To stabilize and preserve the family

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Using Article 20

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I. Introduction

The Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"),\(^1\) a private international law treaty, typically requires the return of an abducted child to the child's habitual residence unless the abductor can establish one of five enumerated defenses. This article focuses on one of these defenses. Article 20 provides that a child need not be returned if the return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."\(^2\) Although an article 20 defense is seldom used and frequently unsuccessful,\(^3\) the defense has the potential

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2. The other Convention defenses are found in article 12 ("the judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment"); article 13(a) ("the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention"); article 13(b) ("there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation"); and article 13 (unnumbered portion) ("the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views").

to work for some domestic violence victims who abduct their children as part of their effort to escape from domestic violence. This article suggests the content for such an argument, and thereby hopes to supplement the defenses available for a group that is often treated unjustly by the application of the Hague Convention to their situations.

This article is the companion piece to my recent paper entitled *Strengthening Article 20*.\(^4\) It argued that article 20 can and should be revitalized, and suggested that the comments and interpretations that had narrowed article 20 were at odds with the provision’s history. I do not repeat the information contained in the earlier article. Rather, I now set forth the details of the article 20 defense that a domestic violence victim might make if she were a respondent to a Hague petition in the United States. I assume that litigators who will be making an article 20 argument will also read the companion piece. Consequently, this paper does not address some typical responses to the article 20 defense (e.g., that article 13(b) and article 20 are redundant or that the human rights violation must “utterly shock the conscience”) because *Strengthening Article 20* addressed those arguments.

**II. The Fact Pattern**

Imagine that you represent Jane. Jane fled to the United States from Country X six months ago because her husband beat her often. She was unable to secure effective protection against her husband in Country X, in

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4. See Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 Fordham L. Rev. 593 (2000); Claire L’Heureux-Dubé, *Cherishing our Children: The Role of the Hague Convention on the Civil Aspects of International Child Abduction, V THE JUDGES’ NEWSLETTER* 17, 19 (2003) (stating “The Hague Convention . . . is not sensitive enough to the needs of mothers who abduct their children in order to escape from abusive situations”); REUNITE, International Child Abduction Centre, *The Outcomes for Children Returned Following an Abduction* (Sept. 2003) (concluding that in “a small number of more extreme cases, the concerns which have led the abducting parent to resist return have not been sufficiently ameliorated by the structures put in place by the returning State to address these issues, and the fears expressed by the returning parent have materialized to the very real detriment of the returning parent and child”). The REUNITE study finds these cases are in the minority, and while they are “no less deserving of our attention for that,” finds that “in most cases in our sample the returning parents were able to eventually get on with their lives, sometimes in the country of their choice, sometimes in a country which they would rather leave.” *Id.* at 46. While the REUNITE study is extremely important in providing facts on the experiences of families affected by the Hague Convention, and while I agree with their conclusion that the topic of domestic violence deserves the Hague Conference’s attention, I disagree with their assessment of the magnitude of the problem. What the study misses is the number of women who are trapped by the fact that the Hague remedy exists, the injustice of asking women to choose between their safety and their child, and the problematic nature of requiring women to endure threats to their safety, even if eventually some semblance of normalcy returns.

part because her husband was a dangerous and tenacious man who paid little attention to court orders and in part because Country X did not always enforce its laws protecting domestic violence victims. When Jane fled, she took their child with her. Jane’s husband has recently instituted a legal action to have their child returned to Country X pursuant to the International Child Abduction Remedies Act (ICARA), which implements the Hague Convention in the United States. Jane’s husband can prove all of the facts necessary to establish a prima facie right to return under ICARA.

In preparing your defense of Jane, your legal research reveals that domestic violence victims as a group receive no special treatment under the Hague Convention’s defenses. Although courts occasionally find domestic violence relevant to their decision not to return a child, many domestic violence victims fare poorly under the Hague Convention’s limited defenses. Judges adjudicating these cases often seem oblivious to the well-documented risks to children from domestic abuse and find threats to the mother’s safety irrelevant to the proceedings.  

Jane’s predicament strikes you as untenable. If Jane loses, Jane faces a horrific choice: her safety or her child. The Hague Convention remedy will send her child back to the place from which Jane has just fled. If Jane returns with her child to the child’s habitual residence, Jane’s safety and life are at risk. If she privileges her own safety and does not return to her child’s habitual residence, Jane will be temporarily deprived of her child pending the custody contest, she will have left her child without her pro-

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9. Numerous authors have detailed the harm to children from domestic violence. See, e.g., Clare Dalton, Judge Susan Carbon, and Nancy Olesen, High Conflict Divorce, Violence, and Abuse: Implications for Custody and Visitation Decisions, 54 Juv. & Fam. Ct. J. 11, 17-20 (2003) (reviewing effects of domestic violence on children, including harm from witnessing violence, increased risk of physical and sexual abuse, harm from emotional abuse, harm from undermining the abused parent’s capacity to parent); Peter G. Jaffe et al., Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes, 54 Juv. & Fam. Ct. J. 57, 61 (2003).

9. While a court in the child’s habitual residence might award Jane interim visitation, Jane might not be allowed to exercise her visitation rights abroad since she is an “abductor.” Cf. R.S, 2003 All E.R. 238 (Fam. U.K.) (discussing court-imposed measures to reduce risk of re-abduction). While a U.S. court could make return contingent upon visitation occurring outside of
tection,\textsuperscript{10} and she will have increased the risk that she will lose a subsequent custody contest in which she does not personally appear.

While the Hague Convention remedy will not force Jane, or any abductor for that matter, to return with her child, Jane confirms that if her child were returned to Country X, she would return too despite the threat to her own safety. Jane's decision to return is typical of women in her situation.\textsuperscript{11} You are concerned for Jane's safety because Jane is likely to become revictimized, even if her batterer assures the court that he will not abuse her,\textsuperscript{12} and Jane's recent attempt to leave significantly increases the risk that her revictimization will result in severe injury or death.\textsuperscript{13}

\textsuperscript{10} Research suggests that there is a 40% median co-occurrence between adult domestic violence and physical child abuse, and that "in the vast majority of cases... the man who battered the mother was also the source of child abuse or neglect." Nicholson v. Williams, 203 F.Supp.2d 153, 198 (E.D.N.Y. 2002) (citing research by Dr. Edelson and Dr. Stark). In addition, the separation from the mother may itself harm the child. There is evidence that "children exposed to domestic violence are at a significantly above-normal risk of suffering separation anxiety disorder if separated from their mother." Id. at 199 (regarding separation imposed by the state as part of child protective system).

\textsuperscript{11} Reunite reported that in twenty-two cases studied, thirteen of the fourteen abducting mothers, but none of the eight abducting fathers, returned to the child's habitual residence even though "domestic violence was raised as a concern in 44.4% of the cases in which the abducting mother raised a concern relating to return." Reunite, supra note 4, at 35. Courts typically awarded these women custody of their children upon return, however, the women's requests to relocate with their children were frequently denied or decided only after a prolonged period of time. Id. at 35, 37, 44.

\textsuperscript{12} The Reunite study revealed that non-molestation undertakings were given in fifty percent of the cases in which undertakings were given (six out of twelve). These non-molestation clauses were broken in one hundred percent of the cases. See id. at 30-31, 38. The Reunite study also documents barriers to court and police enforcement of undertakings. Id. at 34. The limitations of undertakings are discussed generally in Weiner, supra note 4, at 679-81. The limitations of protection orders for domestic violence victims are discussed in Stoneman v. Dollinger, 64 P.3d 997, 1002 (Mont. 2003). See also Andrew R. Klein, Re-Abuse in a Population of Court-Restrained Male Batterers (Why Restraining Orders Don't Work), in EVE S. BUZAWA & CARL G. BUZAWA, Do Arrests and Restraining Orders Work? 192 (1996) (reporting that about half of the abusers re-abused their victims within two years of the restraining order).

\textsuperscript{13} See Baker v. Baker, 494 N.W.2d 282, 286 (Minn. 1992) ("Extensive research on domestic abuse supports the assertion that the risk of danger increases once the victim makes the choice or attempts to leave the abusive relationship"); see also Jaffe, supra note 8, at 59 (citing N. WEBSDALE, UNDERSTANDING DOMESTIC HOMICIDE (1999)).
III. The Structure of Article 20

Article 20 reflects the wisdom that governments must not trample human rights as they implement the Hague Convention. In analyzing an article 20 defense, the relevant fundamental principles of human rights are those of the country in which the Hague Convention petition is adjudicated. If return “would not be permitted” by those “fundamental principles relating to the protection of human rights,” then the judge need not, and arguably must not, return the child.

The application of article 20 raises some difficult questions. These questions include the following: Are the child’s human rights the only human rights relevant to the defense? What is “a fundamental principle . . . relating to the protection of human rights and fundamental freedoms?” Must these fundamental principles be found in a particular source of domestic law? What does it mean that return “would not be permitted” by these fundamental principles? Does a court have discretion to return a child even if the article 20 defense is established? While no definitive answers to these questions yet exist in the United States, the travaux preparatoires and case law from our treaty partners, both of which are relevant to the treaty’s interpretation in the United States, provide some important, although limited, guidance. A brief discussion of these issues sets the backdrop for Jane’s argument.

A. Whose Human Rights?

Some courts in dictum have said that article 20 is limited to situations in which the child’s human rights would be violated by return as opposed to the petitioner’s. This interpretation is clearly at odds with both the language of article 20 as well as the provision’s history. Mr. Anton, then-chairman

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14. For the importance of the travaux to the interpretation of this treaty, see Blondin v. DuBois, 189 F.3d 240, 246 n.5 (2d Cir. 1999). For a discussion of the importance of sister-signatory case law, see Weiner, supra note 7, at 298.

15. Although the Pérez-Vera Explanatory Report is considered to be “the official history and commentary on the Convention,” see Dep’t of State, Hague International Child Abduction: Text & Legal Analysis, Pub. Notice 957, 51 Fed. Reg. 10, 494, 10, 503 (1986), Professor Pérez-Vera admits that certain passages of her report “reflect a viewpoint which is in part subjective.” Elisa Pérez-Vera Explanatory Report, reprinted in HAGUE CONFERENCE ON PRIVATE INT’L LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION, Oct. 6-25, 1980, pp. 427-28. The Pérez-Vera Report never received the approval of the Conference delegates. Id. In addition, one must be cautious about drawing conclusions from the diplomatic history since only a few delegates spoke on any of the many issues that arose during the working sessions. Those delegates who did speak often spoke at cross-purposes and some issues did not receive full debate. Also, the official reports only summarize the speakers’ remarks. See Notice by the Permanent Bureau, reprinted in HAGUE CONFERENCE ON PRIVATE INT’L LAW, III ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION October 6-25, 1980, at 252. As for the relevant case law, it is very sparse. Few litigants raise an article 20 defense, some courts dismiss the defense for the wrong reasons, and the issues raised here are seldom, if ever, addressed. See generally Weiner, supra note 5.

of the Commission of the Hague Conference on Private International Law that drafted the Convention, reported that article 20 was proposed as a response to article 13(b), which focused solely on the child. Since article 13(b) only focused on the child, it “would not by itself necessarily exclude a duty to return a child ‘wrongfully removed’ by a political refugee in breach of rights of custody imputed to a person under the law of the State from which he has sought refuge.” He continues, “Attempts, therefore, were made to widen this exception. . . .”

Professor John Eekelaar, who attended the second meeting of the Special Commission that drafted the Convention, agrees that article 20 was intended to cover the basic human rights and fundamental freedoms of the child or “of the parent who would accompany him.” The delegate from Australia pointed out that the absence of any reference to the “protection of children” meant, in fact, that the provision was quite “broad.” Consequently, an argument that focuses on Jane’s human rights is permissible.

B. Fundamental Principles?

The meaning of “a fundamental principle . . . relating to the protection of human rights and fundamental freedoms” is somewhat unclear. The Reporter’s statement that “the exact scope” of article 20 “is difficult to define” captures the complexity of the issue. While its odd language might suggest that the provision has a very narrow scope (“a fundamental principle . . . relating to the protection of human rights and fundamental freedoms”), the application of article 20 has never been restricted to those fundamental principles that help insure other human rights, such as democratic elections, independent courts, and basic notions of due process. Courts have always assumed that a broad array of human rights abuse might give rise to the defense. The courts’ assumption is supported by


19. Procès-Verbal No. 13, Oct. 21, 1980 (Comments of Mr. Creswell (Australia)), reprinted in HAGUE CONFERENCE ON PRIVATE INT’L LAW, III ACTES ET DOCUMENTS DE LA CONFÉRENCE QUATORZIÈME SESSION October 6-25, 1980, p. 337. This feeling was mirrored in comments by Mr. Yadin from Israel. See id. at 338.


the *travaux preparatoires*, which lacks any suggestion that the defense was limited to a particular type of human right.\(^{22}\) Since it is difficult, if not impossible, to draw distinctions between those human rights that are essential to the guarantee of other human rights and those that are not,\(^ {23}\) the absence of attempts to do so is commendable. Yet even if a court could draw such an artificial line, it might forego the exercise in order to keep its government in compliance with all of its public international law obligations.

Once the relevant fundamental principle of human rights is identified, article 20 seems to require that the domestic "fundamental principle" be shared by the broader international community. This external standard emerged because many countries feared that judges would otherwise undermine the Hague Convention by refusing to return a child based on their own country's public policy, thereby promoting forum-shopping. Consequently, during negotiations over article 20, the reference to "human rights and fundamental freedoms" was substituted for the phrase "the fundamental principles relating to the family and children in the State addressed."\(^ {24}\) The Reporter said that the substitution "considerably diminished" the threat posed by the internal law of the State of refuge by the "reference to the fundamental principles concerning the protection of human rights and fundamental freedoms," since this "relates to an area of law in which there are numerous international agreements."\(^ {25}\) Consequently, this external reference is

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\(^{22}\) W. v. Ireland, [1994] ILRM 126 (Ir. H. Ct.) (holding that articles 40-44 of the Irish Constitution fall within the parameters of article 20, and these articles cover a vast number of different rights); Tribunal Federal Suisse, *Hague Conference on Private Int'l Law, INCADAT: HC/E/CH 427* (Switz. Sup. Ct. Mar. 29, 1999), available at http://www.incadat.com (summary of case) (implying that if return would violate the freedom of movement of the mother, which there was no evidence to support, then article 20 would be established); *Hague Conference on Private Int'l Law, INCADAT: M v. F* (Fr. Ct. App. Mar. 29, 2000), at http://www.hcch.net/incadat/fullcase/0274.htm (suggesting that a parent's relationship with his or her child was one of the human rights covered by article 20); *de los Rios v. Melendez*, 1996 WL 940333 (P.R. June 28, 1996) (suggesting that returning child to Mexico where the child's mother was at risk of further domestic violence violated mother's rights) (opinion of Juez Presidente Señor Andreu Garcia). However, the availability of due process in the foreign state may be relevant to the validity of these other claims. See, e.g., Freier v. Freier, 969 F. Supp. 436 (E.D. Mich. 1996) (holding that restriction on mother's right to travel during pendency of divorce and custody proceedings was not established because injunction could be dismissed if bond were posted and the injunction could be challenged because freedom to travel was a fundamental right in Israel, too); *Caro v. Sher*, 687 A.2d 354, 360-61 (N.J. Super. Ct. Ch. Div. 1996) (holding that the availability of appellate review to address the lethargy of the judicial bureaucracy negated the alleged lack of procedural due process).

\(^{23}\) In fact, article 20 may even apply if return would violate social, economic, or cultural rights. See Weiner, *supra* note 5, at 13-14.

\(^{24}\) For example, without life, no other human rights are relevant. The dichotomy proves false with other human rights, too. Free speech is both a fundamental principle relating to the protection of human rights as well as a human right itself.

important, even though it may have little effect as a practical matter if a court is predisposed to grant the article 20 defense. Jane, therefore, will have to show that the international community generally recognizes the fundamental principle at issue in her case.

In addition, for the fundamental principle of human rights to be the basis of an article 20 defense, it must be applied to purely domestic matters as well as to cases arising under the Hague Convention. As Professor Pérez-Vera wrote in her Explanatory Report, the principles “must not be invoked any more frequently in international cases . . . than they would be in their application to purely internal matters.” She continued, “Otherwise, the provision would be discriminatory in itself, and opposed to one of the most widely recognized fundamental principles in internal laws.” Assuming the validity of the Reporter’s comment, the necessary extent of domestic compliance with the principle is unspecified. The requirement becomes complicated in a federal system, since the application and interpretation of a fundamental principle of human rights may vary by state.

C. Sources of Fundamental Principles?

Article 20 does not specify the sources from which a court might deduce the relevant fundamental principles related to the protection of human rights. The Reporter suggested that the principles accepted by the requested state could be found in “general international law, treaty law,” or “through internal legislation.” In the United States, the federal constitution, state constitutions, ratified treaties, federal and state statutory law, and federal and state common law could all be sources from which one might deduce the relevant principles.

26. It may have little effect for two reasons. First, the court adjudicating the defense is the one to say whether its own county’s fundamental principles correspond with the broader international understanding of human rights. That court’s decision is not subject to appeal to an international body. Nor is there a legal mechanism for other countries to challenge the adjudicating court’s determination. Consequently, a court determined to be guided by its own country’s unique understanding of human rights will probably be able to do so. Second, as a matter of domestic law, a court may have to follow the domestic understanding of human rights even absent an international analog.


28. One might question whether a more frequent application of a fundamental principle in the context of Hague Convention proceedings is really discriminatory. The level of human rights infringement may truly be more egregious abroad. In addition, the respondent is not necessarily a national of the state of refuge, so that a ruling in favor of the respondent is not necessarily “discrimination” in favor of a national.

29. Some states in the United States say that the death penalty constitutes cruel and unusual punishment, see Dist. Att’y Suffolk Dist. v. Watson, 411 N.E.2d 1274, 1275 (Mass. 1980), but federal courts say otherwise. See Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994); Gray v. Lucas, 710 F.2d 1048, 1061 (5th Cir. 1983).

The United States Constitution should not have a privileged status with regard to identifying relevant principles for purposes of the article 20 defense. While inclusion of a particular right in the U.S. Constitution might be determinative of whether a fundamental principle of human rights exists in this country, the absence of a particular fundamental principle of human rights in the U.S. Constitution does not mean that the fundamental principle does not exist. The Constitution itself, in the Ninth Amendment, specifies that not all rights were enumerated. The contours of judicially-created rights such as substantive due process are fluid and depend upon the legal challenges brought before the courts. Even when the Supreme Court finds insufficient historical evidence of a fundamental principle to support its status as a federal constitutional right, the Supreme Court is only one voice in what is often an ongoing historical debate. For example, Professor Heyman criticizes the Court for its description of history in DeShaney v. Winnebago County Department of Social Services. He persuasively argues that the U.S. Supreme Court was wrong when it said that neither the history nor language of the Due Process Clause suggested that a state must protect its citizens from private violence. Nor is there a necessary link between the federal constitution and our popular sense of fundamental principles. As one court stated, "some things that most people would probably consider as a constitutional (or fundamental) right are not so at all [under the federal constitution], [such as] the right of a child to an education . . . ." That same court said, "[I]t is beyond dispute that each person has a fundamental right not to be assaulted," despite the absence of these words in the Constitution.

Moreover, other sources are well recognized as embodying fundamental principles of human rights in the United States. State constitutions have always been important sources of rights, often offering protection beyond the federal constitution. Statutes, such as the Civil Rights Act and the Violence Against Women Act, reflect fundamental principles that may, or may not, find constitutional expression. The same can be said of state statutes. Even case law is a source from which fundamental principles of

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31. U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.").


human rights can be derived in our common law system. For example, in 1823, Circuit Justice Washington described the “fundamental” privileges and immunities of citizens in the several states, i.e., “which belong, of right, to the citizens of all free governments.” He said that they “may . . . be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.” 35 The Declaration of Independence too reflects the belief that life, liberty, and the pursuit of happiness are “self-evident” “unalienable rights.” Numerous courts cite it as a source of fundamental tenets and its language is included in various state constitutions. 36

While these diverse sources may provide evidence that a particular fundamental principle exists in the United States, the principle’s inclusion in the U.S. Constitution may have particular relevance to the issue discussed next: Does the principle prohibit the return of the child?

D. “Would Not Be Permitted”

Perhaps the most perplexing language in article 20 is the phrase “would not be permitted.” The potential meaning of this phrase is discussed at length in Strengthening Article 20. 37 Here I merely summarize the conclusion reached there. First, if the return of the child would violate a law that is superior to ICARA, such as the U.S. Constitution, then a court “would not be permitted” to return the child. Finding a violation of a superior law will typically involve a nuanced analysis because some rights can be permissibly infringed if a sufficient justification exists. Respondents will have the strongest position (but not the only meritorious position) if return would violate a fundamental principle from which limited or no derogation were possible. 38

35. Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (holding that New Jersey’s prohibition on the taking of oysters found in New Jersey waters by nonresidents did not violate the privilege and immunities clause of Article IV section 2 because the government is not obligated to extend to the citizens of other states the same advantages as are secured to their own citizens with respect to the common property of such state).

36. See, e.g., Calder v. Bull, 3 U.S. 386, 397 (1798) (opinion of Paterson, J.); Webster v. Ryan, 729 N.Y.S.2d 315, 320 (N.Y. Fam. Ct. 2001); People v. Lord, 2003 WL 1906774 (N.Y. Just. Ct. Apr. 9, 2003). See also FLA. CONST. art. 1, § 2; ILL. CONST. art. 1, § 1; IND. CONST. art. 1, § 1; IOWA CONST. art. 1, § 1; ME. CONST. art. 1, § 1; N.H. CONST. art. 1, § 1.

37. See generally Weiner, supra note 5, at 11-15.

38. Unlike the South African Constitution, the U.S. Constitution has no express prohibition on derogation from certain rights. See generally SOUTH AFRICAN CONST., § 37. However, certain rights may be “non-derogable” because of case law or the U.S.’s treaty obligations. For example, the prohibition of torture seems to be one such right. See, e.g., Siderman de Blake v. Argentina, 965 F.2d 699, 717 (9th Cir. 1992). Also, there may be ways to argue that a particular
Second, if the return of the child would violate fundamental principles contained in a law with equal or inferior status to ICARA, such as a ratified treaty that lacks implementing legislation or a state constitution, a court could still accept the article 20 defense by interpreting the phrase "would not be permitted" more colloquially. After all, a literal reading of article 20 does not make sense since "principles" never actually prohibit anything. Under a more colloquial interpretation, if return would be manifestly incompatible with the principles embodied in those sources, it would not be permitted by the principles and should not occur.

E. Discretion

Some people, including the Reporter, have suggested that a successful article 20 defense does not prohibit a court from exercising its discretion to return a child. This conclusion is incorrect if the relevant fundamental principle is embodied in the U.S. Constitution or other law that the court must obey. It may have some merit if the fundamental principle is reflected in a law with an equal or subordinate status to the Hague Convention and its implementing legislation.

Courts should rarely, if ever, exercise their discretion to return a child if an article 20 defense has been established. Scholars who have described how judges exercise their discretion suggest that courts balance the purpose of the Convention with the particular defense at issue. When an article 20 defense exists, return will not further the purpose of the

right should be treated as non-derogable. For example, the U.S. has taken the position that "States Party to the International Covenant on Civil & Political Rights (ICCPR) should whenever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant." Resolution of Advice and Consent to the Ratification of the ICCPR, 138 Cong. Rec. S4781, 4784 (daily ed. Mar. 26, 1992) (making advice and consent subject to the above declaration). Of course, the Supreme Court's case law suggests the infringement of some rights, i.e., those deemed fundamental, require a more compelling justification. See infra text accompanying notes 129-30.

39. Treaties have legal effect in U.S. courts if they are either "self-executing" or if they have been implemented by federal law. See generally Frederic L. Kirgis, International Agreements and U.S. Law, ASIL Insight (1997), at http://www.asil.org/insights/insigh10.htm. However, all ratified treaties have "indirect effect in U.S. courts" because U.S. courts interpret federal and state statutes to be consistent with the country's treaty obligations. See id.

State constitutions do not "prohibit" a federal court from returning a child in a Hague proceeding because the federal court is interpreting and applying federal law. A federal court could reject outright the relevance of state constitutional rights to an article 20 defense.

40. See Pérez-Vera Explanatory Report, supra note 15, at 460. See Friedrich v. Friedrich, 78 F.3d 1060, 1067 (6th Cir. 1996); Department of State, supra note 15, at 10509. See generally Hague Convention, supra note 1, art. 18.

41. See Nigel Lowe et al., INTERNATIONAL MOVEMENT OF CHILDREN: LAW, PRACTICE AND PROCEDURE 314, 368 (2004).
Convention sufficiently to offset the disadvantages inherent in ignoring the defense.

The purpose of the Convention is to secure the prompt return of children. This purpose rests on the assumption that prompt return best serves children’s interests,42 by deterring abductions and by situating each custody contest in the place where most of the relevant evidence is located. Since neither of these outcomes are necessarily beneficial for children whose mothers are subject to domestic violence, the court cannot assume that the prompt return of Jane’s child will generally further children’s interests.43 Rather the court should conclude that returning a child despite the existence of an article 20 defense will generally harm children’s interests. Return sends a message to others, including children, that human rights are irrelevant and that the perpetrator of domestic violence is accountable for his acts, yet again. Return may also harm Jane’s child because the risk of abuse may negatively affect Jane’s parenting44 and, when the risk of abuse materializes, harm the child.45 Just as courts in the context of the article 13(b) defense have been reluctant to exercise their discretion because of the risk of harm to a particular child,46 so too should courts be extremely reluctant to exercise their discretion when an article 20 defense exists in these circumstances.

Finally, returning a child when it would violate the mother’s human rights might violate the United States’ obligations under public international law, although whether the United States’ obligations under the relevant human rights treaties trump the “discretion” allegedly given to judges under the

42. See Hague Convention, supra note 1, art. 1; Id. at preamble.
43. Deterring domestic violence victims from escaping is not beneficial for their children. See Weiner, supra note 4, at 619-22. Nor is situating the custody context in the habitual residence. The mother may be unable to participate. See Working Document No. 20, in Report of the Third Special Commission meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997), annex II (proposal of seven countries that stated “the child’s best interests are not protected by this Convention if the abducting parent cannot safely return to participate effectively in a custody hearing”). See id. (final document stated that “in most cases, a consideration of the child’s best interests requires that both parents have the opportunity to participate and be heard in custody proceedings”). If the mother returns to participate, she and her child may be harmed. See infra notes 44-45.
44. See Judicial Council of California, Parenting in the Context of Domestic Violence 13 (March 2003) (citing studies) (“in some samples, researchers found that a battered mother’s mental health is impaired by the violence to which she is subjected; in turn, her children’s problems appear to be associated with her impaired mental health”). The same source notes how abusive partners undermine mothers’ authority with their children, “making effective parenting more difficult.” Id. at 14. Of course, if the mother is killed, her parenting will cease altogether and if she is severely injured, it will be interrupted.
45. See Walsh v. Walsh, 221 F.3d 204, 220 (1st Cir. 2000). See also supra notes 8, 10. There is considerable variability among children regarding the effects of witnessing domestic violence. See generally Nicholson, supra note 10, at 197.
46. See Beaumont & McELEAVY, supra note 3, at 155.
Hague Convention to disregard those same human rights would be a question of treaty interpretation and general principles of international law.47

F. Places to Watch for Answers

As the brief discussion above suggests, article 20 raises many questions. Definitive answers to these issues may emerge as more individuals invoke the article 20 defense. Lawyers in the United States should watch for developments in Europe in particular because the new Brussels II Convention makes it likely that European courts will accept the article 20 defense with greater frequency in the future,48 and decisions of our sister signatories are relevant to the interpretation of article 20 in the United States.49 Lawyers should also watch for potential answers from courts that interpret provisions that parallel article 20, such as the Inter-American Convention on the International Return of Children.50 Even the interpretation of the Uniform Child Custody Jurisdiction and Enforcement Act in the United States might be helpful. Section 105(c) states, "A court of this State need not apply this Act if the child custody law of a foreign country violates fundamental principles of human rights."51 While the wording of article 20 and section 105(c) differ (section 105(c) is limited to considering whether the "child custody law" violates human rights), the commentary to section 105(c) states, "The same concept is found in section 20 of the Hague

47. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 323, 332 cmt. f (1987). The lawfulness of the United States' action might differ under international and domestic law. Under domestic law, for example, rules about the effect of treaties in domestic courts as well as rules about the priority of implementing legislation might be determinative.

48. The new Brussels II states, "[a] court cannot refuse to return a child on the basis of Article 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return." Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, art. 11(4), No. 12513/1/03 Rev. 1 (10 Nov. 2003) [hereinafter Brussels II bis]. It also requires that a court who rests its order of non-return on article 13 transmit its order of non-return to the child's habitual residence and enforce any subsequent judgment requiring return of the child issued by a court in the child's habitual residence. Id. at art. 11(6), (8). The same enforcement obligation does not exist if the court in the state of refuge bases its decision of non-return, even in part, on article 20. Consequently, courts in Europe adjudicating Hague petitions involving a child who was abducted from another European country may rest their decisions not to return, at least in part, on article 20.

49. See Weiner, supra note 7, at 298.

50. See Inter-American Convention on the International Return of Children, July 15, 1989, art. 25, O.A.S. Treaty Series No. 70, 22 I.L.M. 721 ("A child's return under this Convention may be refused where it would be manifestly in violation of the fundamental principles of the requested State recognized by universal and regional instruments on human rights or on the rights of children.").

51. See Uniform Child Custody Jurisdiction and Enforcement Act, 9 UNIF. LAWS ANN. 649 § 105(c) (1999) [hereinafter UCCJEA].
Convention on the Civil Aspects of International Child Abduction . . . .”

Until clarification comes, however, the uncertainties present opportunities for lawyers representing domestic violence victims. The ambiguities are an invitation for creative advocacy.

IV. Your Child or Your Life: A Repugnant Choice

A. Its Formulation

The article 20 argument that I am proposing would look like the following: In the United States, it violates fundamental principles related to the protection of human rights to make a woman choose between her child and her safety. Inflicting this Hobson’s choice on a parent is repugnant because it contradicts our deeply held beliefs that domestic violence should be eliminated, that the victim’s safety is paramount even in matters related to custody, and that a woman should not be punished for trying to escape domestic violence. Asking a domestic violence victim to choose between her safety and her child puts in conflict her right to life and her right to liberty, the latter including the right to the company of her children, for an insufficient reason. While the other parent may have a legitimate interest in safeguarding his relationship with his child, his interest is not affected by a court decision that accepts the domestic violence victim’s article 20 defense. A rejection of the Hague Convention’s remedy only means that any custody litigation will not occur in the child’s habitual residence; the Hague proceeding does not determine custody or what law will apply in a custody contest.

Before I flesh out this argument, I want to emphasize that it is framed very narrowly. I am only suggesting that requiring the mother to choose between her safety and her child violates the mother’s human rights related to life and liberty. I am not making three related arguments that might find favor with a court, and advocates may want to explore these nascent ideas further. First, a domestic violence victim who must litigate custody in a place where she is unsafe might not receive due process (regardless

105(c) has the phrase “fundamental principles of human rights” and article 20 says “fundamental principles relating to the protection of human rights.”

53. Hague Convention, supra note 1, art. 19. I have conceptualized the argument for domestic violence victims variously over time and have come to the formulation set forth in this paper only after considerable thought. In International Child Abduction and the Escape from Domestic Violence, I suggested that a victim “would have difficulty making a successful argument that Article 20 is violated by returning a child to a country where domestic violence is not treated seriously.” Weiner, supra note 4, at 666. My position has changed because my own thinking about the issue has evolved, not because the law in the United States has changed.
of the quality of the legal system). A frightened person who is preoccupied
with her safety might be too distracted to have a fair fight in court, or too
scared to return to the jurisdiction to appear personally before the court.54
Second, a court that returns Jane’s child might also be violating the fun-
damental principle of human rights called non-refoulement if Jane has
applied for asylum or a withholding of deportation.55 The principle of
non-refoulement, which is expressed in numerous international treaties as
well as customary international law, prohibits countries from taking action
that compels refugees to return to territories where their lives, physical
integrity or liberty are threatened.56 Returning a refugee’s child to such a
territory might qualify as a coercive act.57 Third, the rights of Jane’s child

54. See State Central Authority v. Ardito, ML 1481/97, at 37-38 (Fam. Ct. Austrl., Oct. 29,
1997) (holding that it was an “intolerable situation” under article 13(b) that the mother, who had
consented to return with the child, would be unable to accompany her young child back to the
U.S. to participate in the custody litigation because of visa problems and stating in obiter dic-
tum that ordering the child’s return under such circumstances would violate article 20); Dep’t
ing in obiter Ardito’s holding to cases involving an abductor who cannot appear at a custody
contest in the child’s habitual residence because of the respondent’s own personal situation).

55. Jane might be a “refugee” even if she has not yet received asylum or had her status as a
refugee determined. While the 1951 Convention Relating to the Status of Refugees, 28 July
1951, 189 U.N.T.S. 150 (the Geneva Convention), and the 1967 Protocol Relating to the Status
of Refugees, 31 Dec. 1967, 606 U.N.T.S. 267, do not address this issue specifically, the Office
of the U.N. High Commissioner for Refugees (UNHCR) has addressed it and its determinations
are authoritative, pursuant to article 35 of the Geneva Convention. The UNHCR states that a
person qualifies as a refugee and should be protected from refoulement even before the person’s
status is legally determined, and even if the applicant has been denied asylum but is awaiting
resolution of an appeal. See Office of United Nations High Commissioner for Refugees,
Doc. HERI 4/Eng/Rev.1 (reedited 1992). For an application of these principles in the United
States, see U.S. Citizenship and Immigration Services, Obtaining Asylum in the United States:
Two Paths to Asylum, available at http://wscis.gov/graphics/services/asylum/paths.htm (stating
individuals who are physically present in the U.S. and “affirmatively” apply for asylum “are
free to live in the U.S. pending the completion of their asylum processing with USCIS and, if
found ineligible by USCIS, then with an Immigration Judge” and those who apply for asylum
“defensively” are subject to removal if the immigration judge denies the applicant’s eligibility).

56. See, e.g., Convention Relating to the Status of Refugees, supra note 55, art. 33 (pro-
hibiting the refoulement of a refugee “in any manner whatsoever”). The U.S. is a party to the
Protocol and is thereby bound also by the Convention Relating to the Status of Refugees. See
refoulement may even rise to the level of jus cogens so that no derogation would be permitted.
See Jean Allaine, The Jus Cogens Nature of Non-Refoulement, 13 INT’L J. REFUGEE L. 533
(2001). For a full discussion of the topic, see James A.R. Nafziger, The General Admission of
Aliens Under International Law, 77 A.I.L.R. 804, 839 (1983); Guy S. Goodwin-Gill, Refugees
and Responsibility in the Twenty-First Century: More Lessons Learned from the South Pacific,

57. See Sonja Starr & Lea Brilmayer, Family Separation as a Violation of International
Alexander Neve, Making International Refugee Law Relevant Again: A Proposal for Collectivized
and Solution-Oriented Protection, 10 HARV. HUM. RTS. J. 115, 173-74 (1997);
may also be violated by his or her return. It arguably violates the child’s rights to separate the child from his or her mother and send the child to a place that cannot or will not address the mother’s legitimate safety concerns. Among other possibilities, the child’s return might qualify as an arbitrary infringement of the child’s relationship with his or her mother or a violation of the child’s right to special protection by the state.58

Advancing any of these alternative formulations of the article 20 argument requires the same sort of analysis that is now presented for the argument that I have selected. One must show that the fundamental principle at issue exists in the United States, that the principle finds international support, that the principle would not permit the child’s return, and that the principle is applied to purely domestic matters too.

B. Evidence of the Fundamental Principle

The image of the state forcing a woman to choose between her safety and her child is a repugnant one, and our reaction to it provides an important starting point for documenting the existence of the fundamental principle in the United States. While I am not aware of any study that empirically documents that most people in the United States consider abhorrent a state-inflicted choice between one’s safety and one’s child, the law provides an important proxy for such empirical research. While legal reforms are ongoing, and while contrary examples may still exist, the law over the last twenty years has undeniably become much more responsive to the needs of domestic violence victims.

Many laws, in fact, are specifically designed to avoid imposing on domestic violence victims the choice between their safety and their children. The laws related to custody jurisdiction are perhaps the most analogous to Hague proceedings, but other examples, including the criminal law of child abduction, are also relevant. These other examples illustrate the following concepts from which one can derive the existence of the fundamental principle relating to the protection of human rights in the United States: we condemn domestic violence, we believe women should leave abusive relationships, we do not want a woman’s relationship with her children to be a barrier to exit, and we prioritize the victim’s safety even in custody matters. The United States’ treaty and constitutional obligations, which are discussed later, also support the existence of the fundamental principle in the United States, although less precisely.

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1. **Statutory and Common Law Examples**

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which has now been adopted by forty states,\(^{59}\) addresses Jane’s predicament in its approach to jurisdiction. The Act empowers courts to keep together domestic violence victims and their children when the victims flee with their children to find safety. Section 204 allows a court in the state of refuge to assume emergency jurisdiction to determine issues of temporary custody when “it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse,” at least until a custody decision can be made by a court in another state or country with jurisdiction.

The Act’s provisions also try to maximize the domestic violence victim’s safety during custody proceedings, either by moving the custody proceedings to the location of the victim or by facilitating the victim’s participation from afar. Section 207 allows a court with primary jurisdiction to forego jurisdiction in favor of another state that is a more appropriate forum. Relevant factors include “whether domestic violence has occurred and is likely to continue in the future and which State could best protect the parties and the child.”\(^{60}\) A party can raise this issue, but section 207 also permits a court to raise it. Sections 111 and 112 facilitate an out-of-state party’s participation in court proceedings from a distance, and the commentary suggests these sections “should be used” if a person would be “in danger upon returning to the State with jurisdiction.” The Act also allows a court to enter any orders necessary to ensure the safety of the child and the parent if the court directs either to appear.\(^{61}\)

The Act’s other provisions also demonstrate a sensitivity to the safety issues faced by domestic violence victims. Section 208 of the UCCJEA, which directs a court to decline jurisdiction based upon a petitioner’s “unjustifiable conduct,” makes clear that the section does not apply to domestic violence victims who flee with their children. The commentary states:

A technical illegality or wrong is insufficient to trigger the applicability of this section. This is particularly important in cases involving domestic violence and child abuse. Domestic violence victims should not be charged with unjustifiable

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61. UCCJEA, supra note 51, § 210(c).
conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. An inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another state to establish jurisdiction has engaged in unjustifiable conduct and the new State must decline to exercise jurisdiction under this section.\(^{62}\)

Section 209(e) requires a court to seal any identifying information that would threaten the "health, safety or liberty of a party or child."

The importance of domestic violence victims' safety to UCCJEA adjudications was reflected well in two recent cases: Stoneman v. Drollinger and Hector G. v. Josefina P. Both cases illustrate that there is a relevant fundamental principle in the United States and one case demonstrates its application to purely internal matters.

In Stoneman v. Drollinger,\(^{63}\) Montana had been the center of the parties' lives: The parties married, had children, and divorced there. The Montana trial court entered a divorce decree awarding custody of the children to the mother. Afterwards, the mother relocated to Washington state. In Washington, she obtained an order of protection against the father. The mother had been a domestic violence victim for at least seven years.\(^{64}\) The mother requested that the Montana court decline jurisdiction in order to allow the Washington court to assume jurisdiction over pending visitation issues because Montana was an inconvenient forum.

The Montana Supreme Court reversed the trial court, which had denied her request. Domestic violence "authorizes a court to yield jurisdiction to another state if the victim could be better protected in the forum and if the other statutory factors do not militate against the transfer." Washington was an appropriate forum because the mother felt safer in Washington, her family lived there, and her residence and daily routine were not known by the father. None of the other statutory factors "outweighs the concern for the safety and well-being of Drollinger and the children raised by the history of Stoneman's domestic violence." The district court should have given "priority to the safety of victims of domestic violence when considering jurisdictional issues under the UCCJEA." The Montana Supreme Court criticized the trial court for not making findings on the recent violence or on the likelihood of future violence, and for failing to consider which forum could better protect the mother and children.


\(^{63}\) Stoneman v. Drollinger, 64 P.3d 997 (Mont. 2003).

\(^{64}\) Id. at 1003.
The Montana Supreme Court repeatedly emphasized that priority must be given to the victim’s safety, and particularly “which forum can provide the greater safety.” Domestic violence was “at the top of the list of factors that courts are required to evaluate when determining whether to decline jurisdiction as an inconvenient forum for child custody proceedings.” The Montana Supreme Court agreed that the National Conference of Commissioners on Uniform State Laws was justified in assigning priority to the protection of domestic violence victims because research shows both the danger posed to victims by the termination of an abusive relationship and the inadequacy of protection orders for protecting women and children from further abuse.

Hector G. v. Josefina P. is another example of the importance courts give to a domestic violence victim’s safety in UCCJEA adjudications. In Hector G., the father had a custody order from the Dominican Republic that had been entered by default, but affirmed on appeal. After the mother removed the children from the Dominican Republic, allegedly in contravention of the order, the father sought a writ of habeas corpus in the Bronx County Family Court, essentially seeking enforcement of his Dominican decree. The mother responded by filing a petition for custody and seeking an order of protection. She alleged that the father had abused her for at least the last seven years, and that she had fled the Dominican Republic in order to escape the father’s violence.

The fact of domestic violence influenced almost every aspect of the court’s decision. The trial court assumed temporary emergency jurisdiction in order to investigate the allegations of domestic violence. Upon substantiation of those allegations, the court stayed any enforcement proceedings “until the underlying issues of domestic violence and the safety of the child could be resolved or a determination could be made that it was appropriate for the court to assume full jurisdiction of the matter.”

The trial court decided that it need not enforce the Dominican decree and could modify it. After determining that the Dominican court would not exercise jurisdiction, the trial court found that it had jurisdiction to modify the order because the mother and children had a “significant connection” with New York and substantial evidence existed in New York, including evidence related to the domestic violence.

The trial court rejected the suggestion that it should decline to exercise jurisdiction because New York was an inconvenient forum. The trial court stated that the domestic violence was “the most important factor” to consider and compared the relative ability of New York and the Dominican Republic to address the domestic violence. Citing the most recent

Department of State Country Report on Human Rights Practices for the Dominican Republic, the court found that "the Dominican Republic had no laws against domestic violence until 1997. Domestic violence is described as "widespread" in that country, affecting 40 percent of that country's women and children. As of March 2003, there were "no functioning shelters for battered women."" In addition, the Dominican court appeared not to be "in a strong position to protect the respondent and the children from domestic violence or abuse in the future," in part because that court placed no weight on the domestic violence in this family and awarded the father full custody despite an order of protection. Nor did the Dominican court require counseling for the father or family, despite a social worker's recommendation for such counseling.

The court also refused to decline jurisdiction because of the mother's "unjustifiable conduct." It noted that unjustifiable conduct does not include the departure of a parent from the jurisdiction with a child because of domestic violence.

The UCCJEA and its application by courts like the Montana Supreme Court and the Bronx County Family Court provide important evidence that the fundamental principle at issue in Jane's case is recognized in the United States. In fact, the parallels between the UCCJEA and the Hague Convention make the UCCJEA arguably the best source for assessing the importance of Jane's interest in her own safety and the impropriety of returning her child. Both the UCCJEA and the Hague Convention seek to discourage child abduction. Moreover, the parties' interests are often very similar in both types of proceedings. A domestic violence victim typically seeks safety, temporary custody of the child pending the outcome of the custody contest, and a custody adjudication in her present location. The other parent also wants temporary custody of the child and the custody litigation in his present location. Given the parallels in the two

66. See National Conference of Commissioners on Uniform State Laws, supra note 52, § 101 cmt. 4; Hague Convention, supra note 1, at preamble. However, only the UCCJEA addresses jurisdiction.

67. Id.

68. The father may also have due process concerns about whether it is fair to make him litigate in the forum to which the mother fled, especially if he has never been to that place. However, the issue of fairness, which is litigated through the doctrine of personal jurisdiction in the U.S., is not a weighty concern here. First, custody determinations are status determinations so that personal jurisdiction over the father is not necessarily required. See Bartsch v. Bartsch, 636 N.W.2d 3, 4-10 (Iowa 2001) (citing cases). Second, the measure of "fairness," i.e., the "minimum contacts" test, might be satisfied. If the batterer suspected that the mother might flee to the U.S. because of his actions, then the effects of the domestic violence would be foreseeable experienced in the forum. See Hughes ex rel. Praul v. Cole, 572 N.W.2d 747, 750-51 (Minn. Ct. App. 1997). See also Calder v. Jones, 465 U.S. 783, 789 (1984); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 37, and cmt. e (1988). In addition, if the father continues to
types of proceedings—the victim’s interest in safety, both parents’ interest in convenience, and both parents’ interest in their child’s company—the UCCJEA is a better source for determining the weight of the domestic violence victim’s interest in safety than other legal settings in which more substantial concerns of the batterer may be implicated. Since neither UCCJEA proceedings nor Hague proceedings determine the substantive issue of custody, the mother’s safety concerns are not weighed against the father’s interest in a long-term relationship with his child or the child’s interest in an ongoing relationship with the father.

Despite this caveat about other legal settings, those settings also illustrate the great weight the law in the United States assigns to a domestic violence victim’s safety, even in situations where the father’s interest may be stronger than in a Hague proceeding. For example, the substantive custody law in most states now recognizes the importance of domestic violence victims’ safety. Professor Bartlett has written: “[P]robably the most significant trend [over the past decade] with the highest level of consensus among the states is the increasing level of protection for victims of domestic violence. This trend permeates legal reform in the custody area, from custody standards, to dispute resolution requirements and modification standards.”

Every state now recognizes that domestic violence is relevant in a custody proceeding, with many presuming that custody should go to the domestic violence victim. Courts permit physical custodians to relocate with their

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69. However, it must be remembered in drawing comparisons between the UCCJEA and the Hague Convention that the choice imposed on a respondent in a Hague proceeding can be far more draconian than that which might attend a UCCJEA proceeding. In a UCCJEA proceeding, the return of the child may not even be at issue. The only issue may be the forum in which the parents must litigate custody. In addition, as mentioned in the text, the UCCJEA provides various mechanisms to help keep domestic violence victims safe during litigation. Even in situations in which the court in the refuge state is asked to enforce a custody order in the batterer’s favor, the court will not do so unless the victim had notice and an opportunity to be heard before entry of that order. UCCJEA § 205(b). In contrast, a court adjudicating a Hague proceeding may order the child’s return even if no custody order has ever been entered and, in some places, even if the mother has a custody order in her favor. See generally Weiner, supra note 4, at 636-40.


71. See Merle-H. Weiner, The Potential and Challenges of Transnational Litigation for Feminists Concerned about Domestic Violence Here and Abroad, 11 AM. U. J. GENDER SOC. POL’Y & L. 749, 751 & n.6 (2003); Jaffé, supra note 8, at 57; H.R. 172, 101st Cong., 2d Sess., H8280 (1990) (resolution that states should “create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse”).
children when the custodian is moving for reasons of physical safety.\textsuperscript{72} Visitation decisions also reflect a concern about the domestic violence victim’s safety, with some states explicitly conditioning visitation on the safety of the mother and child and many favoring supervised visitation options.\textsuperscript{73} Even subtle changes in family law practice reflect a concern with domestic violence victims’ safety, such as the use of detailed visitation orders instead of orders that call for “reasonable visitation.”\textsuperscript{74}

Model legislation proposed by the prestigious American Law Institute also recognizes that domestic violence victims’ safety is paramount in resolving custody disputes. Among other things, the ALI Principles recommend that states adopt a “safety presumption,” whereby a domestic violence perpetrator is not to be allocated any custodial responsibility or decision making responsibility without a finding that the child and parent can be adequately protected from harm.\textsuperscript{75} The commentary to this provision reminds courts that “abusers often use access to the child as a way to continue abusive behavior against a parent,” and that the “[p]rotection of the safety and welfare of an abused parent is consistent with the primary objective of furthering the safety and welfare of the child.” The ALI Principles also permit relocation by the custodial parent so long as it is for a reasonable purpose and the location is reasonable in light of that purpose; the Principles specify that it is a valid purpose to move “to protect the safety of the child or another member of the child’s household from a

\textsuperscript{72} See, \textit{e.g.}, Ireland v. Ireland, 717 A.2d 676, 682 (Conn. 1998) (holding mother’s fear for her physical safety or her desire to protect the children from physical or mental abuse were legitimate reasons to move and proposed location was reasonable in light of that purpose); Spencer v. Small, 263 A.D.2d 783 (N.Y. App. Div. 1999); Sheridan v. Sheridan, 204 A.D.2d 711 (N.Y. App. Div. 1994). \textit{See also} TENN. CODE ANN. § 36-6-108(c)(10) (2003); 75 ILL. COMP. STAT. 45/13.5(c) (2003); National Council of Juvenile & Family Court Judges, \textit{MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE} § 403 (1994) (creating a rebuttable presumption that the residence of the child in the context of domestic violence should be with the domestic violence victim in the location chosen by that parent because “enhanced safety, personal, and social supports, and the economic opportunity available to the abused parent in another jurisdiction are not only in that parent’s best interest, but are, likewise and concomitantly, in the best interest of the child”). \textit{See also} text accompanying note 76 infra.

\textsuperscript{73} See, \textit{e.g.}, ALA. CODE § 30-3-135(a) (2003); GA. CODE ANN. § 19-9-7(a) (Supp. 2002); VT. STATE ANN. tit. XV, § 650 (2001). \textit{See also} \textit{MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE}, \textit{supra} note 72, § 405(1). As one commentator stated, “[C]ollectively, the codes appear to create a new legal principle; to wit, the existence of domestic violence in a family militates against an award of . . . unsupervised visitation to the abusive parent.” Barbara Hart, \textit{State Codes on Domestic Violence: Analysis, Commentary and Recommendations}, 43 JUV. & FAM. Ct. J. 31, 43 (1992). For an example of a supervised visitation provision, see \textit{MINN. STAT. ANN.} § 518.175(1a)(a) (West. Supp. 2004).

\textsuperscript{74} Jaffe, \textit{supra} note 8, at 70.

\textsuperscript{75} \textit{See} \textit{AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS}, § 2.11(3) (2002) [hereinafter ALI PRINCIPLES].
significant risk of harm." The Principles have numerous other provisions that also are responsive to the domestic violence victim's concern with safety. 77

Statutes that are designed to offer legal protection to domestic violence victims also reflect the principle that a domestic violence victim's safety is of paramount importance even in custody matters. The Model Code on Domestic and Family Violence, section 402(1)(a) states, for instance:

In addition to other factors that a court must consider in a proceeding in which the custody of a child or visitation by a parent is at issue and in which the court has made a finding of domestic or family violence: (a) The court shall consider as primary the safety and well-being of the child and of the parent who is the victim of domestic or family violence. 78

Because domestic violence victims often move for reasons of safety, the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, which has been enacted in twelve states with more expected, requires that states give full faith and credit to out-of-state domestic violence and stalking orders, including ex parte custody provisions, so long as orders were issued in accordance with the jurisdictional requirements governing custody orders in the issuing state. 79

A variety of other statutes (and case law) purposefully excuse the acts of a domestic violence victim who flees for safety so as not to inhibit the victim's efforts. For example, some states require courts to disregard allegations of "abandonment" in custody cases when mothers "abandoned" their children in order to flee for their own safety. 80 While many state

76. Id. § 2.17(4)(a)(ii). Cf. id. § 2.17 & cmt. (providing exemption to notice requirements informing the non-relocating parent of relocation if relocating parent has "good cause" to withhold such notice and stating that the "most compelling ground for failure to give notice is emergency flight from domestic violence").

77. See, e.g., id. § 2.05(2)(f) (requiring affidavit containing information regarding domestic violence); § 2.06(2) (requiring court to hold evidentiary hearing to determine if it should be bound by parenting plan agreed to by parents when domestic violence has occurred); § 2.07(2) (requiring screening for domestic violence prior to mediation and suggesting that mediation only occur under certain circumstances); § 2.11(2) (requiring court to impose limits that are reasonably calculated to protect the child and the child's parent, when there is credible information that domestic violence was inflicted, including eliminating custodial responsibility). See generally Merle H. Weiner, Domestic Violence and Child Custody: Importing the American Law Institute's Principles of the Law of Family Dissolution into Oregon Law, 35 Willamette L. Rev. 643 (1999).


80. See Model Code on Domestic and Family Violence, supra note 72, § 402(2) ("If a parent is absent or relocates because of an act of domestic or family violence by the other parent, the absence or relocation is not a factor that weighs against the parent in determining custody
statutes make it a crime to deprive another of custodial or parental rights, the statutes often provide an affirmative defense if the defendant was fleeing from domestic violence. The federal provision that criminalizes child abduction, the International Parental Kidnapping Crime Act, contains such a defense for women who are fleeing from domestic violence.

Other federal law reflects the principle that it is wrong to make a woman choose between her own safety and her children’s companionship. For example, the federal Violence Against Women Act (VAWA) 2000 contains various immigration provisions designed to keep domestic violence victims and their children together during the immigration process in order to make the immigration benefits afforded by VAWA meaningful. Section 1503 allows battered immigrant self-petitioners to claim lawful permanent residence status while remaining safely in the United States with their children instead of going abroad to get a visa. Section 1504 allows battered immigrants who receive VAWA’s protection against deportation to claim humanitarian parole for their children until the children’s status can be adjusted. Similarly, the U.S. admits into this country the children or visitation”); ALA. CODE § 30-3-132(b) (2003); CAL. FAM. CODE § 3046(a)(2) (West 2004); CO. REV. STAT. §14-10-124(4)(2003); DEL. CODE ANN. § 704A (2003); GA. CODE ANN. § 19-9-1(a)(1)(C) (2003); HAW. REV. STAT. § 571-46(9)(C) (2003); IOWA CODE § 597.15(1) (2003); S.C. CODE ANN. § 20-7-1530(B) (2001). Some appellate courts have also recognized that it is wrong to punish a mother in a custody contest for fleeing with the children for her own safety. See JAFFE, supra note 70, at 97 (citing cases). Similarly, courts have allowed domestic violence victims to vacate judgments that have been entered against them when they fled for safety and only received publication notice. See, e.g., Marriage of Marconi, 584 N.W. 2d 331, 332-33 (Iowa 1998); Lesley v. Lesley, 941 P.2d 451, 455-56 (Nev. 1997), overruled on other grounds by Epstein v. Epstein, 950 P.2d 771 (Nev. 1997).

81. See, e.g., ARIZ. REV. STAT. § 13-1302(c)(2)(b)(2001); CAL. PENAL CODE § 278.7(b) (1999) & section 2 of Stats. 2003, c. 52 (A.B. 1516) (2004 pocket part); ILL. COMP. STAT. 5/10-5(c)(3) (2002); MINN. STAT. § 609.26.2(2) (2003); MO. ANN. STAT. § 565.160(3)(West 1999) N.Y. PENAL LAW § 135.50 (McKinney 1998); WASH. REV. CODE § 9A.40.080 (2000). The general necessity defense also recognizes the principle, albeit implicitly. In addition, while the Model Penal Code makes custodial interference a crime, see MODEL PENAL CODE § 212.4 (1980), it explicitly provides a defense for such action when “the actor believed that his action was necessary to preserve the child from danger to its welfare.” Id. § 212.4(1)(a) (emphasis added). The belief need not even be a reasonable belief because “[the] parent or other person [usually] means no harm to the child.” Id. § 212.4 cmt. 3 (“[T]he natural and desirable willingness of a parent or other interested party to respond to what he perceives to be the child’s best interest calls for special caution in imposing penal sanctions.”).


of women who have obtained asylum because of domestic violence. Even the federal government’s witness protection program, which was modified to better account for noncustodial parents’ interests, recognizes the importance and preeminence of the protected individual’s safety.

Finally, in various contexts, judges are articulating these principles. For example, the Eastern District of New York recently held that New York City’s child welfare system violated the fundamental right of individuals to be protected from violence when it separated domestic violence victims and their children simply because the mothers were victims. The court said:

There is a consensus that even the most minimalist state has the responsibility of protecting its citizens from violence. Once, it was thought that this responsibility did not extend to violence within the home, but that notion has long since been abandoned in the United States. Just as the government has a responsibility to protect children from an abusive parent, so too does the government have a responsibility to protect a victim of domestic violence from her partner, a responsibility not met by punishing her through forcible separation from her children.

And in a Hague Convention case, two Puerto Rican judges noted that it would violate the fundamental principles related to the protection of human rights in Puerto Rico to send a child back to a location where the mother would be unsafe.

In sum, statutes and common law provide concrete evidence that it vio-

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84. See 8 U.S.C.A. § 1158(b)(3)(A) (2003); see also 8 C.F.R. § 208.21. Domestic violence has been a basis for asylum, see Stephen M. Knight, Seeking Asylum From Gender Persecution: Progress and Uncertainty, 79 INTERPRETER RELEASES 689, 690 (2002); Immigration Judge Decisions in Gender Asylum Cases, available at http://www/iceastorms/edi/cgrs/law/ijdec.html (citing cases). The Bush administration is purportedly proposing administrative law changes to make it more likely that domestic violence victims will be granted asylum. See Rachel L. Swarns, Ashcroft Weighs Granting of Asylum to Abused Women, N.Y. TIMES, March 11, 2004.

85. See Witness Security Reform Act of 1984, 18 U.S.C. §§ 3521-3528 (1997). While 18 U.S.C. § 3524 codifies broad protections for non-relocated parents, see, e.g., 18 U.S.C. § 3521(c), the Attorney General may bring an action on behalf of a protected person to modify the court order if the order’s implementation would be substantially impossible. The court may modify the order, and shall provide the other parent a remedy “subject to appropriate security considerations” and “as feasible under the circumstances.” See 18 U.S.C. § 3524(e)(1). If a reasonable security requirement is breached by the non-relocated parent, the Attorney General can bring a motion to modify the custody or visitation order. See 18 U.S.C. § 3524(e)(2). Procedures during custody proceedings also recognize safety issues. For example, some courts allow individuals in the program to testify by telephone in custody proceedings. See, e.g., McComb v. Aboelessad, 535 N.W.2d 744 (N.D. 1995).


87. See de los Rios v. Melendez, 996 WL 940333 (P.R. June 28, 1996). See also Struweg v. Struweg, [2000] F.L.D. 105, at ¶¶ 50-51, 57-58 (Sask. Ct. of Q.B.) (holding, however, that the level of violence was not sufficient to maintain the claim).

In de los Rios, two justices of the Supreme Court of Puerto Rico acknowledged the dilemma posed by the Hague Convention for victims of domestic violence and engaged in an analysis akin to that which would occur under article 20. These were the only two justices who explained the decision, although six justices voted to reverse the order of return and issued a judgment to that effect. While these two justices rested their decision on article 13(b)'s “intolerable situation”
lates fundamental principles related to the protection of human rights in the United States to make a domestic violence victim choose between her safety and her child. The specific concepts reflected in the statutes and case law from which one can derive this fundamental principle are all independently violated by imposing the choice on a domestic violence victim. This choice ignores the importance of the domestic violence victim’s safety, it encourages her to return and makes it likely that she will do so, and it discourages other women from escaping abuse because such escape will threaten their relationship with their children.

2. Treaty Obligations

The United States’ international law obligations also demonstrate that making a domestic violence victim choose between her children and her safety violates fundamental principles relating to the protection of human rights in the United States. The choice imposed on a domestic violence victim is not per se prohibited by public international law; rather, the prohibition flows from other human rights, such as the right to family integrity, the right to life, and the right to be free from torture. The United States has become party to treaties that recognize these rights.

The United States is a party to the International Covenant on Civil and

language, an article 20 analysis occurred sub rosa. They explained that returning the child to Mexico would be intolerable because return would violate the fundamental principles of human rights in Puerto Rico. Domestic violence, and an insufficient response to the domestic violence, violates the fundamental principles of human rights in Puerto Rico.

The fact that the Presidente was really invoking the article 20 defense is confirmed by the explicit attention given by the three dissenting justices to article 20. The dissenting justices acknowledged that the eradication of domestic violence is a fundamental principle of human rights in Puerto Rico, but believed that returning the child would not violate that principle because the Mexican tribunal would be able to consider the domestic violence and make the appropriate custody decision. In addition, the federal district court in Puerto Rico acknowledged subtly that de Los Rios stands for the proposition that article 20 prohibits returning a child to the country where the mother, a domestic violence victim, would be unsafe. When the article 20 defense was raised in Aldinger v. Segler, the federal district court cited and dismissed de los Rios v. Melendez, calling the decision “limited solely to the facts of that case” and not binding. See Aldinger v. Segler, 263 F.Supp.2d 284, 290 (D.P.R. 2003).

It is unfortunate that the Presidente did not base his decision on article 20 explicitly. By using the “intolerable situation” provision to express disdain about the general situation regarding domestic violence in the child’s habitual residence, the Presidente rendered article 20 redundant. See Linda Silberman, Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis, 28 Fam. L.Q. 28-29 (1994). The Presidente also hampered the utility of the defense for domestic violence victims in the future. Article 13(b) is clearly limited to situations that are “intolerable” for the child and no one else. While the Presidente in de los Rios recognized that the child faced a grave risk of harm by return, courts adjudicating Hague petitions have generally had difficulty accepting that domestic violence harms children. See Weiner, supra note 5. Finally, a successful article 13(b) defense does not evoke the same type of moral condemnation as does a successful article 20 defense. The notion of “intolerable situation” has historically covered much more mundane facts, such as the separation of siblings. See Beaumont & McElevy, supra note 3, at 151, 152 n.133.
Political Rights (ICCPR). Among other rights, this treaty recognizes the right to gender equality, the right to life, the prohibition of cruel, inhuman or degrading treatment, and the children’s right to special protection. Article 2(1) requires countries that are party to the ICCPR to “respect” and “ensure” the rights therein. According to the Human Rights Committee, the monitoring body for the ICCPR, a State violates its obligations under the ICCPR by inadequately addressing domestic violence. For the reasons already suggested, returning a domestic violence victim’s child inadequately addresses domestic violence.

In addition, article 17 of the ICCPR prohibits “arbitrary” interference with one’s family. “Arbitrary” means unreasonable in the particular circumstances and in conflict with the underlying provisions, aims and objectives of the ICCPR. The safety issues make the return of Jane’s child unreasonable and inconsistent with other provisions in the ICCPR, such as the protection of the victim’s right to life, her right to be free from cruel, inhuman or degrading treatment, and her right to security of person.

88. ICCPR, supra note 58, arts. 2, 6, 7, 17.
90. The Human Rights Committee in 2000 issued General Comment 28, which addresses state reporting obligations pursuant to article 3 of the ICCPR on equality of rights between men and women. See General Comment 28, supra note 89. The Committee tells States Parties that in reporting on the right to life protected by article 6, they must address private violence. In addition, it said, “[i]to assess compliance with article 7 of the Covenant [prohibiting torture or cruel, inhuman or degrading treatment], as well as with article 24, which mandates special protection of children, the committee needs to be provided information on national laws and practices with regard to domestic and other types of violence against women, including rape.” Id. Comments by the Human Rights Committee in response to State Parties’ reports indicates that law-on-the-books alone is insufficient to fulfill a State’s legal obligation. For example, in commenting on Sweden’s report, the Committee stated, “The Committee notes with concern the persistence of domestic violence despite legislation adopted by the State Party (articles 3 and 7 of the Covenant). The State party should pursue its policy against domestic violence, and in this framework, should take more effective measures to prevent it and assist the victims of such violence.” Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant (Sweden), U.N. HRC, 74th Sess., U.N. Doc. CCPR/CO/74/SWE (2002). Recently the Committee issued a strong resolution affirming its commitment to addressing domestic violence. See, e.g., Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, U.N. HRC, 59th Sess., U.N. Doc. No., E/CN.4/2003/L.52 (2003).
92. See, e.g., ICCPR, supra note 58, arts. 6, 7, and 9.
The ICCPR, like a constitutional document, contains multiple rights that are sometimes in tension with each other. The father of Jane’s child, for example, might claim that the ICCPR also recognizes his right to family integrity and his child’s right to personal relations with both parents. Yet accepting Jane’s article 20 defense is not an arbitrary infringement of these other rights, given the circumstances. While the father can exercise his interim visitation in the location where Jane is safe, Jane cannot do the same in the child’s habitual residence. Since she is an “abductor,” she may not be permitted to exercise interim visitation abroad.\textsuperscript{93} In any event, her concern for her child’s safety and her desire to have daily contact with her child means that Jane will return to the child’s habitual residence, thereby putting both Jane and the child at risk from a recurrence of domestic violence.

The Human Rights Committee has suggested how it might resolve the inevitable tension between Jane’s rights and the father’s rights. It appears to assign more importance to protecting the child from harm than to the parent-child relationship. As a General Comment issued by the Human Rights Committee states, “If the marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children, to give them necessary protection and, so far as is possible, to guarantee personal relations with both parents.”\textsuperscript{94} Since returning the child to a place where the mother is unsafe poses direct and indirect risks to the child’s well-being, the father’s and child’s interests in their relationship should be nurtured in another place.

The United States’ ratification of the ICCPR is evidence that the fundamental principle at issue in Jane’s case exists in the United States (and finds support in the broader international community), even though the ICCPR is not “self-executing” and has not been implemented by federal statute.\textsuperscript{95} The ICCPR is particularly important because courts in the United States must interpret federal statutes consistently with the United States’ treaty obligations, even if they are non-self-executing,\textsuperscript{96} and the United States recognizes that it has obligations to domestic violence victims pursuant to this non-self-executing treaty. The executive branch claims

\textsuperscript{93} See supra note 9.


\textsuperscript{96} See, e.g., Kirgis, supra note 39 (explaining that international treaties have effect in U.S. domestic courts if they are “self-executing” or have been implemented by a federal law, but also noting that treaties may have “indirect effect in U.S. courts” because U.S. courts interpret federal statutes so that the U.S. does not violate its treaty obligations and because U.S. courts invalidate inconsistent state laws). See, e.g., Lawrence v. Texas, 123 S. Ct. 2472, 2481 (2003); Nicholson v. Scoppetta, 203 F.Supp.2d 153, 234 (E.D.N.Y. 2002).
that certain legislation, for example the Violence Against Women Act, was
enacted in furtherance of the United States’ obligations under the ICCPR.\textsuperscript{97}

The United States is also a party to the Convention Against Torture and
Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and
returning the child to a place where Jane is unsafe arguably violates this
treaty too. A court that granted a torturer’s request to have his torture victim’s
child returned to the place of torture would arguably violate CAT’s prohibi-
tion on “expel[ling], return[ing], or extradit[ing] a person to another State
where there are substantial grounds for believing that he would be in danger
of being subjected to torture.”\textsuperscript{98} The violation stems from the constructive
return of the torture victim since the court knows that the torture victim will
follow her child. Returning Jane’s child also violates the U.S.’s obligation
to exercise due diligence to provide torture victims with the means “for as
full rehabilitation as possible.”\textsuperscript{99} When Jane returns to the child’s habitual
residence, the traumatic stress may affect her ability to heal; if Jane stays
in the U.S., removing her child would also impact her ability to heal.\textsuperscript{100}

Successfully invoking CAT on Jane’s behalf requires that domestic
violence be considered “torture.” Domestic violence appears to qualify as
“torture” because the Convention defines “torture” broadly.\textsuperscript{101} In fact, the

\textsuperscript{97} See Summary Record of the 1401st Meeting: United States of America, 17/04/95, U.N.
Doc. CCPR/C/SR.1401.

\textsuperscript{98} See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or
Punishment, Dec. 10, 1984, art. 3, 1456 U.N.T.S. 85 [hereinafter CAT]. See also Amnesty
International, Broken Bodies, Shattered Minds: Torture and Ill-Treatment of Women

\textsuperscript{99} See CAT, supra note 98, art. 14(1); Report of Special Rapporteur on violence against
women, its causes and consequences, Integration of the Human Rights of Women and the

\textsuperscript{100} Jane’s return may undermine her rehabilitation. See Eve B. Carlson & Joser Ruzek,
Effects of Traumatic Experiences, at \url{http://www.ncptsd.org/facts/general/fs-effects.html}
(describing physical and mental reactions to trauma reminders); see also Blondin v. DuBois, 78
F.Supp.2d 283, 290 (S.D.N.Y. 2000) (relaying testimony of Dr. Solnit that sending child victim
of violence back to place of violence can trigger post-traumatic stress disorder). Cf. Judith
Lewis Herman, Trauma and Recovery 159 (1992) (“The first task of recovery [from trauma]
is to establish the survivor’s safety.”).

If Jane stays in the U.S. without her child, her rehabilitation may also be undermined. See
EC/49/SC/CRP.14, ¶¶ 14-17 (1999) (“The refugee family . . . helps to ensure the emotional well-
being of its individual members. The important psychological support which the family envi-
ronment can provide should not, in UNHCR’s experience, be underestimated. Maintaining the
family unit is one means of ensuring a semblance of normality in an otherwise uprooted life.”).

\textsuperscript{101} Torture includes “any act by which severe pain or suffering, whether physical or mental,
is intentionally inflicted on a person for such purposes as . . . intimidating or coercing him . . .
or for any reason based on discrimination of any kind, when such pain or suffering is inflicted
by or at the instigation of or with the consent or acquiescence of a public official or other per-
son acting in a official capacity.” CAT, supra note 98, art. 1(1).
Committee on Torture, the human rights monitoring body overseeing the Convention, considers a state’s response to domestic violence to be within its competency.\textsuperscript{102} While the United States filed a reservation to CAT’s broad definition of torture, and while the United States’ implementing legislation narrowed CAT’s definition of torture and required, among other things, that the acts be “directed against persons in the offenders’ custody or physical control,”\textsuperscript{103} domestic violence should still qualify as “torture” in many situations.\textsuperscript{104} In fact, at least one court in the U.S. has already given immigration relief under CAT to a victim of domestic violence,\textsuperscript{105} and the Sixth Circuit, in a different case, has recognized the appropriateness of CAT as a remedy for some domestic violence situations.\textsuperscript{106} The United States’ ratification of CAT is further evidence that the fundamental principle at issue in Jane’s case exists in the United States.\textsuperscript{107}

3. CUSTOMARY LAW

The United States has not ratified some of the most progressive human

\textsuperscript{102} See, e.g., Conclusions and Recommendations of the Committee Against Torture: Zambia, U.N. Doc. CAT/C/XXVII/concl.4, ¶ 7(c), ¶ 8(h) (2001) (expressing concern regarding the “incidence of violence against women in society, which is illustrated by reported incidents of violence in prisons and domestic violence,” and recommending that Zambia “establish programs to prevent and combat violence against women, including domestic violence”); Summary Record of the First Part 463rd Meeting: Greece, U.N. Doc. CAT/C/SR.463, ¶ 33 (May 9, 2001) (question of Ms. Gaer) (commenting that police discouraged women from pursuing domestic violence cases in courts).

\textsuperscript{103} See Declarations and Reservations, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex 1, U.N. Doc. A/RES/39/46 (1984); 8 C.F.R. § 208.18(a)(6) (2004). The reservation also added additional specificity to the definition of torture by requiring, for example, a mental intent and a duration requirement. See id. The U.S. also entered a reservation limiting its understanding of the meaning of “cruel, inhuman or degrading treatment” to how those terms are understood in the context of the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution. Id. No such limit was placed on the term “torture.” See U.S. Reservation No. 3, ICCPR, supra note 58.

\textsuperscript{104} The U.S. clearly accepts state responsibility based on complicity, see 8 C.F.R. § 208.18(a)(7), and domestic violence victims are frequently controlled by their batterers as part of a “systemic pattern of control and domination.” See Karla Fischer, Neil Vidmar, Rene Ellis, The Culture of Battering and the Role of Mediation in Domestic Violence Cases, 46 S.M.U. L. REV. 2117, 2119-33, 2136-41 (1993). Control occurs, in part, through explicit rules imposed on women by their batterers as well as “through the extensive use of humiliation, ridicule, criticism, and other forms of emotional abuse; financial abuse; and social isolation.” Id. at 2132.

\textsuperscript{105} See Knight, supra note 84 (discussing Matter of K, [number withheld] (B.I.A. 2002)).

\textsuperscript{106} See Ali v. Reno, 237 F.3d 591 (6th Cir. 2001) (recognizing the appropriateness of CAT relief when “authorities ignore or consent to severe domestic violence”). In addition, the ICCPR, discussed above, also prohibits torture. See ICCPR, supra note 58, art. 7.

\textsuperscript{107} The United States declared that articles one through sixteen were not self-executing. See Treaty Doc. No. 100-20 at III (1) (1988). However, some implementing legislation has been adopted. The Code of Federal Regulations directs “competent authorities” to implement article 3’s prohibition on expulsion, return, or extradition of a person to a State where that person is likely to be tortured. See 22 C.F.R. § 95.2(a)(2). In addition, as mentioned above, courts must interpret federal legislation so that the United States is not in breach of its treaty obligations. See supra note 96 and accompanying text.
rights conventions that would also prohibit requiring a domestic violence victim to choose between her safety and her child, such as the Inter-American Convention on the Prevention, Punishment and Elimination of Violence Against Women, the Convention on the Elimination of All Forms of Discrimination Against Women, or the Convention on the Rights of the Child. However, these international instruments, as well as instruments like the Declaration on the Elimination of Violence Against Women and the Universal Declaration of Human Rights, may be evidence of customary international law, which does obligate courts in the United States.

Development of the customary law argument would take far more space than that which remains. Suffice it to note that courts in the United States have cited the Convention on the Rights of the Child as reflecting customary international law, and have referred to customary law's prohibition of torture and inhuman treatment. Admittedly, however, the customary law argument might face various doctrinal challenges.

108. See Inter-American Convention on the Prevention, Punishment & Eradication of Violence Against Women, "Convention of Belém do Pará," June 9, 1994, 33 I.L.M. 1534. Among other things, this Convention requires countries to use due diligence to prevent domestic violence and to change existing laws "which sustain the persistence...of violence against women." Id. art. 7(b), (e). See also de los Rios v. Melendez, 1996 WL 940333 (P.R. June 28, 1996).


112. Customary law has effect in U.S. courts because customary law is part of federal common law. See The Paquette Habana, 175 U.S. 677, 700 (1900). The courts "ought never to construe federal statutes to violate the law of nations if any other possible construction exists." See Murray v. Schooner Charming Betsy, 6 U.S. 44, 118 (1804); Talbot v. Seeman, 5 U.S. 1, 43 (1801).


114. See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980); In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994), and cases cited therein.

115. The main evidence of customary law has historically been the actual practice of states. It is beyond this article to see if state practice has evolved to the necessary extent, and whether any inconsistencies in practice are minor, in which case they are of no real consequence to the formation of the rule. See generally MICHAEL AKEHURST, A MODERN INTRODUCTION TO
4. U.S. CONSTITUTION

Jane’s federal constitutional argument charts new territory since domestic violence victims have not yet raised a federal constitutional challenge to the application of the Hague Convention. The underlying argument is very simple: The U.S. Constitution recognizes everyone’s right to life and liberty, both of which are infringed when the court removes a child from a domestic violence victim and then requires the victim to sacrifice her safety to be with her child. Such a choice can only be imposed on the domestic violence victim if the government has a sufficiently weighty reason. As discussed below, a sufficiently weighty reason does not exist here and any potential justifications are not narrowly tailored to the means. Consequently, a court would violate fundamental principles relating to the protection of human rights, as they are recognized in the U.S. Constitution, if it returned Jane’s child. 116 While Jane’s argument faces several doctrinal hurdles, such as the requirements of state action and that any infringement of her rights be more than de minimis, these hurdles are not insurmountable.

Before sketching Jane’s argument, it is important to emphasize the unique context in which Jane is asserting her constitutional rights. Unlike the facts found in most cases discussing substantive due process (cases in which a litigant is seeking to invalidate a state law or to impose tort

INTERNATIONAL LAW 25-34 (6th ed. 1992). The difficulty with such an empirical examination here is that state practice may coalesce around the absence of situations in which states require women to choose between their safety and their children, and gathering evidence to prove the absence of something is difficult.

Some legal scholars contend that “opinio juris” may now be the most important evidence of customary law. See Sonja Starr & Lea Brilmayer, Family Separation as a Violation of International Law, 21 BERKELEY J. INT’L L. 213, 229-30 (2003) (citing Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, 95 AM. J. INT’L L. 757-59 (2001)). Opinio juris refers to whether states believe a particular practice is allowed or prohibited by international law. Assuming a court accepted that opinio juris is the key to establishing the existence of customary law, the absence of opinions issued by courts and international bodies addressing the very specific dilemma presented in this paper might make it difficult for a court to find sufficient evidence of opinio juris.

116. This article does not develop the potential equal protection argument based upon a U.S. court’s complicity in the gender discrimination existing in the foreign state. Cf. Edmonson v. Leesville Concrete Co. Inc., 500 U.S. 614, 624 (1991) (“By enforcing a discriminatory peremptory challenge, the Court has . . . elected to place its power, property and prestige behind the [alleged] discrimination”); Norwood v. Harrison, 413 U.S. 455, 464-65 (1973) (striking textbook program which gave free textbooks to students who attended private schools, regardless of whether the private school discriminated on the basis of race, because program aided private schools, albeit indirectly, in their ability to discriminate). Domestic violence is based on and perpetuates gender discrimination, and the foreign government’s inadequate response to the violence is per se discrimination. See Rhonda Copelon, International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking, 11 AM. U. J. GENDER SOC. POL’Y & L. 865, 867 (2003); Elizabeth Schneider, Battered Women and Feminist Lawmaking 4 (2000).
liability on a state), Jane is making a constitutional argument solely for purposes of finding that an article 20 defense exists as a matter of federal common law. The absence of the broader policy concerns often associated with constitutional rights litigation, as well as the fact that Jane’s argument is akin to an “as applied” constitutional challenge so that the potential consequences from a ruling in Jane’s favor are contained, may mean that a court will be more inclined than in other contexts to find a violation of Jane’s rights.  

Returning Jane’s child most directly affects Jane’s right to the companionship and care of her child. Jane has this right even though she is technically a “wrongdoer,” and even though the litigant on the other side is a private party and a relative. That both parents may raise this constitutional right in their litigation does not diminish Jane’s ability to raise the claim on her own behalf and subject the court’s action to scrutiny, nor does the father’s assertion of a competing constitutional right mean that his claim has merit.  


119. Most termination cases, for example, are brought against “wrongdoers” of some sort, but the parents are not divested of their constitutional rights by virtue of their bad acts. See, e.g., Santosky, 455 U.S. at 758-59.  

120. Troxel, 530 U.S. at 57; Bates v. Tesar, 81 S.W.3d 411, 436 (Tex. Ct. App. 2002); Zummo v. Zummo, 574 A.2d 1130, 1139-41 (1990). Cf. Nicholson, 203 F. Supp. 2d at 237 (noting that while both parents may have an interest in the care and custody of a child, each parent’s rights must be analyzed independently vis-à-vis the state’s action).  

121. The father cannot convincingly argue that the U.S. Constitution requires that the court reject the mother’s article 20 defense. Permitting the article 20 defense would not remove the child from his custody. Rather, the mother is the one who removed the child. A court’s refusal to find that the mother’s act justifies the requested remedy is not generally thought to constitute a constitutional violation. Cf. Hans Linde, Fair Trials and Press Freedom: Two Rights Against the State, 13 Willamette L.J. 211, 217 (1977). Nor does the court’s ruling affect the father’s ability to visit with his child in this country pending the custody litigation. In addition, to the extent there are conflicting constitutional issues at stake, and to the extent that the court would defer to the legislative solution, see Southcenter Joint Venture v. National Democratic Policy Committee, 780 P.2d 1282, 1289 (Wash. 1989), ICARA requires the return of the child except in a situation like Jane’s.
To be clear, the court infringes Jane’s right when it orders that Jane’s child return to the child’s habitual residence. The court is a government actor, and judicial remedies imposed in private civil litigation can constitute state action. When the court orders Jane to return her child even though the evidence suggests that the child’s habitual residence cannot adequately protect Jane and that Jane faces a substantial risk to her safety in that location, the court is taking action for which it must be accountable.

Some might argue that Jane’s deprivation is de minimis and therefore does not qualify for protection under substantive due process doctrine. The Supreme Court considers “the directness and substantiality of the interference” in deciding whether there is a violation of a constitutional right. While some abductors may in fact experience a de minimis infringement because they have no legal right to their children’s company (e.g., if the state previously had terminated their parental rights or if the abductor lost all custody rights in custody litigation prior to the abduction), Jane is not in this situation. Rather any suggestion that Jane’s rights are only minimally infringed turns on the fact that Jane can return with her child, and if she does not, she will be separated from her child only temporarily (until resolution of the custody contest and permission to relocate is granted), with visitation as an option in the interim.

Those infringements that have been found to be de minimis are of a different kind and magnitude than what Jane experiences. The decision to return Jane’s child is not akin to an inability to wear pants to a city-hall marriage, or the failure of a public employer to live up to its promise to provide Danishes during coffee breaks, or the Internal Revenue Service’s failure to treat a taxpayer with courtesy. The court is forcing Jane to choose between her own safety and her child’s company. If Jane privileges her own safety, Jane would endure a physical separation from her child. As one court stated when it enjoined a city from removing children from their mothers because their mothers were domestic violence victims, “Even a temporary separation can be destructive; it triggers constitutional protections.”

122. See, e.g., Shelley v. Kraemer, 334 U.S. 1, 20-21 (1948) (a court can be acting unconstitutionally when it enforces a racially restrictive covenant found in a private contract); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (common law of defamation as applied by Alabama courts in civil action was state action that must comply with the First Amendment); Troxel v. Granville, 530 U.S. 57, 72, 80 (2000) (court’s application of Washington statute to permit grandparent visitation over fit parent’s objection violated parent’s substantive due process rights). Yet admittedly the doctrine of state action is complicated and confused. See Erwin Chemerinsky, State Action, 618 PRAC. L. INST. 183 (1999).


124. See Hessel, 977 F.2d at 304.

custody litigation in the child’s habitual residence can take considerable 
time.126 Since Jane is an “abductor,” the child’s habitual residence may 
not allow Jane to exercise her visitation outside the country,127 and any 
visitation arrangements will be different in kind from the daily contact 
that Jane has enjoyed as the child’s primary caretaker. Although Jane may 
ultimately prevail in the custody contest, the foreign court may not permit 
Jane to relocate,128 and Jane may forever be faced with the choice between 
her safety and her child.

Since the court’s decision directly and substantially affects Jane’s 
rights, the court’s decision to return the child would need a sufficient jus-
tification. A parent’s right to the care and custody of her child has been 
deemed a fundamental right,129 and typically strict scrutiny is applied to 
Fourteenth Amendment claims involving fundamental rights.130 The key, 
therefore, is whether the court has a compelling reason for violating Jane’s 
rights and whether the government’s action is narrowly tailored to its ends.

The possible justifications for infringing Jane’s rights do not withstand 
close analysis, either because the justifications are doctrinally impossible 
or because the court’s rejection of Jane’s article 20 defense is not narrowly 
tailored to achieve the government’s goal. For example, the child’s return 
cannot be justified as being in the child’s “best interest” because there is 
no determination of the child’s “best interest” in a Hague proceeding.131 
Similarly, return cannot be justified as protecting the father’s interest in 
having a custody award in his favor because the father’s interest can be 
vindicatad in the location where the mother is located. Article 19 of the 
Hague Convention makes clear that the Hague Convention does not itself 
determine custodial rights.

Those justifications that might prove compelling are not sufficiently 
related to the means adopted to achieve them. While the child’s return might

126. See supra note 11.
127. See supra note 9.
128. See supra note 11.
129. Troxel v. Granville, 530 U.S. 57, 65 (2000) (a parent’s right to the care and custody of 
her child is “the oldest of the fundamental liberty interests recognized by the court”).
(Thomas, J. concurring) (noting the absence of an articulated standard of review by any of the 
other justices who acknowledged the existence of a fundamental right, and suggesting that 
“strict scrutiny” applied). See also Nicholson, 203 F.Supp.2d. at 244-45 (applying strict scruti-
ny to city’s removal of child from mother simply because mother was a domestic violence 
victim).
interest of the child” can justify infringements on the parents’ rights. See, e.g., Prince v. 
Commonwealth of Mass., 321 U.S. 158, 166 (1944); In the Interest of A.Q., 2002 LEXIS 927 
(Iowa Ct. App. 2002); Africano v. Castelli, 837 A.2d 721, 730 (R.I. 2003); LaChapelle v. 
Mitten, 607 N.W.2d 151, 163 (Minn. Ct. App. 2000).
be justified as protecting the father’s interest in a relationship with his child pending the custody litigation, the mother has the same interest. Since the father’s interest can be satisfied by structuring safe and appropriate visitation in the place to which the mother has fled, but the mother’s interest cannot be satisfied in the child’s habitual residence without compromising her safety, the return of the child is not necessary to protect the father’s interest.

Opponents of Jane’s article 20 defense might also claim that the child’s return is necessary for the continued vitality of the Hague Convention. Some have claimed that a narrow interpretation of the Hague Convention’s exceptions is essential to the Convention’s success. Yet a court need not reject the defense when it is warranted in order to foreclose its application when it is unwarranted. Courts are adept at drawing appropriate lines. Moreover, while ending international child abduction is an important state interest, so too is ending domestic violence. The only rationale way to harmonize these interests is to allow the article 20 defense in the narrow circumstances in which a woman’s safety will be threatened if she returns with her child to the child’s habitual residence. Otherwise, women may in fact be deterred from abduction, but at great cost to themselves and inevitably their children.

Finally, some might argue that the court’s act of returning Jane’s child has to be “conscience shocking” in order for Jane’s substantive due process claim to succeed. This argument is wrong. The “conscience shocking” standard is used to assess the constitutionality of executive action and not the constitutionality of a legislative enactment. While assessing the constitutionality of a judge’s decision falls in neither of these categories, and theoretically could be subject to the “conscience shocking” test, the Supreme Court justices failed to mention the “shock the conscience” test in Troxel v. Granville when they evaluated whether a judge’s decision complied with substantive due process. Even if the “conscience shocking” standard did apply, however, a judge who returned Jane’s child would be acting in a conscience-shocking manner. What qualifies as “conscience shocking” varies depending upon whether a state actor has time to gather information and reflect on his or her action. A court adjudicating Jane’s case would have had time to do both, and any failure to educate itself about the risks

132. See, e.g., Silberman, supra note 87, at 9.
133. Baker v. Baker, 494 N.W.2d 282, 288 (Minn. 1992) (“[T]he general public has an extraordinary interest in a society free from violence, especially where vulnerable persons are at risk.”) (doing Matthews balancing test for purposes of seeing whether domestic violence victim’s temporary custody order violated due process).
135. Sacramento, 523 U.S. at 846.
136. See id. at 851-52. See also Miller v. City of Philadelphia, 174 F.3d 368, 375 (3d Cir. 1999).
to Jane and to reflect on the effect of its order is conscience shocking.

Jane’s second constitutional argument is that the court threatens Jane’s life by returning her child, since returning her child will cause Jane to return and predictably, but not certainly, be beaten by her batterer. Therefore, the court’s action should be subject to strict scrutiny. The same arguments that were insufficient to justify an infringement of Jane’s right to the care and custody of her child would be insufficient here too.

The largest hurdle to Jane’s argument here is whether sufficient state action exists. After all, the child’s father and not the court will engage in any future violence. The Supreme Court held in *DeShaney v. Winnebago County* that the U.S. Constitution does not obligate the government to protect citizens from private violence.

Yet, as acknowledged by the Supreme Court in *DeShaney*, the state-created-danger doctrine makes the state responsible for private conduct when the state has aided or encouraged that conduct. While the Supreme Court in *DeShaney* did not specify what type of governmental action can make a person more vulnerable or how much more vulnerable that person need be made, other cases suggest that Jane’s situation may qualify under the doctrine. In *Kallstrom v. City of Columbus*, for example, the Sixth Circuit, interpreting *DeShaney* said, “liability under the state-created-danger theory is predicted upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence.” There the court held that the exception applied when the

137. See Baker, 494 N.W.2d. at 287 n.6 (mentioning that a woman has a “protected liberty interest in personal security,” citing Ingraham v. Wright, 430 U.S. 651 (1977), in the context of domestic abuse).

138. Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998) (citing LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1333 (2d ed. 1988) for the proposition that strict scrutiny applies when invasion of personhood is involved). For the statistics on the risk that Jane will be reabused, see supra note 12.


140. The Supreme Court said that while the State may have been aware of the dangers that Joshua DeShaney faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them: “That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father’s custody, it placed him in no worse position than that in which he would have been had it not acted at all...” Id. at 201.

Jane might also argue that the Supreme Court in *DeShaney* misinterpreted the U.S. Constitution and that there is, in fact, an affirmative duty to protect. Professor Heyman persuasively made this argument. See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991). However, Professor Heyman’s argument will not help those who do not appeal their case to the U.S. Supreme Court.

141. See Kallstrom, 136 F.3d at 1066. See also May v. Franklin County Bd. of Comm’r, 2003 WL 1134499, *5 (6th Cir. Mar. 12, 2003) (citing Gazette v. City of Pontiac, 41 F.3d 1061, 1065 (6th Cir. 1996)(in order to create a duty to protect, an officer’s action would have to increase the vulnerability of an individual to private acts of violence beyond the level it would have been absent state action).
city disclosed undercover police officers' personal information to counsel for some alleged drug conspirators. The Sixth Circuit in *May v. Franklin* found that the exception applied when the police went to the door of a domestic violence victim's house, knocked, and left. As the court explained, that act emboldened her batterer because it decreased his fear of arrest.\(^{142}\) The private violence need not be made statistically certain in order for the doctrine to apply.\(^{143}\)

The state-created-danger exception enunciated in *DeShaney* applies to Jane's situation. When the court grants the batterer's petition and returns Jane's child, the court becomes a tool of the batterer. Its decision makes it virtually certain that Jane will return and face danger. The court helps the batterer keep Jane in his physical proximity. The court also encourages the batterer by returning the victim's child. The child's return signals that the court believes Jane was wrong to flee the abuse and that the child was not harmed by the domestic violence. This message, like the implicit message in *May v. Franklin*, emboldens her batterer and makes Jane more vulnerable to severe violence.\(^{144}\) That very risk is why Jane may have to forego most contact with her child and remain in the state of refuge.

Jane's situation differs sufficiently from the facts in *DeShaney* to make her situation ripe for the *DeShaney* exception, even though Joshua DeShaney could not himself benefit from it. As the Supreme Court said in the *DeShaney* case, Joshua was not made any more vulnerable to his father's violence after the social worker returned Joshua to him than Joshua was before the government intervened. Because the social worker had both removed and returned Joshua, the situation after return was the same as if the government had never acted at all. However, in Jane's situation, the U.S. government was not responsible for removing her from the violence. Jane removed herself. The government is only responsible for making her situation worse by returning her child to the place from which she escaped. While the due process clause of the Fourteenth Amendment may not have imposed an affirmative obligation on the gov-

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143. *See Kallstrom*, 136 F.3d at 1064 (holding a "substantial risk of serious bodily harm . . . from a perceived likely threat" was sufficient to give rise to due process claim). *Cf.* Norwood v. Harrison, 413 U.S. 455, 466 (1973).
ernment to remove Joshua from his father,\textsuperscript{145} and while the absence of any such obligation canceled out any liability related to its later decision to return him, the due process clause does not allow the government to thwart citizens’ attempts at self-protection.\textsuperscript{146}

5. State Constitutions

State constitutions are another important source of rights. State constitutions often have provisions that parallel provisions in the U.S. Constitution, and these counterparts may be interpreted in a way that is particularly favorable to Jane’s position. In addition, state constitutions sometimes go further than the federal constitution, either imposing affirmative obligations on the government\textsuperscript{147} or including different rights than those found in the federal constitution. For example, the right to safety is a fundamental principle of human rights often found in state constitutions.\textsuperscript{148} These provisions should help advocates establish that the fundamental principle exists in the United States, although lawyers may debate whether they prohibit a court from returning a child.\textsuperscript{149} Provisions such as these

\textsuperscript{145} DeShaney, 488 U.S. at 196-97.

\textsuperscript{146} See Nicholson v. Williams, 203 F.Supp.2d 153, 253 (E.D.N.Y. 2002) ("DeShaney does not apply to a case such as the present one where state action, rather than state inaction, is the source of harm").

\textsuperscript{147} See Hershkoff, supra note 34, at 18 ("In contrast to the Federal Constitution, state constitutions unambiguously create affirmative rights to explicit government services."). See, e.g., N.Y. CONST. art. 27, § 1. See also Women’s Health Center of W. Va., Inc. v. Panepinto, 446 S.E.2d 658, 665 (Va. 1993) (holding that Virginia constitution’s guarantee of safety “conveys protection from harm,” and obligated state to provide funding for indigent women for abortions that were medically necessary when the state funded other medically necessary procedures).

\textsuperscript{148} W.Va. CONST. art. III, § 1 ("All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.") (emphasis supplied); W.Va. CONST. art. III, § 3 ("Government is instituted for the common benefit, protection and security of the people, nation or community") (emphasis supplied). See also CAL. CONST. art 1(1) ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.") (emphasis added). See generally Joseph R. Grodin, Rediscovering the State Constitutional Right to Happiness and Safety, 25 Hastings Const. L.Q. 1, 3 (1997).

\textsuperscript{149} See, e.g., Katzenberg v. Regents of the Univ. of California, 58 P.3d 339, 348 n.15 (Cal. 2002). In Katzenberg, the Supreme Court of California mentioned, in obiter dictum, that the right to safety in article 1, section 1, of the California Constitution did not by itself give rise to a private right of action for damages or impose “an affirmative duty on the part of the state to take particular steps to guarantee the enjoyment of safety or happiness by all citizens.” However, the court recognized that the right to safety was an “inalienable right,” and it did not suggest that courts’ rulings can or should violate these provisions. See also Daugherty v. Wallace, 621 N.E.2d 1374, 1378-79 (Ohio Ct. App. 1993) (holding that while the “safety” provision of the Ohio Constitution did not oblige state to provide welfare payments to the needy, it did restrain the state from placing unreasonable restrictions on the right); Franklin v. New
should allow creative advocates in various states to strengthen their argument for Jane even further.

V. Conclusion

It is a cruel act to tell a domestic violence victim who has fled with her child in order to escape domestic violence that she must return to the location of violence in order to be with her child. The domestic violence victim must then choose between her own safety and her child, a choice that no civilized society should impose on anyone. Article 20 allows judges to avoid imposing this choice on respondents in Hague Convention cases. The defense recognizes that the return of the child should not occur at the expense of fundamental principles related to the protection of human rights. While the provision’s language raises some doctrinal questions, the object and purpose of the provision is clear: respecting human rights is more important than returning children to their habitual residence.

In the United States, both the right to life and the right to the custody of one’s child are cherished fundamental values. These values have expressed themselves in family law legislation that reflects the following concepts: domestic violence is wrong, women should be free to leave abusive relationships, escape should not threaten the parent-child relationship, and the domestic violence victim’s safety is paramount even in matters related to custody. A court decision that makes a woman choose between her safety and her child violates each of these concepts as well as the general fundamental principles of human rights that motivated them. The return of the domestic violence victim’s child also violates the fundamental principles of human rights found in various other sources, including the ICCPR, the CAT, the U.S. Constitution, and state constitutions.

Advocates need to start arguing, and judges need to start using, article 20 to prevent the return of children whose mothers are unsafe in the child’s habitual residence. In these types of cases, article 20 has the potential to transform the Hague Convention from an instrument of oppression to an instrument of compassion.

Jersey Dep’t of Human Servs., 543 A.2d 56 (N.J. Super. Ct. App. Div. 1988) (holding that clause in New Jersey Constitution that gave citizens right of “pursuing and obtaining safety and happiness” did not impose affirmative obligations upon state to provide shelter for poor, but did establish limitations on the sovereign). See also Grodin, supra note 148, at 19 (saying state constitutions that followed the Virginia model gave people both the negative right to pursue safety without governmental interference and also imposed an obligation on government to further the safety of the people, but that state law jurisprudence has been shallow).