Ecuador, El Salvador, Estonia, Fiji, France, Georgia, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Luxembourg, Macedonia, Malta, Mauritius, Mexico, Moldova, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Saint Kitts and Nevis, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, Turkey, Turkmenistan, United Kingdom, United States of America, Uruguay, Uzbekistan, Venezuela, Yugoslavia, and Zimbabwe. Kenworthy, *supra* note 16, at 332, n.22.

[42] For the Hague Convention to apply, the child must be a resident of a signatory country, and abducted to another signatory country. If either of these criteria is not met, the Hague Convention will not apply, and a left-behind parent may not file a civil suit under the terms of the Convention. *See* June Starr, *The Global Battlefield: Culture and International Child Custody Disputes at the Century's End*, 15 ARIZ. J. INT'L & COMP. LAW 791, 797 (1998).

[43] Herring, *supra* note 13, at 140 n.12 ("Although "abduction" typically appears in the criminal context, the Convention deals only with the civil issues arising from international child abduction.")

the child's immediate return.[44] In order to receive a return order, the petitioning parent must first meet the elements of a prima facie case of wrongful removal.[45] To establish a prima facie case, the party must show: 1) "Habitual residence" – that the child was a habitual resident of the country from which he or she was abducted;[46] 2) "custody rights" – that the petitioning parent had custody rights over the child; and 3) "wrongful removal" – that the child was removed from his "habitual residence" in breach of the petitioning parent's custody rights, which that parent was exercising at the time of the removal.[47] In addition, the Convention only applies if the abducted child is less than sixteen years old.[48] If the petitioning parent proves these elements, the child's return is mandatory unless the abducting parent proves an affirmative defense.[49]

In the United States, the petitioning party has the burden of proof and must prove the "wrongful removal" elements by a "preponderance of the evidence."[50] Once the petitioning parent has satisfied these criteria, the prima facie case allows for return of the child. Once the parent makes a prima facie case, the child's return is mandatory under the terms of Article 12,[51] unless the wrongful abductor can prove certain narrow defenses or exceptions.[52] The burden of proof shifts to the responding party to prove an affirmative defense or exception preventing return.[53]

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[44] Text and Legal Analysis, *supra* note 30, at 10,507.

[45] Hon. James D. Garbolino, INTERNATIONAL CHILD CUSTODY CASES: HANDLING HAGUE CONVENTION CASES IN U.S. COURTS 85 (3rd. ed. 2000)

[46] Hague Convention, *supra* note 33, art. 4.

[47] Hague Convention, *supra* note 33, art. 3.

[48] *See* Hague Convention, *supra* note 33, art. 4. ("The Convention shall cease to apply when the child attains the age of [sixteen] years.").

[49] *Id.*

[50] *See* International Child Abduction Remedies Act, 42 U.S.C. § 11603(e)(2)(A)(b) (2002).

[51] *See* Hague Convention, *supra* note 33, art. 12 ("Where a child has been wrongfully removed or retained ...the authority concerned shall order the return of the child forthwith.")

[52] *See* 42 U.S.C. § 11603(e)(2)(A)(b). For a discussion of defenses that may prevent return, see *infra* Part I(B)(2).

[53] *Id.*

2. Overview of Defenses and Exceptions Limiting Return of the Child in Hague Convention Proceedings

Although the Hague Convention seeks the swift return of children to their habitual residence, the treaty does allow for several defenses that, if successful, will prevent the child's return.[54] These defenses must be constructed narrowly, in keeping with the Convention's main goals of prompt return and judicial compliance with the treaty's terms.[55]

The Convention lists six defenses that will prevent a child from being returned. Four "defenses" deal with general conditions that may stop the court from returning a child. First, Art. 12 states that the court may refuse return if more than a year has passed and the child is already "well-settled" in his new environment.[56] The court may also refuse return under Art. 20 if returning the child would violate "fundamental principles of human rights and fundamental freedoms" of the requested country.[57] Finally, if the petitioning parent had actually consented to or acquiesced to the child's removal, the court may determine that the removal was not actually "wrongful" and therefore not in violation of the treaty.[58] In addition to these defenses, the Hague Convention also has two defenses to return that are based specifically on the child's best

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[54] See Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposeful Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUM. RTS. L. REV. 275, 302 (outlining exceptions and affirmative defenses to the remedy of return).

[55] *See* Text and Legal Analysis, *supra* note 32, at 10,510 (1986) (stating that conference participants believed courts would narrowly construe the exceptions, and allowing their use only in clearly meritorious cases). *See also* Perez-Vera Report, *supra* note 30, at 434-35

[56] Hague Convention, *supra* note 33, Art. 12.

[57] Hague Convention, *supra* note 33, Art. 20. However, this clause has rarely been invoked. The Lowe study of Hague cases found that courts have never decided to refuse return based on an Art. 20 defense. Lowe, Statistical Analysis, *supra* note 6, at 16-17. As Beaumont comments, the defense appears to have "disappeared without a trace" from Hague proceedings. BEAUMONT, *supra* note 5, at 172.

[58] *See* Hague Convention, *supra* note 33, art. 13(a).

interests and wishes: the Art. 13(b) "grave risk of harm" defense and the Art. 13(2) "child's objection" to return.[59]

Article 13(b) is the most commonly used exception in Hague Convention cases.[60] Under Article 13(b), the court may refuse to return the child if the respondent establishes that returning the child would place him or her in "grave risk of psychological or physical harm" or an "intolerable situation."[61] However, as with the previous defenses, the judge retains a degree of discretion, and may still order the child's return even if a 13(b) defense is established.[62]

Despite, or perhaps because of, Article 13(b)'s wide use in Convention actions, the defense has been heavily criticized by many commentators.[63] Many have criticized the courts' strict interpretation of the defense,[64] while others have argued that even stricter restrictions are needed to prevent the defense from overwhelming the principal objectives of the Convention.[65] This clause, like the Children's

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[59] *Id.* at Art. 13(b) and Art. 13(2).

[60] Nelson, *supra* note 15, at 676.

[61] *See* Hague Convention, *supra* note 33, art. 13(b), T.I.A.S. No. 11,670, at 8, 1343 U.N.T.S. at 101.

[62] *See* Perez-Vera Report, *supra* note 30, at 460, ¶ 113. The Report explains that " it is appropriate to emphasize that the exceptions in these two articles do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion – and does not impose upon them a duty – to refuse to return a child in certain circumstances."

[63] *Id.*

[64] *See generally* Nelson, *supra* note 15 (analyzing criteria required to prove "grave risk" in U.S. courts and arguing that courts must expand the definition and interpretation of this clause in order to safeguard children's interests); Weiner, *supra* note 13 (arguing that strict interpretation of the 13(b) defense does not sufficiently protect abductors and children who are victims of domestic violence).

[65] *See, e.g.* Gary Zalkin, *The Increasing Incidence of American Courts Allowing Abducting Parents to Use the Article 13(b) Exception to the Hague Convention on the Civil Aspects of International Child Abduction*, 23 SUFFOLK TRANSNAT'L L. REV. 265, 298 (1999) (arguing that American courts are increasingly considering underlying custody issues when deciding Art. 13(b) defenses, and that this trend undermines the objectives and intentions of the Hague Convention).

Objection Clause,[66] is primarily concerned with advancing the child's individual interests by preventing removal.[67] Therefore, the two clauses are often interrelated, and respondents that raise a 13(b) defense often bring a Child's Objection defense as well.[68] In addition, as outlined below, a child's objection is often considered within the rubric of 13(b) as evidence of a "grave risk."[69] For this reason, much of the interpretation and analysis given to the grave risk defense is also relevant when considering Child's Objections.

Finally, the courts may decline to return a child if a sufficiently mature child objects, and is of sufficient age and maturity to have that objection considered by the courts.[70] This provision, known as the Child's Objection Clause, allows court to consider an abducted child's views before returning that child to his or her country of habitual residence.[71] Unlike the Article 13(b) and Article 20 defenses, this exception only requires proof by a preponderance of the evidence.[72]

The Hague Convention does not define a threshold age at which it is appropriate to consider a child's views, but instead allows judges discretion to determine if a child is sufficiently mature.[73] After a child makes an objection to return, the judge

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[66] To be discussed, *infra*.

[67] *Id.*

[68] *See infra* nn.135-36.

[69] *See infra* Part IV.

[70] Hague Convention, *supra* note 33, art 13(b) at 101.

[71] *Id.*

[72] *See* 42 U.S.C. §11603(e)(2)(B) (assigning "preponderance of evidence" burden of proof for "children's objections" under Art. 13(b). The International Child Remedies Act assigns burdens of proof for Hague defenses as follows: "In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing - (A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and (B) by a preponderance of the evidence that any other exception set forth in article 12 and 13 of the Convention applies." 42 U.S.C. §11603(e)(2).

[73] During the Conference Convention, all efforts at setting a minimum age for considering the views of a child failed, and the drafters eventually compromised by allowing judges to use their own discretion when deciding if the child's views should be considered. *See* Nanos, *supra* note 2, at 444. *See also* Perez-Vera Report, *supra* note 30, at 433, ¶ 30.

determines if the objection is valid and if the child is sufficiently mature to allow consideration of his or her views.[74] Finally, if these criteria are satisfied, the judge may allow the child's wishes to be conclusive and refuse to return the child to his or her country of habitual residence.[75]

II. The Child's Objection Clause of the Hague Convention on International Abduction – International Creation and American Interpretation

The Child's Objection Clause has come under heightened scrutiny in recent years.[76] Advocates have called for both a widening and a restriction on this Clause's use.[77] Many have criticized the Clause for not sufficiently considering children's wishes,[78] while others have argued that the Clause gives too much deference to the wishes of a child who may be confused, immature, or influenced by the abducting parent.[79]

The conflicting issues surrounding this Clause can best be illustrated by the story of two parents: an abductor, and one left behind. Lady Catherine Meyer has struggled for more than seven years to regain custody of her children after their abduction to Germany.[80] In 1992, she separated from her German husband and obtained custody of their two children.[81] Two years later, she sent the children to Germany to spend

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[74] *Id.*

[75] BEAUMONT, *supra* note 5, at 178-79.

[76] *See* Shirman, *supra* note 27 and note 28 for examples of scholarly criticism of this clause.

[77] *See* BEAUMONT, *supra* note 5, at 201-02. *See also* Text and Legal Analysis, *supra* note 57, at 10,510.

[78] *See* BEAUMONT, at 201-02.

[79] *See* Jeanine Lewis, Comment: *The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity*, 13 TRANSNAT'L LAW 391, 415 (2000) (listing reasons cited by opponents of the "child's objection" exception for disallowing such objections).

[80] *See* International Child Abduction: Implementation of the Hague Convention on Civil Aspects of International Child Abductions: Hearing before the Comm. on Int'l Relations, 106th Congress, 33, (1999) (statement of Lady Catherine Meyer, parent of an abducted child) [*hereinafter* Int'l Relations Hearing].

[81] *Id.*

the holidays with their father, and they never came back.[82] Her husband told her he would not return the two boys, and then disappeared with the children.[83] After Ms. Meyer filed suit in England under the Hague Convention, the court ordered the children returned.[84]

However, after asking the court for a half-hour to bring the children to the building, Mr. Meyer again disappeared.[85] He later appealed the court's Hague Convention ruling to a German court, citing the Children's Objection to return under Article 13(2).[86] The German court upheld this defense, finding that a seven-year-old child was old enough to decide because "a seven-year-old faced with the choice of football or judo generally knows what to decide."[87] The court also stated that returning the children would place them in an intolerable situation because German was not spoken at home or at school, and the mother held a job, and therefore had no time for the children.[88]

Since then, Meyer has made numerous applications to have the children returned, but the German court rejected all of them.[89] Although the court did grant her a short three-hour right of access to her children,[90] when she attempted to exercise these rights, the abductor refused to allow the visit, stating that he feared a re-abduction and that the children did not wish to see her. Because the courts do not enforce access rights, no other remedy exists. Over the past six years, Ms. Meyer has seen her children for less than six hours.[91] She testified before Congress about the effect the abduction has had: "There is hardly a day goes by when I don't worry about my children; there is hardly a day goes by that I don't dream about them. I, as a mother, can never rest in peace because I know that the ultimate victims are the children."[92]

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[82] *Id.* at 34
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Int'l Relations Hearing, *supra* note 80, at 34.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*

This case has been heavily criticized in international circles, and in many ways represents the worst fears of those who argue against broad interpretations of the Child's Objection Clause. Germany may have the world's most liberal interpretation of the Child's Objection Clause.[93] The courts have refused return of an abducted child every time a Child's Objection has been raised, even when the objecting child was as young as four years old.[94] The German use, and arguable abuse, of the Child's Objection Clause has provoked the United States to pass a resolution condemning Germany's actions, and urging the nation to comply with the Hague Convention's requirements.[95]

At the opposite extreme, many courts refuse to hear any children's objections. In the U.S., for example, children's objections are routinely denied, to the point where many state that U.S. courts do not recognize the Child's Objection Clause at all.[96]

Somewhere between these two extremes lies justice. Judges are asked to navigate a winding, thick forest of legal, emotional, psychological, and sociological issues, without much guidance, and with much at stake. How much weight should judges give children's objections? Given the strong conflicting interests, and the strong potential for abuse of the Clause, how should courts weigh children's objections? Have American courts' interpretations fulfilled the expectations and objectives of the Hague Convention, and the interests of abducted children?

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[93] *See* Nigel Lowe, INTERNATIONAL FORUM ON PARENTAL CHILD ABDUCTION: HAGUE CONVENTION ACTION AGENDA 12 [*Hereinafter* Lowe Report] (finding that in Germany, between 1990 and 1996, in every case in which a child's objection was raised, a return was refused). *See generally* Karin Wolfe, Note: *A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany,* 33 N.Y.U. J. INT'L L. & Pol. 285, 324 (Fall 2002), for an overview of German case law interpreting children's objections in Hague Convention cases.

[94] *See* Lowe Report, *supra* note 93, at 12.

[95] *See* H. Con. Res. 293, 106th Cong. (2000) (enacted) Urging Compliance with the Hague Convention on the Civil Aspects of International Child Abduction.

[96] *See* Nanos, *supra* note 2, at 448-50 (stating that the U.S. courts do not specifically interpret the Child's Objection Clause, instead addressing children's views within the framework of the "grave risk of harm exception").

A. Legislative history

The Child's Objection Clause was passed after much debate among Conference participants and represents a compromise between many conflicting interests.[97] Many felt that a clause allowing children to decide their place of residence simply needed to be included.[98] First, many assumed that such a clause was necessary given the 16-year age limit on the treaty's applicability.[99] The Hague Convention only applies to children under 16 because the drafters assumed that older adolescents would already have a more independent existence and a mind of their own, making it difficult to return an objecting teenager against his will.[100] The same situation, however, often exists when adolescents are younger than 16.[101] Therefore, the drafters wanted some judicial discretion to refuse return, and avoid the specter of forcible repatriations, which could harm public perception of the treaty.[102]

Second, many countries allow children under sixteen to choose their own place of residence in custody proceedings.[103] While some conference members initially proposed that the Convention should not apply at all in such cases, the drafters eventually rejected this proposal.[104] The Child's Objection Clause allows judges the discretion to refuse returns when the child is legally entitled to choose his residence, without excluding such cases from the Hague Convention completely.[105]

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[97] *Id.* at 443

[98] *Id.* at 444 ("drafters concluded... that a reservation enabling courts to consider the views of a child was 'absolutely necessary' ").

[99] *See* BEAUMONT, *supra* note 5, at 178-179

[100] *See* Perez-Vera Report, *supra* note 30, ¶ 77. (stating that the Convention included the 16-year age limit because a person over sixteen "generally has a mind of his own which cannot be easily ignored by either ... his parents ... or by a judicial or administrative authority"). *See also* BEAUMONT, *supra* note 4, at 178 n.6. (This clause also offset the concerns of a small minority of drafters who favored lowering the age limit.)

[101] *See* Perez-Vera Report, *supra* note 30, at 433 ¶ 30. The Explanatory Report gives the example of a fifteen-year-old who objects to return, and states that it is difficult to accept that a child of that age should be returned against their will. *Id.*

[102] BEAUMONT, *supra* note 5, at 178.

[103] *See* Perez-Vera Report, *supra* note 30, at 450, ¶ 78.

[104] *Id.*

[105] *Id.*

Finally, the Clause allows consideration of the child's best interests and allows children a voice in the Hague proceedings regarding where they should live.[106]

While drafters conceded that it was necessary to have some terms for considering a child's views, many remained concerned about the possible ramifications of such a clause.[107] These critics argued that such an article would open the door to abuse, both by judicial authorities and abducting parents.[108] For example, many argued an abducting parent could unduly influence a child's views. This parent could retain the child by manipulating the child into stating that she did not wish to be returned to her home country.[109] In addition, a child may suffer psychological harm if she feels that she is being forced to choose between the two parents.[110] Some also argued the Clause could be used by judicial authorities to examine the merits of the underlying custody dispute, in violation of the objectives of the Hague Convention.[111]

Finally, numerous countries remained uncomfortable with the very notion of allowing children's wishes to be considered in private law cases.[112] In many countries, including the U.S., courts were under no statutory duty to consider the wishes of younger children in custody hearings.[113] At the time the treaty was formed (1980), the concept of "children's rights" was in its inception, and many were apprehensive

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[106] *See* BEAUMONT, *supra* note 5, at 178.

[107] *See* BEAUMONT, *supra* note 5, at 179 - 80 (examining why the "child's objection" provision proved so contentious when introduced during Convention drafting).

[108] *Id.*

[109] *Id.* at 180. These concerns were cited by both the West German and U.S. responses. *Id.* at n.18.

[110] *Id.* at 179-80. This concern is echoed in the Explanatory Report, which states that the "child's objection" provision could prove dangerous if children are directly questioned in such a way that they feel they must choose between two parents. Perez-Vera Report, *supra* note 30, at 433, para. 30.

[111] *See* BEAUMONT , *supra* note 5, at 180.

[112] *See Id.* at 179 (stating that the intense opposition to this clause may be explained by the relative novelty of considering children's wishes during that time).

[113] *Id.* In the U.S., the common-law rule was that children under fourteen were not to be consulted, although some case law suggests judges did in fact consult children in some cases.

about a provision that they believed allowed a child to interpret his own best interests.[114]

The draft of Article 13 reflected many of these concerns while still attempting to preserve the main objectives of the Clause. At first, drafters attempted to set a minimum age at which a child's views could be considered by the courts.[115] Ultimately, however, the drafters could not agree on a minimum age because all ages suggested seemed arbitrary and artificial.[116] Eventually, the Convention's framers unanimously agreed to leave to the judicial authorities the discretion to decide when a child is of sufficient age and maturity to allow consideration of their views.[117]

As with the other Article 13 defenses, judges are not required to give effect to this Clause.[118] Instead, the drafters allowed judges ultimate discretion to decide whether a return should be ordered.[119] A judge may still order a child returned, for example, even if an abducting parent establishes one of the Article 13 defenses.[120] Therefore, even if a judge finds that the child is sufficiently mature and has in fact objected, the judge may still order the child to be returned in spite of those

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[114] Perez-Vera Report, *supra* note 30, at 433. *See* Nanos, *supra* note 2, at 444 (stating that the drafters were "apprehensive" about the provision, but concluded a reservation enabling courts to consider the views of a child was "absolutely necessary").

[115] The Special Commission originally passed a motion in 1979 declaring that twelve should be the minimum age for consideration of a child's views. However, this proposal was later abandoned by the Drafting Committee. BEAUMONT, *supra* note 5, at 179.

[116] Perez-Vera Report, *supra* note 30, at 433, ¶ 30.

[117] *Id.*

[118] *See* Text and Legal Analysis, *supra* note 57, at 10,510 (stating that application of the Article 13 "child's preference" exception to the return obligation is not mandatory).

[119] *Id.* The Hague Convention grants judges a great deal of discretion to order a child's return. Under Article 18, none of the Convention provisions limit the judicial authority's power to order the return of the child at any time. *See* Perez-Vera Report, *supra* note 30, at 433 ¶112

[120] *See* Nanos, *supra* note 2, at 445 (stating that the court may still order the child's return, even if the abducting parent establishes one or more affirmative defenses).

objections.[121] This provision addresses to some extent the concerns of those who feared the effects of "undue" parental influence on a child's views. If a judge feels that the child's objection is a result of "brainwashing" by the abducting parent, he may decide to attach little weight to those objections, in spite of the child's maturity.[122]

Judges have a great deal of discretionary power when considering an Article 13(2) defense. First, the judge has discretion to decide when a child is of sufficient age and maturity to have their views considered by the courts.[123] Second, the judge has discretion to order the child returned, even if a valid Child's Objection is raised.[124] The lack of objective criteria in the Convention itself for deciding these issues has left the door open for potentially arbitrary decision-making by judges.[125] In addition, judges in the abducted-to nation may favor the abducting parent, who is often a citizen of that country.[126] Given the nebulous criteria, the process is somewhat open to judicial abuse.

The final draft of the Child's Objection Clause represented a compromise between participants who wanted consideration of children's wishes, and those who were apprehensive about the potential misuse of such a clause.[127] To a certain extent, the arguments initiated during the Hague Conference continue on to this day. Family law practitioners and scholars continue to debate how courts should weigh children's objections.[128]

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[121] *See* BEAUMONT, *supra* note 5, at 179. The Hague convention grants judges a great deal of discretion to order a child's return. Under Article 18, none of the Convention provisions limit the judicial authority's power to order the return of the child at any time. Once an affirmative defense is established, return is no longer *mandatory*; however, the judge retains discretion to order return at any time.

[122] *See* Text and Legal Analysis, *supra* note 57, at 10,510.

[123] *See* Perez-Vera Report, *supra* note 99, at 450 ¶ 78.

[124] *Id.*

[125] *See* Nanos, *supra* note 2, at 445 (citing legitimate concerns that the lack of a minimum age for considering a child's view could lead to "subjective and arbitrary decisions").

[126] *Id.* at 447.

[127] *Id.* at 443.

[128] *Id.* at 446-448.

The Hague Convention emphasizes immediate return in order to discourage future abductions and help the child return to her home environment.[129] However, protecting this interest requires courts to avoid considering the child's best interests in most cases, as they would in a traditional custody proceeding.[130] The affirmative defenses contained in Article 13 and Article 20 are the only exceptions allowing courts to consider the child's individual interests in a Hague proceeding.[131] For this reason, these defenses have become the center of debate. Some argue that these defenses should be given a very liberal interpretation because they represent the only way of considering a child's individual interests. However, others argue that these defenses should be interpreted very narrowly, so as not to impede the main objective of the treaty: the prompt return of abducted children. It is argued that by allowing too many defenses, judges will "drive a horse and chariot" through the treaty, allowing abductors to profit from the abduction, impeding the speedy return of children, and opening the door to potential judicial bias.[132]

This central tension is present as well in the Child's Objection Clause. With the treaty's emphasis on broad judicial discretion, judges ultimately have the power to interpret the Child's Objection Clause. Given this discretion, how have American judges interpreted this clause? How have American judges resolved this inherent tension?

B. U.S. Interpretation of the Child's Objection Clause of the Hague Convention on International Abduction

U.S. courts have tended to adhere to a very strict interpretation of the Child's Objection Clause, and judges are very hesitant to prevent

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[129] *Id.* at 438

[130] *See* Perez-Vera Report, *supra* note 30, at 432, ¶. 23. The Explanatory Report emphasizes that "the dispositive part of the Convention contains no explicit reference to the interests of the child" to the extent that recognizing such interests would impede the Convention's stated object. *Id.* However, the preamble of the Convention states that the states declare themselves "firmly convinced that the interests of children are of paramount concern in matters relating to their custody." *Id.*

[131] *Id.*

[132] BEAUMONT, *supra* note 5, at 179.

return based on this clause.[133] Evidence shows that U.S. courts have a "definite disinclination . . . to defer to a child's objection."[134] In almost every case in which a child's objection was raised, American courts refused to allow return based on that objection.[135] Indeed, it is difficult to find any cases in which a child's objection, standing alone, prevented that child's return.[136] As one commentator stated: "In the U.S., analysis under the child's objection exception is fairly straightforward - for the most part, it does not exist."[137] In general, the U.S position favors a "return at all costs," and is therefore reluctant to entertain any defenses that would prevent immediate return of the abducted child.[138]

This position is reflected in most U.S. cases that have considered Child's Objections in Hague Convention proceedings. Traditionally, U.S. judges gave little or no weight to children's views in Hague cases.[139] U.S. courts will rarely allow a child's objection, standing alone, to prevent return.[140] In fact, for many years, the U.S. was considered to not allow "children's objections" except as one factor in a "grave risk of harm" defense.[141] Parties have in fact raised independent "children's objections" under Article 13(2), but such defenses have rarely been successful.[142] Evidence exists, that this trend may be changing;[143]

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[133] *See* Kenworthy, *supra* note 16, at 351 (stating that U.S. courts are unlikely to defer to child's objection as a reason for denying a return request).

[134] Nanos, *supra* note 2, at 448.

[135] *See generally* Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 Fam. L. Q. 9 (1994) (finding that cases reflect that this defense is seldom used to avoid return); BEAUMONT, *supra* note 5, at 184 n.60 (noting that the authors had only found one unpublished case in which U.S. courts denied a child's return based on Art. 13(2)).

[136] *See* Kenworthy, *supra* note 16, at 351.

[137] *Id.*

[138] *Id.* at 347

[139] *Id.* at 351.

[140] *Id.*

[141] *See* Nanos, *supra* note 2, at 448-49 (stating that U.S. courts, while not specifically interpreting the "child's objection clause," address issues concerning children's views within the "grave risk of harm" exception).

[142] *See* Kenworthy, *supra* note 16, at 351-55 for discussion of U.S. case law and trends.

however, the varying and inconsistent interpretations offered by U.S. courts make it difficult to establish a coherent pattern.[144] This section will outline how U.S. courts have treated Child's Objections that are raised as an independent defense to return. First, this section will look at how courts determine if a child is of sufficient "age and maturity" to allow consideration of their views, and what is required for a valid objection. Second, this section will examine how children's objections have been tied into and interrelated with other defenses, with the courts seemingly adopting more liberal interpretations in such cases.

1. Traditional Analysis of the Child's Objection as an Independent Defense and What Constitutes Sufficient Age and Maturity

When a judge hears a child's objection under Article 13(2), he must decide if the child actually objects to return,[145] and if the child is of a sufficient age and maturity to allow that child's objection to be considered.[146] If the judge does decide that the child is of sufficient age and maturity, the court will then consider the child's objection, allowing the objection to prevent return in some cases.[147] However, even if a valid objection is raised by a sufficiently mature child, the court retains discretion to return the child in spite of that objection.[148] Typically, courts narrowly construe the Child's Objection exception, as they do with other Hague defenses.[149]

In order to determine what the child's objection is, the judge may first have the child interviewed; in court,[150] in-camera,[151] or by a child

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[143] *See, e.g. infra* Part III(B)(2) for discussion of possible liberalization of requirements for child's objections in cases involving domestic violence.

[144] *Id.*

[145] *Id.* at 340.

[146] *Id.*

[147] BEAUMONT, *supra* note 5, at 179.

[148] *Id.*

[149] *Id.*

[150] *See* HON. JAMES D. GARBOLINO, INTERNATIONAL CHILD CUSTODY CASES: HANDLING HAGUE CONVENTION CASES IN U.S. COURTS 200 (3rd ed. 2000) (stating that courts may ascertain a child's wishes by allowing the child to testify in court). However, most judges disfavor this method because it could be an

welfare officer or psychological professional.[152] Once the child's views have been determined, the court must then decide if the child is old enough and mature enough to allow consideration of that child's objection. [153] Often, the court will ask a psychologist or professional for an opinion as to that child's age and maturity.[154]

Although the Hague Convention does lay out the procedural framework, it does little to establish when these criteria are met. The treaty itself offers little guidance as to what constitutes sufficient "age and maturity" to make a Child's Objection: it does not define a threshold age or objective criteria for assessing maturity.[155] This lack of objective criteria may help explain the varying rulings on Hague Child's Objection Clause cases in U.S. courts. Courts have issued widely varying, and often conflicting, rulings as to when a child is of sufficient age and maturity to allow consideration of her views.

While the treaty itself contains no "threshold age" for hearing children's objections, some U.S. courts have issued rulings stating that children below a certain age may not be consulted. In the case of *Tahan v. Duquette*,[156] the court held that the Children's Objection Clause "simply does not apply to a nine-year old."[157] In that case, the appeals

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intimidating experience for the child, and could force them into a potential lose-lose situation of choosing publicly between two parents. *Id.*

[151] In this method, the judge interviews the child in chambers, outside the presence of counsel and family. *Id.* This method is often used in U.S. courts, and was utilized in many of the Hague cases involving a child's preference.

[152] In this method, the psychologist examines the child and reports her findings to the court. This method allows children to voice an objection without the possible pressures of a court setting, and allows a real examination by an expert who can ascertain if the child has a true, independent objection to return. *Id.* Courts may also appoint independent counsel for the child in lieu of an interview, however, this method has only once been used in U.S. courts. *Id.*

[153] Herring, *supra* note 13, at 164.

[154] *Id.*

[155] *See* Part II(A), *supra* (citing the large role for judicial discretion in 13(2) exceptions, and noting that drafters intentionally did not include a threshold age or specific criteria for determining "age and maturity" for purposes of determining child's preferences).

[156] 613 A.2d 486 (N.J. Super. Ct. 1992).

[157] Tahan v. Duquette, 613 A.2d 486, 490 (N.J. Super. Ct. 1992). In *Tahan*, the child's father retained the boy in the U.S following a summer visit. The child's

court found that the trial judge had not erred by failing to interview the child to determine if his objection to return should be considered.[158] In fact, the appeals court stated that interviewing the child would have served no purpose.[159] The court stated that the Child's Objection Clause only applies if a child is of sufficient age and maturity, and therefore clearly did not apply to a nine-year-old child.[160] However, *Tahan* did not contain analysis of why a nine-year old is inherently of insufficient age of maturity, a contention that seems at odds with the drafter's decision not to create a minimum threshold age.[161] The drafters decided not to create a minimum age because any age seemed arbitrary and artificial; instead, they allowed courts to make an individualized determination if a particular child had sufficient age and maturity to invoke the clause.[162] In seeming to set a blanket minimum age, the court may no longer make a determination based on a particular child's maturity and experiences; instead, courts may dismiss a case without even hearing that child's objection.

Other cases have followed suit in denying the objections of younger children. For example, in the case of *Sheikh v. Cahill*,[163] the court interviewed the child, and found that although the child did object

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mother filed a petition under the Hague Convention, and the court ordered the child's return. *Id.* at 486. The child's father appealed, stating that the trial court had erred in refusing to consider defenses raised under Art. 13(b) and Article 13(2). *Id.* The appeals court affirmed the trial court, holding that 1.) the petitioner had not proved a "grave risk of harm" under 13(b) because no evidence proffered related not to the child's surroundings, but instead to matters more suited to a custody hearing in Quebec, *Id.* at 489, and 2.) that failure to interview the child was not plain error, because the child's objection clause does not apply to a nine-year-old. *Id.* at 490.

[158] *Id.* at 490

[159] *Id.*

[160] *Id.*

[161] In fact, a court-appointed psychologist did examine the child in question, and the court included a certification from that psychologist which endeavored to establish that the child possessed the requisite age and maturity to lodge an effective objection. *Id.* at 490 n. 1. However, the court stated that the material actually did not establish this proposition, and ruled that the child was not of requisite age and maturity. *Id.*

[162] Perez-Vera Report, *supra* note 30, at 433, ¶ 30.

[163] Sheikh v. Cahill, 145 Misc.2d 171, 177 (N.Y. Sup. Ct. 1989).

to returning to his country of habitual residence, the child was not of sufficient age and maturity to allow consideration of his views, stating flatly that "he is only nine years old."[164]

Although *Tahan* seemed to establish as a matter of law that a nine-year-old may not raise an objection under Article 13(2), other courts have stated that the views of children as young as seven may be heard. [165] In the case of *Raijmakers-Eghaghe v. Haro*,[166] the respondent raised an objection under Article 13(2), contending that the eight-year-old child objected to return.[167] However, the petitioning parent filed for summary judgment, claiming that the courts were precluded by law from taking into account the views of an eight-year-old.[168] That court denied the motion, holding that because the Hague treaty does not contain a minimum threshold age, the court should be allowed to interview a child of eight, who may be of sufficient age and maturity to allow

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[164] *Id.* (holding that the child was wrongfully removed to the U.S. from his country of habitual residence, and ordering the child's return, because 1) The Hague Convention did apply in this case and 2) abducting parent had not met burden of proof to show defenses under 13(b) or 13(2)). In *Sheikh,* the court considered whether a child was wrongfully removed by his father to the U.S. from the U.K. *Id.* at 172. In this case, the two parents became estranged, and the mother was eventually awarded custody, with the father having visitation. *Id.* at 173. Later, the mother removed the child without the father's knowledge to England. *Id.* After the child had a visit with his father in New York, the father refused to return the child and filed for custody. *Id.* The mother filed a wrongful removal charge under the Hague Convention *Id.* at 174. The court found that the child was wrongfully removed to the U.S. and ordered his return. *Id.* The court rejected the father's defenses; finding that he had presented no evidence that the child faced a grave risk of harm in the U.K., and that the child was not of sufficient age and maturity to allow the court to take account of his views. *Id.* at 177. The court stated that the child's objection was most likely a result of being wooed by his father during the summer vacation. *Id.*

[165] *See Blondin, infra* note 217.

[166] 131 F.Supp. 2d 953.

[167] *See* Raijmakers-Eghaghe v. Haro, 131 F. Supp. 2d 953 (E.D. Mich. 2001) (holding that court was not precluded as a matter of law from considering views of eight-year-old under Art. 13(2), but denying "grave risk of harm" defense, citing lack of evidence).

[168] *Id.* at 957.

consideration of his views.[169] However, the court still used its discretion to order that the child be returned to his home country.[170]

These cases establish very different interpretations of whether a young child should even be interviewed at all to consider their age and maturity, with *Tahan* stating flatly the exception could not apply to such a young child, and *Raijmaker* leaving a more open approach allowing the possibility that an eight-year-old may in fact be of "sufficient age and maturity" to allow consideration of his objection. The *Raijmaker* court also reinforced the principle that judges have discretion, but that they must at least have some discovery regarding the child's maturity before dismissing the case.[171]

The conflict regarding the applicability of the Child's Objection Clause based on age is redoubled when the courts must determine if an individual child is also mature enough to allow him to raise a Child's Objection. While some decisions have established a lower age limit that precludes objections, there is no higher limit age at which objections *must* be considered. Courts have decided that age alone is not enough to activate this clause; instead, the child must also show a "degree of maturity."[172] Given the lack of set criteria for determining "maturity," courts have used different methods. Some judges focus on the child's level of understanding; as when one judge rejected an eight-year old's objection because, during an interview, she could not name her year of birth or school classes, did not understand the nature of the hearing, and referred to both the petitioning natural father and her stepfather as her father.[173] Other courts have allowed psychologists or counselors to

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[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *See* Bickerton v. Bickerton, No. 91-06694 (Cal. Super. Ct. 1991) (unpublished opinion) (rejecting 12-year-old child's objection to return, and stating that "[a]ge alone is not a sufficient means for making this determination; if it were, the drafters of the language in Article 13 would not have added the conjunctive requirement of 'degree of maturity.' At some age level, the court could possibly make such a determination, based solely upon age (i.e., if the child were 15 and a half years old). However, even those circumstances, evidence of lack of ordinary maturity could negate such a finding)".

[173] *See* In re Interest of Zarate, 1996 WL 734613 (N.D. Ill. 1996) (holding that the petitioner had shown his child was "wrongfully removed" to the U.S. from

testify about whether a child has the age and maturity at which his views should be considered.[174] However, psychological testimony is not dispositive, and the courts have on occasion found children were not sufficiently mature in spite of expert psychological testimony to the contrary.[175] Because this is essentially a fact-based determination, judges may often simply base the decision on their own examination and observations of the child.[176]

However, in the case of *England v. England*,[177] the Fifth Circuit reaffirmed a very strict interpretation regarding when a child will be of sufficient age and maturity to raise an objection.[178] This case involved a "wrongful removal" by the children's mother after she refused to send the children back to Australia after an extended visit in the U.S.[179] The children's father then filed suit for the children's return under the Hague Convention.[180] The district court ruled that the children had been wrongfully retained in the U.S.,[181] but then considered defenses the

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Mexico, and finding that respondent had failed to prove defenses raised under Art. 13 of the Convention).

[174] *See, e.g.* Ostevoll v. Ostevoll, 2000 WL 1611123, p. 17, (S.D. Ohio 2000) (stating that both psychological experts agree that the eldest children have appropriate age and maturity at which their views should be considered, and finding that the children's objection may therefore prevent return).

[175] *See, e.g., supra* note 161 (court finds child does not have requisite "age and maturity" in spite of psychological certification); and Navarro v. Bullock, No. 86481 (Cal. Super. Ct. Sept. 1, 1989). In the latter case, the court found by a preponderance of the evidence that the children, age 12 and 10, lacked the requisite age and maturity, stating this was evident from the psychologist's testimony. *Id.* However, the psychologist in that case had actually recommended that the children be allowed to remain in the United States. *Id.*

[176] *See e.g.* England v. England, 234 F. 3d 268 (5th Cir. 2000) (stating that the trial judge could accurately determine child's age and maturity because he had the benefit of hearing the child's testimony and conducting a one-on-one interview).

[177] *Id.*

[178] *Id.* at 272 (holding that 13-year-old child was not mature enough to allow consideration of her objection under Art. 13(2) of the Hague Convention).

[179] *Id.* at 269.

[180] *Id.*

[181] *Id.*

respondent raised under Article 13(b) (grave risk of harm) and Article 13(2) (Child's Objection Clause). [182]

The court concluded that the children would face grave risk of psychological harm if returned.[183] The judge also found that Karina, the 13-year-old eldest child, was mature enough to allow the court to consider her objections to return under Article 13(2), and held that that her objection would prevent her return to Australia.[184] However, on appeal to the Fifth Circuit, the appeals court reversed the district court's ruling, and held that the child was not sufficiently mature to allow consideration of her objection.[185] The court found that the trial court did not cite enough specific evidence to prove the child's maturity.[186] The appeals court also decided that she lacked sufficient maturity based on the fact that the child had Attention Deficit Disorder (ADD), took Ritalin, and was "scared and confused" by the proceedings.[187] Based on this evidence, and the "narrow construction" of the Child's Objection Clause, the appeals court held that the exception could not be invoked in this case.[188]

In a strong dissent, Judge DeMoss argued that the court should have upheld the trial court's finding that the child possessed sufficient maturity.[189] DeMoss argued that the appeals court should show deference to the trial court's finding, as that judge had the opportunity to listen to and speak with the child.[190] In addition, he argued that the record actually supported that the child was mature – she had maintained her grades, and participated in school sports. He was also troubled by the court's determination that ADD correlates with immaturity, arguing that the court is ill-qualified to make such psychological diagnosis

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[182] *Id.*

[183] *Id.* at 270.

[184] *Id.* at 272. (The trial court found that "K has clearly objected . . . to being returned to Australia and she is old enough and mature enough for the Court to take account of her views)."

[185] *Id.*

[186] *Id.*

[187] *Id.* at 273

[188] *Id.*

[189] *Id* at 275. *See also* Kenworthy, *supra* note 16, at 354-55 for an interpretation of the judge's dissent in this case.

[190] *Id.* at 274.

without expert testimony.[191] Finally, DeMoss argued that the court's narrow construction seemed to disregard the objections of this child, and the fact that "if the 'age and maturity' exception . . . is to have any force at all, it must be available for a child who is less than 16 years old."[192]

The *England* case exemplifies the "narrow construction" approach generally favored by U.S courts, and their general reluctance to consider a child's views. Although thirteen approaches the Hague Convention's sixteen year-old cut-off age, the appellate court still determined that the child lacked maturity.[193] By requiring specific proof of the child's maturity, the court sets a fairly rigorous standard for establishing maturity, a standard that may be very difficult for parties to meet. In addition, without seeing or interviewing the child, the appellate court overturned the decision of a judge who had. In a certain sense, this case seems to lend credence to the critics who claim that the U.S.'s policy amounts to a blanket denial of Child Objections. At any rate, the *England* case, one of the few to reach the appellate level, reinforces the courts' trend favoring very strict application of the clause.

2. What Constitutes a "Valid Objection" in U.S. Courts?

i. Nature of the Objection

For an objection to be considered, the child must be "sufficiently mature" and also register a valid objection.[194] But what is a "valid objection"? Judges have inherent discretion in this matter[195] and may use their best judgment, previous cases, and the child's own testimony to decide.[196] For example, if the judge believes that the child's objection is the result of undue influence from an abducting parent, the judge may

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[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] Hague Convention, *supra* note 9, art. 13(b).
[195] *See* Perez-Vera Report, *supra* note 101, at 113. ("The very nature of these exceptions gives judges a discretion - and does not impose upon them a duty - to refuse to return a child in certain circumstances.")
[196] *Id.*

give little weight to that objection.[197] In U.S. courts, children's objections are typically narrowly construed,[198] and therefore, judges may decide that the child's views do not in fact constitute a valid objection.[199]

Judges must also confront the question of what a valid objection must address: should the child object to the country or must she only object to the petitioning parent? Judges also have to decide whether the child's preference is a "mere wish" (i.e. that the parents will reunite) or a real objection to return. Finally, the judge has to determine if the child is voicing his own wishes, or merely parroting the views of the abducting parent. Courts show conflicting views in this area, where some consider objections to being returned to the petitioning parent, while others only consider an objection to being returned to the petitioner's country.[200] Similarly, some courts have weighed the *strength* of the objection, requiring a strong objection to return,[201] while other courts seem to accept less forceful objections.[202]

As a general rule, courts require the child's objection to be stronger than a mere preference to remain with one parent.[203] For example, in the case of *Norden-Powers v. Beveridge*,[204] the court refused to consider the children's views, stating that their preferences did not rise to the level of an objection to return.[205] All three children stated in an

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[197] Text and Legal Analysis, *supra* note 57, at 10,510. The Legal Analysis emphasizes that the discretionary nature of the defense is especially important given the potential for brainwashing by the abducting parent. *Id.*

[198] *See* Text and Legal Analysis, *supra* note 57.

[199] *Id.*

[200] *See* discussion *infra* Part II(B)(2)(1).

[201] *Id.*

[202] *Id.*

[203] Kenworthy, *supra* note 16, at 351. *See also* BEAUMONT, *supra* note 4, at 189 (stating that preferences based on a desire to remain with the abductor are accorded little credence in England, France, Australia and the U.S.); and Herring, *supra* note 13, at 164 (stating that courts generally require evidence more than a preference to remain with the abducting parent).

[204] 125 F.Supp. 2d 634.

[205] Norden-Powers v. Beveridge, 125 F. Supp. 2d. 634, 641 (E.D.N.Y. 2000) [In *Norden*, the court ordered three children returned to Australia following their wrongful removal by their mother to the U.S. *Id.* The court found that the petitioning father had established a prima facie case of wrongful removal, and rejected the mother's defenses that 1.) father was not exercising custody rights

interview with the judge that they wished to stay together, and that they wished to remain with their mother, the abducting parent.[206] While the court stated it was "sympathetic to the concerns of each child,"[207] it nevertheless found that their voiced preferences did not rise to an objection to return under Article 13(2).[208] Although the judge found that the children's expressed wishes do not qualify as an objection, the opinion did not outline what *does* qualify as an objection, or what was lacking in this case.

Courts may also weigh the strength of an objection. In one case, the court rejected a 13-year-old's objection because the child had not lodged a "strong objection" to returning to the petitioning country.[209] The child did not fear for his personal safety and had no objection to seeing his mother in the future, but only wished to stay in the United States for the time being. Therefore, the court reasoned that his wishes did not rise to a true objection to return, but instead reflected wishes more suited to an ultimate custody determination.[210]

After hearing a child's views, courts have also decided that the child did not actually make an objection. For example, a child who wishes that the parents would reunite, or that she could see missed pets in the abducted-to country, will probably not have a valid objection to return. [211] In *In re Nicholson,*[212] the court found that the 10-year-old child actually had no substantial objection to return.[213] Instead, the child simply "finds herself wishing the family could remain intact," and would miss either parent, or either home, if forced to live elsewhere.[214] Citing

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under 13(a), and 2.) the children objected to return under 13(2). *Id.* at 635 The court found that the father did in fact have custody at the time, and that the children's stated preference to remain with their mother did not rise to an objection to return. *Id* at 641.

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *See, e.g.* In re Nicholson, *infra* note 213.

[212] 1997 WL 446432.

[213] In re Nicholson, 1997 WL 446432, 446435 (1997) (finding that the child expressed wish parents would reunite, and would miss pets, but did not express strong objection to return).

[214] *Id.*

the "narrow construction" required of Article 13(2) objections, the court found such wishes do not rise to a real objection to being returned.[215]

In short, the narrow construction of the Child's Objection Clause in the U.S. has allowed judges to reject children's objections that are not of the required nature. However, one problem is determining what is the required nature for a child's objection. While some cases emphasize that the child must object to the *country*,[216] others seem to allow objections based mainly upon a wish not to be returned to the petitioning *parent*.[217] In addition, while at least one case required a "forceful" objection,[218] most cases had little or no examination of the strength of the child's objection.[219]

While a high threshold certainly exists, the lack of any definition or guidance as to what form an objection should take has led to some conflicting interpretations in U.S. courts. Indeed, in some cases the holdings seem mutually contradictory, as when Norden-Powers denies an objection because the children objected *only* to the petitioning parent, and Case Y rejects an objection because the children had *no* objection to the petitioning parent. The common problem with all these decisions is a lack of analysis. In *Nicholson*, the court simply stated that the child's wishes did not rise to an objection but did not explain why the views would not qualify. Similarly, in *Escaf* and *Rodriguez,* the cases contained conclusory, short statements that the objections were not valid but did not cite to specific precedent or contain analysis as to why the objections did not qualify.[220] In all these cases, the child's objection was disposed of in one paragraph.

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[215] *Id.*

[216] *See* Norden-Powers v. Beveridge, 125 F. Supp. 2d. 634, 641 (E.D.N.Y. 2000) (stating that child's objection based on desire to remain with abducting parent does not amount to an "objection to return" to resident country under Art. 13(2)).

[217] *See, e.g.* Blondin v. Dubois, 189 F.3d 240 (2nd Cir. 1999). For discussion of this case, see *infra* Part III(B)(1).

[218] *Id.*

[219] *Id.*

[220] *See, e.g.* Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 462 (D. Md. 1999) (denying a child's objection, though child was of sufficient age and maturity, because return would further the aims of the Hague Convention). *See also* Escaf v. Rodriguez, 52 Fed.Appx. 207 (4th Cir. 2002).

ii. Role of Discretional Denials

Even if the criteria for a valid child's objection are met, judges retain discretion to order a return in spite of the objection.[221] In a sense, a valid objection under Article 13(2) merely "opens the door" and allows courts to consider the child's objection. The judge may still decide how much weight she wishes to give that objection and whether she will allow that objection to prevent return. For example, a court may decide to give little weight if it believes the child's objection is the result of undue parental influence.[222]

In the U.S., judges will often use discretion to issue return orders despite a child's valid objection.[223] In many of these cases, the objection is denied based on evidence of undue parental influence.[224] However, in other cases the child is returned in spite of the valid objection, because return would "further the aims of the Hague Convention."[225] Discretion has been routinely invoked in U.S. cases to return children under the Hague Convention and reflects the primary interest that U.S. courts place on the immediate return of abducted children. In a sense, the U.S. courts seem to be saying that allowing a child's objection to prevent return is *always* against the aims and objectives of the Hague Convention.

However, the question remains as to whether such a position has merit. The drafters intended that children's objections should have some consideration in court proceedings, which is why the Clause was included. The U.S. approach of consistently denying valid "children's objections" of sufficiently mature children actually seems to contradict the aims of the Hague Convention by essentially overlooking one of its key provisions.

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[221] The Hague Convention states that the court *may* refuse to order the return of the child if a valid objection is made; it does not require the courts to do so. *See* Hague Convention, *supra* note 22, at Art. 13(2). *See also* Nanos, *supra* note 2, at 445 (stating that even when one or more defense are established, the court may still order the child's immediate return, although the Convention does not mandate return.)

[222] *See* Text and Analysis, *supra* note 32, at 10,510.

[223] *See* Kenworthy, *supra* note 16, at 363 (stating that the US court tend to favor a policy of "return at all costs" in Hague proceedings).

[224] *See* Robinson v. Robinson, *infra* note 235 at 1344.

[225] *See, e.g.,* Rodriguez v. Rodriguez, *supra* note 220, at 462.

III. Policy Objectives Favoring Liberal and Strict Construction of the Child's Objection Clause

Courts, scholars, and countries remain divided regarding how much weight courts should give children's objections under the Hague Convention. While some courts, such as those in the United States, typically give extremely strict interpretation to this Clause, courts in other countries have applied this Clause more liberally.[226] While some commentators have applauded the American approach to Hague defenses, stating that the strict approach preserves the objectives of the treaty,[227] others have criticized the American approach as one of "return at all costs,"[228] which does little to protect children's interests or rights.[229] So, given all the countervailing policy interests, is the U.S. approach valid, or does it fail to consider important interests? Part One of this section will examine the reasons favoring the traditional strict interpretation, while Part Two will examine policy reasons for adopting a more liberal interpretation.

A. Policy Arguments for Strict Construction

In determining how judges should view Hague Convention defenses, many argue that judges should always strictly interpret such defenses. In fact, many argue that children's objections should not have any role in Hague Convention cases.[230] Critics argue that the Child's Objection Clause should be strictly constructed for many policy reasons:

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[226] *See* Lowe, *supra* note 93, at 12.

[227] *See, e.g.* Nanos, *supra* note 2, at 462 (arguing that courts should limit invocation of the provision to extraordinary circumstances and should adhere to a strict interpretation of the clause).

[228] *See* Kenworthy, *supra* note 16, at 363 (criticizing the U.S. for being unwilling to allow more consideration of children's views, instead adopting a "return at all costs" position).

[229] *Id.*

[230] *See* Brenda J. Shirman, *Note, International Treatment of Child Abduction and the 1980 Hague Convention*, 15 SUFFOLK TRANSNAT'L L.J. 188, 219 (1991) (arguing that the exception allowing deference to the child's wishes should be removed to eliminate the possibility of undue influence by the abducting parent). *See generally* Gary Zalkin, *The Increasing Incidence of American Courts Allowing Abducting Parents to Use the Article 13(b) Exception to the Hague Convention on the Civil Aspects of International Child Abduction*, 23 SUFFOLK TRANSNAT'L L. REV. 265 (Winter 1999).

to protect the overarching goals of the Convention, to protect children from having to choose between parents, and to prevent against possible manipulation by the abducting parent.[231] For these and other reasons, many judges and commentators believe that judges should exercise their discretion to narrowly construe children's objections, and that these objections should rarely, if ever, prevent the child from being returned to his custodial parent. [232]

The Hague Convention itself, as well as the U.S. State Department commentary, emphasizes the discretionary nature of the Clause – a discretion many believed was necessary because of the possibility that the abducting parent could brainwash the child.[233] Many judges also cite similar concerns that the child's wishes may be manipulated or shaped by the abducting parent.[234] For example, in the case of *Robinson v. Robinson*,[235] the judge decided not to rely on a 10-year old child's objection to return because the judge believed that the child had been "unduly influenced."[236] The judge concluded that it was inescapable that a caring parent would try to influence the child to stay

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[231] *See, e.g.* Weiner, *supra* note 14, at 289 (arguing that "a uniform interpretation of the treaty is particularly important given its subject matter... Absent a uniform interpretation, potential abductors may be encouraged to abduct, believing they can exploit divergent legal interpretations and thereby avoid the Convention's application and sanction.")

[232] *See* Nanos, *supra* note 2, at 459-60.

[233] *See, e.g.* Public Notice 957, Hague International Child Abduction Convention; Text and Legal Analysis by the Dept. of State, 51 Fed. Reg. 10493, 10510 (1986) (stating that clause is discretionary "because of the potential for brainwashing of the child by the alleged abductor. A child's objection to return may be accorded little if any weight if the court believes that the child's preference is the product of the abducting parent's undue influence over the child").

[234] *See generally* Barbara L. House, *Considering the Child's Preference in Determining Custody: Is It Really in the Child's Best Interest?* 19 J.JUV.L. 176 (1998) (offering guidance to judges in distinguishing children's valid wishes from possible parental influence/alienation).

[235] *Robinson v. Robinson,* 983 F. Supp. 1339 (D. Colo. 1997)

[236] *Id.* at 1344. (The court held that the child must be returned, in spite of objections raised by the child, because of the presence of "undue influence" by the abducting parent, and the court's belief that forcing the child to choose between his parents was too much of a burden for the child to make).

with him, and that the fact the child used legal terms such as "settled" showed some parental influence.[237]

Commentators also argue that the Clause should be narrowly construed because children are not always capable of understanding, or making an informed decision about their welfare. On a related note, many judges and commentators point out that forcing a child to choose between their parents can impose an undue burden on the child's well-being or cause additional psychological harm.[238] In times of instability, these commentators argue that children need to be immediately returned to their stable home.[239]

Finally, advocates argue that courts must interpret the Child's Objection Clause narrowly in order to protect the Hague Convention's overall goals.[240] The treaty was never meant to determine the ultimate custody or the child's best welfare, but was simply meant to return the child to his home country for any later custodial determinations. By allowing a liberal interpretation of this and other clauses, scholars argue that courts would be ultimately determining eventual custody and procedural matters that are best left to the domestic courts.[241] In addition, by allowing more complex and individualized rulings, judges could create a long, drawn-out process and destroy the quick, efficient return envisioned by Hague Convention drafters. For all these reasons, many argue that the Child's Objection Clause should be strictly interpreted to protect the main interests and goals of the Hague Convention on International Child Abduction.[242]

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[237] *Id.*

[238] *Id. See also* Nanos, *supra* note 2, at 459 (arguing that a "narrow interpretation of the Child's Objection Clause can assist in promoting stable familial relationships and reducing psychological trauma which results when parents abruptly uproot children and remove them to foreign lands").

[239] *Id.*

[240] *See* Nanos, *supra* note 2, at 450 (arguing that proper decisions "tend to maintain the narrow interpretation of the Child's Objection defense as contemplated and encouraged by the framers of the Convention.").

[241] *Id.*

[242] *Id.*

B. Policy Reasons Favoring a Liberal Interpretation

While the U.S. has traditionally followed a very strict construction of Article 13(2),[243] some commentators and experts have argued that the courts should instead allow a more liberal interpretation of this Clause.[244] Many argue that both the changing state of the law and the growth of children's rights require a broader reading of this Clause.[245] In addition, the emerging picture of a typical abductor has differed sharply from what Convention drafters expected; a difference which may require a change in the way such cases are considered.[246]

1. Children's Rights under International Law

International law has changed and developed a great deal since the Hague Convention treaty was signed in 1980. The area of "children's rights," in particular, has grown and expanded considerably in the past twenty years.[247] While the law traditionally treated children as little more than their parents' property,[248] children are now recognized as having individual human rights, including the right to self-expression.[249] For this reason, many believe that judicial interpretation of the Hague Convention should reflect the growth in children's rights and the need for children to have a voice in their future.[250]

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[243] Kenworthy, *supra* note 16, at 351 (stating that U.S. courts are unlikely to defer to child's objection as a reason for denying a return).

[244] *See, e.g.* Sharon C. Nelson, *Turning Our Backs on the Children: Implications of Recent Decisions Regarding the Hague Convention on International Child Abduction*, 20 U. ILL. L. REV. 669, 672 (2001) (criticizing court's narrow interpretation of defenses to return under the Hague Convention, and arguing for a broader interpretation of treaty provisions to better protect the best interests of abducted children).

[245] *Id.*

[246] *See infra* Part III(B)(2) for a discussion of the image of a typical abductor.

[247] *See generally* Barbara Bennett Woodhouse, *Talking About Children's Rights in Judicial Custody and Visitation Decision-making*, 36 FAM. L.Q. 105 (2002), for a discussion of the changing and expanding role for children's rights, particularly in the context of custody hearings.

[248] *See* Kenworthy, *supra* note 16, at 342 (stating that historically, children were considered personal property of their parents, as reflected in the legal history of both U.S. and European law dating back to the Middle Ages).

[249] BEAUMONT, *supra* note 4, at 177.

[250] *Id.*

In the field of international law, the concept of children's rights first began developing during the twentieth century with agreements such as the League of Nation's Declaration on the Rights of the Child, which expressed the sentiment that "mankind owes to the child the best it has to give."[251] In 1959, the United Nations enacted a second declaration, which emphasized that children are entitled to basic human rights, such as protection from neglect and cruelty,[252] as well as adequate housing, nutrition, and education.[253] In addition, the treaty states that children are entitled to "special protection," and that "the best interests of the child" should be of "paramount importance."[254]

These treaties show an increasing concern in international law for children's interests, a concern which culminated with the U.N. Convention on the Rights of the Child.[255] This Convention establishes international protection of the rights of children, and for the first time creates principles binding upon signatory countries.[256] The Convention on the Rights of the Child was unanimously adopted by the U.N. General Assembly in 1989 and has since been ratified by nearly every nation in the world.[257] The United States and Somalia are now the only two nations that have not ratified the U.N. Convention.[258]

The Rights of the Child Convention attempts to improve the situation of children around the world, and recognize children's fundamental human rights and freedoms.[259] The treaty, broadly speaking, has four fundamental goals: the protection of children against neglect and exploitation, the protection of children from harm, the

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[251] Rebeca Rios-Kohn, *The Convention on the Rights of the Child, Progress and Challenge,* 5 GEO. J. ON FIGHTING POVERTY 139, 140 (Summer 1998).

[252] Geraldine Van Bueren, The International Law on the Rights of The Child 10 (1995). The Declaration incorporated ten human rights principles from the 1948 Universal Declaration of Human Rights signed earlier in 1949. *Id.*

[253] The Declaration, though influential, was not a binding treaty. *Id.*

[254] *Id.*

[255] Convention on the Rights of the Child, U.N. GAOR, 45th Sess., 61st Plen. Mtg., U.N. Doc. A/RES/44/25 (1989) [Hereinafter U.N. Convention].

[256] *Id.*

[257] Kenworthy, *supra* note 16, at 344.

[258] *Id.*

[259] Rios-Kohn, *supra* note 251, at 142.

provision of assistance for their basic needs, and the participation of children in decisions affecting their destiny.[260]

Thus, for the first time in international law, the treaty[261] expresses the principle that children have a right to freedom of expression and assures that children have a voice in legal proceedings and custody decisions that directly affect their interests.[262] This final objective is achieved through two provisions: Article 3, which establishes that the best interests of children should be a primary consideration in all actions concerning children, whether in courts of law or other areas of government; [263] and Article 12, which establishes the children's right to participate in all aspects of life within the community and family.[264]

Article 12 provides a "child who is capable of forming his or her views the right to express those views freely in all matters affecting the child."[265] This ensures that once a child is capable of forming an opinion, she should always be given the opportunity to express that opinion in legal proceedings that impact her.[266] While a child's view may not be conclusive, courts do have an obligation to hear and consider that child's wishes.[267]

This goal, of allowing children a voice in the legal process, sets up a potential collision course between the requirements of the U.N. Convention on the Rights of the Child and the Hague Convention. Under the strict construction followed by U.S. courts, many children are denied the right to voice their views and objections.[268] While the U.N. Convention requires consideration of all but the youngest infants' views, Hague Convention proceedings conducted in the U.S. typically will

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[260] *Id.*

[261] Van Bueren, *supra* note 252, at 131.

[262] *Id.*

[263] Kenworthy, *supra* note 16, at 345. While the treaty does not define "best interests," this provision is one of the treaty's "core values," requiring consideration of the child's best interest in all proceedings affecting a child. *Id.*

[264] Rios-Kohn, *supra* note 251, at 143.

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *See supra* Part II(B) (discussing narrow US interpretation of child's objection clause).

consider only "mature" adolescents' views.[269] Thus, the American interpretation of "children's objections" seems to be in direct contradiction with the principles of the Rights of the Child Convention.[270] For this reason, many have argued that the U.S. must adopt a more liberal construction of the Child's Objection Clause to allow all children the right to express their views, and further children's rights of free expression and participation.[271]

Although the U.S. has not ratified the U.N. Convention, the President did sign the original treaty.[272] Because it was not ratified by Congress, the treaty is not binding law in the U.S., but its widespread acceptance and support lend the principles considerable persuasive force.[273] This acceptance means that even nations who have not ratified the treaty may incorporate its principles.[274] Indeed, the universality of these provisions may soon move the treaty into the arena of "customary" international law, which is binding regardless of whether a country has ratified the treaty.[275]

While U.S. judges may not be required to follow the U.N. Convention's provisions,[276] they still have the option (and many would argue the obligation) to incorporate the treaty's principles when considering cases involving and impacting a child. It seems clear that the U.S. interpretation of "Child's Objections" is inconsistent with the U.N. Convention's guarantee of children's participation and court consideration of their views.[277]

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[269] *See* BEAUMONT, *supra* note 5, at 178 ("Article 12 states that the views of a child ... should always be given the opportunity to be heard, either directly or indirectly, in proceedings impacting upon him or her.")

[270] *See* Kenworthy, *supra* note 16, at 351-53 (arguing that U.S. interpretation of the "child's objection clause" is in direct contradiction to the principles of the U.N. Rights of the Child Convention).

[271] *Id.*

[272] *Id.*

[273] *See* Rios-Kohn, *supra* note 251, at 156-57 (stating that the treaty has considerable persuasive authority, and may be used as an aid to judicial interpretation for other treaties or laws).

[274] Kenworthy, *supra* note 16, at 346-47.

[275] *Id.*

[276] *Id.* U.S. courts are not required to follow the conventions of the treaty because it has not yet been ratified, or made binding, in the United States. *Id.*

[277] *Id.*

In general, international law has given increased recognition to the children's needs and rights. The world and the state of international law are vastly different now compared to the period when the Hague Convention was signed over twenty years ago. For this reason, many argue that courts should recognize the increased status of children's rights in judicial rulings.[278]

2. Domestic Violence

Many who have called for a more liberal interpretation of Article 13 defenses have criticized the treaty itself for failing to consider significant issues. One problem commentators cite is disconnect between the "typical" abductor contemplated by the Convention and the type of person who actually does abduct a child.[279] Specifically, the drafters of the Hague Convention, and the U.S. Congress, failed to consider situations in which the abductor is an abused spouse who flees with her children to another country. In such scenarios, tension is revealed between the Hague Convention's goal of ensuring the "prompt return" of wrongfully removed children,[280] and the goal of ensuring children's safety from harm.[281]

While the Hague Convention itself does not posit a "typical" abduction, the Explanatory Report includes a description of a

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[278] *Id.*

[279] Merle H. Wiemer, *International Child Abduction and the Escape From Domestic Violence*, 69 Fordham L.Rev. 593, 599 (2000) (examining the general perception when the Hague Convention was drafted that typical abductors were men who feared losing custody to the children's mother, and the fact that drafters failed to consider the possibility that the abducting parent could be a victim fleeing domestic abuse).

[280] The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, opened for signature Oct. 25, 1980, Art. 1(a) T.I.A.S. 11670, 1343 U.N.T.S. 89 (entered into force Dec. 1, 1983) [hereinafter referred to as the Hague Convention on Child Abduction] ("It is affirmed that the Convention shall secure the prompt return of children wrongfully removed to, or retained in, any Contracting State.").

[281] Hague Convention on Child Abduction, *supra* note 9, Preamble. ("Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention...")

"paradigmatic" abduction.[282] It constructed a model of the typical situation which provokes an abduction of a child.[283] In this model, the abductor is seen as a non-custodial parent who abducts the child due to "diminished influence with the child, and frustration with custody proceedings."[284] The report, and the Convention itself, do not appear to have considered situations in which the abductor is instead a spouse who flees the country to escape domestic abuse.[285]

In popular U.S. media, the international child abductor was typically portrayed as "a male non-custodial parent, usually a foreign national, who removed the child from the child's mother and primary caretaker, typically an American national."[286] When the U.S. adopted the Hague Convention, Congressional hearings reveal a perceived "prototype" of the international abductor.[287] When urging ratification of the Hague treaty, Representative Stark of California cited two cases that were "paradigmatic" of international child abductions.[288] In both cases, a child was abducted by a male non-custodial parent to a foreign country leaving behind an American mother.[289] This image is depicted also in news media, which most often features stories in which a left-behind American mother searches for a child in a foreign country.[290] When domestic violence was considered at the Congressional Hearing, it was mentioned as a factor favoring return when a child is abducted by an abusive parent.[291]

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[282] *See* Perez-Vera Report, *supra* note 30, at 243.

[283] *Id.*

[284] *Id.*

[285] Wiemer, *supra* note 253 at 599 (2000)

[286] *Id.* at 602. (citing the stereotyped image of international abductions expressed in popular media during the 1970's to 1990's).

[287] *See* Parental Kidnapping: Hearing Before the Subcomm. on Juvenile Justice of the Senate Comm. On the Judiciary, 98th Cong. 35 (1983) (Statement of James G. Hergen, Assistant Legal Advisor, U.S. Dept. of State).

[288] *Id.*

[289] *Id.*

[290] *See* "Mother Finds No Help For Child Held 'Hostage' In Iran", Seattle Times, July 21, 1985, at A10 (telling plight of mother whose child was abducted by her abusive husband to Iran).

[291] *See Parental Kidnapping: Hearing Before the Subcomm. on Juvenile Justice of the Senate Comm. On the Judiciary*, supra note 287, at 166 (stating that abducted children cannot be assumed to be safe because they are taken by their

It is the disparity between this image of abusive abductors and the reality of the numerous cases that involve an *abused* abductor and child,[292] that may contribute to some of the divergent rulings in U.S. courts based on Children's Objections. U.S courts do not have a framework with which to analyze cases involving an abductor fleeing an abusive parent/spouse. Due to the lack of consideration of such cases in the treaty creation or ratification phase, some courts incorporate a broader interpretation of the Children's Objection and Grave Danger clauses in order to prevent return in such cases.

This argument goes against all precedent for Hague Convention cases. U.S. courts have repeatedly stated that such defenses must be interpreted narrowly.[293] The main purpose of the Convention is to ensure swift return of the child,[294] so that the abducting parent does not gain the advantage of his home country's jurisdiction.[295] In addition, the courts don't want to reward the abductor, or encourage more kidnappings, by allowing a child to stay with the abducting parent.[296] For these reasons,

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own parent, when the parent is abusive or alcoholic.); *id.* at 67 (implying that abusive or drug-addicted parents are more likely to abduct a child before custody is determined because of the low chance of obtaining custody legally).

[292] *See generally* Merle H. Wiemer, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593, 599 (2000).

[293] *See* Rydder v. Rydder, 49 F.3d 369, 372 (8th Cir. 1995) (" A respondent who opposes the return of a child may advance any of the affirmative defenses to return listed in Articles 12, 13, or 20 of the Hague Convention... We believe, however, that a court applying the Hague Convention should construe these exceptions narrowly." *See also* The International Child Abduction Remedies Act, 42 USCS § 11601(a)(4) (2004) ("The [Hague] Convention on the Civil Aspects of International Child Abduction ... establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained.... Children who are *wrongfully removed* or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies.") [Ital. added].

[294] Perez-Vera Report, *supra* note 30, at 429, para. 16.

[295] *Id.*

[296] *See* Blondin v. Dubois, 189 F.3d 240, 246 (2nd Cir. 1999) ("Were a court to give an overly broad construction to its authority to grant exceptions under the Convention, it would frustrate a paramount purpose of that international agreement-namely, to 'preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court'").

U.S. courts have not conducted a deep inquiry into the child's best interests in these types of cases.

Traditionally, U.S. courts have not allowed evidence of domestic abuse against the abducting parent to be considered when deciding whether a Child's Objection, or a grave risk of harm will prevent return.[297] For example, in the case of *Tabacchi v. Harrison*,[298] the court held that the abducting parent had not proven a grave risk of harm to the child, despite evidence that the left-behind parent had abused his spouse, because sufficient evidence did not exist proving the child herself had been abused.[299] However, evidence suggests that courts are now giving a much broader interpretation of these defenses in cases involving domestic abuse.

To illustrate, the district court in the case of *Blondin v. DuBois*[300] appeared to go against precedent when it allowed a seven-year-old's objection to be considered by the courts.[301] However, this ruling arguably represents the court's attempt to take domestic violence into consideration when deciding Hague Convention petitions.

The domestic violence issue came up forcefully in *Blondin*. Ms. Dubois removed her two children, seven-year-old Marie-Eline and two-year-old Francois, from France and brought them to the United States, without their father, Mr. Blondin's, permission or knowledge.[302] The father, a French citizen, then petitioned U.S. courts to return his children to France under the Hague Convention on International Abduction.[303] Dubois raised a defense arguing that returning the children would expose

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[297] *See Weiner, supra* note 14, at 654 (stating that courts often view domestic abuse against the parent as irrelevant to a determination of a "grave risk of harm" under 13(b)).

[298] Tabacchi v. Harrison, 99-C4130, 2000 U.S. Dist. LEXIS 1518 (N.D. Ill. Feb. 8, 2000)

[299] *Id.* at 1544. ("Since the burden is on respondent to prove by clear and convincing evidence that an order returning Beatrice to Italy would present a grave risk to the child, this absence of evidence must be construed against defendant.")

[300] Blondin v. Dubois, 238 F.3d 153 (2nd Cir. 2001) ("Blondin III").

[301] *See id.* at 166 (holding that court was correct in considering seven-year old's objection, because it was not the sole basis for denying return of child to petitioning parent).

[302] Blondin v. Dubois, 19 F. Supp. 2d 123,124 (S.D.N.Y. 1998) ("Blondin I").

[303] *Id.*

them to a grave risk of harm under Article 13(b) of the Convention.[304] The U.S. District Court denied Blondin's petition, agreeing with Dubois, the mother, and finding a grave risk of harm if the children were returned.[305] The court relied on testimony that Blondin had repeatedly abused and beat Dubois, often in the children's presence.[306] Marie-Eline testified that Blondin beat her and her brother, and had twisted an electrical cord around her neck, threatening to kill both her and her mother.[307] She also stated that she did not want to return to France; the court gave some weight to her objections, although it stated that her objection was not dispositive.[308]

This decision prompted a flurry of appeals and remands. On appeal, the decision of the district court was reversed and remanded by the Second Circuit Court of Appeals.[309] The Second Circuit argued that the district court should have considered other alternatives to allow the children to be returned to their home country's jurisdiction, without putting them in the father's custody.[310] The district court, after considering whether such alternatives existed, decided that returning the children to France would expose them to further psychological harm, and that Marie-Eline's objection to leaving the United States should be followed.[311] In finding a grave risk of harm, the court relied on Marie-Eline's testimony, as well as the expert witness's testimony that the

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[304] *Id. at 128.*

[305] *Id.* at 127 ("I find, by clear and convincing evidence, that return of Marie-Eline and Francois to France would present a 'grave risk' that they would be exposed to 'physical or psychological harm' or that they would otherwise be placed in an 'intolerable situation'.")

[306] *Id.* at 124-26.

[307] *Id.*

[308] *Id.* at 128-29.

[309] Blondin, 189 F.3d at 241.

[310] *Id.* at 242. ("While we agree with the District Court that the children should not be returned to their home country in their father's custody, we nevertheless conclude that the District Court should be given a further opportunity to consider the availability of temporary arrangements that would honor the Convention's mandate of delivering abducted children to the jurisdiction of the courts of their home countries, while still protecting them from the 'grave risk' of harm.)

[311] *Id.* at 249

children would suffer psychological harm and a recurrence of post-traumatic stress symptoms if returned to France.[312]

This decision was appealed by the father, Blondin, on the grounds that Marie-Eline was too young to have her views considered when finding a grave risk of harm or a Child's Objection.[313] The court then decided that the child's view may be considered when deciding whether a grave risk of harm exists if the child is returned. The child's testimony only formed a part of the grounds for finding this separate defense, thus courts may use a more liberal interpretation when determining whether the child is of sufficient age and maturity.[314] The court did not rule on whether Marie-Eline was old enough to make an official Child's Objection" to return under Article 13, but decided that because a grave risk of harm had been found, the children would not be returned to France.[315] However, the court stated in dicta that Marie-Eline's objection, taken alone, would also be sufficient to deny return under the Child's Objection clause of Article 13.[316]

The *Blondin* case represents a turning point for U.S. courts. The Second Circuit chose to give a much broader interpretation of the Child's Objection and Grave Risk clauses, allowing the views of a much younger child to be considered and heard when deciding whether a grave risk of harm actually does exists. That decision allowed courts to make a more in-depth analysis of the risks and possible harms children face if returned to their home country.

This case was met with a flood of both praise and criticism. Some commentators praised the decision as representing a step forward

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[312] *Id.*

[313] Blondin, 238 F.3d at 155 ("Blondin IV")

[314] *Id.* at 166. ("We also agree with the government that a court may consider a younger child's testimony as part of a broader analysis under Article 13(b). In either case, of course, a court must take into account the child's age and degree of maturity in considering how much weight to give its views. As the government acknowledges, however, it stands to reason that the standard for considering a child's testimony *as one part of a broader analysis* under Article 13(b) would not be as strict as the standard for relying *solely* on a child's objections to deny repatriation under Article 13.")

[315] *Id.*

[316] *Id.*

in protecting children's interests in cases involving domestic abuse.[317] However, others criticized the court's reading as being unnecessarily broad, and frustrating the main intent of the Hague Convention treaty: the prompt return of abducted children. Some commentators also believe that allowing such a loose interpretation in domestic abuse cases creates uneven and disparate rulings which prevent the uniform application of the Hague Convention in U.S. courts.[318]

Conversely, others argue that the unforeseen prevalence of domestic violence in Hague parental abductions argues for a different, more liberal interpretation of its provisions.[319] One commentator argued that courts should allow more weight to a child's objections when the child voices a preference to remain with an abducting parent who has been a domestic violence victim.[320] While courts are typically reluctant to consider an objection if the child simply objects to returning to the petitioning parent, or if they suspect parental influence, these approaches may ultimately discount or dismiss the child's fear.[321]

Often, a child who has witnessed or suffered violence by the petitioning parent may object to return because he is afraid of that parent and wishes

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[317] *See generally* Peter Glass, *Blondin v. DuBois: A Closer Step to Safeguarding the Welfare of Children?,* 26 BROOK. J. INT'L L. 723 (2000-2001).

[318] *See* Merle H. Weimer, *Navigating the Road Between Uniformity and Progress: the Need for Purposeful Analysis of the Hague Convention on the Civil Aspects of International Child Abduction,* 33 COLUM. HUM. RTS. L.REV. 275, 338-339 (2002) ("Blondin IV, however is problematic. It makes Hague Convention proceedings much more like custody contests, [and] dramatically widens Article 13(b) defenses.... These aspects ... were unnecessary and are contrary to the purposes that underlie the Convention.")

[319] *See generally* Jeanine Lewis, *The Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity,* 13 TRANSNAT'L 391 (2000); Sharon Nelson, *Turning Our Backs on the Children: Implications of Recent Cases Regarding the Hague Convention on International Child Abduction,* 2001 U. ILL. L.REV. 669 (2001); Weiner, *supra* note 21 (outlining how strict interpretation of the Convention can lead to unjust results in cases involving victims of domestic violence, and arguing for a more liberal interpretation, and a separate legal defense, in such cases).

[320] Id. at 663.

[321] *See id.* (arguing that the court's failure to consider the stated preference to remain with one parent can limit the usefulness of the Children's Objection clause for children who have been abused).

to remain with the non-violent parent.[322] However, the court will traditionally have little regard for a child's simple preference to remain with one parent.[323] Thus, the narrow construction of the Children's Objection clause would cause courts to dismiss possible valid fears of a child who has suffered or witnessed domestic violence.

A child who has witnessed or suffered abuse may be unable or unwilling to share the details of the abuse, or his or her fears.[324] For this reason, advocates have argued that courts should allow a child to state a simple preference without additional explanations.[325] When such a preference is stated in a case involving credible allegations of abuse by the left-behind parent, courts should give considerable weight to those views.[326]

To some extent, it seems that courts have already taken some of these policy arguments into account. Considering U.S. rulings through this lens helps to explain some of the divergent rulings amongst recent cases. Many of the cases that allowed a lower age limit for considering a Child's Objection involved a child who had suffered or witnessed alleged domestic abuse.[327]

IV. Analysis of Case Law and Conclusion

By examining how U.S. courts have ruled in Hague Convention cases, certain patterns emerge. One is the extreme reluctance of U.S. courts to hear children's objections, while another is the lack of clear analysis or precedent from these cases. First, examining the cases reveals that children's objections, standing alone, will almost never justify refusing to return the child. Only one case exists in which a child's objection was the sole ground for refusing return. In this case,

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[322] *Id.*

[323] *See supra* Part II(B)(2)(i), regarding court's general approach not to consider 'child's objections' based on that child's preference not to live with the petitioning parent.

[324] *Lewis, supra* note 330, at 664.

[325] *Id.* at 664.

[326] *Id.*

[327] *See generally* Nelson, *supra* note 15, at 672 (2001) (criticizing court's narrow interpretation of defenses to return under the Hague Convention, and arguing for a broader interpretation of treaty provisions to better protect the best interests of abducted children).

the objecting child was fifteen years old.[328] In all the other cases in which judges allowed child's objections, the judge eventually refused return based on other grounds, such as grave danger or settlement in a new environment.[329] Overall, judges are reluctant to give children's objections real force in US courts but will be lenient in allowing such objections if the return will be refused on other grounds.

This objective may help explain the varying rulings on the treaty provision regarding age and maturity. In cases that also involve a valid Article 13(b) defense, such as *Blondin*, judges are more willing to find a Child's Objections as a separate ground, though the child may be only eight. However, in cases such as *England*, which did not involve any other defense, the judge refused the children's objection, even though the child was thirteen.[330] In a sense, it is a results-based jurisprudence. Courts are reluctant to allow children's objections to have decisive force, thereby holding these objections to a higher standard as a sole defense than the standard employed if return is already refused on other grounds.

The real effect of this in U.S. courts is to make the Child's Objection Clause moot. An objection by a child will almost never *change* the outcome of the trial, but merely act as a second or third ground for refusal of return. Thus, in a real sense, the cases have the same result as if the Child's Objection Clause did not exist at all. Without decisive force, the Clause becomes toothless, and, in a sense, worthless.

The second main issue in the interpretation of the Clause is the lack of analysis employed by U.S. courts. The U.S. courts have not created a consistent framework for consideration or analysis of children's objections, but instead employ a fact-specific approach. Often, judicial opinions merely contain a conclusory statement that the objection is not

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[328] *See* In the Matter of L.L. (Children), (N.Y. Fam. Ct. May 22, 2000) (www.incadat.com, The Hague Conference on Private International Law, The International Child Abduction Database (INCADAT)) (last visited Sept. 30, 2005); *See also* BEAUMONT, *supra* note 5, at 184 n.60 (noting that the authors had only found one unpublished case in which U.S. courts denied a child's return based on Art. 13(2)).

[329] *See, e.g.*, Blondin,, 189 F.3d 240 *and* Raijmakers-Eghaghe v. Haro, 131 F. Supp. 2d 953 (E.D. Mich. 2001).

[330] *See* England, *supra* note 176.

allowed, without including any analysis as to why.[331] This lack of analysis contributes to the problem of inconsistent and varying rulings issued by the U.S. courts.[332] Quite simply, the courts have no consistent approach, and thus do not achieve consistent results.

While the U.S. approach has arguably contradicted the intended purpose and effect of the Child's Objection Clause by rarely allowing such objections, it seems that *always* allowing such objections to carry weight would also contradict the drafters' intent. In Germany and Austria, for example, courts have almost always prevented return when a child objects, regardless of the child's age, maturity, or reason for objecting.[333] This extremely loose interpretation of the Clause has led some parental rights advocates to charge that the German approach hurts the families' interests and that the courts are actually twisting the Child's Objection Clause to allow German abducting parents to keep the abducted child. [334] As the plight of Lady Catherine Meyer shows,[335] an overly liberal interpretation of the Child's Objection Clause creates its own risk of injustice.

Children's objections raise many complex social, psychological, and legal issues and judges are asked to weigh a finely balanced mix of policy issues both for and against these objections. Therefore, courts should employ a balancing test that would allow it to more effectively and consistently weigh and analyze these issues. Other country's approaches can help in formulating such a framework for analysis. However, most other signatories to the Hague Convention are civil law countries, and therefore their approach may be less relevant and applicable to U.S. courts. Alternatively, other common law systems offer valuable approaches. The United Kingdom's approach to weighing

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[331] Kenworthy, *supra* note 16, at 351 ("In the U.S., analysis under the child's objection exception is fairly straightforward - for the most part, it does not exist.").

[332] *See supra* Part II (B) for a discussion of conflicting case rulings in the United States.

[333] *See, e. g.* Thomas A. Johnson, *The Hague Abduction Convention: Diminishing Returns and Little to Celebrate for Americans*, 33 N.Y.U. J.INT. LAW & POL 125, 147 (2000-2001) ("These countries, such as Austria, Germany and Sweden, have made the Child Abduction Convention an instrument for ensuring the success of their abductors...").

[334] *Id.*

[335] *Supra* Part II.

an objection by an abducted child may offer a useful template for the United States.

In the United Kingdom, judges who weigh a Child's Objection use a much more involved process.[336] First, judges consider a set of specific factors that outlines the most important issues involved in a Child's Objection case under the Hague Convention. Next, the courts use specific methods and questions to determine a child's "age and maturity." Finally, the British courts have created guidelines to aid a judge in determining when an objection is valid, and when it is appropriate for a judge to use his discretion to refuse return.

Hague Convention cases are relatively uncommon, and many judges will rarely, if ever, hear such a case. Given the complexity of these cases, and the general lack of experience in this area, it becomes even more important for judges to have a set of specific factors and analytical frameworks to help guide their decision-making. In the seminal case of *In re S,* the British court listed several general factors for a judge to consider in deciding how to rule on Children's Objections.[337]

First, the court emphasized that a Child's Objection is a separate and independent ground for refusing return; and that it does not require that the child would face a grave risk of harm or an intolerable situation if returned.[338] This approach ensures that Children's Objections are given the intended force as an independent ground for refusing removal, in sharp contrast to the U.S. approach, which often conflates this clause with the grave risk of harm requirement.[339]

Next, the questions of whether a child objects, or is of sufficient maturity to object, remain questions of fact to be decided by the trial judge.[340] In addition, the judge is usually expected to find out why the child is objecting to return – if the child simply wishes to remain with the abducting parent, this fact may weigh against allowing the objection when the judge decides to use his discretion.[341] Furthermore, the court

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[336] *See generally* Kenworthy, *supra* note 16, at 355-62. (examining in-depth British analysis of Child's Objections in Hague Convention cases).

[337] *See In re* S [1993] Fam at 242. (This case is considered to contain the classic identification of principles to be applied in a Hague Abduction case).

[338] *Id.*

[339] *See* Kenworthy, *supra* note 16, at 344-46.

[340] *In re* S, *supra* note 336.

[341] *Id.*

emphasizes that there is no minimum age requirement for raising a Child's Objection. (In the *In Re S* case itself, a nine-year-old child raised a successful objection; and English courts have been willing to at times allow objections by children as young as seven). If the court comes to the conclusion that the child's views have been influenced by the abducting parent, or the child simply wishes to remain with that parent, the objection will be given little weight. However, if the court finds that the child has valid reasons for her objection, the court may refuse to order the return.

Finally, the court reiterated that a court should only refuse to order a child's return in exceptional circumstances.[342] These factors ensure that judges are presented with most of the important issues involved – this is especially important given the fact that most judges do not have a great deal of experience with Hague cases, and are not specialists in this area of the law.

Once the objection is raised, British courts have a specific analytical framework that guides how such objections should be considered by the court. In the case of *In Re S*, the British courts created a defined framework for considering Article 13 objections that allows a step-by-step consideration of the issues involved.[343] First, the court determines whether the child is of sufficient "age and maturity" to object; then whether the court should use its discretion to allow that objection to prevent the child's return.[344]

First, the courts assume there is no threshold age for invoking a Child's Objection, but hold that the younger the child is, the less likely that child will have the requisite age and maturity to raise a valid objection under the Hague Convention.[345] Second, in order to determine a child's maturity, the court appoints a child welfare officer to interview the child and make a finding; the court then uses its own test to decide if the child is sufficiently mature to object. However, the judge retains discretion, and may refuse an objection, even if the welfare officer finds sufficient age and maturity.[346]

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[342] *Id.*

[343] *In re* S (A Minor) (Abduction: Custody rights), [1993] Fam 242 (Eng.)

[344] *See* Kenworthy, *supra* note 16, at 358.

[345] *Id.*

[346] *See generally* Kenworthy, *supra* note 16.

When deciding the difficult question of when a child is "sufficiently mature" to raise an valid objection, British courts have framed the question in this manner: A child will be deemed sufficiently mature if the child has reached the point of development at which, when asked "do you object to a return to your home country?" that child can give an answer based not on instinct alone, but based on a discernment of that question's implications for his best interests in the long and short term.[347] Under this approach, maturity isn't assumed based simply on age. Although in general, the younger the child is, the less likely the child will be found sufficiently mature; however, the court will rely on the testimony of child welfare officers, and the child's own answers rather than making an automatic assumption that the child lacks maturity.[348]

First, the court welfare officer ensures that a child is at least afforded the opportunity to have his or her voice heard. Any child objecting to return has the opportunity to speak to a court officer; it is then the court's decision whether that objection should be dispositive. Regardless of what a judge decides, this system helps to ensure that the judge has an adequate factual basis for their decision, based on the child's statements to the court. In addition, this process allows other issues, such as domestic violence, to be factored into the court's decision, in case the issue is influencing the child's objection to return. In contrast, the US approach allows judges to decline to even hear a child's objection if that judge feels that the child is not sufficiently mature.[349] Britain's split approach prevents conclusory rulings by allowing the objection, thus giving the judge the opportunity to investigate before making a decision on the level of maturity of the objecting child. This approach ensures that children at least have an opportunity for their objection to be heard and avoids situations like that in *Tahan,* where the court refused to even hear that child's objection based on a blanket statement that a nine-year old lacks maturity.[350]

In addition, this approach is more consistent with the UN Convention on the Rights of the Child, which guarantees children a right

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[347] *See* Re S (minors) (abduction: acquiescence) [1994] 2 F.C.R. 945, 954 (India).

[348] *See* Kenworthy, *supra* note 16, at 358.

[349] *See, e.g. Tahan*, 613 A.2d at 486, *supra* note 159.

[350] *Id.*

to be heard in all matters affecting the child.[351] As in the UN Convention, the amount of weight given to that view may vary based on the child's age and experience, but the child at least has an opportunity to express his wishes. This approach is consistent with the UN Convention that seeks to allow children the freedom to speak and have their wishes considered by the courts; and stands in contrast to the strict US approach that often denies children the opportunity to even express that view.

Finally, even after a judge finds the child is "sufficiently mature" to raise a valid objection, the judge must decide if that objection should prevent the child's return. Even if the judge decides that the child has objected to return, and is sufficiently mature to raise such an objection, the judge still has discretion to order the child's return in spite of that objection.[352] After the court determines that the child is of the necessary age and maturity to raise an objection, this only "unlocks the door" to allow the judge to exercise his discretion and decline to return the child. The Child's Objection Clause is not compulsory; under the Hague Convention, judges retain the ultimate discretion to decide whether a valid child's objection should prevent return. Because the decision to accept or reject a Child's Objection is discretionary, it is sometimes unclear when it is appropriate for a court to take such objections into account.

In English cases, courts have also listed principles to guide judges in deciding when a valid child's objection should prevent return.[353] First, the court examines what the child's own self-perception is: What does the child believe is in her best interests?[354] Second, the court examines to what extent the child's reason for objection is rooted in reality, or reasonably appears to the child to be grounded in reality.[355] Third, the court ascertains to what extent the child's views have been influenced or shaped by pressure from the abducting parent. Finally, the court examines whether these objections could be mollified upon return (for example, by removing the child from the influence of an abducting

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[351] U.N. Convention, *supra* note 247.
[352] *Id.*
[353] *See* Re T (Abduction: Child's Objection to Return) [2000] 2 F.L.R. 192, 204 (India).
[354] *Id.*
[355] *Id.*

parent).[356] This approach allows judges to weigh many of the most important policy reasons for following, or not following, a child's objection.

This second test allows judges to use their discretion when deciding whether to prevent return based on an objection, but also creates a guide for judges to use when making that decision. In addition, it also allows for consideration of many of the policy issues underlying parental abductions. By examining how much of the child's objection is rooted in reality, judges can consider whether domestic abuse, bad conditions or actual mistreatment by the petitioning parent is motivating the objection. Conversely, judges can also consider whether it is in fact the abducting parent's influence or wishes that are really motivating the objection. Under this approach, judges investigate, to an extent, the *reason* for the child's objection, allowing the court to learn of possible instances of abuse that could remain unseen under the stricter U.S. approach.

The main difference between U.S. and British courts may not necessarily be the end result, but the means used to reach that end. The British system has created a specific system for weighing Child Objections that allow children a greater opportunity to raise their views, and a greater opportunity for courts to fully consider the many factors involved and reach more consistent results.

The English approach therefore offers a useful template for how children's objections may be, or should be, considered by U.S. courts. The United States also follows common-law principles. Thus, judicial analysis and tests employed in one case can form precedent for courts to follow in other similar cases. The analytical process outlined above could also be employed in U.S. judicial rulings. First, a list of factors could be outlined for courts to consider in Child's Objection cases. Second, the courts could use a specific test to determine a child's maturity, the qualities of a valid objection, and when a judge should use her discretion to deny return. While the British approach offers a possible example of what these tests should be, perhaps the most important point is that a test is used at all. The use of a specific analytical framework reduces the arbitrariness of judicial rulings, and creates more uniform and well-explained results.

Overall, the British system offers a useful approach to weighing a Child's Objections, an approach that could also be adopted by U.S.

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[356] *Id.*

courts. By employing a similar analytical framework, U.S. courts can conduct more evaluative and consistent rulings. The British approach has a number of advantages. First, it employs a fairly uniform process for considering children's views through a welfare officer, as opposed to the varying methods employed in US courts.[357] Second, it offers a framework for analyzing and weighing Child Objections.[358] Under the British approach if a child has the requisite age and maturity to object, while weighing the policy objectives involved, the court then decides whether to use its discretion to prevent the child from being returned. Judges are able to consider policy issues such as parental influence or domestic abuse within a wider context. This approach ensures that judges consider and are aware of the many factors that must be weighed in such a decision.

However, while the British approach offers more consideration of a child's view, it does not act to automatically prevent return, as courts in other countries have done. A child's view will not prevail if the child lacks maturity, or the court decides that policy reasons outweigh the child's objection. This approach allows courts to avoid the possible abuse and weakening of the Clause that could result from an overbroad interpretation, while still allowing children's objections to have real force. The balancing approach, in essence, avoids many of the possible problems that may result from both an overly liberal interpretation (as in Germany) and an overly strict interpretation (as in the U.S.). In place of the conclusory rulings and strict interpretation employed by the U.S. courts, a more in-depth framework could lead to more just results. By having a systematic analysis, the courts can better justify and explain the results they reached, and create precedent for future rulings. Finally, having a more involved system helps to ensure that justice is done, by helping to ensure that the child's interests are truly considered and weighed by the courts. Only by having a set framework for analysis, can courts fully consider the policy objectives involved and decide on a more conservative or liberal interpretation of the Children's Objection Clause. This will avoid the results-based opinions often made in U.S. courts and allow for a more evaluative consideration of all the interests involved. Finally, it ensures that all children at least have the opportunity and right

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[357] *See* Kenworthy, *supra* note 16, at 359 ("To determine whether the child is old enough or mature enough, the U.K. employs the use of a court welfare officer.")
[358] *Id.*

to participate and raise an objection, whether that objection is actually conclusive or not.

By employing a systematic framework for analysis of Child Objections under the Hague Convention, U.S. courts can fully weigh and consider the child's views. Instead of reaching results based on the presence of other defenses, the courts will base their opinion on the merits of the objection itself. In conclusion, by employing a more in-depth analysis, U.S. courts can revitalize this clause and provide children with a forum for their voices to be heard and valued in Hague Convention proceedings.