THE TIGHTROPE OF ARTICLE 13(B): JUDICIAL INTERPRETATION OF THE HAGUE ABDUCTION CONVENTION'S "GRAVE RISK OF HARM" EXCEPTION IN THE UNITED STATES AND CANADA

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I. INTRODUCTION

Adriana,[1] her husband, and their five-year-old child lived as citizens of Brazil. Since the beginning of her marriage, Adriana's husband inflicted physical and psychological abuse upon her and threatened her life on several occasions. Her child almost completely escaped the father's abuse, though the child witnessed her mother being abused on several occasions. Adriana wished to flee Brazil to live with acquaintances in the United States or in Canada. Under current law from both nations, if she fled to Canada, Canadian courts would be more willing to allow her and her daughter to stay after this "abduction," even if her husband filed court proceedings against her to return their child. If she fled to the United States, courts may or may not allow her to stay even if she could prove that she experienced substantial domestic violence.

Adriana would be best advised to flee to Canada because she could more easily assert affirmative defenses to any legal action her husband might file to return her child to Brazil. However, though the Canadian approach clearly offers more safety to those in Adriana's situation, extending the existing array of exceptions to international child abduction laws can have malignant effects for parents with sinister intentions. Judicial interpretation of these laws is a balancing act; a comparison of strengths and weaknesses of each jurisdiction's approach to international child abduction would inform the decisions made in every proceeding. This topic has special relevance at the time of publication: shelter-at-home orders across the world in response to the COVID-19 pandemic have increased the danger of domestic violence for women,[2] making international flight from this violence more likely.

This Note compares how Canada and the United States evaluate the "grave risk of harm" and "intolerable situation" defenses within the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention"), a multilateral treaty binding on both the United States and Canada. The difference in legal outcome mentioned above arises from slightly different interpretations of the Hague Convention's Article 13(b), which applies when a parent, but not an abducted child, experiences domestic violence. In Canada, for the purposes of a Hague Convention return order, courts generally consider physical harm to a caretaker as identical to physical harm to a child. Even if no abuse to the child could be proven, if abuse to the caretaker were proven, an Article 13(b) defense would stand. Courts in the United States are divided in their interpretations: some separate physical harm to a parent and to a child and deny a return order when the child is not a direct target of abuse, while others follow Canada's approach and consider both harms as one and the same. This distinction is often the difference

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1. The present scenario is the author's hypothetical example, but it imitates several cases described below.

2. For a meta-analysis of thirty-eight articles on this topic, see Odette R. Sánchez et al., *Violence Against Women During the COVID-19 Pandemic: An Integrative Review*, 151 J. GYNECOLOGY OBSTETRICS 180 (2020).

between a child escaping a dangerous living situation and a child being returned to that situation.

This Note argues that the Canadian approach, which has been accepted by certain judicial Circuits of the United States, better fulfills State obligations under the Hague Convention. Implementing this perspective across the remainder of the United States promises benefits for those seeking shelter from domestic violence and utilizes current social science research on domestic violence and abduction. Part II of this Note discusses the origin, purpose, and applicability of the Hague Convention. Parts III and IV discuss the reasoning and judicial approaches of the United States and Canada to Article 13(b). Part V recommends that the United States adopt Canada's perspective on Article 13(b) claims, treating past violence toward a parent as violence toward a child in their calculus of "grave risk" and adding these guidelines within the United States' existing statute, 22 U.S.C. § 9001. These actions are relatively simple to implement, would allow the United States to better fulfill its obligations under the Hague Convention, would accord with current realities of child abuse and domestic violence, and would eliminate potential forum shopping across United States jurisdictions and between the United States and Canada.

II. HISTORY AND BACKGROUND

A. Purpose of the Hague Convention

The preamble of the Hague Convention, which sets out its purpose and guides its interpretation, states as follows:

> The States signatory to the present Convention, firmly convinced that the interests of children are of paramount importance in matters relating to their custody, desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access, have resolved to conclude a Convention to this effect, and have agreed upon the following provisions . . . .[3]

Prompt return of a child serves three main purposes: (1) it protects against harm which arises because of removal;[4] (2) it dissuades parents from "forum shopping," or fleeing to a country that may award them custody in the case of a custody dispute;[5] and (3) it permits faster adjudication of the merits of cases in

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3. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, 98.

4. *See* E. Gallagher, *A House Is Not (Necessarily) a Home: A Discussion of the Common Law Approach to Habitual Residence*, 47 N.Y.U. J. INT'L L. & POL. 463, 465 (2015).

5. *See* A. M. Greene, *Seen and Not Heard?: Children's Objections Under the Hague Convention on International Child Abduction*, 13 U. MIAMI INT'L & COMPAR. L. REV. 105, 111 (2005).

the forum where the events took place without time-consuming disputes about a proper judicial forum.[6]

Each contracting State of the Hague Convention "designate[s] a Central Authority to discharge the duties which are imposed by the Convention upon such authorities."[7] After a child is abducted to a contracting State, a "left-behind parent" may make an application to the "home" State with a description of the abducted child and the grounds for return. The Central Authority of the home State then transmits a request to the Central Authority of the State where the child is located. If the child is not voluntarily returned by the abductor, the State to which the abductor fled may commence legal proceedings against him or her, during which he or she may raise a defense under the Hague Convention. During these proceedings, common-law judges often refer to decisions in foreign courts faced with similar Hague Convention issues.[8] If necessary, further proceedings regarding child custody can continue in the State of habitual residence.

The United States implements the Hague Convention into its domestic law with federal statutes designating Central Authorities, procedures regarding Hague Convention complaints, burdens of proof, judicial remedies, and other structural elements.[9] Canada implements each of these mechanisms using provincial and territorial statutes rather than Canadian federal law.[10]

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6. *See* R. SCHUZ, THE HAGUE CHILD ABDUCTION CONVENTION: A CRITICAL ANALYSIS 96 (Hart Publishing 2013).

7. *Id.* at 99.

8. Justice Harry S. LaForme of the Ontario Court of Appeal, in Wentzell-Ellis v. Ellis, [2010] 262 O.A.C. 136 (Can. Ont. C.A.), set out the rationale for referring to foreign case law in Hague Convention cases ("Although foreign case law is not binding, the court should nevertheless take care to ensure consistency with the interpretations adopted by the courts of other states parties, particularly where a consensus has emerged from among them. To do otherwise would, in my view, not only weaken the Convention but also run contrary to the will of the legislature which has chosen to enact it into domestic law."). For this reason, I have referred in this judgment to the case law of other Convention signatories, and particularly to case law from the United States, which appears to have given considerable attention to the proper treatment of 13(b) claims.

9. *See* 22 U.S.C. §§ 9001-11. The Congress makes the following declarations:

(1) It is the purpose of this Act to establish procedures for the implementation of the Convention in the United States.
(2) The provisions of this Act are in addition to and not in lieu of the provisions of the Convention.
(3) In enacting this Act the Congress recognizes—
(A) the international character of the Convention; and
(B) the need for uniform international interpretation of the Convention.
(4) The Convention and this Act empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

22 U.S.C. § 9001(b).

10. *See, e.g.,* R.S.A. 2000, c. I-4 (Can. Alta.); S.B.C. 2011, c 25, (Can. B.C.); R.S.N.B. 2011, c. 175 (Can. N.B.R.); R.S.N. 1990, c. C-13, s. 54 (Can. Nfld.); R.S.N.W.T. 1988, c. I-5 (Can.

B. Does the Hague Convention Bind the United States and Canada?

The sources of binding international law accepted among States are listed in Articles 38(1)(a) through 38(1)(c) of the Statute of the International Court of Justice.[11] International customs of treaty interpretation and other norms of customary international law are described by the 1969 Vienna Convention on the Law of Treaties (the "Vienna Convention"). Though the Convention has not been ratified by several States, the United States included.[12] According to the norm within Article 11, States can express their intent to be bound by conventions by signing or ratifying them.[13] Since both the United States[14] and Canada[15] have

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N.W.T.); R.S.N.S. 1989, c 67 (Can. N.S.); R.S.O. 1990, c. C.12, s. 46 (Can. Ont.); R.S.P.E.I. 1988, c C-33 (Can. P.E.I.); C.Q.L.R. c A-23.01 (Can. Q.); ss-1996-c-i-10.11 (Can. Sask.); sy-2008-c-5 (Can. Y.). Note that Quebec, the only province of Canada which follows a Civil Law tradition, does not directly use the text of the Hague Convention in its provincial law. Instead, it implements the principles of the Convention with similar language. For a comparison between Quebec's and the rest of Canada's enforcement of the Hague Convention, see Martha Bailey, *Canada's Implementation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction*, 33 N.Y.U. J. INT'L L. & POL. 17, 18-19 (2000).

11. Statute of the International Court of Justice, art. 38(1)(a)-38(1)(c) ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations."); *see, e.g.*, GEORG SCHWARZENBERGER, INTERNATIONAL LAW 26 (1958) ("The significance of [the enumeration in Article 38(1)(a) through Article 38(1)(c)] lies in its exclusiveness. It rules out other potential law-creating processes such as natural law, moral postulates or the doctrine of international law.").

12. *See*, *e.g., Restatement (Fourth) of the Foreign Relations Law of the U.S.* § 306 cmt. a (AM. L. INST. 2018) (stating that the articles of the Vienna Convention on the Law of Treaties are generally accepted as reflecting customary international law). The United States is not a party to the Vienna Convention on the Law of Treaties. *See Vienna Convention on the Law of Treaties,* United Nations Treaty Collection, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en [https://perma.cc/J8HG-4AFA]. Canada, however, is a party to this Convention. *Id*.

13. Vienna Convention on the Law of Treaties, art. 11, May 23, 1969, 1155 U.N.T.S. 331.

14. *Status Table: 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Hague Conference on Private and International Law (July 19, 2019), https://www.hcch.net/en/instruments/conventions/status-table/?cid=24 [https://perma.cc/NDJ8-MXLK]. The United States ratified the Hague Convention on April 29, 1988, and the Convention entered into force in the United States on July 1, 1988. *Id.*

15. *Id.* Canada ratified the Hague Convention on June 2, 1983, and the Convention entered into force in Canada on December 1, 1983. *Id.* For a detailed account of Canada's implementation, including some slight differences in its implementation under Quebec's legal tradition, see Martha Bailey, *Canada's Implementation of the 1980 Hague Convention on the Civil Aspects of*

ratified the Hague Convention, it binds both States under customary international law. Both States have therefore assumed a duty to perform the Hague Convention's obligations in good faith[16] and to interpret it "in accordance with the ordinary meaning to be given to the terms of the [Convention] in their context and in the light of [its] object and purpose."[17] To discern the "context" of a convention, interpreters must look to the convention's text, including its preamble and any annexes and agreements made between the parties in relation to the convention.[18]

The United States incorporates all international law into its domestic law—at least in theory. Article VI of the United States Constitution declares that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ."[19] In *The Paquette Habana*, the United States Supreme Court wrote that "international law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[20] In practice, the United States considers treaties as matters of federal law but applies their provisions "to the extent authorized by the political branches."[21] The United States is still bound by customary international law, though its relationship with this source is often unclear and is the subject of continued debate.[22] It should be noted that the United States is a party to few

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International Child Abduction, 33 N.Y.U. J. INT'L L. & POL. 17 (2000).

16. Vienna Convention on the Law of Treaties, *supra* note 13, at art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

17. *Id.* at art. 31 ("(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. (3) There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. (4) A special meaning shall be given to a term if it is established that the parties so intended.").

18. *Id.*

19. U.S. CONST. art. VI.

20. The Paquete Habana, 175 U.S. 677, 700 (1900).

21. Gary Born, *Customary International Law in United States Courts*, 92 WASH. L.REV. 1641 (2017).

22. *Id.* at 1642 ("Citing constitutional text and judicial precedent, an extensive body of authority has concluded that rules of customary international law are presumptively rules of federal law, which apply directly in U.S. courts and preempt inconsistent state law even in the absence of federal legislative or executive authorization. Citing other constitutional provisions and judicial precedent, another body of authority has concluded that, in the absence of congressional legislation

human rights treaties;[23] its ratification of the Hague Convention may express significant attention toward the specific crime of international child abduction.

Canada's approach to treaties is similar to that of the United States: once ratified, treaties are incorporated into domestic law by legislation that gives them the force of domestic law. In the realm of customary international law, Canada follows the principle of "adoption," in which the courts "may adopt rules of customary international law as common law rules in order to base their decisions upon them, provided there is no valid legislation that clearly conflicts with the customary rule."[24] As the Supreme Court of Canada wrote,

> the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary.[25]

III. ARTICLE 13(B) AND DOMESTIC VIOLENCE

Signatories to the Hague Convention are "firmly convinced that the interests of children are of paramount importance in matters relating to their custody."[26] A return order under the Hague Convention runs counter to this purpose if it places children in extremely dangerous living situations, such as war zones, or in close proximity to people who would cause them grave harm. To address this, the Hague Convention's drafters included an affirmative defense to a return order in Article 13(b):

> Notwithstanding the provisions of [Article 12, explaining the Convention's statute of limitations], the judicial or administrative authority of the requested State is not bound to order the return of the child if . . .
>
> (b) there is a *grave risk* that his or her return would expose the child

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or a U.S. treaty, rules of customary international law will generally be matters of state law. A third body of commentary proposes other approaches, suggesting that customary international law be treated either as a form of general common law (subject to independent development in state and federal courts) or a sui generis category of 'non-preemptive federal law.'"); *see also* Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295 (1994).

23. For a list of multilateral treaties to which the United States is a party, see *28: Convention of 25 October 1980 on the Civil Aspects of International Child Abductions*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (July 19, 2019), https://www.hcch.net/en/instruments/conventions/status-table/?cid=24 [https://perma.cc/NDJ8-MXLK].

24. R. v. Hape, 2007 CarswellOnt 3563, ¶ 36 (Can.).

25. *Id.* ¶ 39.

26. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 3, at 1.

> to physical or psychological harm or otherwise place the child *in an intolerable situation*."[27]

By design, this defense is difficult to assert. An important aspect of the Hague Convention is the mutual acknowledgment between States that the ultimate welfare of a child is best determined by courts of the child's habitual residence, not by foreign courts.[28] If States generally refused return orders and preferred to judge the merits of custody disputes themselves, comity between States would decay, and the Hague Convention would lose most of the effectiveness it derives from State cooperation.[29] Furthermore, if foreign judges preferred to decide foreign custody disputes under the Hague Convention themselves, this would create an incentive for abductors to forum-shop. Parental abductors would have an incentive to take their children to countries with favorable interpretations of family law rather than resolving matters in their local jurisdictions. Courts are therefore reluctant to grant Article 13(b)'s defense.[30]

This reluctance is due both to the high burden of proof necessary in Hague Convention proceedings and the substantial level of domestic violence necessary to trigger Article 13(b). First, both the United States and Canada require that an Article 13(b) defense be proven by "clear and convincing" evidence, not the typical "preponderance of the evidence" of civil lawsuits. [31] This higher burden was criticized as a harmful addition to the Hague Convention and outside its requirements and purpose; in fact, the exact burden of proof is never mentioned in the Hague Convention and is simply a creation by member States striving to fulfill the Convention's purpose.[32]

Next, even if the defense is successfully asserted, Article 18 states that Article 13 "do[es] not limit the power of a judicial or administrative authority to order the return of the child at any time."[33] One common reason for returning abducted children despite a successful Article 13(b) defense is that the child's State of habitual residence has the capability to protect the child from grave harm with undertakings such as protective orders or alternative living arrangements.[34]

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27. *Id*. at art. 13(b) (emphasis added).

28. *See* Nicholas Bala & Mary Jo Maur, *The Hague Convention on Child Abduction: A Canadian Primer*, 33 CANADIAN FAM. L.Q. 267, 282 (2014).

29. *See In re* Application of Adan, 437 F.3d 381, 395 (3d Cir. 2006).

30. *See* ELISA PEREZ-VERA, EXPLANATORY REPORT ON THE 1980 HCCH CHILD ABDUCTION CONVENTION 427, 459 (1981).

31. 22 U.S.C. § 9003(e)(2)(A); *see, e.g.*, Husid v. Daviau, 2012 ONSC 547 ¶ 104. For discussion and criticism of this burden of proof, see Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases,* 34 FAM. L.Q. 43 (2000).

32. *See* Karen Brown Williams, *Fleeing Domestic Violence: A Proposal to Change the Inadequacies of the Hague Convention on the Civil Aspects of International Child Abduction in Domestic Violence Cases*, 4 J. MARSHALL L.J. 39, 73-74 (2011).

33. Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 3, at 100.

34. *See, e.g.,* Krefter v. Wills*,* 623 F. Supp. 2d 125 (D. Mass. 2009); Achakzad v. Zemaryalai,

Though orders of undertakings preserve the sovereignty of contracting States, they would likely be ineffective if a State government could not secure the child's safety before the abduction or if the abusing parent can still reach or communicate with the abducting parent or abducted children.[35]

Next, in both Canada and the United States, courts have found significant levels of domestic violence to a child to constitute a "grave risk" of serious physical or psychological harm or an "intolerable situation" under Article 13(b).[36] The amount of potential harm to a child upon his or her return must rise to a level higher than "ordinary" risk,[37] barring all but the most significant cases. Luckily, this high requirement has great potential to broaden: since the Hague Convention's creation in 1980, perceptions of domestic violence as a global health crisis have risen, and it is increasingly viewed as a societal scourge rather than a concern limited to the family members afflicted.[38] Domestic violence is now acknowledged as complex and pervasive: it can be physical, psychological, or financial,[39] and scholars have proposed that it is best described as a systematic pattern of abuse rather than a series of isolated incidents.[40] Though the Hague

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2010 CarswellOnt 5562 (Can.). For U.S. cases, *see, e.g.,* Simcox v. Simcox, 511 F.3d 594, 607-08 (6th Cir. 2007) (dividing Hague Convention cases into three broad categories and laying a framework describing when undertakings are unnecessary and when undertakings are relevant. Undertakings "should be adopted only where the court satisfies itself that the parties are likely to obey them," which is by definition a more subjective evaluation on the part of an adjudicator. *Id*. at 608.); Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045, 1057 (E.D. Wash. 2001) (stating that if a person seeking to defeat a return order successfully proves that the State of habitual residence lacks the capacity to protect the child, this often influences a judge's decision as to undertakings).

35. *See, e.g., Krefter*, 623 F. Supp. 2d at 137-38 (D. Mass. 2009) (critiquing the usefulness of undertakings in situations of domestic violence); *see also* Miranda Kaye, *The Hague Convention and the Flight From Domestic Violence: How Women and Children Are Being Returned by Coach and Four*, 13 INT'L J.L. POL'Y & FAM. 191, 192 (1999) (women who fled their countries to escape situations of domestic violence often do so out of necessity, due to the ineffectiveness of authorities in the State of habitual residence).

36. *See, e.g.,* Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000); *see also* Callicutt v. Callicutt, 2014 CarswellMan 339 (Can.).

37. *See* PEREZ-VERA, *supra* note 30, at 460; *see also* Thomson v. Thomson, [1994] 3 S.C.R. 551 (Can.) ¶ 82; *see also* F. (R.) v. G. (M.), 2002 CanLII 41087 (Can.).

38. *Violence Against Women*, WORLD HEALTH ORG. (Mar. 9, 2021), https://www.who.int/en/news-room/fact-sheets/detail/violence-against-women [https://perma.cc/Z4JC-AAE7]; Nicholas Bala & Jaques Chamberland, *Family Violence and Proving "Grave Risk" for Cases Under the Hague Convention Article 13(b)* 5-6 (June 2015) (Queen's University Legal Research Paper No. 2017-091).

39. *See* WORLD HEALTH ORG., *supra* note 38; *see also* Monica A. Lutgendorf, *Intimate Partner Violence and Women's Health*, OBSTETRICS & GYNECOLOGY, 134(3) (describing the forms which domestic violence can take, including physical violence, sexual violence, stalking, and psychological aggression).

40. *See* M. A. Dutton & L. A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLes 743 (2005).

Convention demands a significant amount of violence to take effect, as the understanding of domestic violence changes, the Hague Convention's reach broadens as well.

In many cases, the serious physical or psychological harm at issue is directed to a parent or primary caretaker, not toward the child themselves. However, serious physical or psychological harm inflicted upon a caretaker still has a grave effect on children, not only because it could be transferred to a child but also because of its psychological effects upon the entire household. Current social science research suggests that children require a secure relationship with their primary caretakers for proper emotional and cognitive development.[41] Violence against a caretaker disrupts this relationship, causing significant psychological harm and lack of development.[42] Continued witnessing of abuse to a caretaker also has dire developmental consequences.[43] Returning a child to a living situation rife with abuse, even if the child was only a witness, would therefore run counter to the purpose of the Hague Convention and the obligations of each

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41. *See* Isabelle Mueller & Ed Tronick, *Early Life Exposure to Violence: Developmental Consequences on Brain and Behavior*, FRONT. BEHAV. NEUROSCI. 156, 157 (2019); Stephanie Holt et al., *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature,* 32 CHILD ABUSE & NEGLECT 797 (2008).

42. N. Letourneau, et al., *Supporting Mothering: Service Providers' Perspectives of Mothers and Young Children Affected by Intimate Partner Violence,* 34 RES. NURS. HEALTH 196 (2011) (". . . mothers who experienced IPV ["intimate partner violence"] spent more energy than usual trying to meet basic safety and survival needs, limiting the available energy to cope with other events. Service providers commented that mothers who experienced IPV were ''so beaten down that they had little or nothing left for their children . . . ."); Pels, T., van Rooij, F. B., & Distelbrink, M., *The Impact of Intimate Partner Violence ("IPV") on Parenting by Mothers within an Ethnically Diverse Population in the Netherlands*, 30 J. FAM. VIOLENCE 1055, 1056 (2015) ("The lack of support and diminished wellbeing due to IPV can lead to hyper-vigilant, unresponsive, and overly permissive or controlling parenting behavior, as well as to a lack of emotional support for children, insufficient parental protection from witnessing IPV or from becoming a direct victim of the violence."); *see also* Caroline A. Greene et al., *Psychological and Physical Intimate Partner Violence and Young Children's Mental Health: The Role of Maternal Posttraumatic Stress Symptoms and Parenting Behaviors*, 77 CHILD ABUSE & NEGLECT 168 (2018) (finding that while physical or psychological IPV to a caretaker does not have a direct correlation to a preschool-age child's likelihood of externalizing this behavior, a strong correlation exists between IPV and caretaker PTSD, and between caretaker PTSD and mental health problems in children).

43. *See* Clare Bridget Noonan & Pamela Doreen Pilkington, *Intimate Partner Violence and Child Attachment: A Systematic Review and Meta-Analysis*, 109 CHILD ABUSE & NEGLECT 104765 (2020) ("Exposure to IPV includes a child's experience of IPV through their awareness that violence occurs between their parents, regardless of whether they directly witness it . . . . It also refers to the secondary effects of violence on children. Secondary effects may be seen when the child is not the direct victim of violence, but they are impacted indirectly through the effect it may have on their caregiver and parenting practices." (citations omitted)); *see also* TARYN LINDHORST & JEFFREY L. EDLESON, BATTERED WOMEN, THEIR CHILDREN AND INTERNATIONAL LAW (2012).

member State.

When an abducting parent who experienced domestic violence asserts an Article 13(b) defense, but the abducted child was solely a witness to this violence, would Article 13(b) apply? Canadian Courts usually answer in the affirmative. Courts in the United States vary in their interpretations of Article 13(b): some take the Canadian approach, while others see violence towards a caretaker as distinct from violence to a child and will give it far less weight while deciding whether to consider the child in grave risk of harm.[44] The following two sections compare these approaches.

IV. PERSPECTIVE OF THE UNITED STATES

In general, the United States favors policies that discourage child abduction rather than policies that allow abduction in cases of domestic violence,[45] though courts now recognize domestic violence during Hague Convention proceedings with greater frequency.[46] Some have proposed that the burden of Article 13(b) be lowered, yet make use of undertakings if the abuse is not proven beyond a "clear and convincing" standard.[47] Others have proposed examining Article 13(b) through the lens of U.S. tort law, utilizing the torts concept of the "zone of danger" to analyze whether harm to a primary caretaker would be transferred to a child.[48]

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44. *See* Kevin Wayne Puckett, *The Hague Convention on International Child Abduction: Can Domestic Violence Establish the Grave Risk Defense Under Article 13*, 30 J. AM. ACAD. MATRIMONIAL L. 259, 264 (2017).

45. Shani M. King, *The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence*, 47 FAM. L.Q. 299, 306 (2013).

46. Montes v. Toscano (In re M.V.U.), 2020 IL App (1st) 1191762, ¶ 40.

47. Kyle Simpson, *What Constitutes a Grave Risk of Harm: Lowering the Hague Child Abduction Convention's Article 13(b) Evidentiary Burden to Protect Domestic Violence Victims*, 24 GEO. MASON L. REV. 841, 862 (2017).

48. Andrew A. Zashin, *Domestic Violence by Proxy: A Framework for Considering a Child's Return under the 1980 Hague Convention on the Civil Aspects of International Child Abduction's Article 13(b) Grave Risk of Harm Cases Post Monasky*, 33 J. AM. ACAD. MATRIMONIAL L. 571, 588-89 (2021). The author proposes a four-step inquiry:

> 1) are the children in question in such proximity to the danger;
>
> 2) that they themselves are in danger of the same injuries as the parent who is the direct victim of violence;
>
> 3) and if returned to their habitual residence the children would be put in grave risk of harm or an otherwise intolerable situation;
>
> 4) for which the legal system of the habitual residence cannot protect the children even if appropriate undertakings are employed.

Id.

A. Judicial Approach to "Grave Risk of Harm"

When adjudicating Article 13(b) defenses in which a caretaker, but not the abducted child, experiences harm, United States courts take two general perspectives. First, a court would accept an Article 13(b) defense only when harm might be transferred from the caretaker to the child if returned. If a child was never the target of grave harm, the child's position would not be of the "intolerable" nature demanded by Article 13(b), and a return order would not be proper. Decisions of the Sixth Circuit,[49] Second Circuit,[50] and the Southern District of New York[51] take this perspective. Next, other courts accept the Article 13(b) defense when grave harm to a caretaker is proven, even if no grave harm inflicted upon the abducted child is proven. Since young children are dependent physically and emotionally upon their parents or primary caretakers, and since witnessing domestic violence has harmful effects upon a child, if a caretaker would be subjected to grave harm by returning to the home State, the child would experience harm as well. Courts of the Seventh Circuit,[52] Eleventh Circuit,[53] and Illinois Court of Appeals[54] hold this perspective. The following sections exemplify the reasoning of both sides.

B. Harm to a Caretaker Is Separate from Harm to a Child

i. Walsh v. Walsh *(1st Circuit Court of Appeals, 2000)*

In *Walsh v. Walsh,* the First Circuit based its decision upon the likelihood that serious harm inflicted by a father upon his spouse would be transferred to her minor children; as such, the court denied the father's return order.[55] In this case, a mother of two children was abused by her husband for five years, beginning shortly after their marriage began.[56] At the time of the abuse, the parents had two minor children, eight-year-old M.W. and two-year-old E.W, while the father had two adult children from another marriage. At the hands of her husband, the mother sustained injuries, including bruises on her face, chest, and knees, and one injury to her lower spine.[57] After reporting these injuries to a third party, the police were called to investigate the ongoing abuse, which the husband denied.[58] Later, the husband initiated a fight with one of his adult sons, after which the

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49. *See, e.g.,* Simcox v. Simcox, 511 F.3d 594, 607 (6th Cir. 2007).

50. *See, e.g.,* Ermini v. Vittori, 758 F.3d 153, 164 (2d Cir. 2014).

51. *See, e.g.,* In re Lozano, 809 F. Supp. 2d 197, 221 (S.D.N.Y. 2011).

52. *See, e.g.,* Van De Sande v. Van De Sande, 431 F.3d 567, 570 (7th Cir. 2005).

53. *See, e.g.,* Gomez v. Fuenmayor, 812 F.3d 1005, 1014 (11th Cir. 2016) (it "requires no stretch of the imagination to conclude that serious, violent domestic abuse repeatedly directed at a parent can easily be turned against a child.").

54. *See, e.g.,* Montes v. Toscano (In re M.V.U.), 2020 IL App (1st) 1191762, ¶ 48.

55. Walsh v. Walsh, 221 F.3d 204, 221 (1st Cir. 2000).

56. *Id.* at 209.

57. *Id.* at 209-10.

58. *Id.*

husband threatened M.W.[59] M.W. and the mother testified that the husband had hit M.W. on several occasions but not to the extent that the mother was abused.[60] After several more incidents of abuse—and after the mother fled her home for her safety—she sought a protective order with conditions that the father would "stay away from the family home" and that she would not "take the children out of the jurisdiction."[61] After a subsequent assault despite this order, the mother applied for an Irish passport then took her children by plane to the United States, contrary to the protective order.[62] Later that year, the father filed a return order under the Hague Convention, and in court, the mother raised the defense of Article 13(b).[63] The District Court of Massachusetts decided in favor of the father on the basis that the children did not experience the grave risk of harm demanded by Article 13(b) and ordered the return of the children.[64] The mother appealed.

The appellate court held that the children would be at grave risk of harm if returned in proximity to their father, though it did not see the two harms as identical. Rather, the court focused on the probability that the father's violence would be transferred to the children. The court gave the following five reasons: (1) that the father's assaults upon the mother due to his "uncontrollably violent temper" did not lessen when he was in the presence of minor children; (2) that his violence "knows not the bonds between parent and child or husband and wife, which should restrain such behavior[;]" (3) that the father showed potential to harm persons younger than he, as exhibited by additional testimony in which he assaulted a young man in the presence of his family; (4) that "credible social science literature establishes that serial spousal abusers are also likely to be child abusers[;]" and (5) that U.S. state and federal law held that children "are at an increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser."[65] The court held that these factors were "sufficient to make a threshold showing of grave risk of exposure to physical or psychological harm,"[66] and denied the father's return order. The Court of Appeals interpreted the Hague Convention broader than the lower court—it did not wholly disregard the father's violence because it was not directed at the children—but rather than focusing on potential harm to the mother, it described the likelihood

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59. *Id.*

60. *Id.* at 212.

61. *Id.* at 210-11.

62. *Id.*

63. *Id.* at 212.

64. *Id.* at 217.

65. *Id.*; *see, e.g.,* Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 VIOLENCE AGAINST WOMEN 134 (1999); Anne E. Appel & George W. Holden, *The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal*, 12 J. FAM. PSYCHOL. 578 (1998); Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, *in* Kersti Yllo & Michele Bograd, FEMINIST PERSPECTIVES ON WIFE ABUSE 158 (1988); Susan M. Ross, *Risk of Physical Abuse to Children of Spouse Abusing Parents*, 20 CHILD ABUSE & NEGLECT 589 (1996); *see also Walsh*, 221 F.3d at 220.

66. *Walsh*, 221 F.3d at 220.

that the children would be caught in the crossfire of violence.

ii. Whallon v. Lynn *(1st Circuit Court of Appeals, 2000)*

Three months after the decision of *Walsh*, the First Circuit revisited Article 13(b). In *Whallon*, the court denied an abducting mother's Article 13(b) defense and ordered a return because none of the harm was directed at the child and, furthermore, did not reach the "grave" risk anticipated by the Hague Convention.[67]

In this case, the mother and father lived in Mexico with their five-year-old child. For approximately three years after the child's birth, the father performed typical parental duties, including "driving [the child] to and from nursery school every day for almost two years; buying the child clothes; helping her with homework and art projects; attending various school activities; and taking the child to the doctor when she was sick."[68] In 1999, when the father learned that the mother intended to bring the child to the United States to visit the mother's parents, he filed a petition with a Mexican court to gain full custody. This petition was denied; the Mexican court concluded that the father "had failed to establish the imminent danger, absolute abandonment, or sort of corruption or mistreatment required to terminate a mother's custody . . . ."[69] Several attempts to block the mother and child from leaving Mexico failed, and when they arrived in the United States, the father brought a suit under the Hague Convention for the child's return. The mother objected under Article 13(b), and in defense of her assertion, she described a lengthy pattern of verbal abuse that the father inflicted against her as well as several incidents of physical abuse against her and her child.[70] The district court found that while the father likely committed the abuse which the mother mentioned, it did not rise to the level of harm anticipated by the Convention and ordered the child's return.[71] The mother appealed.

The First Circuit found no likelihood of transference of harm to the child and, furthermore, that the harm alleged by the mother did not meet the "grave" standard of Article 13(b).[72] It considered how the mother "never alleged that [the father] abused [their child], either physically or psychologically, and concluded that the close relationship between father and child did not imply harm which may come from a return."[73] The court also considered whether the child would experience psychological harm from the allegations of violence towards the mother and concluded that any which may arise did not meet Article 13(b)'s

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67. Whallon v. Lynn, 230 F.3d 450, 453-54 (1st Cir. 2000).

68. *Id.* at 453.

69. *Id.*

70. *Id.*

71. *Id.* at 453-54.

72. *Id.* at 460 ("allegations of verbal abuse and an incident of physical shoving are distinct from the 'clear and long history of spousal abuse' presented in *Walsh*.").

73. *Id.*

standard.[74] The court's distinction between harm to the mother and harm to the child makes it difficult to consider those harms the same. If the facts in *Whallon* differed, the First Circuit's perspective on Article 13(b) might have taken a different route.

iii. Lozano v. Alvarez *(Southern District of New York, 2011)*

In this case, the court denied a return order under Article 13(b)—though it found evidence that the abducting mother experienced serious emotional and psychological abuse at the hands of the father—because sufficient undertakings existed to prevent the father's abuse from reaching the child in the future.[75] Here, both the mother and father lived in Columbia but met in London, England. Several months after the two began dating, the mother moved into the father's flat, and the two welcomed a child one year later. The mother testified that a few months after the parents began living together, she experienced a continuous pattern of physical and emotional abuse from the father, including kicks to her stomach while she was pregnant, sexual abuse, a pattern of control over her acquaintances and relationships, and indications for her to commit suicide.[76] The mother fled to a domestic violence shelter in the United Kingdom. When the mother later fled to New York with her child, the mother was diagnosed with post-traumatic stress disorder by a licensed therapist.[77] After the mother's flight, the father filed a petition under the Hague Convention, to which the mother asserted an Article 13(b) defense.

In its analysis, the court cited several cases from the Eastern and Southern Districts of New York in which a primary caretaker suffered abuse which could reach the standard of "grave," but in which an Article 13(b) defense was denied because of undertakings or of an absence of abuse which might likely be transferred to the child.[78] The court denied the mother's Article 13(b) defense because it was unable to conclude that the child's trauma stemmed from the father's actions and not from the mother taking her suddenly from her home, ceasing contact with her family, or living in a domestic violence shelter.[79] Therefore, the court concluded that it was "impossible to determine, by even a preponderance of the evidence, that the child's trauma was caused by anything [the father] did to the child."[80] Though the court was unable to conclude that the child was harmed by her father, it did conclude that the mother suffered

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74. *Id.* ("The court considered the alleged psychological harm to Micheli from the abuse and correctly found that any such harm did not to rise to the level required for sustaining an article 13(b) exception.")

75. *See generally* Lozano v. Alvarez, 809 F. Supp. 2d 197 (S.D.N.Y. 2011).

76. *Id.* at 204.

77. *Id.* at 206.

78. *See* Rial v. Rijo, No. 10-CV-1578, 2010 U.S. Dist. LEXIS 39271, at 2-3 (S.D.N.Y. 2010).

79. *Lozano*, 809 F. Supp. 2d. at 224.

80. *Id.*

emotional abuse at his hands,[81] and the manager of the child's nursery testified that the home environment "obviously had a negative effect upon [the child]."[82] Despite this, the court considered the violence against the child separate from violence against the mother in its analysis, restricting the reach of the Hague Convention in this case.

iv. Abdollah Naghash Souratgar v. Fair *(2d Circuit, 2013)*

Here, the court again distinguished analysis of harm to a parent from harm to a child, writing that

> [s]pousal abuse . . . is only relevant under Article 13(b) if it seriously endangers the child . . . The Article 13(b) inquiry is not whether repatriation would place the respondent parent's safety at grave risk, but whether so doing would subject the child to a grave risk of physical or psychological harm.[83]

Furthermore, the court held that spousal violence alone, "without a clear and convincing showing of grave risk of harm to the child," would "unduly broaden" the reach of Article 13(b) and is unacceptable as a defense.[84]

In this case, the mother and father were both residents of Singapore, living with their son. Over the course of their tumultuous marriage, both parents described frequent incidents of verbal and physical abuse upon each other, though the extent of this abuse against the mother—the child's primary caretaker—was not clear.[85] Furthermore, the district court "found no credible evidence of any harm directed against the child."[86] In fact, both parents testified their affection towards him, and there was no controversy as to the fact that he loved them as well. After the parents separated and began child custody proceedings, the mother moved out of the family home and, after an unsuccessful attempt, was able to take

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81. The court did not explicitly mention that the mother's suffering would be considered "grave" under the Article 13(b) standard, yet in its analysis, it cited a prior case which held that "[a] grave risk of psychological harm, even construed narrowly, undoubtedly encompasses an almost certain recurrence of traumatic stress disorder." Blondin v. Dubois, 238 F.3d 153,163 (2d Cir. 2001) (alterations and internal quotation marks omitted). Since the mother was diagnosed with post-traumatic stress disorder, this would be considered "grave" harm under this standard.

82. *Id.* at 207 ("[The father] testified that the child laughed and was happy, but acknowledged that the child was not speaking when at the nursery [in the United Kingdom] . . . In contrast, Respondent testified that while living with Petitioner, the child was very quiet and depressed, did not smile, and would have tantrums.").

83. Abdollah Naghash Souratgar v. Fair, 720 F.3d 96, 103-04 (2d Cir. 2013) ("evidence of "[p]rior spousal abuse, though not directed at the child, *can support the grave risk of harm defense*," yet "evidence of this kind, however, is not dispositive in these fact-intensive cases."(emphasis added)).

84. *Id.* at 105-06.

85. *Id.* at 99.

86. *Id.* at 100-01.

the child to the United States without his father's knowledge. The father filed proceedings under the Hague Convention shortly afterward, and in response, Lee asserted an Article 13(b) defense, claiming that the child would face "(1) exposure to spousal abuse; (2) direct abuse from his father; or (3) the loss of his mother" if returned in any proximity to the father.[87] The district court denied this defense and ordered a return, and Lee appealed.

The appellate court wrote that only when there existed a "sustained pattern of physical abuse and/or a propensity for violent abuse that presented an intolerably grave risk to the child" could a court reject a return.[88] After reviewing the record of the District Court, which concluded that the mother indeed suffered some abuse and that the child was not harmed or targeted by this abuse, the court determined that allegations of harm to the child were "speculative,"[89] and ordered that the child be returned.

C. Harm to a Caretaker Is Identical to Harm to a Child

i. Simcox v. Simcox *(6th Circuit, 2007)*

In this case, the court accepted an Article 13(b) defense, noting the grave abuse to the mother and several of her children would also be considered abuse to the youngest child, even though the youngest child was not a direct target of abuse.[90] In this case, both parents traveled the world with their young children, living a somewhat nomadic life.[91] Just before the parental abduction, the family lived in Mexico. Throughout their journeys, the father claimed that his children lived "blissful [lives], filled with exotic travel and wondrous educational and cultural opportunities."[92] By contrast, the mother claimed that their children's lives "were 'filled with hard labor, severe physical punishment, exposure to [the father]'s humiliations and violent behavior and long weeks of travel confined to a car.'"[93] The mother decided to leave Mexico and take the children to Ohio, and the father filed a return order through the Hague Convention. The District Court found that the father established the necessary requirements under the Hague Convention and ordered a return. To this, the mother raised the defense of Article 13(b); however, the court stated that, though she had proven "evidence of a serious risk of harm due to abuse and emotional dependence" in her situation, it was not enough to constitute a "grave risk" of harm for her or her children and

87. *Id.* at 103.

88. *Id.* at 104.

89. *Id.*

90. *Id.* ("Although S. Simcox, presumably due to her young age, appears to have largely escaped the physical and psychological injuries suffered by her older siblings, nothing in the Convention requires that a child must first be traumatized by abuse before the Article 13(b) exception applies.").

91. *See generally* Simcox v. Simcox, 511 F.3d 594 (6th Cir. 2007).

92. *Id.*

93. *Id.*

would not meet the criteria of Article 13(b).[94] The mother appealed.

The Sixth Circuit Court of Appeals reversed the district court, noting that "the serious nature of the abuse, the extreme frequency with which it occurred, and the reasonable likelihood that it will occur again absent sufficient protection" met the standard under Article 13(b).[95] The court went on to describe how the abuse of a caretaker and siblings increased "the likelihood of future abuse" to that child and would create a "grave risk" of an "intolerable situation,"[96] as seen in *Walsh* and *Whallon*. In fact, the court noted a danger "of making the threshold so insurmountable that district courts will be unable to exercise any discretion in all but the most egregious cases of abuse."[97]

ii. Davies v. Davies *(2d Circuit, 2017)*

The opinion for this Hague Convention appeal was unpublished, but several published opinions have used it in support.[98] In this case, the court held that the psychological and physical abuse inflicted by the father to the mother of the abducted child met the standard of Article 13(b), though the abducted child did not experience such grave abuse.[99]

In this case, the mother was a citizen of both the United States and the United Kingdom.[100] She and her husband were married in New York in 2006, moved to the island of St. Martin in 2008, and welcomed a child in 2012. The family lived together until 2016, at which point the mother began to live with a friend and then at a hotel due to verbal and physical abuse at the hands of her husband. The abuse included the father throwing items at her, screaming in her face, and choking her several times by covering her mouth.[101]

In addition, the mother credibly testified that her husband "frequently grabbed [their four-year-old child] from [her] arms, screamed at him, and called him names . . . and would yell at him when [the child] would be the slightest bit obstinate."[102] The child witnessed a great deal of these outbursts directed at his mother, which often occurred outside the home as well.[103] The couple visited a marriage counselor who, after examining these incidents, testified that the relationship appeared to be "controlling and coercive" and "not normal

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94. *Id.* at 600.

95. *Id.* at 609.

96. *Id.*

97. *Id.* at 608.

98. *See, e.g.,* Grano v. Martin, 443 F. Supp. 3d 510 (S.D.N.Y. 2020); Saada v. Golan, No. 1:18-CV-5292 (AMD) (SMG), 2020 U.S. Dist. LEXIS 79039 (E.D.N.Y. May 5, 2020). The district court's decision in this matter was published (Davies v. Davies, 2017 U.S. Dist. LEXIS 10494 (S.D.N.Y. Jan. 25, 2017)).

99. *Davies*, 2017 U.S. Dist. LEXIS 10494 at 48-49.

100. *Id.* at 1-2.

101. *Id.* at 6-8, 19.

102. *Id.* at 9-10.

103. *Id.* at 15-17.

behavior."[104] The counselor further testified that it was likely the mother occasionally entered a "disassociating" state where "her mind goes somewhere else, out of her body, and [she has a] weak feeling and she can't think," a statement consistent with the mother's testimony, and one the counselor described as concerning.[105]

Later, the counselor privately recommended that the mother leave the father.[106] After another outburst from the father in which the mother grew concerned for her and her child's safety, the mother spent the night at a friend's home.[107] After more discussions between the mother and counselor in the following days, the mother left St. Martin for the United States, taking her child with her.[108] She testified that she decided to leave "because 'there was nowhere to be safe . . . [t]here was nowhere to go . . . you know everybody there . . . [a]nd [she] just wanted to go somewhere safe where [she] could eat and sleep and just not be afraid all the time.'"[109] In response to the removal, the father sent several threatening communications to her,[110] after which he filed a Hague Convention return order, to which the mother asserted a defense under Article 13(b).[111]

The court explained that determining psychological harm within the context of Article 13(b) was not a light matter and was "premised on 'overwhelming evidence of [the father's] extreme violence and uncontrollable anger, as well as his psychological abuse of [the mother] over many years.'"[112] The court found a "near certainty" that the child would be exposed to some of this psychological harm if returned.[113] Furthermore, the court found that threats upon Mrs. Davies would create grave psychological harm to the child even though the father did not threaten him directly.[114] Finally, the court cited the expert opinion of the counselor who met with the mother, noting that

> [T]here is a consensus in the scientific community that the effects of abuse are essentially the same whether the abuse is directed at the child or whether the child is witnessing the abuse. The effect is the same because when a small child witnesses violence between parents he is not capable of understanding anything other than that someone is in great danger.[115]

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104. *Id.* at 25.
105. *Id.* at 26.
106. *Id.* at 27.
107. *Id.* at 28.
108. *Id.* at 35.
109. *Id.* at 32.
110. *Id.* at 35-39.
111. *Id.* at 36.
112. *Id.* at 51-52.
113. *Id.* at 52.
114. *Id.* at 50-51.
115. *Id.*

iii. Montes v. Toscano *(In re M.V.U.) (Ill. Ct. App. 2020)*

In this case, the court accepted a mother's Article 13(b) defense when it found "a pattern of escalating violence as well as a pattern of interference with [the mother's] personal liberty which, in turn, affected the psychological welfare of the child."[116] The child, in this case, was a witness rather than a direct target of the violence.[117]

The father and mother lived in Mexico and had a daughter in 2014.[118] Throughout their time together, the mother experienced a history of domestic violence at the hands of the father, including specific instances where he attempted to choke the mother and threaten her life.[119] Though the young child was never a target of abuse, she was a witness on several occasions.[120] Finally, the mother fled with her child to Chicago, Illinois, in 2017. In 2018, after the mother petitioned for custody of the child, the father filed a petition under the Hague Convention to have the child returned to Mexico. To this, the mother asserted the defense of Article 13(b), alleging that being forced to return to Mexico would put the child at grave risk of substantial harm.[121]

The court affirmed the mother's Article 13(b) defense, writing that "the evidence demonstrates that the child faces 'a real risk' of being hurt psychologically due to her witnessing [the escalating abuse]."[122] Furthermore, no expert testimony was required on the part of the mother to show "the psychological impact [the father's] behavior had on the child. [The court found] that such evidence is not required by Article 13(b). Although such evidence may be helpful in a grave risk defense, it is not necessary."[123]

V. PERSPECTIVE OF CANADA

Canada's overall approach to the defense under Article 13(b) is similar to that of the United States: it acknowledges harm to a primary caretaker as a component of domestic violence, and it keeps Article 13(b) difficult to successfully assert in order to preserve the Hague Convention's integrity. The similarity is not surprising, considering the geographical proximity and somewhat similar legal traditions of both States. However, Canada's current law tends to employ a more expansive view of "grave risk of harm" to a child, taking the perspective that harm to a primary caretaker is the same as harm to a child and allowing any proof of harm to a primary caretaker to serve as evidence for an Article 13(b) defense.

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116. Montes v. Toscano (In re M.V.U.), 2020 IL App (1st) 1191762, ¶ 44.
117. *Id.* ¶ 45.
118. *Id.* ¶ 4.
119. *Id.* ¶ 2.
120. *Id.* ¶ 44.
121. *Id.* ¶ 2.
122. *Id.* ¶ 8.
123. *Id.* ¶ 9.

A. Legal Tradition of Canada

Canada is a federal parliamentary democracy with provincial and territorial governments beneath a federal government. After occupation by the United Kingdom, it was constituted by the British North America Act of 1867, which established its current legal and political structure. With the Canada Act of 1982, the United Kingdom relinquished legislative control over Canada.

Canada follows the English Common Law legal tradition but incorporates many elements of the French Civil Law tradition.[124] There are three main levels of court in Canada: trial courts, appellate courts, and the Supreme Court of Canada. Excluding the province of Quebec, which follows the French civil law custom, Canadian provinces and territories follow the principle of *stare decisis* and are bound by previous judicial decisions of higher courts and previous decisions of the same court.

B. Judicial Approach to "Grave Risk of Harm"

In many ways, Canada's domestic law has focused on the relationship between domestic violence and child development.[125] In provincial statutes, violence committed between parents is a factor recognized in courts' evaluations as to whether a child should be delivered to a child protection agency.[126] In their

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124. For a brief discussion of Canadian legal history, see S. Wadams, J. Brierly, & Gerald L. Gall, *Law, in* THE CANADIAN ENCYCLOPEDIA (Dec. 6, 2013), https://www.thecanadian encyclopedia.ca/en/article/law [https://perma.cc/KR4N-5HMM].

125. *See generally,* FIDLER ET AL., CHALLENGING ISSUES IN CHILD CUSTODY DISPUTES: A RESOURCE GUIDE FOR LEGAL AND MENTAL HEALTH PROFESSIONALS (2008); *see also* Children's Law Reform Act, R.S.O. 1990, c 12, amended by S.O. 2006 § 24(4)-(5). ("(4) In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against; (a) his or her spouse; (b) a parent of the child to whom the application relates; (c) a member of the person's household; or (d) any child. (5) For the purposes of subsection (4) anything done in self-defence or to protect another person shall not be considered violence or abuse.").

126. *See Child and Family Services Act,* S.N.W.T. 1997, c 13, s 7(3) ("[a] child needs protection where **...** (j) the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or towards a parent of the child and the child's parent fails or refuses to obtain services, treatment or healing processes to remedy or alleviate the harm"); *see also Family Services Act,* S.N.B. 1980, c F-2.2, s 31(1) (providing that "[t]he security or development of a child may be in danger when . . . (f) the child is living in a situation where there is domestic violence."); *see also Children and Family Services Act,* S.N.S. 1990, c 5, s 22(2) ("[a] child is in need of protective services where . . . (i) the child has been exposed to, or has been made aware of, violence by or towards (i) a parent or guardian, or (ii) another person residing with the child, and the parent or guardian fails or refuses to obtain services or treatment, or to take other measures, to remedy or alleviate the violence."); *see also Child and Family Services Act,* S.S. 1989-90, c C, 7.2, s 11 ("[a] child is in need of protection where (a) as a result of action or omission by the child's parent: ... (vi) the child has been exposed to interpersonal violence or severe domestic disharmony that is likely to result in physical or emotional harm to the child.").

definitions of domestic violence, some jurisdictions in Canada include "psychological, emotional and financial abuse, coercive control, threats to other persons, pets or property, and children's 'direct or indirect exposure to family violence.'"[127]

This approach is reflected in Canada's judicial evaluations of Article 13(b), as explained below. Canadian courts mostly use similar reasoning to that of the United States Court of Appeals for the Seventh and Eleventh Circuit, among others; they often acknowledge that physical or psychological harm to a primary caretaker can create physical or psychological harm for a child even if the child does not experience this kind of harm. The following cases first describe Canada's approach to harm under Article 13(b) in general, then describe how Canadian courts analyze grave harm to a caregiver as grave harm to a child.[128]

i. Thomson v. Thomson *(Supreme Court of Canada, 1994)*

Thomson was the first case from the Supreme Court of Canada to interpret and apply the Hague Convention,[129] and is presented here to give an overall example of how the Supreme Court of Canada approaches Article 13(b) defenses. It was also the only time that the Supreme Court of Canada directly defined "grave risk of harm" and "intolerable situation," laying the groundwork for determining what evidence may support an Article 13(b) defense in the future.[130] This case focuses on harm stemming from a separation between parent and child: if grave harm due to separation could be easily asserted, caretakers with strong attachments to their children could refuse to return to a country, then leverage this attachment to keep the child.[131] This was the issue before the Court in *Thompson*.

In this case, the father and mother had an ongoing child custody dispute in Scotland, during which the court granted the mother interim custody of their child. The mother mistakenly believed that she had full custody of her child[132] and proceeded to travel to Canada to stay with her family.[133] When the father applied for and received full custody of the child in the ongoing custody case, he requested that the mother bring the child back to Scotland. When the mother refused, the father lodged a complaint under the Hague Convention, to which the mother raised the defense in Article 13(b), alleging not that she experienced physical or psychological abuse, but that her child was "settled in [his] new

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127. Jennifer Koshan, *Specialized Domestic Violence Courts in Canada and the United States: Key Factors in Prioritising Safety for Women and Children*, 40(4) J. SOC. WELFARE AND FAMILY L., 515, 516 (2018) (citing *Family Law Act*, 2011, § 1).

128. Many cases deciding Hague Convention issues arise in Ontario courts and contemplate abductions from the United States, likely due to Ontario's population and its close proximity to the United States.

129. Thomson v. Thomson, [1994] 3 S.C.R. 551, ¶ 1 (Can.).

130. *Id.* ¶ 35.

131. *Id.* ¶ 27.

132. *Id.* ¶ 6.

133. *Id.* ¶¶ 6-7.

environment" in Canada, and that taking him from her would cause him "serious [psychological] harm."[134] The Manitoba Court of Queen's Bench denied the mother's defense, stating that since the affidavits were worded in terms of the "best interests" of the child, and that the present issue was not contemplated by Article 13(b).[135] Mrs. Thomson then appealed to the Supreme Court of Canada.

The Supreme Court affirmed the Manitoba Court of Queen's Bench, finding that the harm experienced from separation from a caregiver, though considerable, did not rise to the level required by Article 13(b):

> [A]lthough the word "grave" modifies "risk" and not "harm," this must be read in conjunction with the clause "or otherwise place the child in an intolerable situation." The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to the degree that also amounts to an intolerable situation.[136]

The Court cited Canadian cases from lower courts, as well as cases from Australia and the United Kingdom, which proposed that the "grave" level of harm necessary for an Article 13(b) defense must also amount to an "intolerable situation;" something greater than the harm that "would normally be expected on taking a child away from one parent and passing him to another."[137]

ii. Pollastro v. Pollastro *(Ontario Court of Appeal, 1999)*

In *Pollastro*, the Ontario Court of Appeal allowed an Article 13(b) defense. The father, in this case, inflicted grave harm upon the mother, and the mother was the only member who "demonstrated any reliable capacity to responsible parenting."[138] The court found that the child's welfare was "inextricabl[y] tied to [the mother's] psychological and physical security,"[139] and that harm to the child's primary caretaker constituted harm to the child himself.[140]

In this case, both parents were residents of California.[141] The mother took primary care of the child and was the main supporter of the family, while the father was disengaged from their marriage and caretaking.[142] The mother provided

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134. *Id.*

135. *Id.* ¶ 18.

136. *Id.* ¶ 82 (emphasis added).

137. *Id.*

138. Pollastro v. Pollastro, [1999] 43 O.R. 3d 497, ¶¶ 34-35 (Can. C.A.).

139. *Id.* ¶¶ 33-34 ("Returning a child to a violent environment places that child in an inherently intolerable situation, as well as exposing him or her to a serious risk of psychological and physical harm. . . . It is therefore relevant in considering whether the return to California places the child in an intolerable situation, to take into account the serious possibility of physical or psychological harm coming to the parent on whom the child is totally dependent.").

140. *Id.*

141. *Id.* ¶ 4.

142. *Id.* ¶¶ 5-6.

evidence as to a pattern of abuse against her, including physical violence and public verbal abuse; the stress caused by this violence produced noticeable harm to her physique.[143] After a prolonged episode of physical violence in late 1997, the mother fled to family in Canada, taking their child.[144] The father filed a return order under the Hague Convention, to which the mother asserted a defense under Article 13(b), citing the father's prior violence.[145]

The Ontario Court of Appeal found that the evidence—verbal abuse and threats, physical violence, irrational, irresponsible, and unpredictable behavior, a serious drug and alcohol problem, an uncontrollable temper, and "palpable" hostility to his wife—created a grave risk of an intolerable situation for the child under Article 13(b).[146] Though the child experienced no direct "grave harm," the court found that Mr. Pollastro has been violent against his wife while in close proximity to their child,[147] that the mother was "the only parent who has demonstrated any reliable capacity for responsible parenting" and that "[the child's] interests are inextricably tied to her psychological and physical security."[148] Therefore, the Article 13(b) defense was upheld.[149]

iii. Achakzad v. Zemaryalai *(Ontario Court of Justice, 2010)*

In this case, an Article 13(b) defense succeeded due to physical harm perpetrated against the primary caregiver of the child; risk of harm to that primary caregiver "constitute[d] a risk of harm to the child.[150]

Both parents, in this case, lived with their child in California as citizens of the United States.[151] During the four years after their child's birth, the mother experienced a continuous pattern of physical abuse from the father,[152] including threats upon her life, one of which was made at gunpoint.[153] On several occasions, their young child witnessed this behavior.[154] Eventually, the mother fled to Canada for a temporary stay. She brought a claim for custody and a restraining order in a Canadian court against the father, while the father brought an action under the Hague Convention to forestall any attempt to stay in Canada. The

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143. *Id.* ¶¶ 8, 10-11.

144. *Id.* ¶ 9.

145. *Id.* ¶ 17.

146. *Id.* ¶¶ 32, 36.

147. *Id.* ¶ 35 ("Although John Pollastro has not been overtly physically violent to his son, he has been violent and had temper outbursts when his wife has been with the child. On one occasion, for example, he threw hot coffee at her, narrowly missing their 7-day-old son whom she was holding.").

148. *Id.* ¶ 34.

149. *Id.* ¶ 37.

150. Achakzad v. Zemaryalai, [2010] O.J. No. 3259, § 5.2(a), ¶ 81 (Can. Ont. C.J.).

151. *Id.* ¶ 1.

152. *Id.* ¶¶ 37-48.

153. *Id.* ¶ 71(7).

154. *Id.* ¶ 79.

mother then asserted an Article 13(b) defense due to alleged domestic violence inflicted against her.[155]

The court held that if credible evidence of domestic violence against a child's primary caretaker existed, and if the child was totally dependent upon that caretaker, the "grave risk" requirement of Article 13(b) would be fulfilled.[156] In a review of other case law, the court listed reasons for which an Article 13(b) claim of grave risk of harm against a caretaker, but not a child, failed: lack of credible evidence,[157] a lesser degree or little frequency of violence,[158] if the abductor "expressed no fear of the [alleged] assailant,"[159] or if the abductor did not flee due to violence and had other reasons for the abduction.[160] In this case, the court found only one incident of violence posed direct harm to the child: the incident when Mr. Zemaryalai threatened his wife by pointing a firearm in her direction with her son nearby.[161] However, the court found "no need to establish instances of physical harm or risk of such harm perpetrated *directly against the child*"[162] because the child was totally dependent upon Mrs. Zemaryalai, and Mrs. Zemaryalai suffered continuous harm. Therefore, the Article 13(b) defense was upheld.

iv. Husid v. Daviau *(Ontario Court of Appeal, 2012)*

Here, an Article 13(b) defense survived because grave harm inflicted upon a primary caretaker led to psychological harm to the child, even though the child was not subject to the kind of psychological harm endured by her mother.[163]

In this case, both parents lived in Lima, Peru, with a young child.[164] They continued to live in Lima, during which time the mother experienced increasing

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155. *Id.* ¶ 31(1).

156. *Id.* ¶ 13; *see also* Lombardi v. Mehnert, 2008 CarswellOnt 2075 (Can. Ont. C.J.) (WL).

157. *See, e.g.*, Wentzell-Ellis v. Ellis, 2010 CarswellOnt 2981 (Can. Ont. C.A.) (WL); *see also* Sierra v. Sierra, 2001 CarswellOnt 1869 (Can. Ont. S.C.J.) (WL).

158. *Wentzell-Ellis,* 2010 CarswellOnt 2981 ¶ 44; *see also* Finizio v. Scoppio-Finizio, 1999 CarswellOnt 3018 (Can. Ont. C.A.) (WL) (with the violence alleged being a violent punch to the face on one occasion and a withdrawal of bank account funds); *see also,* Suarez v. Carranza, 2008 CarswellBC 1829 (Can. B.C. S.C.) (WL) (where the only violence implied was pushing on two occasions).

159. Achakzad v. Zemaryalai, 2010 CarswellOnt 5562 ¶ 16.

160. *See* Cannock v. Fleguel, 2008 CarswellOnt 6633 (Can. Ont. C.A.) (WL).

161. Achakzad v. Zemaryalai, 2010 CarswellOnt 5562 ¶ 81.

162. *Id.* (emphasis added).

163. Husid v. Daviau, 2012 CarswellOnt 12136, ¶ 28 (Can. Ont. C.A.) (WL) ("The child would be in constant fear that the mother would be accosted, at grave risk of being wrongfully taken using physical force by the father's family, and at grave risk of psychological harm from the continuation of the domestic conflict." A court-appointed psychologist assigned to the case corroborated this testimony.).

164. *Id.* ¶¶ 8, 11.

levels of abuse from her husband, leading to the couple's separation.[165] Several years later, a physical confrontation between the couple led to police intervention.[166] After the couple officially divorced, the mother obtained an order allowing her and her child to travel to Canada.[167] When the father learned that the mother decided not to return, he filed an application under the Hague Convention, to which the mother asserted a defense under Article 13(b), citing the ongoing abuse.[168]

The court found that their home "was a place of unhappiness, oppression and abuse for the mother at the hands of the father for many months, and [the child] was there to experience it too."[169] The mother alleged that returning the child to Peru would put her at grave risk of psychological harm because she "had already suffered harm in her environment in Perú and a return would be to the same environment found by Peruvian court psychologists to be harmful to her."[170] After examining the evidence presented, including reports from the Peruvian justice system, the court found that the mother suffered from "anxiety and depression as a result of the father's violent and aggressive attitude."[171] In turn, the child showed signs of "insecurity and clinginess," and the nanny "described the situation as 'very scary' and said she was in fear for her life."[172] Since the child was in her mother's care "the great majority of the time," the "constant fear" in which the mother lived caused the child to live in constant fear as well.[173] The court found that a return to Peru would expose the child to grave risk of psychological harm: the situation "of being in constant fear of the mother's being accosted and publicly berated in [the child's] presence, with a need to seek police intervention; or worse, of her being wrongfully taken or wrongfully overheld by her father and his family, with the use of physical force to achieve their goal."[174]

v. Brown v. Pulley *(Ontario Court of Justice, 2015)*

Here, an Article 13(b) affirmative defense was denied because the asserting parent could not prove harm to the extent demanded by *Thomson*. Still, the court reaffirmed the reasoning of its prior cases, stating that harm to a caretaker should be treated as identical to harm to a child within Article 13(b) analyses.

In this case, both parents lived in the United States until their separation, at which time they had two children.[175] Sometime after their marriage, the mother

165. *Id.* ¶ 12.
166. *Id.* ¶ 13.
167. *Id.* ¶ 14.
168. *Id.* ¶ 6.
169. Husid v. Daviau, 2012 CarswellOnt 1107, ¶ 52 (Can. Ont. S.C.J.) (WL).
170. *Id.* ¶ 88.
171. *Id.* ¶ 106.
172. *Id.*
173. *Id.* ¶ 113.
174. *Id.* ¶ 115.
175. Brown v. Pulley, 2015 CarswellOnt 5078 (Can. Ont. C.J.) ¶ 1.

alleged physical assaults at the hands of her husband, who forcibly confined her to her home, "wildly sw[ung]" a knife at her, pulled out lengths of her hair, [and] threatened to "chop her up into pieces and store her in the freezer," among other threats.[176] The mother also alleged that the father dealt drugs and was involved in other criminal activity, was irresponsible with her children, and was not a beneficial caretaker for them.[177] In early 2015, the mother took both children, driving from North Carolina to Toronto, Canada.[178] When the father lodged a complaint under the Hague Convention, the mother asserted a defense under Article 13(b), alleging physical and emotional abuse.[179]

The court mentioned that Article 13(b) claims "have been rejected when the assaults have been minor or a one-time occurrence, or when the court finds that, although some violence may have occurred, that the claimant has no fear of [the] other parent and is resistant to a return order for other reasons."[180] However, the court found that the violence, in this case, did not meet the "systematic, controlling, and coercive" standard of *Pollastro* set for Article 13(b).[181] Moreover, the court found that the mother "significantly contributed to the domestic violence and conflict in the family home,"[182] and that the father was "experienced in caring the for the children and [had] a loving relationship with them,"[183] and would be assisted by his own parents.[184] While the court acknowledged that the children witnessed violence, "the level of violence did not meet the standard required for an Article 13 (b) exception"[185] and could not prevent the father's return order. Though the party asserting an Article 13(b) defense did not meet her burden in *Brown,* the case restated the theories that a child could be subjected to grave harm when witnessing a caregiver's abuse or when that caregiver is physically abused.

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176. *Id.* ¶ 50.

177. *Id.* ¶¶ 53-56.

178. *Id.* ¶ 1.

179. *Id.* ¶ 3.

180. *Id.* ¶ 162.

181. *Id.* ¶ 165; *see also id.* ¶ 162 (citing Czub v. Czub, 2012 ONCJ 566 (Ont. C.J.)) ("Courts have sometimes refused to order the return of a child in cases where there is violence directed by the "left behind" parent towards a child's primary parent. In these cases, the violence has involved a prolonged course of conduct, involving severe assaults in circumstances in which the legal protections available in the home state have not been sufficient. . . . Claims under 13(b) have been rejected when the assaults have been minor or a one-time occurrence, or when the court finds that, although some violence may have occurred, that the claimant has no fear of other parent and is resistant to a return order for other reasons.").

182. *Id.* ¶ 166(c).; *see also id.* ¶ 166(f) ("The children enjoy a good relationship with the father. There is no indication that the father has ever physically or verbally abused them.").

183. *Id.* ¶ 168(b).

184. *Id.*

185. *Id.* ¶ 169.

vi. R.G. v. K.G. (N.) *(New Brunswick Court of Queen's Bench, 2019)*

In this case, though the court did not allow an Article 13(b) defense to stand, it explicitly mentioned that abuse occurring in the presence of a child would by definition be seriously harmful to the child, even if the child escaped most or all of the physical abuse.[186] Whether it was enough to trigger the high standard of Article 13(b) would be a fact-specific question.[187] In this case, the court was not presented with enough evidence to conclusively accept the defense.[188]

Both the father and mother, in this case, lived with their children in Israel. Almost from the very beginning of the relationship, the mother reported a long history of physical, psychological, and sexual abuse that she received at the hands of the father,[189] including instances in which the father explicitly threatened her life.[190] Citing concerns for her safety and that of her children, the mother, fled to Canada. When the father heard of this, he filed a Hague Convention complaint, to which the mother responded with a defense under Article 13(b).[191]

The court saw several evidentiary issues with the violence alleged[192] and doubted the mother's testimony for several reasons: she had not sought help from another person, police, or social agency and had not begun any kind of custody case.[193] On the topic of violence occurring in front of children, the court wrote the following:

> I do not doubt that if the abuse alleged by the Respondent did occur, that some of it may have occurred in front of the children. This undoubtedly, by definition, would be harmful to the children. To what degree this has happened is not clear from the evidence. Whether it creates a situation of grave risk of harm or an intolerable situation to or for the children is not at all clear either . . . .[194]

Based on the absence of evidence, the court determined that the concerns

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186. R.G. v. K.G. (N.), 2019 CarswellNB 149, ¶ 44.

187. *Id.* ¶ 35.

188. *Id.* ¶ 44.

189. *Id.* ¶¶ 3, 38.

190. *Id.* ¶ 14 (In an affidavit, the mother stated that "if [she] did not get out of there with the girls, [she] was going to be dead and the girls would be abused and cursed.").

191. *Id.* ¶ 33. It should be noted that the court drew a distinction between cases in which returning the child would place him or her in a volatile and dangerous home environment and cases in which returning the child to his or her place of habitual residence would not require the child to be put back in that specific living situation. *See also* Wentzell-Ellis v. Ellis, 2010 ONCA 347 (Ont. C.A.) ¶ 50 (". . . An order that the child be returned to England simply recognizes that the mother was not entitled to take the child from England and that custody proceedings should be decided by English courts.").

192. *Id.* ¶ 24 ("To say that 'credibility' is an issue arising from the evidence is an understatement.").

193. *Id.* ¶ 49.

194. *Id.* ¶ 44.

under Article 13(b) raised by the mother did not meet the required burden of proof.[195] Though returning the children to their home State would likely cause psychological disruption, the court held that this did not equate to a "grave risk of harm."

VI. COMPARISON AND ANALYSIS

Canadian and U.S. courts have many similarities in their approach to the Hague Convention at large. Both accept that Article 13(b) requires a high burden of proof in order to preserve comity between States. The "grave risk of harm" includes significant, not trivial, situations and is usually more than what would occur if a child were separated from a caregiver with no other factors of danger present. Furthermore, both States require adequate proof that such harm would occur, and both States have relied upon the testimony of psychologists in making this inquiry. Finally, both United States and Canadian case law acknowledge that psychological abuse to a caretaker can create psychological abuse to a child.[196]

However, in general, Canadian courts see grave risk of harm to a caretaker as grave risk of harm to a dependent child, even if the child is not a direct target of abuse. Courts in the United States take somewhat divergent perspectives regarding the Article 13(b) defense; in certain cases, harm to a caretaker is treated the same as harm to a child, and in others, harm to a caretaker only becomes harm to a child if it would likely be transferred to the child, putting him or her in a crossfire of abuse. Though Canada's perspective broadens the reach of Article 13(b) and takes some degree of power from foreign courts, it gives more attention to the most central part of a growing child's life—his or her relationship with a parent—and the harm which arises in the child when that parent suffers abuse. For this reason, this Note argues that Canada's approach better serves the spirit and purpose of the Hague Convention and would be useful for the United States to adopt.

VII. RECOMMENDATIONS

A. General Recommendations for Both States

The Hague Convention's exceptions have been criticized at length for their inaccessibility, especially in cases of domestic violence, due to the high burden of proof required to assert the defense.[197] In agreement with analyses from other scholars, I propose that both the United States and Canada lower the burden of

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195. *Id.* ¶ 53.

196. Davies v. Davies, 717 F. App'x. 43, 48 (2d Cir. 2017) ("Based on Mr. Davies's psychological abuse of not only K.D., but also of Ms. Davies in K.D.'s presence, we find no error in the district court's conclusions as to the magnitude of the potential psychological harm to K.D."); *see also Husid,* 2012 CarswellOnt 12136 at ¶ 28.

197. *See* Karen Brown Williams, *Fleeing Domestic Violence: A Proposal to Change the Inadequacies of the Hague Convention on the Civil Aspects of International Child Abduction in Domestic Violence Cases*, 4 J. MARSHALL L.J. 39, 73-74 (2011).

proof within Article 13(b) from "clear and convincing evidence" that the grave risk of harm occurred, to the typical civil standard, "preponderance of the evidence." The Hague Convention balances the best interests of children with mutual respect for others between States' domestic laws. However, given that domestic violence is already difficult to prove, lowering the existing burden of proof would capture the reality of domestic abuse and would prevent more children from being forced to return to violent situations. Furthermore, the Hague Convention is often the only judicial remedy available to a victim of domestic violence seeking escape. As mentioned above, courts of a State in which the abducting parent resides often lack the tools to protect the parent and child due to burdens of proof in their own family law systems which cannot be met or due to unresponsiveness of law enforcement. A slightly lower burden of proof for Article 13(b) defenses could affect the safety of countless parents and children were it adopted by the United States and Canada.

B. Recommendations Specific to the United States

United States courts are beginning to interpret Article 13(b) more broadly, often considering harm to a parent as harm to a child in calculating grave risk. This progression also accords with the current social science literature mentioned above. However, the application of the Hague Convention in many United States jurisdictions often fails to fulfill the purpose of the Convention. This Note recommends that judges throughout the United States consider grave harm to a parent or primary caretaker as grave harm to a child when evaluating the merits of an Article 13(b) defense. Furthermore, lawmakers of the United States might consider adding provisions specifically targeting domestic abuse to 22 U.S.C. § 9001, the federal statute giving force of law to the Hague Convention in the United States.

Another recommendation for Hague Convention States, and especially for the United States, is to consider "coercive control" of the abusive parent over the abducting parent as meeting the standard of Article 13(b). Coercive control such as ongoing threats of violence or economic control over another parent's life is psychologically harmful. If the interpretation of Article 13(b) continues to widen, it will likely encompass this kind of behavior. However, an imprecise definition of "coercive control" could require extensive investigation into each parent's fitness as a caretaker, which would be an issue likely best decided by home States. Coercive control as "grave risk of harm" or an "intolerable situation" would be worthwhile addressing in other conventions, such as the Convention on the Rights of the Child.

VIII. CONCLUSION

The Hague Convention on the Civil Aspects of International Child Abduction was created with the safety of children as its goal. However, not every parent flees with their child to another nation for malicious reasons; sometimes, flight is for the child's safety, such as when the child's home is rife with domestic violence. Unilaterally returning a child to their place of habitual residence could result in grave risk of physical or psychological harm to the child, forcing the

Hague Convention to work against its own purpose. The exception under Article 13(b) attempts to solve this problem. When deciding a Hague Convention case involving domestic violence, judges must strike a delicate balance in their adjudication of Article 13(b) claims, walking a tightrope between protecting children from harm and honoring State sovereignty. Broadening the situations in which an Article 13(b) defense applies would allow more children to be kept away from dangerous living situations, yet it also can incentivize forum-shopping, compromise the comity between States, and even spur more abductions. Conversely, enforcing Article 13(b) too narrowly puts abused children at risk of harm when they are returned to a violent household or to close proximity to an abuser.

Canadian and U.S. courts balance these interests in different ways, but both have the same obligations under the same Convention. Since current social science shows that grave risk of harm to parents has serious impacts upon their dependent children, States must treat both harms in similar ways in order to fulfill their obligations under the Hague Convention. Adopting the perspective of Canada and certain Circuits of the United States would enable all United States courts to fully honor their international obligations and to protect the health and safety of all children in flight from domestic oppression.