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## Splitting the Baby Internationally: Evaluating the Least Restrictive Conundrum When Protecting Children from International Parental Abduction.

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**“SPLITTING THE BABY” INTERNATIONALLY: EVALUATING THE  
“LEAST RESTRICTIVE” CONUNDRUM WHEN PROTECTING  
CHILDREN FROM INTERNATIONAL  
PARENTAL ABDUCTION**

**JASON NITZ\***

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\* 2014 Candidate for Juris Doctor, St. Mary’s University School of Law; University of Arizona, Bachelor of Science: Biochemistry, 1998. The author is eternally grateful to John Visser and Charles Lipton for their insight and to Paul Toland, Christopher Savoie, and all of the left-behind parents and their supporters for their tireless and selfless work to prevent parental child abduction. The author hopes this Comment will help those parents who know the fear of going to bed at night terrified that it will be the last time they see their children. The author hopes it will help judges, attorneys, law enforcement, and political representatives understand the reality of international child abduction and the irreversible impact of their decisions. Special thanks to Colleen Lisowski and the Editorial Board of *The Scholar: St. Mary’s Law Review on Race and Social Justice* for all their hard work.

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### FOREWORD

The last time my two beloved children were at our home in Franklin, Tennessee, it was a Tuesday afternoon in August 2009. Isaac and Rebecca were in the middle of playing a game when their mother arrived to pick them up. She told us she was taking the children back-to-school shopping.

The kids put their shoes on and we made plans for later on in the week. I hugged my children goodbye. I gave my children the kind of hug you give your children when you will see them again in a few hours or a day or two—not the kind of hug you would give them if you knew it was the last time you will see them.

I hugged them goodbye, not knowing that their mother, instead of taking them back-to school shopping, would be taking them on a flight out of Chicago in only a few hours; a flight that would take my beloved children completely out of my life and into a country that is well-known to be a black hole for child abduction. My children’s mother kidnapped them to Japan. – *Christopher Savoie, at a Capitol Press Conference, during the introduction of House Resolution 1326, Washington, D.C. (May 2010).*\*\*

On behalf of my abducted children, I am grateful to the author for venturing into the world of parental child abduction—an area frequently

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\*\* Prior to the abduction of his children to Japan, Dr. Savoie founded and operated several successful technology start-up companies. Dr. Savoie is currently managing partner of Savoie & Associates in Franklin, Tennessee and co-founder of BACHome, an organization dedicated to preventing international child abduction and securing return of abducted children. He was the original drafter of U.S. House Resolution 1326, condemning Japan for its complicity in international parental abduction. Dr. Savoie holds a doctorate in molecular medicine from Kyushu University and his Juris Doctor from Nashville School of Law.

misunderstood, and one that is fraught with misinformation. As stated by Liss Haviv, director of the non-profit organization, Take-Root, “Most conversations about child abduction are conducted by people who have never been abducted.”

The truth is that children who have been abducted by a parent are stolen, sequestered, and brainwashed, causing them to suffer life-long trauma. Although it is beyond the scope of this foreword (and more well-suited to a psychology journal), suffice it to say that children who were parentally kidnapped report suffering from severe problems, even years following their recover. Such problems include having nightmares about being abducted again, experiencing trust issues, having relationship problems, always feeling different and alone, and winding up, to quote Liss Haviv, feeling like a *psychological orphan*—the abductor will not accept how his/her actions have hurt the child, leaving the child (or adult) without closure or an apology, and often the victim parent (the so-called *left-behind parent*) is so distraught and traumatized by a child’s abduction that he/she is in no shape to gently and firmly guide the child through the reintegration process. For these, and so many other reasons, the focus *needs* to be on the prevention of parental abduction.

Judges and court-appointed officials such as psychologists, guardian ad-litem and parental coordinators need to get this right. Six years ago, I underwent a divorce with a Japanese national. After the divorce and before their eventual abduction, my children enjoyed time with both parents—their mother and I both lived in the same town and lived about fifteen minutes apart from one another.

I was an assistant baseball coach for my son’s team, taught my daughter to sing and play guitar, and spent countless hours of our free time together playing, reading and watching movies together. I would help them with their homework, and I would take them to the doctor when they were sick.

My former spouse, shortly after my remarriage, began to make escalating threats that she might abduct the children to Japan. She outlined in an email specifically how she did not like the fact that my kids were becoming “too American” in her eyes. Aware that if the kids were taken to Japan that I would likely be denied *all contact* with them forever, I was alarmed and asked my attorney to seek a restraining order preventing the children from being removed from the United States. The temporary restraining order was granted, and a hearing was conducted a couple of weeks later.

The results of that hearing became a matter of international news and have spawned several lawsuits that have created interesting case law precedent in the Sixth Circuit (referenced here in Mr. Nitz’s Comment).

At the hearing on the restraining order, the trial court judge, despite clearly recognizing the risk of abduction to Japan, decided to trust the children's mother with travel to Japan and lifted the restraining order. What ensued, represented not just the denial of a restraining order and the granting of a vacation, but effectively, it resulted in the abrogation of all of my Troxel parental rights and the denial of any residential time or visitation with my children since.

During a trip to Japan with the kids (ostensibly "a vacation with the kids"), my ex-wife, we later learned from the F.B.I. and other law enforcement sources, had opened up bank accounts, set up housing, and contacted friends to explain that she was preparing to move to Japan with the children. She and the children returned to Franklin, Tennessee, and while I spent two weeks with my children for some summertime fun, my ex-wife secretly shipped her items to Japan, made plans to sell her car, and transferred money out of the country. Under the pretension of back-to-school shopping, she picked my kids up from my house and had them at the airport for a *very* early morning flight to Chicago the next day, and she had the children in the air, on their way to Japan, even before I had gotten my phone call from the school asking why Isaac and Rebecca were absent for their first day of school.

I am heartbroken. I worry about my children constantly . . . and I dream about being able to turn back the clock so that I can see them again . . . so I can see them as they were when I hugged them goodbye on that day in August 2009. That was four years ago. I will never know what it felt like to hug my son at age nine, to sing with my daughter when she was seven, to take them to see a play, to watch them open up birthday presents, or to kiss them good night ever since. Perhaps the most tragic thing about this entire ordeal is how absolutely preventable this tragedy was. If the restraining order had remained in place, I would be spending this weekend with my kids instead of penning this foreword.

## I. INTRODUCTION

Recent high-profile abduction cases highlight the growing family law problem of international parental child abduction.<sup>1</sup> Recovering an ab-

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1. See, e.g., *Dateline: Sean's Story* (NBC television broadcast Apr. 27, 2012), available at <http://www.nbcnews.com/video/dateline/47213230#47213230> (describing the plight of an American father who struggled to retrieve his abducted son from his ex-spouse's Brazilian family after her death, despite agreements between the United States and Brazil to expedite the return of abducted children); *Good Morning America: Mother, Daughter Reunite After 12 Years* (ABC television broadcast June 4, 2009), available at <http://abcnews.go.com/GMA/video?id=7753974> (recounting the story of an American woman's State Department-arranged visit to Egypt to see her estranged daughter after her abduction by her Egyptian father).

ducted child is a difficult, expensive, and sometimes impossible task.<sup>2</sup> As a result, laws intended to prevent parental child abduction continue to expand at the state,<sup>3</sup> federal,<sup>4</sup> and international<sup>5</sup> levels.

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2. See, e.g., Timothy Weinstein, *The Financial Cost of Child Abduction*, BRING SEAN HOME FOUND., <http://bringseanhome.org/resources/the-left-behind-parent/the-financial-cost-of-child-abduction> (last updated June 2012) (highlighting cases in which the cost of recovering a child exceeded \$100,000).

3. See generally UNIF. CHILD ABDUCTION PREVENTION ACT, 9 Pt. IA U.L.A. 43 (Supp. 2012) (articulating guidelines to prevent parental child abduction). Twelve states—Alabama, Colorado, Florida, Kansas, Louisiana, Mississippi, Nebraska, Nevada, New Mexico, South Dakota, Tennessee, and Utah and the District of Columbia have—enacted some form of UCAPA legislation. ALA. CODE §§ 30-3C-1 to -13 (West 2010); COLO. REV. STAT. ANN. §§ 14-13.5-101 to -112 (West 2007); D.C. CODE §§ 16-4604.01 to -4604.10 (2009); FLA. STAT. ANN. § 61.45 (West 2010); KAN. STAT. ANN. §§ 23-3801 to -3812 (West 2007); LA. REV. STAT. ANN. §§ 13:1851–1862 (West 2007); MISS. CODE ANN. §§ 93-29-1 to -23 (West 2009); NEB. REV. STAT. §§ 43-3901 to -3912 (West 2007); NEV. REV. STAT. ANN. §§ 125d.010–.230 (West 2007); NM ST § 40-10C-4 (West 2013); S.D. CODIFIED LAWS §§ 26-18-1 to -12 (West 2007); TENN. CODE ANN. §§ 36-6-601 to -612 (West 2010); UTAH CODE ANN. § 78B-16-101 to -112 (West 2008). Two additional state legislatures—Michigan and Pennsylvania—recently introduced UCAPA legislation. S.B. 1449, 2012 Gen. Assemb., Reg. Sess. (Pa. 2012); S.B. 325, 96th Leg., Reg. Sess. (Mich. 2012) (passed by the Senate unanimously and referred to the House Committee on Family, Children, and Seniors on Sept. 11, 2012). Other states—including Arkansas, California, Oregon, and Texas—enacted or strengthened preventative measure through a non-UCAPA framework.

4. See International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11611 (2006) (enabling legislation for enactment of the Hague Convention on the Civil Aspects of International Child Abduction); Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 6–10, 94 Stat. 3566, 3568–73 (codified as amended in scattered sections of 26, 28, & 42 U.S.C.) (enacting legislation addressing parental kidnapping issues among the states and U.S. territories); Sean and David Goldman International Abduction Prevention and Return Act of 2013, H.R. 1951, 113th Cong. (2013) (proposing legislation requiring the executive branch to take action to secure the return of abducted children and to pressure noncompliant countries to abide by Hague principles); S. Res. 543, 112th Cong. (2012) (resolving to urge noncompliant countries to sign the Hague, comply with the Hague, and return abducted children); H.R. Res. 1326, 111th Cong. (2010) (condemning Japan for the practice of retaining abducted U.S. children and calling for their return); see also Travel Control of Citizens and Aliens, 8 U.S.C. § 1185 (2011) (restricting entrance to and exit from the United States); Control of Aliens Departing from the United States, 22 C.F.R. §§ 46.1–.7 (2012) (explaining limitations and restrictions associated with aliens departing from the United States).

5. See Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children art. 5–14, *opened for signature* Oct. 19, 1996, 35 I.L.M. 1391 (signed by the U.S. Oct. 22, 2010; entered into force Jan. 1, 2002), *available at* <http://www.hcch.net/upload/conventions/txt34en.pdf> [hereinafter Hague Convention on Jurisdiction] (clarifying applicable jurisdictional law in international child custody cases); Hague Convention on the Civil Aspects of International Child Abduction art. 1, *opened for signature* Oct. 25, 1980, 42 U.S.C. §§ 11601–11611, 1343 U.N.T.S. 89, *available at* <http://treaties.un.org/doc/Publication/UNTS/Volume%201343/v1343.pdf> [hereinafter Hague Convention on Civil Aspects] (“[S]ecur[ing] the prompt return of children wrongfully removed” through international

However, problems arise when the potential-abducted-to-country (PATC)<sup>6</sup> is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction (Hague)<sup>7</sup>—a treaty designed to facilitate the prompt return of abducted children to their home countries.<sup>8</sup> If the PATC is not a signatory or has a pattern of non-compliance with treaty obligations, left-behind parents may have no recourse to gain access or to continue a relationship with their abducted children.<sup>9</sup> Abduction prevention is the only remedy to parents in such situations.<sup>10</sup> Therefore, family courts become the first and last line of defense to protect these children.<sup>11</sup>

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abduction and “ensur[ing] that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”).

6. In this Comment “PATC” refers to a place that a potential abductor is likely to take a child based on his or her strong business, familial, or experiential ties to the community.

7. Hague Convention on Civil Aspects, *supra* note 5.

8. *See id.* at art. 1 (securing the return of children and rights of custody among Contracting States).

9. *See* U.S. DEP’T OF STATE, OFF. CHILD. ISSUES, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 5–6 (2013), available at <http://www.travel.state.gov/pdf/2013-1980ReportonComplianceAbduction.pdf> [hereinafter 2013 COMPLIANCE REPORT] (noting “[m]any of the international parental child abduction cases that the U.S. Central Authority (USCA) handles involve abductions to countries not yet party to the Convention” and listing Argentina, Australia, France, Mexico, Netherlands, and Romania as particularly problematic signatories). *See generally* Nancy Faulkner, *Parental Child Abduction is Child Abuse*, PANDORA’S BOX (June 9, 1999), <http://www.prevent-abuse-now.com/unreport.htm> (compiling research that demonstrates the long-term effects of parental kidnapping including deleterious effects on the relationship between the left-behind parent and the abducted child).

10. JANET CHIANCONE ET AL., U.S. DEP’T JUST., OFF. JUV. JUST. & DELINQ. PREVENTION, OJJDP BULL. NO. NCJ 190105, ISSUES IN RESOLVING CASES OF INTERNATIONAL CHILD ABDUCTION BY PARENTS 1, 14–15 (2001), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/190105.pdf> (lamenting little can be done to recover a child after he or she is abducted to a noncompliant country and recommending practitioners be trained in and judges take preventative measure).

11. *See* U.S. DEP’T JUST., OFF. JUV. JUST. & DELINQ. PREVENTION, NCJ 215476, A FAMILY RESOURCE GUIDE ON INTERNATIONAL PARENTAL KIDNAPPING 6 (rev. ed. 2007), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/215476.pdf> (discussing legal preventative measure to take under federal and state law). *See generally* *International Child Abduction: Broken Laws and Bereaved Lives: Hearing Before the Subcomm. on Africa, Global Health, & Human Rights of the H. Comm. on Foreign Affairs*, 112th Cong. 89 (2011) (statements of David Goldman, Carlos Bermudez, Joshua Izzard, and Colin Bower), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hrg66530/pdf/CHRG-112hrg66530.pdf> [hereinafter *Hearings on International Child Abduction*] (detailing an absence of confirmation procedures amongst the airlines to verify the authority of minor children to travel, patterns of foreign consulates’ or embassies’ complicity in the abduction of their children, mistakes by the Transportation Security Agency in identifying suspect travel documents, and lack of substantive support from the State Department’s Office of Children’s Issues in locating and securing prompt return of abducted American citizens).

Assessing the risk and consequence of international flight in custody battles is complex.<sup>12</sup> Although laws, international treaties, and procedures exist to discourage parental abduction, these measures are woefully ineffective to left-behind parents, specifically in the United States, in the case of international parental child abduction to many countries.<sup>13</sup> Unfortunately, judges, lawyers, law enforcement agents,<sup>14</sup> social service providers,<sup>15</sup> and airlines,<sup>16</sup> who are uninformed about the issues surrounding international child abduction, contribute to the problem.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) designed the Uniform Child Abduction Prevention Act (UCAPA) as a road map to navigate this process within the U.S. justice system.<sup>17</sup> Choosing the correct method of prevention can make the difference between actual abduction and abduction prevention.<sup>18</sup> UCAPA's comment to its section dealing with measures to prevent abduction rather ambiguously proscribes the "least restrictive" method as the preferred

12. See generally *id.* (statement of Patricia E. Apy) (detailing the complexities of international child abduction).

13. See CHIANCONE ET AL., *supra* note 10, at 1–10 (compiling an array of barriers to obtaining adequate legal remedies before and after an abduction); see generally 2013 COMPLIANCE REPORT, *supra* note 9 (listing countries systemically avoiding treaty obligations under the Hague).

14. See CHIANCONE ET AL., *supra* note 10, at 7–8 (describing a general lack of experience with international abduction cases and an unwillingness by U.S. judges to implement effective prevention measures). As reported, this lack of experience is widespread: a majority of parents encountered law enforcement agents that were "unaware of their obligation to investigate the whereabouts of the abductor and child"; only a quarter of U.S. lawyers demonstrated a high competency regarding international parental abduction; and left-behind parents relayed disgust about the ease of departure from the country of children accompanied by only one parent. *Id.*

15. See generally JANET R. JOHNSTON & LINDA K. GIRDNER, U.S. DEP'T JUST., OFF. JUV. JUST. & DELINQ. PREVENTION, OJJDP BULL. NO. NCJ 182788, FAMILY ABDUCTORS: DESCRIPTIVE PROFILES AND PREVENTIVE INTERVENTIONS 3–5 (2001) (illuminating dichotomous tension between adequately addressing true, untreated abuse cases that end in mothers "escaping" with their children and identifying delusional or sociopathic parents who use their children as a tool of their divorce).

16. *But see* Bower v. El-Nady, 847 F. Supp. 2d 266, 279–81 (D. Mass. 2012) (finding no duty on the part of international carriers to overcome ignorance about potential international child abduction occurring via their airlines, but also not preempting possible suits if prior warning is given), *aff'd on other grounds* No. 12–1427, 2013 WL 5452805 (1st Cir. Oct. 2, 2013).

17. See UNIF. CHILD ABDUCTION PREVENTION ACT Prefatory Note, 9 Pt. IA U.L.A. 43 (Supp. 2012) (offering the Act as supplementary legislation to identify risk factors and prevention measures in states that have not enacted laws to address the problem of potential parental abduction).

18. See JOHNSTON & GIRDNER, *supra* note 15, at 2 (identifying positive outcomes in at-risk cases when courts intervene with prevention measures).



method of prevention.<sup>19</sup> However, underestimating the risks or overestimating the restrictiveness of prevention measures can lead to devastating effects for all parties involved.<sup>20</sup>

The only way to effectively prevent child abductions is to enable and encourage U.S. courts to consider the potential for abduction and take preemptive action depending on the potential-abducted-to-country. This Note discusses ramifications of misconstruing the “least restrictive” clause of UCAPA and suggests appropriate remedies for cases involving the potential abduction of children to countries that have a track record of mistreating the interests of U.S. citizens in custody disputes in favor of supporting native abductors. Specifically, this Note discusses characteristics of individuals involved in parental child abduction, including the ill effects on the child and family (Section II); the laws that attempt to solve these problems (Section III); the profile of countries with consistent abduction issues (Section IV); the range of available remedies to protect children from potential abduction and their effectiveness (Section V); and the analysis of flight risks in case law and UCAPA (Sections VI and VII). Finally, this Note argues trial courts must act decisively and take particular notice of the potential-abducted-to-country to craft sufficiently effective prevention measures (Section VIII).

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19. See UNIF. CHILD ABDUCTION PREVENTION ACT § 8 cmt., 9 Pt. IA U.L.A. 43 (Supp. 2012) (advising the least restrict method should be used, but not elaborating on what a least restrictive should look like).

20. See OFF. OF JUV. JUSTICE & DELINQ. PREV., *supra* note 11, at 6–9 (discussing the dangers posed to abducted children, detailing courts’ roles in prevention, and enumerating possible deleterious outcomes for poorly crafted court orders); UNIF. CHILD ABDUCTION PREVENTION ACT Prefatory Note, 9 Pt. IA U.L.A. 43 (Supp. 2012) (“Child abduction is a serious problem both in scope and effect.”); see also Levi Pulkkinen, *Charge: Unhappy with Parenting Plan, Seattle Mom Took Daughter to Japan*, SEATTLE PI (Aug. 14, 2012, 11:10 PM), <http://www.seattlepi.com/local/article/Charge-Unhappy-with-parenting-plan-Seattle-mom-3788325.php> (reporting abduction of a child by her mother after the court ordered visitation rights for the father and imposed travel restriction and passport controls for the Japanese mother without securing the passport or the child immediately following the order); Bruce Vielmetti, *Plea Agreement Reached in International Custody Case*, J. SENTINEL (Nov 21, 2011), available at <http://www.jsonline.com/news/crime/plea-deal-may-be-struck-in-custody-case-3135858-134270968.html> (reporting arrest and incarceration of a parental abductor after returning to Hawaii to renew her immigration status). Consider also potential harm to third parties. See *Savoie v. Martin*, 673 F.3d 488, 490–92 (6th Cir. 2012) (failing to impose adequate restrictions resulted in an abduction and sparked an unsuccessful law suit against the presiding judge); *United States v. Miller*, Crim. No. 2:11-CR-161-1, 2012 WL 1435310, at \*1, \*9 (D. Vt. Apr. 25, 2012) (denying defendant’s motions to dismiss in a case finding a pastor guilty of aiding an international abduction under IPKCA); *McEvoy v. Helikson*, 562 P.2d 540, 541, 543–44 (Or. 1977), *abrogated on other grounds by Moore v. Willis*, 767 P.2d 62, 64 (Or. 1988) (allowing malpractice suit alleging mental suffering against abductor’s lawyer for returning passports to abductor in violation of custody agreement).

## II. AFFECTED INDIVIDUALS IN PARENTAL ABDUCTION

### A. *The Child*

Parental child abduction is a form of child abuse.<sup>21</sup> Children suffer long-term psychological trauma from prolonged parental abduction.<sup>22</sup> Because abductors invariably place their needs above the needs of their children, they often use their children as malleable tools of revenge and control, ultimately causing the children to form psychosis due to attachment disorders.<sup>23</sup> Victims abducted to countries with different cultures or languages may suffer exacerbated damages.<sup>24</sup>

Abductors will often turn the child against the left-behind parent, decaying the parental bond and triggering unwarranted anger and resentment towards the innocent party.<sup>25</sup> Parents generally abduct young children because they are easy to transport and less likely to protest.<sup>26</sup> As children age, indoctrination against the other parent becomes a coercive tool to coax cooperation and assistance during the abduction.<sup>27</sup> An estimated twenty percent of abductors involve the children in planning their own abductions.<sup>28</sup>

### B. *The Abductor*

Most parental child abductors share common characteristics.<sup>29</sup> The Department of Justice identifies six profiles of parental child abductors:

21. See generally Faulkner, *supra* note 9 (compiling research that demonstrates the long-term effects of parental kidnapping).

22. See CHIANCONE ET AL., *supra* note 10, at 5 (reporting “anxiety, eating problems, and nightmares . . . difficulty trusting other people, withdrawal, poor peer relations, regression, thumb sucking, and clinging behavior . . . anger and resentment, guilt, and relationship problems in adulthood” amongst the emotional distress suffered by abducted children).

23. See Faulkner, *supra* note 9 (enunciating a myriad of emotional disturbances, including Post-Traumatic Stress Disorder, general anxiety, stress, phobias, and learned helplessness).

24. See CHIANCONE ET AL., *supra* note 10, at 5 (speculating that an extreme change in circumstance will exact a greater toll on children).

25. See *id.* (describing the destructive effects of indoctrination at the hand of the abducting parent); Faulkner, *supra* note 9 (citing several studies that investigated the propensity of abductors to indoctrinate their children against the left-behind parent and concluding that the damage is significant).

26. See JOHNSTON & GIRDNER, *supra* note 15, at 2 (calculating a mean age of victims of abduction to be two to three years old).

27. *Id.* (portraying older abduction victims as those children “particularly vulnerable to influence”).

28. See CHIANCONE ET AL., *supra* note 10, at 6 (“One-fifth of parents [surveyed] said they believe the abductor secretly involved the child in planning the abduction”).

29. JOHNSTON & GIRDNER, *supra* note 15, at 2.

(1) parents who have previously abducted or threaten to abduct; (2) parents who make claims of abuse and have social support; (3) parents who are paranoid delusional; (4) parents who are severely sociopathic; (5) parents who are foreign and end a mixed marriage; [and] (6) parents who “feel alienated from the judicial system” and have “social support in other communities.”<sup>30</sup> About half of abducting parents fit into multiple categories.<sup>31</sup> Common characteristics among abductor-types include propensity to discount the value of the other parent to the child, a likelihood of strong social ties, both locally and in the PATC, and a tendency to exculpate their dubious actions even in the face of damning evidence.<sup>32</sup> Though both sexes exhibit equal propensity to abduct, mothers tend to abduct their children after issuance of court orders and fathers tend to abduct prior to court rulings.<sup>33</sup>

### C. *The Left-Behind Family*

Between 2008 and 2010, parents requested assistance in returning 4,728 children to the United States through the Hague process, representing a fraction of actual cases.<sup>34</sup> Although left-behind parents are generally more educated, have greater economic stability, and better employment prospects than abducting parents,<sup>35</sup> left-behind parents are not immune from the damage reaped by the abduction of their children. They incur “substantial psychological, emotional, and financial problems.”<sup>36</sup> Parents and family members can suffer severe depression, anxiety, insomnia, anger issues, and fear of another abduction even after their children re-

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30. *Id.* at 2–6.

31. *Id.*

32. *Id.*

33. *Id.*; John Daignault, *Psychological Effects of International Child Abduction*, BOS. B. ASS'N.: FAM. L. SEC. (Bos. Bar Ass'n, Boston, Mass.), Winter 2012, at 3, 6.

34. Peter Thomas Senese, *International Parental Child Abduction Will Cost American Economy Billions of Dollars Over Next Decade According to Upcoming Report Issued by The I CARE Foundation*, INT'L PARENTAL CHILD ABDUCTIONS (Mar. 26, 2012), <http://internationalparentalchildabductions.wordpress.com/2012/03/26/international-parental-child-abduction-will-cost-american-economy-billions-of-dollars-over-next-decade-according-to-upcoming-report-issued-by-the-i-care-foundation>; *see also* International Child Abduction Prevention and Return Act of 2011, H.R. 1940, 112th Cong. § 2(a)(1) (2011) (noting in 2011 alone there were about 1,793 cases of international child abduction pending before the OCI, involving 2,488 children, and that not all parents who experience abduction use the Hague process).

35. Daignault, *supra* note 33 (reporting only half of abductors had a high school diploma and “twice as many abductors were unemployed” as compared to the left-behind parent).

36. *The Human and Social Cost of International Parental Child Abduction*, TRAVEL.STATE.GOV., [http://www.travel.state.gov/abduction/solutions/solutions\\_3872.html](http://www.travel.state.gov/abduction/solutions/solutions_3872.html) (last visited Oct. 30, 2013).

turn.<sup>37</sup> Left-behind parents may also experience a stigmatic presumption that they are at fault for the abduction.<sup>38</sup>

### III. LEGAL FRAMEWORK

With the understanding of the severity of this issue due to the number of potentially affected persons and to further appreciate why U.S. courts need to take preemptive action in preventing child abductions, it is important to consider the existing international legal framework. Many U.S. state courts believe international child abduction is an issue best resolved through international legislation; however, the need for U.S. courts to proactively protect potentially-abducted children is readily apparent when examining the current legislative framework and its inconsistent application.

#### A. *The Hague*

The United States is a treaty partner with seventy-seven other nations and territories to the Hague Convention on the Civil Aspects of International Child Abduction.<sup>39</sup> The Hague mandates that member countries establish a “Central Authority” to receive and adjudicate petitions for return of internationally abducted children.<sup>40</sup> Under the treaty the role of tribunals is not to decide the best interests of the children;<sup>41</sup> instead, it is merely bound to quickly determine the habitual residence of the chil-

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37. *Id.*; CHIANCONE ET AL., *supra* note 10, at 8 (“Eighty-five percent of parents turned to family and friends for emotional support.”).

38. *See* CHIANCONE ET AL., *supra* note 10, at 8 (revealing parental sentiments of perceived bias against left-behind parents). David Goldman encapsulates this feeling in his statement to Congress:

If we show anger . . . like we’re outraged . . . our State Department wants to look for something to dismiss us[,] as much as someone who just can’t believe that a parent could take a child from another parent without the left-behind parent to have done something that deserves it. So we are already starting out with this overwhelming feeling that we are behind the eight ball with a scarlet letter.

*Hearings on International Child Abduction*, 112th Cong. 44 (2011) (statement of David Goldman).

39. *Hague Abduction Prevention Country List*, TRAVEL.STATE.GOV., [http://travel.state.gov/abduction/resources/congressreport/congressreport\\_1487.html](http://travel.state.gov/abduction/resources/congressreport/congressreport_1487.html) (last visited Oct. 30, 2013).

40. Hague Convention on Civil Aspects, *supra* note 5, at arts. 6–7.

41. *See, e.g.*, TEX. FAM. CODE ANN. § 153.002 (2006) (“The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.”). *But see* Raymon Zapata, Comment, *Child Custody in Texas and the Best Interest Standard: In the Best Interest of Whom?*, 6 SCHOLAR 197, 203–09 (2003) (exploring application and flaws of the best interest standard in Texas).

dren and return them to their homes.<sup>42</sup> Under Article 11 of the Hague, courts must make the determination of habitual residence within six weeks from the submission of the application by the left-behind parent.<sup>43</sup>

In the United States, Congress enacted the International Child Abduction Remedies Act (ICARA) as the enabling legislation of the Hague treaty.<sup>44</sup> ICARA provides remedy when a child is abducted to the United States, but bears no authority in foreign courts when *returning* children to the United States. ICARA does not create new substantive rights for parents.<sup>45</sup> It is a procedural mechanism limited to assist children who habitually resided in a contracting state prior to relocation.<sup>46</sup> Thus, if the foreign nation is not a partner to the convention with its own enacting legislation, the left-behind parent can only seek redress in foreign courts, attempt self-help measures, or hope for diplomatic intervention.<sup>47</sup>

Though treaty partners designed the Hague to facilitate the prompt return of abducted children, inconsistent implementation and application within various nations leads to adverse results for U.S. citizens attempting to retrieve their abducted children.<sup>48</sup> The treaty offers three exceptions that are only supposed to be applied in extreme situations. Hague members initially intended that “the three types of exception to the rule concerning the return of the child must be applied only so far as they go and *no further . . . they are to be interpreted in a restrictive fashion.*”<sup>49</sup> How-

42. See Hague Convention on Civil Aspects, *supra* note 5, at arts. 8–20 (outlining the role of Central Authorities which mainly focuses on cooperation between the tribunals and return of children to their countries of habitual residence).

43. *Id.* at art. 11.

44. International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11611 (2006). Section 11601(b)(1) declares the purpose of the legislation is “for the implementation of the [Hague] in the United States. *Id.* § 11601(b)(1).

45. See *In re Mohsen*, 715 F. Supp. 1063, 1065 (D. Wyo. 1989) (finding that ICARA provides no substantive rights because “[t]he Act plainly states that it ‘empower[s] courts in the United States to determine only rights under the Convention’”).

46. See *id.* at 1064 (deciding ICARA only applies to children whose habitual residence was in a Hague contracting state).

47. See *Foreign Correspondent: Sayonara Baby* (Australian Broadcasting Corporation television broadcast May 22, 2012) (detailing the grim chances of securing a child’s return without extrajudicial help when foreign courts are ineffective).

48. See S. Res. 543, 112th Cong. (2012) (condemning a list of nations for not complying with their obligations under the Convention).

49. Elisa Perez-Vera, *Explanatory Report on the Convention on the Civil Aspects of International Child Abduction*, in 3 ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION (1980), at 426, 434, ¶ 34 (1982), available at <http://www.hcch.net/upload/expl28.pdf> (emphasis added).

ever, foreign courts apply these exceptions unpredictably and in blatant opposition to this guiding principle.<sup>50</sup>

The first exception provides that the Central Authority can reject a petition if it finds that the child has settled into the new environment, an exception referred to as “acclimation”.<sup>51</sup> Acclimation can occur if more than one year has passed since the wrongful retention of the child began, if left-behind parents voluntarily and consistently abrogated their visitation rights in the place of habitual residence or if a child of sufficient maturity expresses an intention to remain with the abductor.<sup>52</sup> One problem aggrieved parents face is courts can extend litigation for years, with multiple appeals, and then claim that although a child should have been initially returned, acclimation now precludes the ruling.<sup>53</sup> Another obvious problem arises in eliciting opinions from children, given the complexity of issues and the amount of psychological stress related to child abduction.<sup>54</sup>

In the second exception, the Hague provides discretion to courts if returning the child would violate the requested country’s notions of human rights or fundamental freedom (fundamental principles).<sup>55</sup> Though the Hague does not offer a definition of fundamental principles, those principles can only be inferred from general international laws or other international agreements.<sup>56</sup> If a particular child in his or her specific circumstance was likely to be a victim of a heinous violation of a treaty, like the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>57</sup> or the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation

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50. See *Resolving International Parental Child Abduction to Non-Hague Convention Countries: Hearing Before Subcomm. on Africa Global Health, Global Human Rights & Intl. Orgs. of the H. Comm. on Foreign Affairs*, 113th Cong. 1 (2013) [hereinafter *Hearings*] (statement of Rep. Christopher Smith) (revealing foreign Central Authorities, using procedural tactics and the exceptions, return abducted children less than 40% of the time). This Comment further discusses discrepancies in the application of the Hague, in the context of specific Hague non-compliant countries in Part IV.

51. Hague Convention on Civil Aspects, *supra* note 5, at arts. 12–13(a).

52. *Id.* at arts. 12–13.

53. *Hearings*, 113th Cong. 1–2 (2013) (statement of Rep. Christopher Smith); see U.S. DEP’T OF STATE, OFF. CHILD. ISSUES, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 9 (2012), available at <http://www.travel.state.gov/pdf/2012HagueComplianceReport.pdf> (listing nation with a history of slow and inadequate response to Hague petitions).

54. Perez-Vera, *supra* note 49, at 426, 433, ¶ 30.

55. Hague Convention on Civil Aspects, *supra* note 5, at art. 20.

56. Perez-Vera, *supra* note 49, at 426, 461–62, ¶ 118.

57. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984), available at <http://www.un-documents.net/a39r46.html>.

in Respect of Parental Responsibility and Measures for the Protection of Children (Child Protection Convention [CPC]),<sup>58</sup> then the violation could form the basis for refusing return. However, application of this provision is only indicated in situations where returning the child would “shock the conscience.”<sup>59</sup>

Finally, if the Central Authority finds the abducted child faces grave risk of physical or psychological harm, or will be placed in an intolerable situation, the court can refuse the return of the child.<sup>60</sup> In accordance with the intention of the Hague, the U.S. approach requires evidence of a grave risk of harm—more than merely serious risk—to the child with no available remedy in the country of habitual residence.<sup>61</sup> However, many critics have grave concerns about misuse of the Grave Risk clause to unfairly retain children in the abducted-to-country.<sup>62</sup>

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58. See Hague Convention on Jurisdiction, *supra* note 5 (utilizing Hague Central Authorities to implement the Convention and encoding principles which support shared parenting philosophies and the rights of children).

59. *Dir.-Gen., Dept. of Families, Youth and Cmty. Care v. Rhonda May Bennett* [2000] Fam CA 253, ¶ 56 (Austl.), available at <http://www.hcch.net/incadat/fullcase/0275.htm>.

60. Hague Convention on Civil Aspects, *supra* note 5, at art. 13(b).

61. Public Notice, 957, Hague International Child Abduction Convention; Text and Legal Analysis, 59 Fed. Reg. 10494-1 (Mar. 26, 1986).

The person opposing the child’s return must show that the risk to the child is grave, not merely serious.

A review of deliberations on the Convention reveals that “intolerable situation” was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an “intolerable situation” is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child’s return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an “intolerable situation” and subjected to a grave risk of psychological harm.

*Id.*

62. See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 *FORDHAM L. REV.* 593, 698 (2000) (asserting that expansion of the grave-risk provision shifts the Convention away from the original intention of allowing the court in the habitual residence to determine facts of the case); Laurie L. Trotter, *The Hague Convention Two Decades Later: Assessing the Effectiveness of the International Child Abduction Remedies Act*, 6 *GONZ. J. INT’L L.* (2002–03), available at <http://www.gonzagajil.org/> (describing senators’ discontent with some nations-state’s overuse of the grave-risk clause to retain U.S. citizens); Glen Skoler, *A Psychological Critique of International Child Custody and Abduction Law*, 32 *FAM. L.Q.* 557, 559 (1998) (calling the misuse of the grave-risk exception egregious).

### B. *U.S. Jurisdictional Laws*

The Uniform Child Custody Jurisdiction Act (UCCJA)<sup>63</sup> and the subsequent Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)<sup>64</sup> enunciate rules for determining jurisdiction and enforcing existing court orders in interstate custody battles.<sup>65</sup> These rules are not enforceable internationally.<sup>66</sup> Therefore, even when restrictions are not imposed, crafting court orders that include Hague language is important.<sup>67</sup>

A court order should do the following: state the legal foundation for the court's assertion of jurisdiction; describe the notification method and type of hearing afforded to entitled individuals; detail each litigant's custody rights and the child's residential arrangements; enumerate penalties for violation; and identify the "country of habitual residence" of the child at the time of the order.<sup>68</sup> When possible, it is important to establish jurisdiction in the United States prior to any action in foreign countries.<sup>69</sup> Acquiescing to jurisdiction of a foreign court can eliminate remedies in

63. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 Pt. IA U.L.A. 66 (Supp. 2012).

64. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9 Pt. IA U.L.A. 120 (Supp. 2012).

65. See John J. Sampson, *Uniform Family Laws and Model Acts*, 42 FAM. L.Q. 673, 675–76 (2008) ("The UCCJA operated upon novel principles that (1) established jurisdiction over a child custody case in one state and (2) protected the order of that state from modification in any other state as long as the original state retained jurisdiction over the case. If a noncustodial parent could not take a child to another state and petition a court of that state for a favorable modification of an existing custody order, the incentive to run with the child was greatly diminished."). All fifty states, the District of Columbia and the Virgin Islands, have enacted UCCJA or UCCJEA. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9 Pt. IA U.L.A. 120 (Supp. 2012); UNIF. CHILD CUSTODY JURISDICTION ACT, 9 Pt. IA U.L.A. 66 (Supp. 2012).

66. Cf. *National Report International Child Custody*, TRAVEL.STATE.GOV, [http://travel.state.gov/abduction/resources/resources\\_543.html](http://travel.state.gov/abduction/resources/resources_543.html) (last visited Oct. 30, 2013) (recognizing the UCCJA's international application in so far as it provides for the recognition of foreign custody decrees under specific circumstances in U.S. courts, but noting its limited effect due to inconsistency in state adoption and reciprocity issues with foreign nations).

67. See UNIF. CHILD ABDUCTION PREVENTION ACT § 8 cmt., 9 Pt. IA U.L.A. 43 (Supp. 2012) (observing that any abduction may become an international abduction and recommending the following language: "The State of \_\_\_\_\_, United States of America, is the habitual residence of the minor children within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction").

68. See UNIF. CHILD ABDUCTION PREVENTION ACT § 8, 9 Pt. IA U.L.A. 43 (Supp. 2012) (listing language necessary to strengthen arguments regarding jurisdiction under the Hague).

69. See *id.* § 5 cmt. (cautioning UCAPA only applies if the court has jurisdiction and that under UCCJEA, establishing jurisdiction in another court can result in losing home jurisdiction for the American citizen).



American courts.<sup>70</sup> This is especially significant for military members and diplomats stationed overseas.<sup>71</sup>

The Parental Kidnaping Prevention Act of 1980 (PKPA)<sup>72</sup> is a federal jurisdictional act requiring state recognition of custody orders from other states and authorizes states that consider parental kidnapping a crime to enforce the Fugitive Felon Act.<sup>73</sup> It does not compel state recognition of foreign custody decrees and has no bearing in foreign courts.<sup>74</sup> PKPA's main effect is that it prevents concurrent jurisdictions in interstate custody battles.<sup>75</sup>

The International Parental Kidnaping Crime Act (IPKA) criminalizes the act of taking a child out of the United States or retaining a resident child who travels outside the United States.<sup>76</sup> Congress implemented IPKA as a vehicle to gain jurisdiction over parental abductors in foreign

70. See UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 105, 9 Pt. IA U.L.A. 120 (Supp. 2012) (declaring foreign countries will be treated as if they were States of the United States in regard to the act's general provisions and jurisdictional provisions).

71. See, e.g., *Toland v. Futagi*, 40 A.3d 1051, 1064 (Md. 2012) (finding that, despite presumed inequities of the Japanese court system, Maryland UCCJEA's "vacuum jurisdiction," a provision allowing unrelated jurisdictions to assume authority if necessitated by the unjustifiable conduct of the other party, was not applicable because the plaintiff, who ceded jurisdiction to a Japanese court in the original custody dispute, did not make unjustifiable conduct arguments to the Japanese court), *cert. denied*, 133 S.Ct. 265 (2012). Following the abduction of his daughter from an American naval base in Japan, Commander (CDR) Toland filed for custody in a Japanese court and lost, barring Washington State's jurisdiction over the matter. *Toland v. Toland*, No. 35070-0-II, 2007 Wash. App. LEXIS 2498, at \*1-3 (Wash. Ct. App. Aug. 21, 2007). After the suicide of his ex-wife, the Japanese court awarded *guardianship* to the maternal grandmother without notice to CDR Toland. *Estate of Toland v. Toland*, 286 P.3d 60, 61 (Wash. Ct. App. 2012), *reh'g granted*, 297 P.3d 707 (Wash. 2013). Refusing to consider a presentation by CDR Toland that he could not receive a fair custody hearing in Japan, and with disregard to the fact the jurisdiction exercised by Japan was subsequent to an abduction, the court determined that guardianship and custody were separated legal statuses and would not usurp the Japanese court's guardianship order without a showing that the father was, in fact, unfairly treated by the Japanese courts in a suit for custody. *Toland v. Futagi*, 40 A.3d 1051, 1064-66 (2012), *cert. denied*, 133 S.Ct. 265 (2012).

72. Parental Kidnaping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3566 (codified as amended in scattered sections of 26, 28, & 42 U.S.C.).

73. Sue T. Bentsch, Comment, *Court-Sponsored Custody Mediation to Prevent Parental Kidnapping: A Disarmament Proposal*, 18 ST. MARY'S L.J. 361, 374, 376 (1986) (outlining the effects of PKPA).

74. See William Rigler & Howard L. Wieder, *The Epidemic of Parental Child Snatching: An Overview*, TRAVE.STATE.GOV, [http://travel.state.gov/abduction/resources/resources\\_545.html](http://travel.state.gov/abduction/resources/resources_545.html) (last visited Oct. 30, 2013) (noting that PKPA differs from UCCJEA because PKPA does not require states to recognize foreign courts).

75. *Id.* (describing PKPA's mandate to "accord full faith and credit to the first state's ensuing custody decree").

76. International Parental Kidnapping Crime Act, 18 U.S.C. § 1204(a) (2006).

countries through the extradition process.<sup>77</sup> However, IPKA can only be effective if the United States has an extradition treaty or other agreement with the foreign country and that country cooperates.<sup>78</sup> Even with an extradition treaty, the foreign nation must recognize parental kidnapping as a crime to begin the extradition process.<sup>79</sup>

### C. U. S. Department of State

The U.S. State Department implemented the Children's Passport Issuance Alert Program (CPIAP) as an early warning system to protect alert parents who suspect the other parent might try to flee the country with their children.<sup>80</sup> The Department cannot revoke existing U.S. passports or track their use, but it will prevent issuance unless a parent can prove that they have a legal right to unilaterally receive the passport.<sup>81</sup> Though the State Department describes the program as "one of [its] most important tool for preventing international parental child abduction," it also acknowledges that it is virtually useless to stop parents who have the ability use existing U.S. passports or to apply for foreign passports.<sup>82</sup> The Department recommends that parents send a letter to foreign consulates requesting that they refrain from issuing passports or visas to their children, but admits that foreign consulates have no legal duty to comply.<sup>83</sup>

Once a child is abducted to a noncompliant country, the State Department lacks the ability to enforce the Hague and secure return of abducted children from many foreign countries.<sup>84</sup> Indeed, parental advocates often criticize the State Department for not using more robust diplomatic and economic tools against noncompliant countries in facilitating the return

77. Rigler & Wieder, *supra* note 74.

78. *See id.* (observing a foreign country is not required to cooperate without an existing agreement).

79. *See, e.g.,* Treaty on Extradition, U.S.-Japan, art. II, Mar. 3, 1978, 31 U.S.T. 892 (entered into force Mar. 26, 1980) (requiring parity between the laws of both nations and a sentence of more than a year for the treaty to be applicable).

80. *Children's Passport Issuance Alert Program*, TRAVEL.STATE.GOV, [http://travel.state.gov/abduction/prevention/passportissuance/passportissuance\\_554.html](http://travel.state.gov/abduction/prevention/passportissuance/passportissuance_554.html) (last visited Oct. 30, 2013).

81. *Id.*

82. *Id.* Responding to a frequently asked question about passports already issued by another country, the Department recognized it "cannot prevent other countries from issuing their passports to children who are also their nationals." *Id.*

83. *Id.*

84. *See Hearing on Int'l Child Abduction Before Tom Lantos Human Rights Comm'n of the H. Comm. on Foreign Affairs*, 111th Cong. (2009) (statement of Hon. Bernard Aronson, Assistant Secretary of State for Inter-American Affairs (1989–1993)) (presenting testimony about ten years of failure by the U.S. government to secure the return of American citizen children), available at [http://chrissmith.house.gov/uploadedfiles/bernard\\_aronson\\_testimony.pdf](http://chrissmith.house.gov/uploadedfiles/bernard_aronson_testimony.pdf).

of more U.S. citizens to the United States.<sup>85</sup> Congress is currently considering legislation to pressure the Executive Branch into creating new agencies that would assist left-behind parents, report findings to Congress, and trigger automatic diplomatic pressure against noncompliant nations.<sup>86</sup>

#### D. *Department of Homeland Security (DHS)*

Cross-border abductions to Mexico and Canada constitute thirty-six percent of child abduction from the United States.<sup>87</sup> Experts estimate airlines facilitate the remaining sixty-four percent of abductions to countries not sharing borders with the United States.<sup>88</sup> The federal government does not have an effective method to prevent individuals with valid foreign travel documents from departing with their children by land, air, or sea without consent from the left-behind parent.<sup>89</sup> Courts can issue requests to the Office of Children's Issues (OCI) at the State Department to enroll children in the Prevent Departure Program—a discrete anti-terrorism program authorizing the DHS to prevent suspected criminals from leaving the country.<sup>90</sup> Enrollment may take as long as two days<sup>91</sup> and is

85. *See, e.g., id.* (sternly criticizing the Executive Branch for failing to use sanctions and political power to pressure foreign governments to return American children).

86. Sean and David Goldman International Abduction Prevention and Return Act of 2013, H.R. 1951, 113th Cong. (2013) (setting up liaisons between left-behind parents and foreign government, requiring collection and report of data to congress, and giving the Executive Branch a list of action that they could choose from to create pressure, ranging from canceling cultural exchanges to economic sanctions).

87. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-602, Commercial Aviation: Program Aimed at High Risk Abductors Could Aid in Preventing Abduction 4–5 (2011) (estimating thirty percent of abduction victims cross the southern border to Mexico and six percent end up in Canada).

88. *Id.* at 5 (predicting that abductors heading to the six most frequent non-border destinations, Australia, Brazil, Germany, India, Japan, and the United Kingdom, must use airlines as their primary mode of travel).

89. U.S. DEP'T OF STATE, *supra* note 80 (stressing there are no exit controls at U.S. borders, that agents do not screen names of people leaving, and that any country's passport will permit flight without parental consent).

90. *See* 8 C.F.R. §§ 215.2–.3 (2012) (providing DHS the authority to prevent “departures deemed prejudicial to the interests of the United States”); United States Government Accountability Office, *supra* note 87, at 12 (“DHS’s broader Prevent Departure program is aimed at preventing the departure of non-U.S. citizens whose departure could be harmful to the security of the United States. . . . [O]fficials have interpreted international parental abductions by non-U.S. citizens to be prejudicial to national interests, thus falling under its Prevent Departure program authority.”); *see also* OFF. OF JUV. JUSTICE & DELINQ. PREV., *supra* note 11, at 27 (providing a number for law enforcement to call to place the children on the alert list, 703-391-1733, and warning that it takes up to two days to enroll the children in the program); *see also* S.B. 1206, 2012 Leg., Gen. Sess., Leg. Bill Hist. (Cal. 2012)

not an option available to the general public.<sup>92</sup> Courts requesting participation from DHS *must* also request that local law enforcement act as an intermediary between the parent and DHS.<sup>93</sup> It is important to note the Prevent Departure Program is not a prevention measure *per se*—it is an emergency interdiction measure requiring pre-consideration for implementation.<sup>94</sup> Thus, it should not be used as the primary or sole prevention measure.<sup>95</sup>

Almost half of all abductions occur during legal visitation time, giving limited warning to left-behind parents when their children are specifically vulnerable to abduction.<sup>96</sup> Even though federal law requires local law enforcement officers to immediately report missing children to the National Crime Information Center (NCIC),<sup>97</sup> local officials often view parental abduction as a private matter and will not enter a suspected abduction into the NCIC database in time to alert official at DHS.<sup>98</sup>

Furthermore, even when a reported abduction is timely filed with the NCIC and DHS is able to crosscheck a child on the Federal Bureau of Investigation's Missing Persons File with an airline's passenger manifesto,<sup>99</sup> DHS would likely not be able to react in time to coordinate a rescue with airport law enforcement.<sup>100</sup> The Government Accountability

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(describing the program as a “high level anti-terrorism effort” for which DHS does not provide public information about).

91. OFF. OF JUV. JUSTICE & DELINQ. PREV., *supra* note 11, at 27.

92. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 87, at 12–13 (2011) (identifying law enforcement officers and certain State Department officials only as having the ability to request an alert). “Although parents cannot contact DHS directly, parents, family members, prosecutors, and others concerned about a forthcoming abduction could contact the State Department's Office of Children's Issues to add names to the list.” *Id.* at 13.

93. See OFF. OF JUV. JUSTICE & DELINQ. PREV., *supra* note 11, at 26–27 (stating law enforcement participation is required); United States Government Accountability Office, *supra* note 87, at 12 (detailing law enforcement's integral work in securing an alert).

94. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 87, at 13 (indicating DHS requires a court order which prohibits international travel of a child with a non-U.S. citizen parent).

95. See OFF. OF JUV. JUSTICE & DELINQ. PREV., *supra* note 11, at 27–28 (warning of the limited amount of time to act once an abduction is initiated).

96. CHIANCONE ET AL., *supra* note 10, at 5; see U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 87, at 7 (relaying left-behind parents' experiences of surprise abductions).

97. See 42 U.S.C. §§ 5779–80 (2012) (requiring reporting and prohibiting the establishment of a waiting period to report missing children).

98. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 87, at 14, 22 (postulating police officers' inactivity in the face of parental abduction stems from the view that it is private squabble, not a criminal incident).

99. See *id.* at 14 (admitting DHS could only confirm two instances in which a match was made but DHS could not confirm if that resulted in a successful rescue).

100. See *id.* (portraying an emergency reaction protocol that requires too much coordination to act in the short time needed to stop an abduction).

Office recommended developing a more comprehensive database for custody orders that airlines would use at check-in to flag parent-child passengers prohibited from flying together.<sup>101</sup> Congress has not acted on this proposal.

#### IV. IMPORTANCE OF AN INDIVIDUALIZED FLIGHT RISK ANALYSIS

An analysis of the above legal framework in place to assist left-behind parents and prevent potential child abduction is entirely inadequate without courts performing an individualized analysis on a case-by-case basis to determine the potential flight risk posed by a child's parents. Although the UCAPA suggests a "least restrictive" measure of prevention, the real-world manifestation of "least restrictive" largely depends upon flight risk analysis, including the potential harm to the abducted child, difficulties associated with post-abduction recovery, and motivation of the abducting parent.<sup>102</sup> Section 7 of UCAPA lists factors courts must consider when determining the likelihood a parent or guardian will abscond with their child.<sup>103</sup> Similar abduction protection laws in California and Texas differentiate between personal risk factors (individual actions) and potential-abducted-to-country (PATC) risk factors (existence of ties to noncompliant potential-abducted-to-countries) and require consideration of personal risk factors as a prerequisite to considering PATC risk factors.<sup>104</sup>

UCAPA does not differentiate between the two types of factors.<sup>105</sup> UCAPA specifically emphasizes the prominence of risk factor considerations—reinforced but unencumbered by individual factors—for each PATC.<sup>106</sup> UCAPA also allows consideration of relevant unlisted factors that may assist in understanding the issues.<sup>107</sup> In fact, it does not specifi-

101. *Id.* at 24.

102. *See* UNIF. CHILD ABDUCTION PREVENTION ACT § 7 cmt., 13–14, 9 Pt. IA U.L.A. 43 (Supp. 2012) (describing how to relate risk factors to prevention measures).

103. *Id.* §§ 7, 10–12.

104. *See* CAL. FAM. CODE § 3048(b)(1)(D) (West 2003) (prohibiting consideration of strong ties to another country without evidence of other risk factors list in the law); *In re Sigmar*, 270 S.W.3d 289, 299–300 (Tex. App.—Waco 2008, no pet.) (interpreting the Texas Family Code Section 153.502 as requiring at least one risk factor but not more).

105. *See* UNIF. CHILD ABDUCTION PREVENTION ACT § 7, 9 Pt. IA U.L.A. 43 (Supp. 2012) (listing behavioral factors, such as threatening to abduct or closing bank accounts, in a numerical continuum with risks related to destination countries, such as close ties to a foreign nations or likelihood that the destination country may not comply with the Hague).

106. *See id.* § 8 cmt. ("The most restrictive measures should be used . . . when the obstacles to recovering the child are formidable due to countries not cooperating and enforcing orders from the United States, not being signatories to the Hague Convention on the Civil Aspects of International Child Abduction or non-compliant.").

107. *Id.* § 7(a)(13).

cally require any listed risk factors be present to authorize prevention measures.<sup>108</sup>

#### A. *Personal Risk Factors*

Personal risk factors closely track abductor profiles previously detailed in Section II of this Note.<sup>109</sup> Previous threats, attempts, or enacted abductions are of primary concern,<sup>110</sup> followed by recent planning activities<sup>111</sup> and attempts to harm the other party or deceive government officials.<sup>112</sup> Planning activities include liquidating assets, gathering necessary documents, or abandoning employment.<sup>113</sup> Attempts to deceive or harm include providing false evidence, filling out misleading government documents, using multiple names, refusing to follow custody orders, committing domestic violence, abusing a child, or stalking.<sup>114</sup>

Courts can also consider additional conduct if it is pertinent to abduction risk.<sup>115</sup> It is not arbitrary to conclude that culture clashes within a marriage provide evidence of propensity to abduct.<sup>116</sup> UCAPA refers to the Department of Justice profiles for insight into the nature of possible additional personal factors.<sup>117</sup> For instance, courts should consider alien-

108. *See id.* § 7 cmt., (acknowledging more risk factors indicate higher risk of abduction, but specifically noting that absence of risk factor does not insure safety from abduction); Patricia M. Hoff, “UU” UCAPA: *Understanding and Using UCAPA to Prevent Child Abduction*, 41 FAM. L.Q. 1, 11–12 (2007) (instructing that risk of abduction must be determined, but factors are not limited to the ones listed in UCAPA).

109. *See* UNIF. CHILD ABDUCTION PREVENTION ACT § 7 cmt. 13–14, 9 Pt. IA U.L.A. 43 (Supp. 2012) (indicating much of the profile criteria derives from the research of JOHNSTON & GIRDNER, *supra* note 15).

110. *Id.* § 7(a)(1)–(2); Hoff, *supra* note 108, at 11 (declaring verbal or actual manifestations of intent to abduct are of primary concern).

111. *See* UNIF. CHILD ABDUCTION PREVENTION ACT § 7(a)(3), 9 Pt. IA U.L.A. 43 (Supp. 2012) (enumerating the following: “abandoning employment;” “selling a primary residence;” “terminating a lease;” “conducting any unusual financial activities;” “applying for . . . travel documents;” or “seeking to obtain the child’s [records]”).

112. *See id.* § 7(a)(4), (11) (listing: “hiding or destroying financial documents[,]” refusing to follow court orders, forging documents or misleading the government, and using multiple names).

113. *See id.* § 7(a)(3) (including closing bank accounts and selling property as liquidating assets).

114. *Id.* § 7(a)(4)–(5), (9)–(12).

115. UNIF. CHILD ABDUCTION PREVENTION ACT § 7(a)(13), 9 Pt. IA U.L.A. 43 (Supp. 2012).

116. *See* Al-Silham v. Al-Silham, No. 93-A-1770, 1994 WL 102480, at \*4 (Ohio Ct. App. Mar. 25, 1994) (concluding attempts to subjugate a wife to traditional subservient roles and lack of willingness to co-parent provided evidence of a likelihood to act outside the best interests of the child, allowing for the possibility of abduction).

117. *See* UNIF. CHILD ABDUCTION PREVENTION ACT § 7(a), 9 Pt. IA U.L.A. 43 (Supp. 2012) (referring to JOHNSTON & GIRDNER, *supra* note 15).

ation of one parent by other parent as an example of a non-enumerated risk factor in conjunction with enumerated factors.<sup>118</sup>

Another distinguishing characteristic of abductors is their tendency to resolve custody conflicts with repeated litigation.<sup>119</sup> Courts should find evidence of delusional or sociopathic behavior extremely persuasive in abduction prevention cases.<sup>120</sup> Parents who have a transient relationship with the other parent may also show a propensity to abduct, especially when the other parent has not provided child support.<sup>121</sup> In international abduction cases, parents who idealize their culture and denigrate the other show high rates of abduction.<sup>122</sup>

### B. *Domestic Violence*

Almost half of all abduction cases involve accusations of domestic violence.<sup>123</sup> UCAPA cautions against application of prevention measures in “escape” cases wherein a parent attempts fleeing from domestic violence—an action encompassing many of the personal risk factors.<sup>124</sup> The Act is vague as to the level of domestic violence justifying child abduction,<sup>125</sup> but almost certainly is not referring to isolated incidences of aggressive behavior amid marital discord.<sup>126</sup> Rather it appears physical,

118. *See id.* § 7 cmt. (advising court consideration of a parent’s tendency to dismiss the other parent’s value to the child as a common attribute of abductors).

119. JOHNSTON & GIRDNER, *supra* note 15, at 2.

120. *See id.* at 4–5 (pointing to parents who have paranoid feeling of betrayal and to highly manipulative and exploitive sociopaths as particularly dangerous abductors).

121. *See id.* at 6 (stating unmarried primary caregivers often feel outraged at the notion that the other parent has rights to the child).

122. *Id.* at 5.

123. UNIF. CHILD ABDUCTION PREVENTION ACT § 7 cmt., 9 Pt. IA U.L.A. 43 (Supp. 2012).

124. *See id.* § 9 cmt. (warning courts to be cognizant of potential use of the warrant system by abuser to further a pattern of controlling behavior).

125. *See id.* § 7 cmt. (admonishing courts “to be sensitive to domestic violence issues”). The U.S. Department of Health and Human Services offers multiple variant definitions of domestic violence and recognizes that each state has different civil and criminal definitions to address specific actions that constitute domestic violence. U.S. DEP’T OF HEALTH AND HUMAN SERV., DEFINITIONS OF DOMESTIC VIOLENCE, at 1–2 (2011), *available at* [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/defdomvio.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/defdomvio.pdf). The clinical definition requires that “a pattern” of these specific behaviors exist. *Id.* at 1 (differentiating the psychological definition of abuse, which requires a pattern of assaultive behaviors, from the legal definition, in which any single incident of assaultive behavior is considered abuse).

126. *See* UNIF. CHILD ABDUCTION PREVENTION ACT § 9 cmt., 9 Pt. IA U.L.A. 43 (Supp. 2012) (advising courts to check law enforcement databases prior to issuing an emergency warrant to take custody of a child and then, if the petitioner appears in the database, to temporarily order placement of the child while the court weighs the danger of further abuse against the harm of abduction).

sexual, or emotional abuse must be substantiated, be likely to continue post-divorce, and be severally detrimental to the child and parent in order to be considered by courts.<sup>127</sup> In the case of potential international abduction, courts must take serious efforts in weighing the risk of relocation against the implicated parental action.<sup>128</sup>

Specifically, the Act instructs:

If the evidence shows that the parent preparing to leave is fleeing domestic violence, the court must consider that any order restricting departure or transferring custody may pose safety issues for the respondent and the child, and therefore, should be imposed only when the risk of abduction, the likely harm from the abduction, and the chances of recovery outweigh the risk of harm to the respondent and the child.<sup>129</sup>

Four of the six abductor profiles involve claims of domestic violence as a characteristic of the respondent, the petitioner, or both.<sup>130</sup> In Japan, where accusations of abuse in divorce cases are a standard tactical component of divorce,<sup>131</sup> the Mixed-Cultural profile may also be incorporated into the discussion.<sup>132</sup> The Department of Justice advocates for thorough investigation in light of abuse allegations, respectfully consider-

127. Regarding emergency orders, UCAPA contemplates temporarily placing a child in alternative custody until a hearing can be held, if, upon determining the existence of flight risk by one party, a court confirms, through various databases or testimony, that there is also a history of domestic violence by the other party. *Id.* § 7 cmt. Thus, indicating the importance of positive confirmation of an actual crime and a reluctance to automatically nullify parental rights even in the face of confirmed violent tendencies. *Id.* § 7 cmt. The Act pays particular attention to the damage caused by international parental child abduction to countries with fewer safe guards than the United States and instructs courts to compare the harm of potentially permanent abduction to harm at the hands of a petitioner. *Id.* § 7 cmt.

128. *Id.* § 7 cmt.

129. *Id.* § 7 cmt.

130. See JOHNSTON & GIRDNER, *supra* note 15, at 2–6 (classifying people with a history of perceived abuse who attempt to flee in their own profile, indicating that sociopaths and persons suffering from paranoid delusions show a strong propensity to make false allegations of domestic abuse, and describing a subset of people who feel alienated by the legal system because of ignored claims of abuse).

131. See TAKAO TANASE, POST-DIVORCE LAWS GOVERNING PARENT AND CHILD IN JAPAN 26–28 (2010), available at [http://travel.state.gov/\\_res/docs/pdf/tanase\\_on\\_visitation\\_law\\_in\\_english.pdf](http://travel.state.gov/_res/docs/pdf/tanase_on_visitation_law_in_english.pdf) (depicting widespread misuse of a system that allows women to perpetually prevent contact between a father and his children prior to a custody determination by merely alleging domestic violence against her).

132. See UNIF. CHILD ABDUCTION PREVENTION ACT § 7 cmt., 9 Pt. IA U.L.A. 43 (Supp. 2012) (dictating court consideration of cultural ties to a foreign country and patterns of discrimination in those countries).



ing input from both parties.<sup>133</sup> The Department suggests conducting psychological evaluations of the accuser and the accused to better evaluate parenting habits.<sup>134</sup> If respondents attempt to excuse risk factors by presenting evidence of an intolerable situation,<sup>135</sup> courts should heavily scrutinize evidence, consider cultural factors, and fashion equitable remedy with a strict eye toward eliminating flight opportunity.

#### V. ASSESSMENT OF THREAT POSED BY NON-HAGUE AND NONCOMPLIANT COUNTRIES

In addition to considering the risk factors of parents in a potential abduction situation, courts must also assess the potential-abducted-to-country and evaluate its own level of risk. UCAPA and similar prevention legislation contain provisions directing U.S. courts to consider a country's Hague-compliance status when structuring preventive measures.<sup>136</sup> UCAPA strongly emphasizes factors relating to Profile Five of the U.S. Department of Justice's abductor profiles—divorces involving mixed-culture marriages from countries with obstacles to recovery.<sup>137</sup> UCAPA directs court evaluation of the strength of the potential abductor's ties to another country<sup>138</sup> and likelihood the destination country would not comply with the Hague or be otherwise dangerous for the child.<sup>139</sup>

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133. See JOHNSTON & GIRDNER, *supra* note 15, at 3 (calling for "a careful and thorough investigation").

134. *Id.* at 4.

135. See generally Noah L. Browne, Note, *Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction*, 60 DUKE L.J. 1193 (2011) (arguing that an intolerable situation for the parent does not necessarily equate to an intolerable situation for the child under the Hague and that only a high grave-risk criteria can be sufficient to justify forced relocation of a child).

136. UNIF. CHILD ABDUCTION PREVENTION ACT § 7 (a)(8)(A), (B), 9 Pt. IA U.L.A. 43 (Supp. 2012).

137. Compare *id.* § 7(a)(7), (8) cmt. (considering strong family and economic ties to a foreign country and warning that "[i]nternational abductions pose more obstacles to return of a child than do abduction within the United State," especially when the PATC is noncompliant), with JOHNSTON & GIRDNER, *supra* note 15, at 5 (imparting the importance of analyzing the Hague status of a PATC and relating a parent's emotional connection to a country to the likelihood of abduction).

138. See UNIF. CHILD ABDUCTION PREVENTION ACT § 7(a)(7), 9 Pt. IA U.L.A. 43 (Supp. 2012) ("[C]ourts shall consider *any* evidence that the petitioner or respondent . . . has strong familial, financial, emotional, or cultural ties to another state or country.") (emphasis added).

139. See *id.* § 7(a)(8) (directing court consideration of *any* evidence regarding Hague compliance, the foreign court system, cultural element or conditions that may be dangerous to the child, restrictions on freedoms, diplomatic relations with the U.S., military status, and terrorist activity).

Each element is a stand-alone risk factor.<sup>140</sup> The “strong ties” element instructs courts to evaluate the individual’s underlying temptation to flee.<sup>141</sup> The “likelihood” element focuses on the degree to which the destination country could harm or isolate a child.<sup>142</sup> This distinction in the law indicates a strong presumption that prevention measures are appropriate solely based on a connection to a dangerous foreign country, even when the perceived desire to flee may be low.<sup>143</sup>

UCAPA legislation encourages courts to look past the signatory status of the country in question, dedicating much consideration to the record of compliance with the law and to the actual judicial, executive, and cultural practices that could endanger the child, prevent return, or prejudice U.S. parents.<sup>144</sup> Some courts assume individual cases vary too greatly to conclude that instances of noncompliance indicate a systemic problem.<sup>145</sup> Advocates must combat judicial skepticism about dangers posed by noncompliant countries. How much information is enough to break the threshold of doubt? The answer might depend on the country in question. To appreciate the ramifications of their decisions, courts need a standardized method of profiling countries similar to profile abductor personality methodology. UCAPA provides the necessary elements in creating this profile.<sup>146</sup>

Attorneys representing clients who fear abduction to countries that typically evoke positive images may need extra help explaining certain dangers to a court.<sup>147</sup> Advocates must collect information from reliable

140. *See id.* § 7(a)(7), (8) (maintaining cultural ties to any foreign country and likelihood to travel to certain countries as independent elements).

141. *See id.* § 7(a)(7) (encapsulating emotional and familial elements with elements relating to financial security).

142. *See id.* § 7(a)(8) (evaluating qualities independent of the potential abductor, such as hazardous conditions in the PATC, the child’s ability to connect with the other parent post-abduction, and the finality of the decision).

143. *See id.* § 7 cmt. (separating the active element of exhibiting emotional affection for a foreign country from the passive qualities of that country, along with a strong caution to consider the dangers of international abduction and an explicit denunciation of a maximum number of elements required to implement prevention measures, and indicating that the presence of a high degree of danger associated with the PATC should be sufficient to consider strong prevention measures).

144. UNIF. CHILD ABDUCTION PREVENTION ACT § 7 (a)(8)(B)–(G), 9 Pt. IA U.L.A. 43 (Supp. 2012).

145. *See infra* Part V.II.B.

146. *See* UNIF. CHILD ABDUCTION PREVENTION ACT § 7 cmt., 9 Pt. IA U.L.A. 43 (Supp. 2012) (directing courts to consider the characteristics of the potential country of relocation).

147. *See Hearings, supra* note 50, at 39–40 (statement of Patricia Apy) (expressing concern over State Department’s overly-rosy outlook on Japan’s accession to the Hague will dupe judges and juries into believing that the Hague will be remotely effective).

sources, avoiding the perception that their basis for restrictive measures is merely xenophobic conjecture.<sup>148</sup> This Note segregates the “likelihood” element into three categories based on the source of the information and analytical approach. The first category, verified violations, contains elements that can be definitively shown through compliance reports issued by the State Department. The second and perhaps most fact-intensive category involves proof that bureaucratic mechanisms established by the foreign country are fundamentally inoperable in returning abducted children and cannot produce just results. The final category, humanitarian violations, includes those elements pertaining to the general socio-political state of a country, independent of its Hague status, established through a variety of U.S., international, and nongovernmental sources.

#### A. *Compliance with the Hague*

Courts may take judicial notice of information provided by the State Department regarding a nation’s disposition toward abducted children without expert testimony or notice to the respondent because the information is considered legislative fact.<sup>149</sup> The State Department issues reports on Hague signatory status and history of compliance with the Hague.<sup>150</sup> Additionally, the State Department keeps lists of state sponsors of terrorism,<sup>151</sup> countries in which the United States does not have a diplomatic presence, and countries that are currently engaged in military action.<sup>152</sup> Each list has a corresponding element or sub-element present in UCAPA.<sup>153</sup> If a country finds itself on any one of these lists, courts should take particular care in crafting its decision to protect the rights of potential left-behind parents and children.<sup>154</sup>

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148. *Cf. Katare v. Katare*, 283 P.3d 546, 554–55 (Wash. 2012) (rejecting claims of racial profiling by reasoning that appellant’s connection to a country that posed a risk to the child was not based on race, but to country’s circumstances).

149. *In re Sigmar*, 270 S.W.3d 289, 301—02 (Tex. App.—Waco 2008, no pet.) (citing *Skiriotos v. Florida*, 313 U.S. 69, 73 (1941) and *Rodriquez v. State*, 90 S.W.3d 340, 360 (Tex.App.—El Paso 2001, pet. ref’d)).

150. U.S. DEP’T OF STATE, *Child Abduction: Country Information*, [http://travel.state.gov/abduction/country/country\\_3781.html](http://travel.state.gov/abduction/country/country_3781.html) (last visited Dec. 23, 2013).

151. U.S. DEP’T OF STATE, *State Sponsors of Terrorism*, <http://www.state.gov/j/ct/list/c14151.htm> (last visited Dec. 23, 2013) (listing Cuba, Iran, Sudan, and Syria on the official list, but providing links to reports contain more detailed information on global terrorist activity).

152. U.S. DEP’T OF STATE, *International Travel*, TRAVEL.STATE.GOV, [http://travel.state.gov/travel/travel\\_1744.html](http://travel.state.gov/travel/travel_1744.html) (last visited Dec. 26, 2013).

153. UNIF. CHILD ABDUCTION PREVENTION ACT § 7 (a)(8), 9 Pt. IA U.L.A. 43 (Supp. 2012).

154. *See id.* § 7 cmt. (instructing strong consideration of recovery obstacles from international abduction).

At the forefront of the analysis is whether the potentially abducted to country is a “party” to the Hague agreement.<sup>155</sup> If a country “is not a party to the Hague *and* does not provide for the extradition of an abducting parent or for the return of an abducted child,” then the court *must* consider this fact in their analysis.<sup>156</sup> This can be confusing as country may have signed the treaty, ratified the treaty domestically, and officially acceded to the Hague without becoming an actual party to the Hague.<sup>157</sup>

If a new country wishes to join this treaty, it must first ratify, sign, and accede, but if the U.S. Department of State deems that the bureaucratic mechanisms established by the domestic implementing legislation are ineffective, the United States can refuse recognition of the new nation as a party.<sup>158</sup> This means that even though the country would be considered a Hague signatory and other Hague countries may consider them partners, U.S. citizens could not avail themselves of the law in the foreign country.<sup>159</sup>

In an additional wrinkle, countries that were parties to the original Convention in 1980 but refused to subsequently accede, automatically became parties with the original members upon accession—even without approval of member nations.<sup>160</sup> This anomaly in international customary practice completely prevents the United States from denying party status to certain new signatories under international law despite glaring deficiencies in the newcomer’s implementing legislation.<sup>161</sup> Therefore, merely observing that a country is a party to the Hague indicates little to U.S. courts about the ramification of abduction to that country.

Therefore, the next step in the analysis must be for courts to analyze a country’s compliance with the Hague. To establish a baseline for Hague status, the State Department website contains evaluations of many of nations that draw red flags concerning issues involving child abduction and international custody disputes.<sup>162</sup> The compliance reports typically only list those countries that are partners to the Hague, with India and Japan

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155. *Id.* § 7 (a)(8)(A).

156. *See id.* § 7 (a)(8) (mandating consideration of a PATC’s Hague status).

157. *Hearings, supra* note 50, at 6 (statement of Amb. Susan S. Jacobs, Dept. of State Special Advisor for Children’s Issues) (noting Korea does not become an automatic partner with the U.S. without evaluation and acceptance by the State Department).

158. *Id.*

159. *Id.*

160. *See id.* (responding to an inquiry on why the State Department does not evaluate Japan given its heinous record on child abduction, but does scrutinize Korea).

161. *Id.*

162. U.S. DEP’T OF STATE, *supra* note 150.

being the non-Hague outliers that receive notice for their endemic abduction problem.<sup>163</sup>

Although inclusion on one of the lists clearly indicates increased risk that a child will not be returned, absence from the list does not definitively indicate that a country is risk-free.<sup>164</sup> The State Department may subjugate the wellbeing of U.S. children to other diplomatic, geopolitical and economic interests by neglecting to make overt declarations of non-compliance in order to maintain friendly diplomatic relationships with the PATC.<sup>165</sup> In such cases, attorneys can use a variety of alternative international and foreign sources to demonstrate the danger and permanency of child abduction to suspect countries by performing independent Hague assessment or providing a humanitarian violation analysis.

### B. *Application of the Hague*

When the State Department does not decisively declare that a country is noncompliant with the Hague, UCAPA allows courts to assess whether a PATC “lacks legal mechanisms for immediately and effectively enforcing a return order under the Hague Convention on the Civil Aspects of International Child Abduction,” independent of the State Department’s evaluation.<sup>166</sup>

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163. Compare U.S. DEP’T OF STATE, OFF. CHILD. ISSUES, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 6 (2009) (listing Canada, Mexico, Germany, Brazil, United Kingdom, the Dominican Republic, Australia and Columbia as noncompliant countries and Japan and India as non-Hague countries with the most incoming abduction cases), with U.S. DEP’T OF STATE, OFF. CHILD. ISSUES, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 6 (2010) (replacing the Dominican Republic from 2009’s top-ten-offender nation list with the Philippines, a non-Hague country) and S. Res. 543, 112th Cong. (2012) (condemning Canada, Mexico, Germany, Brazil, United Kingdom, Ecuador, and Columbia as noncompliant countries and Japan, India, and Egypt as non-Hague countries that currently top the list of uncooperative countries).

164. See UNIF. CHILD ABDUCTION PREVENTION ACT § 7, 9 Pt. IA U.L.A. 43 (Supp. 2012) (establishing risk factors referencing government-established lists, but also providing categories describing characteristics of the countries).

165. David Goldman, *Government Must Be Advocate for Abducted Children*, ASBURY PARK PRESS, (Dec. 24, 2013, 12:18 am), available at <http://www.app.com/article/20131224/NJOPINION03/312240003/Government-must-advocate-abducted-children> (“Too often, the desire to maintain harmonious bilateral relations with other countries trumps human rights issues like child abduction”); *In International Abduction Cases, Quiet Diplomacy Is Not Working*, WASHINGTON POST, (Dec. 28, 2013), available at [http://www.washingtonpost.com/opinions/give-parents-more-tools-in-international-abduction-cases/2013/12/28/2d0a96aa-6c0e-11e3-aecc-85cb037b7236\\_print.html](http://www.washingtonpost.com/opinions/give-parents-more-tools-in-international-abduction-cases/2013/12/28/2d0a96aa-6c0e-11e3-aecc-85cb037b7236_print.html) (“For thousands of parents deprived of the chance even to communicate with their children, quiet diplomacy isn’t getting the job done.”).

166. UNIF. CHILD ABDUCTION PREVENTION ACT § 7 (a)(8)(B)(iii), 9 Pt. IA U.L.A. 43 (Supp. 2012).

As described above, a Central Authority established independently by each Hague signatory is the main avenue to bring abducted children to their country of habitual residence. However, if a country has a legislatively gelded Central Authority, lacks the ability to bring abductors before the Central Authority, or is unable to enforce the decisions of a Central Authority, compliance becomes an elusive hope.<sup>167</sup> For parents who fear their co-parent will abduct their child to a country that does not have a track record of specifically applying the Hague, either because the number of reported abductions are too few or because the country recently joined the Hague, an independent analysis will be crucial—but not easy.<sup>168</sup>

The U.S. State Department encourages countries such as China, Japan, Korea, Ghana, Tunisia, and Vietnam to join the Hague,<sup>169</sup> which will usher them into a categorical limbo. Regrettably, instead of directly opposing the Hague, countries can accede to the Hague and allow their Central Authority to misuse Hague exceptions in avoiding the return of children.<sup>170</sup> The United Nations compiles a searchable database of international case law on Hague decisions,<sup>171</sup> and if the country misuses provisions repeatedly, they find themselves on the U.S. non-compliance list.<sup>172</sup> Fortunately, when State Department reports do not definitively declare a country noncompliant or abjectly misleading, family courts must deter-

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167. See, e.g., Reyna Aurora Martínez López, *The Experience of Mexico on International Child Abduction*, FED. FOREIGN OFF. 2, <http://www.auswaertiges-amt.de/cae/servlet/contentblob/482364/publicationFile/4325/RedeLopez.pdf> (last visited Oct. 30, 2013) (recognizing that the lack of federal legislation on international returns and the clear reservation of family matters to state courts in the Mexican constitution leads impediments to return of abducted children); HEARINGS, *supra* note 50, at 1 (TESTIMONY OF DAVID GOLDMAN) (testifying child abduction within Brazil is illegal but abduction to Brazil by a Brazilian parent is not); *Supreme Court: "Public Streets and Day Care Prohibited" in the Retrieval of Children After Divorce* (離婚後の子の引き渡し「保育園や公道ダメ」最高裁), Nihon Keizai Shinbun (Aug. 7, 2013), available at [http://www.nikkei.com/article/DGXNASDG0103C\\_W3A800C1CC1000](http://www.nikkei.com/article/DGXNASDG0103C_W3A800C1CC1000) (exposing newly promulgated judicial regulations that prevent law enforcement from retrieving abducted children from a school, public places, or the child's home without permission from the taking parent, making the law practically unenforceable).

168. See *Hearings on International Child Abduction*, *supra* note 38 (statement of Patricia Apy) (lamenting difficulty fearful parents face when the State Department inadequately describes the risk of abduction of countries in their analysis).

169. 2013 COMPLIANCE REPORT, *supra* note 9, at 5.

170. *Hearings*, *supra* note 50, at 1 (statement of Rep. Christopher Smith) ("Susceptible to abuse by taking parents or unwilling judges, the Convention has too often been stretched to provide cover for the abduction, rather than recovery of the child.").

171. HAGUE CONFERENCE ON INTERNATIONAL PUBLIC LAW, INTERNATIONAL CHILD ABDUCTION DATABASE, <http://www.incadat.com/>.

172. See 2013 COMPLIANCE REPORT, *supra* note 9, at 3–6 (describing ways countries fail to properly implement the Hague).

mine risk by looking at foreign domestic laws and their judicial systems.<sup>173</sup>

For example, in the wake of Japan's expected accession to the Hague in 2014, the confluence of cultural, judicial, executive and legislative processes perpetuating abduction culture in Japan provide a panoply of examples of how clever governments can manipulate the system and placate an ill-equipped State Department with empty promises and an artificial compliance structure.<sup>174</sup> Therefore, while Japan has begun the process of accession to the Hague, courts must go further in their analysis and consider how Japan's laws, and other foreign laws, define and apply Hague exceptions, specifically, the acclimation and grave risk exception.<sup>175</sup> Attorneys need to address the enforcement mechanisms and the cost of enforcement.<sup>176</sup>

Courts should also consider the cultural context in which these laws are applied to determine the reasonable likelihood that they can and will be applied justly.<sup>177</sup> Advocates can develop evidence of judicial practice

173. *Hearings on International Child Abduction*, *supra* note 38 (statement of Patricia Apy) ("Without [accurate Hague] information, it is very difficult for a judge to be a country expert on every single country. . . . [W]e are going to have to tell our judges, [t]hat despite the fact that we have entered into the treaty, they cannot rely upon that reciprocal relationship until the following things have been dealt with.").

174. *See, e.g.*, Takaaki Nishiyama et al., *Hague Convention Still Doesn't Offer Clear-Cut Answers*, ASAHI SHINBUN (May 23, 2013), [http://ajw.asahi.com/article/behind\\_news/politics/AJ201305230075](http://ajw.asahi.com/article/behind_news/politics/AJ201305230075) (reporting senior Japanese official's acknowledgement that other countries might find the gaping loopholes in the law to be objectionable when children are not returned). *But see Hearings*, *supra* note 50, at 6 (statement of Amb. Susan S. Jacobs, Dept. of State Special Advisor for Children's Issues) (admitting Japan definitively refuses to resolve abduction through current methods, such as memorandums of understanding or extradition, but pushing to *prevent* congress from enacting a bill that gives her office more tools to pressure noncompliant countries to return abducted children despite clear indications that the Hague will be ineffective).

175. *See* UNIF. CHILD ABDUCTION PREVENTION ACT § 7(a)(8), 9 Pt. IA U.L.A. 43 (Supp. 2012) (directing courts to look at the legal mechanisms for immediate enforcement by the PATC).

176. *See Hearings*, *supra* note 50, at 46 (statement of Patricia Apy) ("Left-behind parents seeking the return of their children or the ability to simply visit children endure endless legal battles, conducted in languages they do not speak and suffer emotional and financial ruin."). *See, e.g.*, TANASE, *supra* note 131, at 32–33 (describing two extremely weak and largely unsuccessful forms of enforcement in Japan). *See also, In re A.R.*, 236 S.W.3d 460, 469–472 (Tex. App.—Dallas 2007, no pet.) (conditioning supervised visitation on the placement of bond based on the expected cost of litigation were the parent to abduct the child).

177. *See, e.g.*, Danielle M. Andrews, *Non-Muslim Mothers v. Egyptian Muslim Fathers: The Conflict Between Religion and Law in International Child Custody Disputes and Abductions*, 23 SUFFOLK TRANSNAT'L L. REV. 595, 609 (2000) (elaborating on how, under Shari'a law, Egypt and Libya cannot return children to a non-Muslim mother without violating basic tenant of their society if they believe she may not raise the children Muslim);

through expert testimony, or in an era of legislative transparency, in some cases they can go straight to the foreign regulations or foreign equivalent of C-SPAN to hear how legislators intend their implementing legislation to work.<sup>178</sup>

i. Procedural Roadblocks

For abducted children, justice delayed is justice denied. Yet foreign governments can implement draconian requirements extending the judicial process far past the six-week requirement.<sup>179</sup> One such technique is providing multiple appeals.<sup>180</sup> In Mexico, for example, abducting parents can use a special procedure, claiming a violation of rights under the Mexican constitution, to prolong Hague proceedings indefinitely.<sup>181</sup> Another method is to require lengthy and costly mediation with little chance of return.<sup>182</sup>

While the Conference encourages mediation, it provides standards to ensure fairness for the left-behind parent and the child.<sup>183</sup> The mediation

TANASE, *supra* note 131, at 4, 6 (describing a family law system in Japan in which the mother almost always receives sole custody and can deny all visitation to the father); U.S. DEP'T OF STATE, OFF. CHILD. ISSUES, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 5 (2011), *available at* <http://www.travel.state.gov/pdf/2011HagueComplianceReport.pdf> [hereinafter 2011 COMPLIANCE REPORT] (reporting contrary to Hague procedures, courts in Mexico often re-adjudicate the custody issues, rather than merely determining habitual residence).

178. See, e.g., DEUSCHER BUNDESTAG, [http://www.bundestag.de/htdocs\\_e/index.html](http://www.bundestag.de/htdocs_e/index.html) (providing a searchable look into German parliamentary deliberations); HOUSE OF REPRESENTATIVES INTERNET TV, <http://www.shugiintv.go.jp/jp/index.php/> (opening a window into the Japanese deliberative process); CAMARA DOS DEPUTADOS, <http://www2.camara.leg.br/> (documenting legislative actions in Brazil).

179. See *Hearings*, *supra* note 50, at 1 (statement of Rep. Christopher Smith) (elucidating a practice of using judicial proceedings to elongate the process of return, allowing children to fall under the acclimation principle).

180. 2011 COMPLIANCE REPORT, *supra* note 177 (describing the “amparo,” a legal mechanism used to delay Hague proceedings).

181. *Id.*

182. See, e.g., JEREMY D. MORLEY, *Japan's Potential Ratification of the Hague Convention: An Update*, Int'l Family Law (Mar. 15, 2013, 9:38 PM), <http://www.internationalfamilylawfirm.com/2013/03/japans-potential-ratification-of-hague.html> (chronicling the disadvantages foreigners face during Japanese family court mediation, including requirements for multiple on-site appearance over a longer period of time, discrimination, and blackballing techniques applied to force acquiescence to unfair terms); Colin P. A. Jones, *Hague Convention on Child Abduction May Shape Family Law—Or Vice Versa*, JAPAN TIMES (June 11, 2013), <http://www.japantimes.co.jp/community/2013/06/11/issues/hague-convention-on-child-abduction-may-shape-japans-family-law-or-vice-versa> (speculating that court ordered mediation may force applicants to “voluntarily” concede to a mediation process that has no clear path back to the courthouse).

183. Hague Conference on Private International Law, *Guide to Good Practice: Mediation*, at 12 (2012), *available at* [http://www.hcch.net/upload/guide28mediation\\_en.pdf](http://www.hcch.net/upload/guide28mediation_en.pdf).



should be legally and practically designed to return the child quickly and amicably.<sup>184</sup> Otherwise courts should view it as no more than a sham, because once a child is in the country more than a year, foreign courts can deem the child “acclimated” and deny return.<sup>185</sup>

## ii. Manipulation of Hague Exceptions

Though the Hague calls for courts to take into consideration the opinion of children who have reached a certain degree of maturity, some foreign courts will take into consideration the opinion of even very young children in determining the best interest of the child, providing an incentive for parents to make strong attempts to alienate the children from the other parent.<sup>186</sup> The additional time merely gives additional opportunities to indoctrinate and coach young children to levy accusations.

The Grave Risk exception provides an easy out for foreign courts in refusing return of children when the abductor makes accusations of domestic violence.<sup>187</sup> This Note considers this subject more in depth below, but for evaluating a foreign judicial system, courts should evaluate the standard of evidence required to prove allegations and the services the PATC provides in combatting the problem.

The U.S. Supreme Court issued regulations defining the standard of evidence required to show grave risk, stating that a respondent must provide clear and convincing evidence of more than merely serious harm.<sup>188</sup> If a foreign court uses evidentiary standards that are significantly lower, then failure to secure the children’s safety in the U.S. deprives them of their due process rights.<sup>189</sup> Moreover, if the PATC is in violation of hu-

184. *Id.*

185. *Hearings, supra* note 50, at 1 (statement of Rep. Christopher Smith).

186. *Compare, e.g., Perez-Vera, supra* note 49, at 426, 433, ¶ 30 (acknowledging that direct questioning of young children about their opinions of their parents is inappropriate, but conceding that teenagers could possibly raise valid opposition), *with TANASE, supra* note 131, at 24–25 (elucidating a judicial practice of ignoring parental coercion of even very young child against their father to facilitate a preordained conclusion that the child’s best interests are served by an unfettered relationship with the mother).

187. *See Hearings on International Child Abduction, supra* note 38 (statement of Patricia Apy) (describing how abductors and foreign government official frequently abuse the grave risk provision by invoking baseless claims of domestic violence).

188. *See* Public Notice 957, Hague International Child Abduction Convention; Text and Legal Analysis, 59 Fed. Reg. 10494-1 (Mar. 26, 1986) (“Only evidence *directly establishing* the existence of a *grave risk* that would expose *the child* to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court’s determination.”) (emphasis added).

189. *Cf. Hearing of Japanese H.R. Comm. on Judicial Affairs*, No. 183 Sess. 10 (衆議院会議録情報法務委員会, 第183回国会第10号) (Apr. 25, 2013), *available at* [http://www.shugiin.go.jp/itdb\\_kaigiroku.nsf/html/kaigiroku/000118320130404014.htm?OpenDocument](http://www.shugiin.go.jp/itdb_kaigiroku.nsf/html/kaigiroku/000118320130404014.htm?OpenDocument) (statement of Takuya Miyama) (translated by author) (explaining the Japanese judi-

manitarian standards and does not have services to protect children from the abuse, the court should determine whether a child can receive better protection under local services.<sup>190</sup>

### iii. Likelihood of Enforcement

Furthermore, courts should examine a country's ability and willingness to enforce court orders.<sup>191</sup> Inability to enforce orders may stem from a decentralized enforcement mechanism, local obstinacy to central control of family matters, or codified provision that make enforcement impossible.<sup>192</sup> If enforcement mechanisms are inadequate, then pristine implementing legislation and a fair judiciary become irrelevant.

## C. Humanitarian Violations Analysis

Regardless of a country's Hague compliance status, courts should limit a child's travel to counties engaging in military actions, terrorist activities,

ciary's evidentiary standard to prove grave risk under Hague, "Even in domestic cases, it is not rare to have decisions that confirm domestic violence without conclusive evidence. . . . [T]here may be cases where there is [no record of violence against the mother]. . . . [I]n the end, I think it will become such a situation that the family court investigator will collect evidence by getting detailed statement from both parties, even ones that are difficult to get, *firmly turn those statements into evidence*, and spare no effort to make an appropriate decision." (emphasis added).

190. *Compare, e.g., id.* (dedicating a majority of discussion ensuring loopholes are strong enough to protect Japanese citizens from allegedly abusive foreigners and deny return of the children), with EMMA CHANLETT-AVERY ET AL., CONG. RESEARCH SERV., RL33436, JAPAN-U.S. FOREIGN RELATIONS: ISSUES FOR CONGRESS 13-14 (2013) ("Japanese officials say that, in many cases, the issue is complicated by accusations of abuse or neglect on the part of the foreign spouse, though a senior U.S. State Department official has said that there are 'almost no cases' of substantiated claims of violence."). By contrast, there is an epidemic of child abuse in Japan and few resources to combat it. See Kyung Lah, *Japan Sees Alarming Rise in Child Abuse*, CNN (Feb. 15, 2001, 5:04 AM), available at <http://www.cnn.com/2011/WORLD/asiapcf/02/14/japan.child.abuse/index.html> (describing an epidemic of child abuse cases in Japan and quoting a Japanese orphanage director as stating, "The world's image is that Japan is kind to its children. . . . But the image does not match reality."); *Japan Child Abuse at Record High, Police Data Shows*, BBC (Aug. 5, 2010, 6:32 AM), available at <http://www.bbc.co.uk/news/world-asia-pacific-10879109> (portraying a society fraught with child abuse and child pornography); Maki Okubo, *Study: Child Abuse Costs Japan 1.6 Trillion Yen*, ASAHI SHINBUN (Dec. 08, 2013) (finding resources dedicated to combatting child abuse is grossly inadequate relative to other western nations). In such situations, using U.S. resources to protect the child is preferable. See JOHNSTON & GIRDNER, *supra* note 15, at 4 (recommending long-term counseling and a guardian ad-litem, but not permitting abduction).

191. See HEARINGS, *supra* note 50, at 39-40 (statement of Patricia Apy) (discussing problems with foreign countries that facilitate abduction and actively obstruct return, while misleading the State Department).

192. *Hearings on International Child Abduction, supra* note 38 (statement of Patricia Apy).

or unfriendly relations with the United States.<sup>193</sup> Though the number of cases reported to the State Department involving abductions to countries following Islamic law (e.g., Indonesia,<sup>194</sup> Iran,<sup>195</sup> Jordan,<sup>196</sup> Lebanon,<sup>197</sup> Morocco,<sup>198</sup> Nigeria,<sup>199</sup> Pakistan,<sup>200</sup> Saudi Arabia,<sup>201</sup> and Syria<sup>202</sup>) are few, the number of custody cases involving abduction prevention reaching the appellate level are relatively numerous and often address humanitarian issues.<sup>203</sup> While these countries come under particular scrutiny in

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193. UNIF. CHILD ABDUCTION PREVENTION ACT § 7(a)(8)(E–F), 9 Pt. 1A U.L.A. 43 (Supp. 2012).

194. See U.S. DEP'T OF STATE, INTERNATIONAL PARENTAL CHILD ABDUCTION INDONESIA, [http://travel.state.gov/abduction/country/country\\_497.html](http://travel.state.gov/abduction/country/country_497.html) (last visited Sept. 29, 2012) (describing the legal system in general as having a mix of influences, but noting family courts are controlled by Islamic principles).

195. See U.S. DEP'T OF STATE, INTERNATIONAL PARENTAL CHILD ABDUCTION IRAN, [http://travel.state.gov/abduction/country/country\\_498.html](http://travel.state.gov/abduction/country/country_498.html) (last visited Sept. 29, 2012) (indicating Islamic courts govern Iran's legal system).

196. U.S. DEP'T OF STATE, INTERNATIONAL PARENTAL CHILD ABDUCTION JORDAN, [http://travel.state.gov/abduction/country/country\\_4797.html](http://travel.state.gov/abduction/country/country_4797.html) (last visited Sept. 29, 2012).

197. U.S. DEP'T OF STATE, INTERNATIONAL PARENTAL CHILD ABDUCTION LEBANON, [http://travel.state.gov/abduction/country/country\\_5693.html](http://travel.state.gov/abduction/country/country_5693.html) (last visited Sept. 29, 2012).

198. U.S. DEP'T OF STATE, INTERNATIONAL PARENTAL CHILD ABDUCTION MOROCCO, [http://travel.state.gov/abduction/country/country\\_509.html](http://travel.state.gov/abduction/country/country_509.html) (last visited Sept. 29, 2012).

199. U.S. DEP'T OF STATE, INTERNATIONAL PARENTAL CHILD ABDUCTION NIGERIA, [http://travel.state.gov/abduction/country/country\\_5077.html](http://travel.state.gov/abduction/country/country_5077.html) (last visited Sept. 29, 2012) (labeling the legal system as Shari'a law).

200. U.S. DEP'T OF STATE, INTERNATIONAL PARENTAL CHILD ABDUCTION PAKISTAN, [http://travel.state.gov/abduction/country/country\\_519.html](http://travel.state.gov/abduction/country/country_519.html) (last visited Sept. 29, 2012).

201. U.S. DEP'T OF STATE, INTERNATIONAL PARENTAL CHILD ABDUCTION SAUDI ARABIA, [http://travel.state.gov/abduction/country/country\\_517.html](http://travel.state.gov/abduction/country/country_517.html) (last visited Sept. 29, 2012).

202. See U.S. DEP'T OF STATE, INTERNATIONAL PARENTAL CHILD ABDUCTION SYRIA, [http://travel.state.gov/abduction/country/country\\_4820.html](http://travel.state.gov/abduction/country/country_4820.html) (last visited Sept. 29, 2012) (describing the legal system as a "blend of French, Ottoman, and Islamic jurisprudence" and subject to Shari'a courts).

203. See, e.g., *D.S. v. A.F.*, No. E038894, 2006 WL 3813601, at \*12–13 (Cal. Ct. App. Dec. 28, 2006) (nullifying travel restriction on a Lebanese immigrant because he only satisfied one flight risk factor, strong ties to a foreign country); *Al-Silham v. Al-Silham*, No. 94-A-0048, 1995 WL 803808, at \*5–6 (Ohio Ct. App. Nov. 24, 1995) (finding no error by trial court in restricting visitation for a Saudi Arabian father that threaten to abduct); *Al-Zouhayli v. Al-Zouhayli*, 486 N.W.2d 10, 13 (Minn. Ct. App. 1992) (agreeing with lower court that evidence of abduction was insufficient to require supervised visitation for as Syrian citizen).

U.S. custody disputes, they are by no means the only countries that should raise issues.<sup>204</sup>

Additionally, UCAPA directs court consideration of the degree to which a country would endanger the health or safety of a child because of the child's personal circumstances or a general pattern of human rights violation against children.<sup>205</sup> Courts are to evaluate discriminatory legal practices impeding free relation or free movement of one parent with the child based on "gender, nationality, marital status, or religion."<sup>206</sup>

"Courts should be particularly sensitive to the importance of preventive measures where there is an identified risk of a child being removed to countries that are guilty of human rights violations, including arranged marriages of children, child labor, lack of child abuse laws, female genital mutilation, sexual exploitation, any form of child slavery, torture, and the deprivation of liberty. These countries pose potentially serious obstacles to return of a child and pose the possibility of harm."<sup>207</sup>

The United Nations provides a variety of reports on disposition of member nations towards humanitarian issues.<sup>208</sup> Independent nongovernmental organizations also contribute to the research.<sup>209</sup> Furthermore, there is a wealth of independent legal analysis on humanitarian issues that can fill any gaps.<sup>210</sup>

204. *See, e.g.*, Summary Prepared by the Office of the High Commissioner for Human Rights, In Accordance with Paragraph 15(C) of the Annex to Human Rights Council Resolution 5/1: Japan, Human Rights Council, 2nd Sess., May 5–16, 2008, at 2, U.N. Doc. A/HRC/WG.6/2/JPN/3 (Apr. 3, 2008) ("[Japanese Courts] are disinclined to apply international human rights treaties as judicial norms, and in the interpretation of treaties, courts tend to ignore the general comments and views of treaty bodies.").

205. UNIF. CHILD ABDUCTION PREVENTION ACT § 7(a)(8)(C), 9 Pt. IA U.L.A. 43 (Supp. 2012).

206. *Id.* § 7(a)(8)(D).

207. *Id.* § 7 cmt.

208. *See generally* United Nations: Human Rights, <http://www.un.org/en/rights/index.shtml> (providing an array of analytical reports on international human rights).

209. *See, e.g.*, WORLD ORG. AGAINST TORTURE, <http://www.omct.org> (providing an interactive map that links to articles on state-sponsored torture); UNICEF: CHILDINFO, <http://www.childinfo.org> (compiling data on the wellbeing of children); AMNESTY INTERNATIONAL, <http://www.amnestyusa.org> (researching global human rights abuses).

210. *See, e.g.*, Edna Boyle-Lewicki, *Need World's Collide: The Hudad Crimes of Islamic Law and International Human Rights*, 13 N.Y. INT'L L. REV. 43 (2000) (evaluating human rights in the family law context in Islamic Countries); Jeff Vize, *Torture, Forced Confessions, and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System*, 20 UCLA PAC. BASIN L.J. 329 (2003) (reporting on the practice of torture in Japanese prisons); Mary Catherine Hendrix, *Enforcing the U.S. Trafficking Victims Protection Act in Emerging Markets: The Challenge of Affecting Change in India and China*, 43 CORNELL INT'L L.J. 173 (2010) (analyzing human trafficking practices in Asia).

Once a court determines there is a flight risk and the PATC falls into one of the risk categories, it must choose from a range of provisions in preventing the abduction.<sup>211</sup> Clearly, UCAPA does not indicate that the most stringent protections are required when one parent has ties to a problematic foreign country as the *only* risk factor, but it does emphasize preventing children from reaching a Hague noncompliant country or one dangerous to the child.<sup>212</sup> Inclusion in multiple categories should exponentially increase court consideration of causation.<sup>213</sup>

## VI. PREVENTION MEASURES IN THE UNITED STATES

### A. *Uniform Child Abduction Prevention Act (UCAPA)*

Considering the difficulty of securing the return of abducted children and extradition of their abductors from non-Hague or noncompliant countries, laws such as the International Child Abduction Remedies Act (ICARA) and the International Parental Kidnaping Crime Act (IPKA) are ineffective deterrents, and jurisdictional acts have little effect on the international stage.<sup>214</sup> The National Conference of Commissioners on Uniform State Laws (NCCUSL), recognizing the damage parental child abduction has on children and noting that abduction can occur before, during, and after a custody dispute is legally initiated,<sup>215</sup> designed the Uniform Child Abduction Prevention Act (UCAPA) to assist in evaluating flight risks,<sup>216</sup> identifying barriers to recovery,<sup>217</sup> devising adequate remedies,<sup>218</sup> and drafting court orders maximizing enforceability.<sup>219</sup>

State legislatures enacted UCAPA in twelve states and the District of Columbia,<sup>220</sup> and are currently considering implementation in three more

211. See UNIF. CHILD ABDUCTION PREVENTION ACT § 8 cmt., 9 Pt. IA U.L.A. 43 (Supp. 2012) (suggesting the least restrictive measure of prevention, generally, but recommending the most restrictive methods when there is a high risk of harm from the destination country).

212. See *id.* § 7 cmt. (instructing one risk factor does not necessarily indicate a likely abduction, but directing courts to take care in potential international abduction cases and refer to State Department compliance reports and human rights records).

213. *Id.* § 7 (a)(8).

214. See *id.* at Prefatory Note (acknowledging the limited scope of precedent law and treaties in the prevention of child abduction).

215. See *id.* (“Preventing an abduction is in a child’s best interests.”).

216. See *id.* § 7 (enumerating risk factors for abduction).

217. See UNIF. CHILD ABDUCTION PREVENTION ACT § 7 cmt., 9 Pt. IA U.L.A. 43 (Supp. 2012) (describing the increased barriers to recovery in international abductions).

218. See *id.* § 8 (detailing examples of recommended remedies).

219. See *id.* § 8 cmt. (“Joint custody arrangements create special enforcement problems.”).

220. ALA. CODE §§ 30-3C-1 to -13 (West 2010); COLO. REV. STAT. ANN. §§ 14-13.5-101 to -112 (West 2007); D.C. CODE §§ 16-4604.01 to -4604.10 (2009); FLA. STAT. ANN.

states.<sup>221</sup> Several other states chose to address abduction prevention with similar but separate legislation.<sup>222</sup> In fact, NCCUSL based UCAPA on existing Texas laws addressing curtailment of international abduction and expanded the concepts to interstate abductions.<sup>223</sup> Texas courts subsequently expanded application of its abduction law to potential interstate abduction.<sup>224</sup> Using the ubiquitous “best interest” standard, principles of preventative protections in UCAPA could apply in virtually every state, even without additional legislative action.<sup>225</sup> Because there are very few

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§ 61.45 (West 2010); KAN. STAT. ANN. §§ 23-3801 to -3812 (West 2007); LA. REV. STAT. ANN. §§ 13:1851–1862 (West 2007); MISS. CODE. ANN. §§ 93-29-1 to -23 (West 2009); NEB. REV. STAT. §§ 43-3901 to -3912 (West 2007); NEV. REV. STAT. ANN. §§ 125d.010–230 (West 2007); S.D. CODIFIED LAWS §§ 26-18-1 to -12 (West 2007); TENN. CODE ANN. §§ 36-6-601 to -612 (West 2010); UTAH CODE ANN. § 78B-16-101 to -112 (West 2008).

221. S.B. 1449, 2012 Gen. Assemb., Reg. Sess. (Pa. 2012), *available at* [www.legis.state.pa.us/cfdocs/legis/home/bills](http://www.legis.state.pa.us/cfdocs/legis/home/bills) (approved by the Senate unanimously and referred to the House Judiciary Committee, Oct. 2, 2012); H.B. 684, 2011 Gen. Assemb., Reg. Sess. (NC 2012), *available at* [www.ncga.state.nc.us](http://www.ncga.state.nc.us) (referred to Committee on the Judiciary, Apr. 7, 2011); S.B. 743, 96th Leg., Reg. Sess. (Mich. 2012), *available at* [www.legislature.mi.gov](http://www.legislature.mi.gov) (passed by the Senate unanimously and referred to the House Committee on Family, Children, and Seniors on Sept. 11, 2012).

222. *See* ARK. CODE ANN. §§ 9-13-401 to -407 (West 2005) (enacting its version of the *International Child Abduction Prevention Act*); 2012 Cal. Leg. Serv. Ch. 276 (S.B. 1206) (West) (codified as amended at CAL. FAM. CODE § 2040 and § 3134.5) (includes *Keisuke's Law*, which are additional measures to existing prevention measures, including: passport controls and a provision to freeze the assets of abductors); OR. REV. STAT. ANN. § 109.035 (West 2007) (articulating risk factors for international child abduction and authorizing court orders in certain situations).

223. *Compare* TEX. FAM. CODE ANN. §§ 153.502–153.503 (West Supp. 2006) (delineating abduction risk factors and prevention measures), *with* UNIF. CHILD ABDUCTION PREVENTION ACT §§ 7–8, 9 Pt. IA U.L.A. 43 (Supp. 2012) (using virtually identical criteria for determining flight risk and applying similar prevention measures as it relates to international abduction). *See also* Hoff, *supra* note 108, at 3 n.8 (crediting Texas's law, and other similar state law, as the inspiration for UCAPA).

224. *See In re A.R.*, 236 S.W.3d 460, 470–73 (Tex. App.—Dallas 2007, no pet.) (using Texas's international abduction prevention law, Texas Family Code Section 153.502, in determining risk factors for abduction within the United States and finding that supervised visitation was in the best interest of the child); *In re M.M.M.*, 307 S.W.3d 846, 854 (Tex. App.—Fort Worth 2010, no pet.) (relying on *In re Sigmar*, 270 S.W.3d 289 (Tex. App.—Waco 2008, no pet.), a case that used § 153.502 to prevent international abduction, to support supervised visitation to prevent potential interstate abduction).

225. *Cf. Katare v. Katare*, 283 P.3d 546, 552–55 (Wash. 2012) (exemplifying the employment of risk factors common for domestic and international abduction). This court pointed to the existence of risk for abduction, including, past threats to take a child (similar to UCAPA § 7a(2)), abusive behavior (similar to UCAPA § 7a(4)), and strong ties to a non-Hague county (similar to UCAPA § 7a(8)(A)), warranted surrender of passports (similar to UCAPA § 8a(4)(B)) and restricted visitation (similar to UCAPA § 8 a(1)) under the “best interest” clause in a section of Washington's family code (WASH. REV. CODE ANN. § 26.09.191(3)(g) (West 2011)). *Id.*

appellate cases in which petitioners disputed the application of UCAPA laws,<sup>226</sup> this Note will also consider the application of UCAPA principles in a few cases involving potential parental child abduction.<sup>227</sup>

### B. *Suggested UCAPA Measures*

UCAPA prescribes preventative measures and advises courts and legislatures to use the “least restrictive” measure in deterring abduction.<sup>228</sup> Alternatively, it suggests “most restrictive” measures be used when threat of harm to the child is high, obstacles to recovery are high, or when Respondent has previously threatened abduction.<sup>229</sup> Suggested prevention measures include supervised visitation, travel restrictions, reduced authority to contact the child, passport controls, requiring that orders be reported to U.S. and foreign governmental institutions, registering the order in other states, requiring that parties establish mirror custody orders in the potential-abducted-to-country, or requiring a bond be posted prior to visitation.<sup>230</sup> If the court finds imminent threat of abduction, the law advises court issuance of an ex parte warrant taking immediate custody of the child.<sup>231</sup>

### C. *Additional Measures*

U.S. courts are not limited to remedies suggested in UCAPA.<sup>232</sup> To the extent allowed under state law, courts may creatively craft their own prevention measures.<sup>233</sup> Specifically, courts may consider the following techniques: using GPS technology during visitation; separating visitation

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226. *See Lee v. Lee*, 49 So. 3d 211, 214 (Ala. Civ. App. 2010) (upholding supervised visitation using Alabama UCAPA based on repeated threats of abduction and a strong connection to a non-Hague country, Morocco). *But see In re Marriage of Zappa*, No. 100242, 2008 WL 5401490, at \*1 (Kan. Ct. App. Dec. 19, 2008) (unpublished table opinion) (affirming a district court decision to waive travel restriction based on the scantiness of evidence of flight risk in the record and a limited standard of review); *Mohsen v. Mohsen*, 5 So. 3d 218, 224 (La. Ct. App. 2008) (vacating a decision to confiscate children’s passports solely on the non-Hague status of the PATC and remanding for further inquiry, but upholding interstate travel restrictions with the children).

227. *See infra* Part VII.

228. *See UNIF. CHILD ABDUCTION PREVENTION ACT* § 8 cmt., 9 Pt. IA U.L.A. 43 (Supp. 2012) (articulating proper application of the law in ideal situations, but leaving it up to the court to decide what least restrictive means).

229. *See id.* § 8 cmt. (extending caveats in less than ideal situations to apply “most restrictive” measure, but offering no middle ground).

230. *Id.* § 8.

231. *Id.* § 9.

232. *See id.* § 8 cmt. (noting the Act is meant to complement and supplement existing remedies at law).

233. *See id.* § 8(f) (asserting the Act’s remedies do not bar other available remedies).

schedules for each child when multiple children are involved; truncating visitation times to less than the time reasonably needed to enact an abduction; or requiring respondent to obtain a written assurance from the foreign government that it recognizes the court order and will not in any way be a party to the transportation in violation of the order.<sup>234</sup> Because “[m]any law enforcement officers are unclear about their role in responding to parental kidnapping cases . . . [a] provision in the custody order directing law enforcement officers to ‘accompany and assist’ a parent to recover an abducted child may be useful.”<sup>235</sup>

## VII. JUDICIAL INTERPRETATION OF PREVENTION LEGISLATION

“[T]he trial court need not wait for actual harm to accrue before imposing restrictions on visitation.”<sup>236</sup> The court must only find an existing danger of harm.<sup>237</sup> This Note considers the application of UCAPA principles in three state appellate cases from three different UCAPA states, ten cases out of Texas, eight cases out of California, and six cases from other states that do not have UCAPA or specific international child abduction prevention laws.<sup>238</sup> By examining these cases, the need for courts to take preliminary, preemptive measures is evident.

Courts are split over the number of risks factors required for imposition of travel restrictions and degree to which the nature of the potential-abducted-to-country affects the severity of the restriction.<sup>239</sup> Although some courts strictly interpret UCAPA, applying both the prescribed “least restrictive” and “most restrictive” language (the “Texas” approach), others apparently consider the “least restrictive” clause controlling and formulate decisions without deference to the catastrophic effects of abduction to an inhospitable potential-abducted-to-country (the “California approach”).<sup>240</sup> This Note proposes that all states adopt the Texas

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234. See UNIF. CHILD ABDUCTION PREVENTION ACT § 8 cmt., 9 Pt. IA U.L.A. 43 (Supp. 2012) (declaring a “court may do whatever is necessary to prevent an abduction”).

235. *Id.* § 8 cmt.

236. *Katare v. Katare*, 283 P.3d 546, 552 (Wash. 2012).

237. *Id.*

238. See *infra* Part VII; *Stancuna v. Stancuna*, 41 A.3d 1156, 1162 (Conn. App. Ct. 2012) (agreeing with the lower court that it would be in the best interest to allow the childrens’ foreign parent to travel to Russia in spite of Russia’s Hague status);

239. Compare, e.g., *In re Sigmar*, 270 S.W.3d 289, 299 (Tex. App.—Waco 2008, no pet.) (demanding only one specific action relating to abduction prior to evaluating the PATC), with *In re Marriage of Zappa*, No. 100242, 2008 WL 5401490, at \*1 (Kan. Ct. App. Dec. 19, 2008) (unpublished table opinion) (regarding one act of preparation insufficient and evaluating the danger of the abducted-to country to the child outside of the abduction framework).

240. Compare, e.g., *Sigmar*, 270 S.W.3d at 307 (echoing language in UCAPA that prescribes supervision, the most restrictive remedy, until threat of abduction subsides),



approach in order to protect the affected children and left-behind parents.

### A. *Texas Approach*

Texas appellate court rulings provide the strongest support to U.S. citizens and their children by explicitly applying the principles of UCAPA.<sup>241</sup> Texas courts find attempting to abduct or move children without notice to the other parent,<sup>242</sup> denying access in violation of another's rights,<sup>243</sup> living with economic instability,<sup>244</sup> selling property and liquidating assets,<sup>245</sup> violating court orders,<sup>246</sup> committing habitual domestic violence,<sup>247</sup> making a false allegation of abuse,<sup>248</sup> having ties to noncompliant or non-

*with Di Napoli v. Di Napoli*, No. 2d Civil No. B235354, 2012 WL 2878646, at \*5 (Cal. Ct. App. July 16, 2012) (avoiding analysis of the relocation of a parent with a child to a non-Hague using the California abduction law and opting to give weight to a California common law analysis of relocation).

241. *See, e.g., Sigmar*, 270 S.W.3d at 289 (assessing applicability of prevention measures in lieu of ample precedent).

242. *See Arredondo v. Betancourt*, 383 S.W.3d 730, 733, 740 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (finding a mother in violation of father's rights when she informed him of the move two days after moving to Mexico); *Chen v. Hernandez*, No. 03-11-00222-CV, 2012 WL 3793294, at \*12 (Tex. App.—Austin Aug. 28, 2012, pet. denied) (mem. op.) (deeming an intrastate move without notice an indication of propensity to abduct); *Kogel v. Robertson*, No. 03-04-00246-CV, 2005 WL 3234627, at \*7–8 (Tex. App.—Austin Dec. 2, 2005, no pet.) (mem. op.) (applying strict prevention measures to a Belgian parent who took her child to Belgium without the other parent's consent).

243. *See Arredondo*, 383 S.W.3d at 739–40 (highlighting evidence of withholding visitation in violation of a custody order as important to a jury's determination of order modification).

244. *See id.* at 743–44 (correlating failure to take a job and collecting unemployment benefits with a lack of financial reason to stay in the United States); *Boyo v. Boyo*, 196 S.W.3d 409, 423 (Tex. App.—Beaumont 2006, no pet.) (tying part-time work in Nigeria to lacking financial reason to stay in the United States).

245. *See Osojic v. Osojic*, No. 03-08-00688-CV, 2009 WL 2902743, at \*6–7 (Tex. App.—Austin Aug. 27, 2009, no pet.) (mem. op.) (transferring and hiding funds and selling a home in the United States constituted a severance of ties to America); *In re Sigmar*, 270 S.W.3d 289, (Tex. App.—Waco 2008, no pet.) (selling an office building constituted abduction preparation).

246. *See Boyo*, 196 S.W.3d at 423 (determining failure to pay child support was a violation relevant to child abduction).

247. *See Karenev v. Kareneva*, No. 2-06-269-CV, 2008 WL 755285, at \*3 (Tex. App.—Fort Worth Mar. 20, 2008, no pet.) (mem. op.) (concluding conviction for sending harassing email to ex-wife and a history of hitting the children and pulling their hair constituted domestic violence under the Texas abduction law).

248. *See In re A.R.*, 236 S.W.3d 460, 472 (Tex. App.—Dallas 2007, no pet.) (“Mother's unsubstantiated beliefs, instability, and inability to consider the child's interest increase the likelihood she may abduct the child”); *Kogel v. Robertson*, No. 03-04-00246-CV, 2005 WL 3234627, at \*1 (Tex. App.—Austin Dec. 2, 2005, no pet.) (mem. op.) (ordering sole conservatorship for the accused, fines for the accuser, and counseling for both).

Hague countries,<sup>249</sup> lacking strong ties to the United States,<sup>250</sup> having an uncertain immigration status,<sup>251</sup> and requesting to take children to potentially dangerous countries<sup>252</sup> each constitute flight risks and therefore permit preemptive judicial action in preventing potential abductions.

Consistent with the Department of Justice profiles, Texas courts also consider a parent's difficulty co-parenting,<sup>253</sup> his or her tendencies to alienate their child from the other parent,<sup>254</sup> and a potential-abducted-to-country's passport procedures<sup>255</sup> as amplifiers to abduction risks. For instance, in *Elmakiss v. Elmakiss*,<sup>256</sup> the court suspended parental access by ex parte order and prohibited unsupervised visitation based upon an inference of potential international abduction, high parental conflict, inadequate employment history, and poor parenting skills.<sup>257</sup> Texas courts move quickly from personal risk factors to PATC risk factors when the potential-abducted-to-country is a non-Hague country.<sup>258</sup> For example, a

249. *Chen v. Hernandez*, No. 03-11-00222-CV, 2012 WL 3793294, at \*12 (Tex. App.—Austin Aug. 28, 2012, pet. denied) (mem. op.); *Boyo*, 196 S.W.3d at 423–24.

250. *See id.* at \*13–14 (comparing three aunts and friends in the United States with all immediate family in Taiwan, in conjunction with expressions of a desire to return home and an unstable visa status, to conclude that a mother's ties to America were relatively weak).

251. *See id.* at 13 (finding failure to procure permanent resident status or secure a stable visa status indicated lack of intent in remaining in the United States).

252. *See Arredondo v. Betancourt*, 383 S.W.3d 730, 743 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (noting the dangers taking children to countries with travel warning issued by the State Department); *Boyo v. Boyo*, 196 S.W.3d 409, 424 (Tex. App.—Beaumont 2006, no pet.) (enjoining travel with children to Nigeria based on evidence of routine threats on the father's life in the country was not unreasonable).

253. *See Elmakiss v. Elmakiss*, No. 12-06-00405-CV, 2008 WL 2358221, at \*8 (Tex. App.—Tyler June 11, 2008, no pet.) (mem. op.) (declaring that evidence of inability to share in decision-making is contrary to a presumption of joint managing conservatorship, lending credence to a lower-court ruling that supervised visitation was appropriate in an international abduction case).

254. *See Chen v. Hernandez*, No. 03-11-00222-CV, 2012 WL 3793294, at \*5, \*15 (Tex. App.—Austin Aug. 28, 2012, pet. denied) (mem. op.) (referring generally to guardian ad litem testimony regarding mother's desire to limit father's involvement in child's life); *Elmakiss v. Elmakiss*, No. 12-06-00405-CV, 2008 WL 2358221, at \*9 (Tex. App.—Tyler June 11, 2008, no pet.) (mem. op.) (holding that excessive criticism and overt hostility to another parent in front of their child supported a reduction in presumed parental rights).

255. *See Chen*, 2012 WL 3793294, at \*6, \*14 (mem. op.) (expressing concern about Taiwanese requirements for obtaining minors' passports).

256. *Elmakiss*, 2008 WL 2358221, at \*1.

257. *See id.* at \*12 (categorizing a vague retort to a claim that the parent's connection to Israel was an issue which suggested that his family ties to Israel were not at issue because it would be just as easy to abduct a child within America, as a threat to abduct and using it in combination with other marital factors to impose supervised visitation).

258. *See, e.g., Chen*, 2012 WL 3793294, at \*12 (emphasizing precedent that stated only one risk factor needs to be present to move to the country risk factors).

statement of a desire to return home to China with a child serves as evidence of a threat to abduct.<sup>259</sup> In *Elshafie v. Elshafie*,<sup>260</sup> the court found that unilaterally extending holiday visitation with a child an additional five days, when the accusing party was given notice and had previously acquiesced on other similar occasions, constitutes withholding a child in violation of another's right of possession.<sup>261</sup> Remarkably, having strong U.S. ties in the form of siblings and extended family living nearby, having a respectable professional career, and having U.S. citizenship were not significant in the face of strong ties to a non-Hague country, even when foreign ties are less substantial.<sup>262</sup> The *Elshafie* court concurred with the ruling in *In re Sigmar*,<sup>263</sup> deciding the lower court has broad discretion to determine the "least restrictive" method.<sup>264</sup> Generally, Texas appellate courts have upheld travel restriction implemented by the trial courts relating to the child and only overturned parental travel restrictions when the adult is traveling alone.<sup>265</sup>

After determining flight risk exists, Texas courts have ordered supervised visitation,<sup>266</sup> transferred custody or given the sole right to determine residence to one parent,<sup>267</sup> applied geographic restrictions,<sup>268</sup>

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259. *See id.* (considering a statement by a Taiwanese mother that she would like to return home someday with her child in combination with uncorroborated testimony by the father that the mother threaten to abduct on two occasion was sufficient evidence to indicate a threat to abduct).

260. *Elshafie v. Elshafie*, No. 13-10-00393-CV, 2011 WL 5843674 (Tex. App.—Corpus Christi Nov. 22, 2011, no pet.) (mem. op.).

261. *Id.* at \*6 (Tex. App.—Corpus Christi Nov. 22, 2011, no pet.) (mem. op.).

262. *See id.* at \*8 (deciding that speaking several foreign languages, frequently traveling internationally, and having cousins in a non-Hague country outweighed the employment status and family support in America).

263. *In re Sigmar*, 270 S.W.3d 289 (Tex. App.—Waco 2008, no pet.).

264. *Elshafie*, 2011 WL 5843674, at \*8.

265. *See Arredondo v. Betancourt*, 383 S.W.3d 730, 744 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (agreeing with travel restriction for the children, but finding that complete travel restriction of the abducting ex-wife without her ex-spouse's written consent was overly broad).

266. *See Osojic v. Osojic*, No. 03-08-00688-CV, 2009 WL 2902743, at \*1 (Tex. App.—Austin Aug. 27, 2009, no pet.) (mem. op.) (allowing only supervised visitation three weeks per year); *Sigmar*, 270 S.W.3d at 289 (upholding a temporary order for supervised visitation); *Elmakiss v. Elmakiss*, No. 12-06-00405-CV, 2008 WL 2358221, at \*1 (Tex. App.—Tyler June 11, 2008, no pet.) (mem. op.) (permitting only supervised visitation in the face of a small risk of abduction); *In re A.R.*, 236 S.W.3d 460, 466 (Tex. App.—Dallas 2007, no pet.) (conditioning supervised visitation on a \$50,000 bond).

267. *See Arredondo*, 383 S.W.3d at 733 (awarding father exclusive right to determine residency); *Chen v. Hernandez*, No. 03-11-00222-CV, 2012 WL 3793294, at \*6 (Tex. App.—Austin Aug. 28, 2012, pet. denied) (mem. op.) (writing the father has the exclusive right to designate primary residence); *Elshafie v. Elshafie*, No. 13-10-00393-CV, 2011 WL 5843674, at \*3 (Tex. App.—Corpus Christi Nov. 22, 2011, no pet.) (mem. op.) (limiting access to the

confiscated passports and implemented passport controls,<sup>269</sup> limited parental access,<sup>270</sup> required registration of abduction prevention orders with law enforcement agencies,<sup>271</sup> and have required a bond when exercising visitation.<sup>272</sup> In *Sigmar*, the court asserted that protecting a child from international abduction outweighs a parent's constitutional right to parentage.<sup>273</sup> The policy of protecting children from international abduction also overrides Texas public policy directing court assurance of frequent contact with a parent.<sup>274</sup>

The Texas approach of moving quickly past the issue of personal risk factors and focusing the evaluation on risks to the child and the left-behind parent in the potential-abducted-to-country squarely places the child's best interest front and center.<sup>275</sup> By first securing the child within its jurisdiction and then determining an equitable visitation scheme under the secured arrangement, Texas ensures that the child is not unilaterally and arbitrarily subjected to a judicial system or society holding antitheti-

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child); *Osojie*, 2009 WL 2902743, at \*1 (Tex. App.—Austin Aug. 27, 2009, no pet.) (mem. op.) (restricting possession and visitation).

268. See *Arredondo*, 383 S.W.3d at 733 (upholding very limited restrictions on the location of the primary residence); *Chen*, 2012 WL 3793294, at \*14 (prohibiting travel outside of Texas with her children); *Elshafie*, 2011 WL 5843674, at \*5 (limiting travel within the United States); *Boyo v. Boyo*, 196 S.W.3d 409, 423 (Tex. App.—Beaumont 2006, no pet.) (enjoining international travel with children).

269. See *Arredondo*, 383 S.W.3d at 741 (authorizing a court to implement passport and travel controls); *Chen*, 2012 WL 3793294, at \*14 (obligating parental surrender of child's passport and prohibiting a parent from applying for a passport or visa); *Boyo* 196 S.W.3d at 423 (restricting access to children's passports).

270. See *Elshafie*, 2011 WL 5843674, at \*5 (prohibiting father from taking children out of school).

271. See *Chen*, No. 03-11-00222-CV, 2012 WL 3793294, at \*14 (requiring a Taiwanese citizen register her order with law enforcement agencies).

272. See *Osojie*, 2009 WL 2902743, at \*6 (finding that a \$50,000 was a reasonable bond amount to dissuade abduction); *A.R.*, 236 S.W.3d at 470 (comparing the \$50,000 bond to the equal amount spent on legal fees and deciding that it was not unreasonable considering the likelihood that the other would violate the court order); *Kogel v. Robertson*, No. 03-04-00246-CV, 2005 WL 3234627, at \*7 (Tex. App.—Austin Dec. 2, 2005, no pet.) (mem. op.) (setting bond at \$100,000 to cover a portion of the cost of a second Hague proceeding should the violating parent abscond a second time).

273. *In re Sigmar*, 270 S.W.3d 289, 305 (Tex. App.—Waco 2008, no pet.).

274. *Id.* at 305–06.

275. See *id.* at 299–301 (opining provision in the Texas Family Code Section 153.502, the portion of the code dealing with specific personal actions that indicate an intent to abduct, requires only consideration of those factors prior to moving to the PATC factors and that evidence contrary to any one factor did not prohibit courts from considering the PATC factors).

cal values. It allows court authority in mediating conflict and stabilizing rifts within the family.<sup>276</sup>

### B. *California Approach*

Conversely, California courts offer much less support to parents concerned about international child abduction.<sup>277</sup> In one case, a California court allowed a Thai citizen to relocate a couple's son to Thailand, a non-Hague country, against the father's will.<sup>278</sup> The court cited three common law factors in determining if whether permitting international relocation is appropriate:<sup>279</sup> (1) enforceability of U.S. court orders in the foreign court; (2) cultural differences between the countries; and (3) distance to the foreign country from the United States.<sup>280</sup>

The court reasoned that an expensive, twenty-two-hour flight did not pose a significant impediment to maintaining a parental relationship.<sup>281</sup> The court noted the father's objection to aspects of Thai culture and recognized the cause of the divorce to be irreconcilable differences in parenting, but dismissed his concerns by pointing to a letter sent prior to the divorce promising that he would live in Thailand with his wife and child.<sup>282</sup> The court also acknowledged that Thai courts would not recognize U.S. court orders, but expressed the feeling that the mother would obey the order and offered a consolation of a \$10,000 bond and the possibility of terminating the father's child support obligation if she abducted the child.<sup>283</sup>

276. See, e.g., *In re A.R.*, 236 S.W.3d 460, 469 (Tex. App.—Dallas 2007, no pet.) (ordering counseling to mitigate the parental discord that created a flight risk concern).

277. See *Di Napoli v. Di Napoli*, No. 2d Civil No. B235354, 2012 WL 2878646, at \*1 (Cal. Ct. App. July 16, 2012) (permitting relocation to a country that does not recognize U.S. court orders, in spite of the other parent's opposition); *In re Marriage of Mukutmoni*, No. G042721, 2010 WL 3333394, at \*6, \*13 (Cal. Ct. App. Aug. 25, 2010), *aff'd*, *In re Marriage of Tapas & Mukutmoni*, No. G045409, 2012 WL 2053545 (Cal. Ct. App. June 7, 2012) (ignoring previous threats of abduction in a highly contentious divorce embroiled with alienation and granting travel to Russia); *D.S. v. A.F.*, No. E038894, 2006 WL 3813601, at \*12 (Cal. Ct. App. Dec. 28, 2006) (overruling a finding of flight risk because the trial court relied solely on the laws in the PATC and failed to address allegations of threats to abduct); *Slain v. Clark*, No. A107733, 2005 WL 639673, at \*1 (Cal. Ct. App. Mar. 21, 2005) (allowing a parent with an alleged history of abduction to travel internationally for four months).

278. *Di Napoli v. Di Napoli*, No. 2d Civil No. B235354, 2012 WL 2878646, at \*1 (Cal. Ct. App. July 16, 2012).

279. *Id.* at \*4.

280. *Id.*

281. See *id.* at \*2, \*7 (holding child relocation to Thailand for most of the year did not impede a parents relationship).

282. *Id.* at \*1, \*6.

283. *Id.* at \*5.

In *Casas-Cordero v. Mira*,<sup>284</sup> a California court denied relief to a parent requesting order of a bond under the abduction prevention law for his child who was previously abducted.<sup>285</sup> The father wished to secure a large inheritance bequeathed to the abductor and to lure the abductor back.<sup>286</sup> The court decided that the abduction prevention measures could not apply after abduction occurred.<sup>287</sup> In response to cases like these, the California legislature recently passed Keisuke's Law (name after a Keisuke Collins, a boy abducted from California to Japan), which authorizes freezing abductor assets following abductions.<sup>288</sup>

In *In re Marriage of Mukutmoni*,<sup>289</sup> the court decided a Russian parent who previously threatened to abduct the child was not a flight risk because the parent returned from past travels to Russia without incident.<sup>290</sup> The court did not factor in the high-conflict nature of the relationship between the parents, the tendency of the Russian citizen to alienate their child from the other parent, or the difficulty that a person would have initiating a custody battle in a noncompliant country.<sup>291</sup>

These three cases illustrate California courts are far less likely to intervene and make preemptive rulings than Texas courts. However, California courts are not completely insensitive to the worries of parents who suspect their ex-spouses intend to flee the United States with their children.<sup>292</sup> One court declared a parent a flight risk based on previous misdemeanor convictions for withholding their child and a history of false

284. *Casas-Cordero v. Mira*, No. B192839, 2007 WL 3348301 (Cal. Ct. App. Nov. 13, 2007).

285. *Id.* at \*9.

286. *Id.* at \*8.

287. *Id.*

288. 2012 Cal. Leg. Serv. Ch. 276 § 3 (S.B. 1206) (West) (codified as amended at CAL. FAM. CODE § 3134.5).

289. *In re Marriage of Mukutmoni*, No. G042721, 2010 WL 3333394 (Cal. Ct. App. Aug. 25, 2010), *aff'd*, *In re Marriage of Tapas & Mukutmoni*, No. G045409, 2012 WL 2053545 (Cal. Ct. App. June 7, 2012).

290. *See id.* at \*13 (concluding abduction threats were stale and that the parent was not likely to remain in Russia).

291. *See id.* at \*11 (focusing, instead, on procedural missteps by the lower court).

292. *See In re Marriage of Fathali & Dayani*, No. C057521, 2008 WL 4561650, at \*3 (Cal. Ct. App. Oct. 14, 2008) (assuming, without a court record, that a trial court made sufficient findings to implement passport controls and geographical restrictions on the daughter of an Iranian-American citizens); *G.A.S. v. Superior Court*, No. D051243, 2007 WL 2111052 (Cal. Ct. App. July 24, 2007) (rejecting a lower court order that a mother relinquish child's passport to an Iranian father without a full evidentiary hearing); *In re Marriage J.S. & J.B.*, No. E033814, 2004 WL 1246040, at \*6 (Cal. Ct. App. June 8, 2004) (using the California Family Code Section 3048, detailing elements of flight risk, to apply supervised visitation).

accusations, demonstrating California's inconsistent application of the UCAPA flight risk analysis.<sup>293</sup>

The California approach relies on hope and faith of one parent to exercise personal restraint and good judgment.<sup>294</sup> It discounts inherent conflict between parties to the suit and, in effect, gives one parent the option of unilaterally deciding whether its ruling is just and appropriate.<sup>295</sup> It erroneously assumes that the absence of abduction preparation factors (personal risk factors) sufficiently eliminates cause to implement safety measures that can definitively prevent abduction, a particularly grievous error when the results of the abduction are irreparable.

For example, contrary to the ruling in *Tapas*, visiting a potential-abducted-to-country with a child and returning without incident is not a counter-indication of a propensity to abduct or a nullification of the harm that would be afflicted if a parent abducted.<sup>296</sup> Judges must fight against the notion that children will be safe as long as they are with one parent and consider the rights of the child and the left-behind parent.<sup>297</sup>

### C. UCAPA States

While Texas and California have adopted their own version of UCAPA preventive legislation, other states have adopted UCAPA in its entirety. Decisions in these states are also split as to the appropriateness of abduction prevention measure, with two states following the California approach and one following the Texas approach. In stark contrast to application of Texas law, a Kansas court refused to address the potential-abducted-to-country's risk factors without more than one personal indicator.<sup>298</sup> The court compared the safety concerns of traveling to Indonesia

293. See *J.S. & J.B.*, 2004 WL 1246040, at \*6 (bolstering the case for supervised visitation for a mother with psychological issues by applying California abduction laws).

294. See, e.g., *Di Napoli v. Di Napoli*, No. 2d Civil No. B235354, 2012 WL 2878646, at \*5–6 (Cal. Ct. App. July 16, 2012) (allowing a parent, who lied to the court about a second marriage in the homeland, to relocate a child to a non-Hague country based on a belief that the parent would not violate visitations provisions, while simultaneously recognizing that the left-behind parent had no recourse in the foreign court).

295. *JOHNSTON & GIRDNER*, *supra* note 15, at 2, 5 (finding highly litigious parents more likely to abduct and warning about the serious potential of permanent deprivation of access following abduction to a non-Hague country).

296. *But see Daignault*, *supra* note 33 (noting one-third of abductors made preparatory visits to the destination country prior to the actual abduction).

297. See *CHIANCONE ET AL.*, *supra* note 10, at 5 (“[A] long period of separation from the left-behind parent is particularly damaging.”).

298. *Compare In re Marriage of Zappa*, No. 100242, 2008 WL 5401490, at \*1–2 (Kan. Ct. App. Dec. 19, 2008) (unpublished table opinion) (finding only one abduction risk factor and considering the dangers of travel to Indonesia as an issue separate from abduction), *with Chen v. Hernandez*, No. 03-11-00222-CV, 2012 WL 3793294, at \*12 (Tex. App.—Aus-

with the benefit of seeing the grandmother and the cultural enrichment under a general best interest standard, separate from the abduction analysis.<sup>299</sup>

In *Mohsen v. Mohsen*,<sup>300</sup> the court assumed the Louisiana legislature would have explicitly indicated if it intended a country's Hague status to be the sole basis for abduction prevention measures; so, the court referred the case back to the lower court for a full evidentiary hearing to determine if it could find additional elements to consider.<sup>301</sup> This interpretation is odd considering the Louisiana legislature adopted Section 7 of UCAPA as written and without distinguishing the potential-abducted-to-country element from any of the twelve other elements,<sup>302</sup> as was done in Texas and California.

UCAPA legislation is not entirely toothless. In *Lee v. Lee*,<sup>303</sup> an Alabama court ordered sole custody to a U.S. Navy seaman and granted supervised visitation with restriction on access to records for a Bahraini parent with strong ties to Morocco.<sup>304</sup> The court's decision was based on those foreign ties, an application for a personal passport by the Bahraini parent, and unsubstantiated testimony regarding threats to abduct.<sup>305</sup> Additionally, the court gave the seaman authority to designate a third-party custodian during deployments.<sup>306</sup> The court decided supervised visitation was an appropriate, least-restrictive measure to prevent abduction in this instance.<sup>307</sup>

#### D. Other States

Since 2002, courts in the remaining states have generally favored protecting children from abduction under a best-interest framework.<sup>308</sup> For

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tin Aug. 28, 2012, pet. denied) (mem. op.) (finding one personal risk factor and incorporating it with the PATC risk factor analysis).

299. *Zappa*, 2008 WL 5401490, at \*1–2 (unpublished table opinion).

300. *Mohsen v. Mohsen*, 5 So. 3d 218 (La. Ct. App. 2008).

301. *Id.* at 224 n.5.

302. Compare LA. REV. STAT. ANN. § 13:1857 (2007) (transcribing § 7 of UCAPA with no caveats), with UNIF. CHILD ABDUCTION PREVENTION ACT § 7 cmt. at 13–14, 9 Pt. IA U.L.A. 43 (Supp. 2012) (purposefully refraining from proscription of a minimum quantity of elements necessary and emphasizing the Hague status of the PATC).

303. *Lee v. Lee*, 49 So. 3d 211 (Ala. Civ. App. 2010).

304. *Id.* at 214–15.

305. *Id.*

306. *Id.* at 214.

307. See *id.* at 215 (rejecting the notion of supervised visitation's overbreadth in solving potential abduction problems).

308. See *Shady v. Shady*, 858 N.E.2d 128, 138–39, 141–42 (Ind. Ct. App. 2006) (heeding expert testimony and referring to abductor profiles to determine that abduction to Egypt is not in the best interest of the child and imposing supervised visitation); *Samman v.*



example, in *Olupo v. Olupo*,<sup>309</sup> a Minnesota appellate court analyzed a lower-court's discretion to choose a highly restrictive abduction prevention measure over the "least restrictive" measure that the guardian ad litem suggested.<sup>310</sup> It compared continuation of supervised visitation after four years to the recommended solution of placing the child on the State Department's registry and confiscating the foreign parent's passport, and then decided that the lower court could choose how to weigh the testimony of experts and that the remaining risk factors justified continued maximum protection measures.<sup>311</sup>

However, in one New Jersey case, a mother negotiated in the divorce decree a right for the father to travel to Lebanon with their daughter, but later realized the potential dangers of this decision.<sup>312</sup> The court permitted the "angry" father to take his daughter to Lebanon based on the mother's prior informed consent, finding no legislative basis to implement a de facto prohibition on travel to dangerous non-Hague countries in the Middle East.<sup>313</sup> This court allowed the mother to negotiate with the best interests of her child by permitting travel to a country with a history of human rights abuse against women and prevented her from equitably rectifying her mistake.<sup>314</sup> Before deciding this case, the court should have appointed an attorney or guardian ad litem to represent the daughter, a minor-child.<sup>315</sup>

Courts throughout all jurisdictions also addressed a common claim: limiting a person's visitation rights to their children or their right to travel based on ties to a foreign country violates their constitutional rights. As to parental travel, confiscating passports and prohibiting travel of parents without their children *does* violate the right to travel.<sup>316</sup> However, using

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Steber, No. 1577-04-4, 2005 WL 588313, at \*3-6 (Va. Ct. App. Mar. 15, 2005) (relying on testimony from a former U.S. delegate to the Hague Permanent Bureau who supervised visitation and \$75,000 bond was in the best interest of the child of a Syrian parent who made threats of abduction);

309. *Olupo v. Olupo*, No. C8-02-109, 2002 WL 1902892 (Minn. Ct. App. Aug. 20, 2002).

310. *Id.* at \*2.

311. *Id.* at \*3 (deeming the mother's continued filing of protective orders in violation of the court's decree and unstable immigration status as important factors).

312. *Abouzahr v. Matera-Abouzahr*, 824 A.2d 268, 272-73, 279 (N.J. Super. Ct. App. Div. 2003).

313. *See id.* at 272-73, 279 (deciding mother was sufficiently aware of problems with recovery from Islamic-law countries when she negotiated the agreement).

314. *See id.* at 270-71, 279.

315. *See JOHNSTON & GIRDNER, supra* note 15, at 4 (suggesting appointment of a guardian ad litem to argue for the child in high-conflict cases that present dangers to the child).

316. *See Kelly v. Faizi*, No. 1 CA-CV 08-0583, 2009 WL 3116160, at \*6 (Ariz. Ct. App. Sept. 29, 2009) (concluding confiscation of U.S. passports from a Pakistani dual-citizen

place of origin as a factor in evaluating abduction risk *does not* violate equal protection under the U.S. Constitution.<sup>317</sup> Limiting ability of a parent to take a child overseas through prevention measures does not hinge on the race or nationality of the potential abductor.<sup>318</sup> For example, a Texas court implemented prevention measures on a father of Austrian origin based on his strong ties to Mexico.<sup>319</sup>

### VIII. RECOMMENDATIONS FOR U.S. COURTS TO GUIDE THEIR ANALYSIS

A parent has a constitutional right to involvement with his or her child.<sup>320</sup> Ineffective federal, state, and international provisions currently fail to protect these rights when abduction is possible to non-Hague or non-compliant countries.<sup>321</sup> By explicitly or passively allowing parental travel with a child to a foreign country that does not adhere to Hague principles, a U.S. court deprives the child and the left-behind parent of their parental and familial rights.<sup>322</sup> Because appellate courts show an overwhelming deference to trial court discretion,<sup>323</sup> it is imperative that trial courts fashion a correct order from the outset. U.S. courts should

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parent was not a narrowly tailored remedy to prevent abduction of the children); *Arredondo v. Betancourt*, 383 S.W.3d 730, 744 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (freeing a parent to travel internationally, but maintaining travel restrictions on the children).

317. See *Al-Silham v. Al-Silham*, No. 93-A-1770, 1994 WL 102480, at \*5 (Ohio Ct. App. Mar. 25, 1994) (including nationality as one factor among many does not violate the Constitution).

318. See, e.g., *Katare v. Katare*, 283 P.3d 546, 556 (Wash. 2012) (declaring strong ties to a foreign country does not necessarily implicate race or ethnicity, and therefore, could not be considered racial profiling).

319. *In re Sigmar*, 270 S.W.3d 289, 301 (Tex. App.—Waco 2008, no pet.).

320. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . [P]arents retain a vital interest in preventing the *irretrievable* destruction of their family life.”) (emphasis added).

321. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 87, at 1 (reporting a steep increase in the number of unresolved international cases).

322. See Martha Bailey, *The Right of a Non-Custodial Parent to an Order for Return of a Child under the Hague Convention*, 13 CAN. J. FAM. L. 287, 301 (1996) (arguing any unilaterally enforced separation from a parent is deprivation of a child’s civil rights). *But see* U.S. DEP’T OF STATE, *Possible Solutions – Using a Foreign Country’s Civil Justice System*, TRAVEL.STATE.GOV, [http://www.travel.state.gov/abduction/solutions/solutions\\_3855.html](http://www.travel.state.gov/abduction/solutions/solutions_3855.html) (last visited Oct. 30, 2013) (acknowledging that U.S. laws do not apply to citizen within the boundaries of sovereign foreign nations).

323. See *In re M.M.M.*, 307 S.W.3d 846, 852 (Tex. App.—Fort Worth 2010, no pet.) (reciting precedence requiring only some credible evidence of character to justify a decision, even in the face of conflicting evidence).

“focus . . . on the best interest of the child, not the best interest of the parent.”<sup>324</sup>

When determining which measures apply to cases of potential abduction, the customs and laws of the potential-abducted-to-country should determine remedy and should carry more weight than degree of personal flight risk exhibited.<sup>325</sup> Once a court determines flight risk exists, the next step should be envisioning what a foreign custody arrangement would look like post-abduction. This analysis involves not only the practices of foreign courts and social customs of the potential-abducted-to-country, but also the ability of the left-behind parent to relocate, financially navigate the complexity of the society, and maintain a meaningful relationship with their child.<sup>326</sup> In other words, the restrictiveness of the visitation arrangement should be evaluated in relation to the likely foreign living arrangement.<sup>327</sup>

In order to complete this analysis, this Note suggests guidelines for addressing concerns about parental abduction by individuals with ties to non-signatory or noncompliant Hague countries by separating concerns into four categories: (1) no risk factors, but a general concern about abduction by one party; (2) only non-enumerated risk factors; (3) one or more enumerated risk factors; and (4) confirmed domestic violence by the potential left-behind parent. By creating this additional guidance, courts can more uniformly prevent child abductions by understanding the measures that need to be taken when risk factors are found. This requires courts to take a more specific, individualized look into the potential-abducted-to-country when determining the “least restrictive” measures rather than solely evaluating the personal risk factors of a child’s parents. This Note proposes inclusion in these four categories should necessarily define the “least restrictive” measures necessary to protect the interests of the parents and children involved.

In category one, even in the absence of personal risk factors, if a parent or guardian objects to removal of a child from the United States and requests prevention measures, a court should immediately secure existing travel documents, order entry into the Children’s Passport Issuance Alert

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324. *In re A.R.*, 236 S.W.3d 460, 480 (Tex. App.—Dallas 2007, no pet.).

325. See UNIF. CHILD ABDUCTION PREVENTION ACT § 8 cmt., 9 Pt. IA U.L.A. 43 (Supp. 2012) (describing certain remedies, such as supervised visitation and travel restrictions, as particularly important in international abduction cases).

326. See CHIANCONE ET AL., *supra* note 10, at 6–7 (listing an array of obstacles that influence the difficulty of recovery by a parent).

327. Compare, e.g., *A.R.*, 236 S.W.3d at 469 (leveling one of the most restrictive visitation arrangement by conditioning supervised visitation on a bond and counseling), with TANASE, *supra* note 131, at 4–6 (illuminating Japan’s culture of total alienation of one parent after divorce).

Program, impose geographical travel restriction on the children, require parental waiver of objection to extradition when there is an extradition treaty between the nations, authorize upon suspected abduction immediate law enforcement action, request entry into the Prevent Departure Program, and request cooperation from local law enforcement in facilitating the Prevent Departure Program.<sup>328</sup> Though parents may feel stigmatized by these measures, these actions epitomize the notion of “least restrictive” because they do not infringe on the rights of parents to travel individually or to parent.<sup>329</sup> These measures allow maximum visitation time within the boundaries of the United States. Most importantly, it creates a barrier against unexpected abductions.<sup>330</sup>

In category two, when only non-enumerated personal risk factors exist but a parent reasonably believes that an abduction to a noncompliant country is possible, the court should consider, in addition to the previous suggestions, creative visitation orders that would make it difficult to initiate abduction, order restricted visitation until enforceable reciprocal custody orders can be filed in the foreign country, require a bond in the amount of the expected recovery cost, order psychological evaluations of both parties by experts in the field of child abduction, and include language in the custody order that increases the likelihood that the U.S. order might hold persuasive value in a foreign court.<sup>331</sup> Because non-enumerated risk factors indicate high-conflict without specific abduction-related activities, courts must be cognizant that insufficient restrictions may spark abduction.<sup>332</sup> Since child abduction to noncompliant countries may be irreparable, courts should err on the side of greater restriction and be sure to secure the child until parents meet all prevention requirements.

Under category three, when one or more explicit risk factors exist, courts should also strongly consider taking immediate physical control of the child, implementing restraining orders that limit access, and limiting

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328. See OFF. OF JUV. JUSTICE & DELINQ. PREV., *supra* note 11, at 21–24 (providing a list of remedies that do not restrict parental access).

329. See *Arredondo v. Betancourt*, 383 S.W.3d 730, 744 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (preventing individual travel based on flight risk is too restrictive, but limiting travel with children does not interfere with parental rights).

330. See UNIF. CHILD ABDUCTION PREVENTION ACT § 7 cmt., 9 Pt. IA U.L.A. 43 (Supp. 2012) (noting absence of risk factors does not ensure that an abduction will not occur and that courts need to pay particular attention in international abduction cases).

331. See *id.* § 8 cmt. (allowing court use of a full range of options to conclusively prevent abduction and making suggestions for international abduction cases).

332. See A FAMILY RESOURCE GUIDE ON INTERNATIONAL PARENTAL KIDNAPPING, *supra* note 11, at 10 (warning restriction application may trigger an abduction).

visitation to supervised sessions.<sup>333</sup> If the U.S. court provides more access for the child to the foreign parent than an abducted child would receive with the left-behind parent in the foreign country, then the child ultimately benefits, even from restricted access to one parent.<sup>334</sup> Courts should maintain these measures until there is clear evidence that the risk of abduction has fully subsided.<sup>335</sup>

Finally, when accusations of *specific acts* of domestic violence by the potential left-behind parent are *conclusively substantiated*, courts should determine if the relationship between the left-behind parent and the child is repairable.<sup>336</sup> Likewise, if a parent's actions stem from therapeutically treatable behaviors, then the child will ultimately benefit from two functioning parents.<sup>337</sup> Courts should refuse abduction prevention measures to a noncompliant potential-abducted-to-country only when completely severing ties with one parent and relocating a child to the hazardous environment that is in the best interest of the child.<sup>338</sup>

When necessary, courts should assign third party, surrogate guardians who can prevent both abduction and abuse while the courts assess the parents. In the interim, courts should implement category-one or category-two restrictions if the parent and child are not in immediate physical danger.<sup>339</sup> This will provide time for emotions to equilibrate and allow

333. See UNIF. CHILD ABDUCTION PREVENTION ACT § 8 cmt., 9 Pt. IA U.L.A. 43 (Supp. 2012) (describing supervised visitation as the most common and effective prevention measure, and emphatically suggesting it when there is a risk of international abduction to a noncompliant country).

334. By allowing supervised visitation under guided counseling many of the causes of the negative effects of abduction can be mitigated. See CHIANCONE ET AL., *supra* note 10, at 5 (ascribing many of the negative effects of abduction to long-term separation from a parent and alienation).

335. UNIF. CHILD ABDUCTION PREVENTION ACT § 8 cmt., 9 Pt. IA U.L.A. 43 (Supp. 2012).

336. See *id.* § 8 cmt. (calling for comparison of the potential damage of domestic violence and the potential irreparable damage of international abduction); JOHNSTON & GIRDNER, *supra* note 15, at 4 (extolling the virtue of reforming parent-parent and parent-child relationships); Daignault, *supra* note 33 (detailing the powerful negative psychological effects of abduction on a child); Nancy Faulkner, *Parental Child Abduction is Child Abuse*, PANDORA'S BOX (June 9, 1999), <http://www.prevent-abuse-now.com/unreport.htm> (strongly asserting that kidnapping is child abuse, on par with domestic violence).

337. See JOHNSTON & GIRDNER, *supra* note 15, at 4 (recommending long-term counseling and a guardian ad-litem, but not permitting abduction).

338. *But see* Rigler & Wieder, *supra* note 74 (asserting abductions are often rationalized, but rarely justified).

339. See UNIF. CHILD ABDUCTION PREVENTION ACT § 7, 9 Pt. IA U.L.A. 43 (Supp. 2012) (instructing a child be placed with petitioner or third party until ample testimony is available in abuse cases and requiring that damage of abduction be weighed against harm of abuse).

courts to adequately assess the long-term consequences of their orders.<sup>340</sup> Conversely, when accusations of domestic violence are false or found to be highly exaggerated, courts should refer directly to category-three restrictions, as it could be a sign of an extremely dangerous abduction propensity.<sup>341</sup>

## IX. CONCLUSION

U.S. state courts must acknowledge that international legislation and federal programs are insufficient to protect the rights of children and potential left-behind parents. This is particularly true when the interpersonal relationship between parents is extremely hostile or the true nature of parenting capability is difficult to assess. Focusing on the potential-abducted-to-country as the primary risk factor allows continuing U.S. court jurisdiction and utilizes U.S. social services to address the animosity.<sup>342</sup> Labeling measures as “preventative” does not ensure implementation will effectively prevent abduction.<sup>343</sup> Similarly, preventative measures can be effective in some circumstance and completely ineffective in others.<sup>344</sup> Unless the potential-abducted-to-country has equal or greater social services available to maintain and mediate the parent-child-parent relationship and a concurrent tendency to mandate such measures, the best interest of the child is preliminarily served by applying prevention measures, even if the requesting parent is considerably less adept at parenting.<sup>345</sup>

Relinquishing legal control to judicial systems that do not respect or cannot protect the rights of U.S. citizens is wholly unjust to both the child and the left-behind parent. Unfortunately, foreign citizens must endure

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340. See JOHNSTON & GIRDNER, *supra* note 15, at 3 (calling for extensive psychological evaluations of the parties).

341. See *id.* at 4–5 (stressing that false allegations and alienation are extreme warning signs of a propensity to abduct).

342. See Browne, *supra* note 135, at 1233 (construing UCCJEA as giving strong preference to home-state jurisdiction); *In re Adan*, 437 F.3d 385, 395 (3d Cir. 2006) (reasoning in a Hague return case that relocation is only warranted if the court in the habitual residence will not protect the child).

343. See, e.g., Pulkkinen, *supra* note 20 (reporting abduction of an American child the day after a Washington appellate court up-help preventative measures of restricting travel and confiscating passports without securing the child first).

344. See, e.g., *Children’s Passport Issuance Alert Program*, *supra* note 80 (stating CPIAP is one of the most important mechanism to prevent international abduction, but noting that it is ineffective when foreign consulates choose to issue foreign passports to their citizen).

345. *Cf. Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996) (declaring unilateral relocation decisions can only be tolerated if the abducted-from country is unable to protect children and they are in imminent danger or abuse is *serious*).

the consequences of legal and cultural conditions abroad.<sup>346</sup> Though protecting U.S. children may create an unfavorable setting for non-citizens who maintain ties to their homeland, disparities are not created by U.S. laws or judicial actions, but by the conditions in their home state. Until the State Department and DHS can provide safeguards at our porous borders and apply diplomatic pressure with ample leverage to ensure return of abducted children, courts *must* take strong stances in protecting U.S. children from parental abduction.

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346. See, e.g., *Micklethwait v. Micklethwait*, No. 03-06-00500-CV, 2007 WL 1852609, at \*4–5 (Tex. App.—Austin June 27, 2007, pet. denied) (mem. op.) (stressing importance of the child's relationship with both parents).