Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of The Hague Convention on the Civil Aspects of International Child Abduction

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NAVIGATING THE ROAD BETWEEN UNIFORMITY AND PROGRESS:
THE NEED FOR PURPOSIVE ANALYSIS OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION*

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I. INTRODUCTION

Federal court decisions in the United States that interpret the Hague Convention on the Civil Aspects of International Child Abduction¹ (Hague Convention or Convention) have recently increased dramatically. From July 2000 to January 2001, for example, the United States courts of appeals released nine decisions,² and the United States district courts released seven.³ These numbers represent more than a 300% increase over 1993, when there were only five


² See Diorinou v. Mezitis, 237 F.3d 133 (2d Cir. 2001); Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001); Blondin v. Dubois, 238 F.3d 153 (2d Cir. 2001); England v. England, 234 F.3d 268 (5th Cir. 2000); In re Tserbopoulos, No. 00-3593, 2000 WL 1721800 (9th Cir. Nov. 17, 2000); Kanth v. Kanth, 232 F.3d 901 (10th Cir. 2000); Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000); Croll v. Croll, 229 F.3d 133 (2d Cir. 2000); Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000).

published decisions at both the federal trial and appellate levels.\textsuperscript{4} These new numbers are noteworthy because the quantity of federal opinions now appears to dwarf the quantity of published state opinions,\textsuperscript{5} even though concurrent jurisdiction exists under the federal implementing legislation, the International Child Abduction Remedies Act.\textsuperscript{6} This ground swell of federal cases is producing some significant doctrinal changes in the United States' Hague Convention jurisprudence.

Many of these cases involve a domestic violence victim who flees transnationally with her children to escape her abuser. Seven of the nine cases decided by the United States courts of appeals between July 2000 and January 2001 involved an abductor who alleged that she was a victim of domestic violence.\textsuperscript{7} These numbers comport

\begin{footnotesize}
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\item See Diorinou v. Mezitis, 237 F.3d 133, 136 (2d Cir. 2001) (The mother, here a petitioner, although previously a respondent, had obtained from the New York Family Court a temporary protective order prohibiting her husband from harassing her.); Blondin v. Dubois, 238 F.3d 153, 156 (2d Cir. 2001) ("Dubois claims that Blondin abused her and their children throughout the time they lived together."); In re Tsarbopoulos, No. 00-35393, 2000 WL 1721800, at *3 (9th Cir. Nov. 17, 2000) (abductor alleged that she and the children had suffered abuse);\end{enumerate}
\end{footnotesize}
with the published figures that seventy percent of the abductors are mothers. Typically these women are the child’s primary caretaker and often are victims of domestic violence.

As I have written elsewhere, the Convention was not drafted with this fact pattern in mind, and it often works unjustly in these cases. The Convention was created to discourage abductions by parents who either lost, or would lose, a custody contest. The abductor was not traditionally thought to be the primary caretaker. The

Whallon v. Lynn, 230 F.3d 450, 460 (1st Cir. 2000) (“[T]he district court found that the alleged instances of verbal abuse of Lynn and her older daughter Leah, and of physical abuse of Lynn, while regrettable, neither were directed at Micheli nor rose to the level of the conduct of the petitioner father in Walsh.”); Croll v. Croll, 229 F.3d 133, 135 (2d Cir. 2000) (detailing that Ms. Croll filed an action in April 1999 seeking an order of protection); Walsh v. Walsh, 221 F.3d 204, 209 (1st Cir. 2000) (“The events of the following five years evidence John’s violent behavior toward his wife and others.”); Kanth v. Kanth, 232 F.3d 901 (10th Cir. 2000).

Commentators, myself included, probably underestimate the domestic violence at issue in these cases. Domestic violence may escape notice, either because it is not mentioned or emphasized by a court, or because it is not raised by either party. For instance, the district court in Kanth only described the relationship as “deeply troubled.” Kanth v. Kanth, 79 F. Supp. 2d 1317, 1320 (D. Utah 1999). Yet according to the affidavit of Cory Leigh Kanth, filed in the district court, there was violence in the relationship and Mr. Kanth was extremely controlling. For example, she stated, “[H]e repeatedly threatened to kick my teeth in if I bathed the girls when he forbade me.” Cory Leigh Kanth Aff. at 47, Kanth v. Kanth, 79 F. Supp. 2d 1317 (D. Utah 1999) (No. 2: 99-CV-532-C). On one occasion he threw her out of their apartment in her pajamas on a cold winter morning and refused to let her back inside. On other occasions, he controlled her ability to leave the house, to handle money, and to access the passports. Id. at 47-49, 52.


10. See Elisa Pérez-Vera, Explanatory Report, reprinted in Hague Conference on Private International Law, III Actes et documents de la Quatorzième Session October 6–25, 1980 ¶ 11 (1980) [hereinafter Pérez-Vera Explanatory Report] (discussing the places to which an abducted child may be returned) (“[T]he situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child.”).
Convention drafters adopted a ‘remedy of return,’ which results in abducted children being sent back quickly to their habitual residence. This remedy of return was supposed to discourage abductions, reconnect children with their primary caretakers, and locate each custody contest in the forum where most of the relevant evidence existed. While the remedy of return works well if the abductor is a non-custodial parent, it is inappropriate when the abductor is a primary caretaker who is seeking to protect herself and the children from the other parent’s violence.

In some of the recent decisions, courts have adopted novel legal interpretations in an effort to avoid applying the Convention to these abductors. These interpretations are both exciting and frightening. On the one hand, novel interpretations that create just solutions to difficult recurring fact patterns are welcome because treaty amendment is a difficult, if not impossible, process. On the other hand, some of these decisions are contrary to interpretations taken by our Convention partners. Since the Convention was supposed to foster uniformity among states in their responses to international child abduction, these new decisions potentially weaken the Convention. In addition, the judicial manipulation of the Convention in cases involving domestic violence may ultimately encourage courts to engage in judicial creativity in other types of Convention cases, with

11. The preamble to the Convention is short and states that the Convention exists because the members were “[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody” and because they desired “to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.” Hague Convention on Child Abduction, supra note 1, pmbl.

12. Weiner, supra note 9, at 601–32. Most of the abductors who flee to escape the other parent’s violence are women. In all of the seven cases cited supra in note 7, the abductors alleging that they were victims of domestic violence were women. But see, e.g., Fawcett v. McRoberts, 168 F. Supp. 2d. 595 (W.D. Va. 2001) (father claimed that he was victim of abuse).

13. Eck v. United Arab Airlines, 360 F.2d 804, 812 n.18 (2d Cir. 1966) (noting that “the language of such a document is less likely to be modified in the light of changing conditions than is the language passed by a legislative body that convenes regularly”); Weiner, supra note 9, at 675–76.

14. See infra notes 42–44 and accompanying text.

15. While drawing any sort of causal relationship is mere speculation, one is struck, for example, by the Ninth Circuit’s recent opinion in Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001). In its decision, the court did two things that were quite
potentially deleterious effects.

This tension between uniformity and progress has played itself out recently in cases addressing some important Hague Convention topics. These issues include whether a *ne exeat* clause\(^{16}\) converts rights of access into rights of custody and whether a crucial Convention defense can be partially predicated on the child’s stability in the abducted-to country. Two recent opinions by the Second Circuit that addressed these issues—*Croll v. Croll*\(^{17}\) and *Blondin v. Dubois*\(^{18}\)—suggest that courts are not always managing this tension between uniformity and progress in a way that strengthens the Convention.

This Article argues that the Second Circuit’s mistakes in *Croll* and *Blondin* are largely, but critically, of form. The opinions reach the correct substantive outcome, but the court was not appropriately deferential to the existing international interpretations of the Hague Convention. Further, it did not follow a ‘purposive interpretation’ when it deviated from those prevailing interpretations. In *Croll* and *Blondin*, the weight of foreign case law suggested a different type of analysis and outcome. Yet in neither case did the Second Circuit acknowledge the weight of the contrary authority, work within the existing doctrinal structure, or justify its departure with a purposive analysis. For these reasons, both cases should be considered failures, and frankly, embarrassments to the United States.

These two cases represent two different types of mistakes. In *Croll*, the court correctly rejected existing doctrine on ‘rights of custody,’ but did not acknowledge the weight of contrary authority or appropriately justify its departure from this authority. The court in *Blondin* unnecessarily changed existing doctrine, instead of working within it to achieve the same substantive result. Both types of mis-

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remarkable. First, it articulated a detailed roadmap for how a court is to evaluate a child’s habitual residence. *Id.* at 1071–73. This was a departure from the non-technical, fact-based approach followed by most courts. Second, it departed from the view that a joint intent by the parents to move, plus some sort of settled purpose, was enough to change a child’s habitual residence. The Ninth Circuit stated that parents now need a shared intent to forego the prior habitual residence (or evidence of the child’s significant acclimatization to the new place). *Id.* at 1076–81.

16. A *ne exeat* clause is a provision that restricts a party from removing the child from the jurisdiction without the other parent’s or court’s permission.
17. *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000).
takes could have been avoided had the court been more respectful of our sister signatories’ decisions, and had it thought more about the object and purpose of the Convention.

The Convention’s continued viability depends not only on the perceived legitimacy of substantive outcomes, but also on the legitimacy of the interpretative process that is used to reach these outcomes. For this reason, advocates, judges, and scholars should analyze courts’ decisions for both substance and form. This Article proposes a framework for such an analysis.

The Article begins by setting forth some guidelines for evaluating Hague Convention decisions. Specifically, it discusses the need to maintain a uniform Convention interpretation and to use a purposive analysis to interpret the treaty. Both of these criteria are shown to be beneficial and firmly grounded in contemporary treaty interpretation doctrine. The Article suggests that it may sometimes be appropriate for a court to depart from the prevailing, and virtually uniform, interpretation of the Convention. Departure might be appropriate if two conditions are met: 1) the prevailing approach is unjust to a large number of individuals whose situation was not sufficiently addressed by the Hague Conference at the time of the Convention’s adoption; and 2) the change can be justified as consistent with the Convention’s object and purpose.

II. GUIDELINES FOR EVALUATING HAGUE CONVENTION DECISIONS

The two proposed criteria for evaluating Hague Convention opinions are straightforward. Courts should presumptively follow decisions by our treaty partners on the same legal issue, and if that presumption is rebutted, courts should justify any departure in terms of a purposive analysis. These criteria are useful evaluative tools, and are consistent with existing treaty interpretation doctrine. 19

A. Measuring Success (Part I): The Importance of Uniformity

A ‘good’ Hague Convention opinion always recognizes the case law of sister signatories when other courts have rendered decisions on the same issue. Also, a good opinion expresses the court’s willingness to follow the predominant interpretation of our treaty

partners, as a presumptive matter. There are five reasons why a court should follow this approach.

First, federal courts in the United States are out of familiar territory when adjudicating Hague Convention petitions. Convention disputes, although technically ‘procedural,’ are fundamentally family law disputes—an area traditionally reserved for state courts. Some recent Hague Convention opinions expose our federal courts’ lack of sophistication and experience regarding basic family law matters, such as evaluating the maturity of a minor for purposes of determining the weight to give to the minor’s expressed interest. Federal


21. A perfect example of a federal court’s limited expertise in family law matters was evident in England v. England, 234 F.3d 268 (5th Cir. 2000). The Convention permits a court to deny a petition for return when a child of sufficient age and maturity expresses his or her reluctance to being returned. Hague Convention on Child Abduction, supra note 1, art. 13. A trial court has wide discretion as to whether the child’s age and maturity qualify, and the weight to afford the child’s opinion once these criteria are met. Compare Sheikh v. Cahill, 546 N.Y.S.2d 517, 521–22 (N.Y. Sup. Ct. 1989) (holding that a nine-year-old child had “not attained an age and degree of maturity to warrant [the] court to take account of his views”), and Tahan v. Duquette, 613 A.2d 486, 490 (N.J. Super. Ct. App. Div. 1992) (holding that the standard in Article 13 “simply does not apply to a nine-year old child”), with B v. K, 1 Fam. Ct. Rep. 382, 387 (Eng. Fam. 1991) (holding that seven and nine-year-old children had “attained an age and degree of maturity at which it is appropriate . . . to take account of their views”). Even though most abducted children are too young to invoke the defense, the defense is still the “most used reason for refusal” to return children. Statistical Analysis,
courts themselves acknowledge their lack of expertise, and have refused to adjudicate international visitation disputes arising under the Convention. See supra note 8, at 19. See also Nigel Lowe, International Child Abduction—The English Experience, 48 Int'l & Comp. L.Q. 127, 146 (1999) ("[T]he child's objection was the most common reason for judicial refusals to make a return order" in 1996.).

In England v. England, the appellate court accorded no deference to the district court on the issue of maturity. There the district court had found thirteen-year-old Karina sufficiently mature and credited her desire to remain in the U.S. with her mother. The district court stated:

Karina has clearly objected to being returned to Australia and she is old enough and mature enough for the Court to take account of her views. She has maintained friendships with classmates here while living abroad, she likes it here and her situation has stabilized. The Court, in accordance with Karina's stated preference, declines to return her to Australia.


Instead, the Court of Appeals in England v. England drew its own conclusions from the written record, mentioning that the child "has had four mothers in twelve years. She has been diagnosed with Attention Deficit Disorder [ADD], has learning disabilities, takes Ritalin regularly, and is, not surprisingly, scared and confused by the circumstances producing this litigation." England, 234 F.3d at 273. Yet, no expert testimony supported a correlation between the child's circumstances and immaturity. The lay testimony in the record suggested that Ritalin helped Karina overcome any learning disability related to ADD, not that it caused immature behavior. Moreover, the record indicated that "Karina was an average student academically, maintaining the school grade level commensurate with her age, and that she was engaged in a variety of sports and extracurricular activities." Id. at 274. Considering her background, this achievement itself suggested maturity.

statements about state courts’ superior experience and resources, and the superior ability of state courts to weigh the childrens’ interests, the parents’ interests, and other familial considerations. 23

The self-proclaimed inexperience of the federal judiciary suggests that federal deference to other nations’ interpretation of the Convention is warranted. 24 Few nations have the same jurisdictional division as does the United States between family courts and courts adjudicating Hague Convention petitions. For example, in the United Kingdom, there are only sixteen High Court judges of the Family Division who have jurisdiction to try these abduction cases. 25 On appeal, these cases go to the Supreme Court of Judicature in the Court of Appeal, Family Division. 26 Similarly, Germany now has concentrated the adjudication of Hague Convention cases in fewer judges, all of whom have a family law background. 27 British and Ger-


23. Janzik, 2000 WL 1745203, at *2 (noting that the court in Bromley dismissed an access rights petition for lack of subject matter jurisdiction); Teijeiro Fernandez, 121 F. Supp. 2d at 1126; Bromley, 30 F. Supp. 2d at 862.

24. A similar point could be made about federal court deference to state court interpretations. Arguably, the federal courts should give great weight to interpretations of the Convention issued by state court judges, given those state court judges’ expertise on family law matters and their consequent greater ability to predict the potential implications of their decisions.


Under the [1999] amendment, one local family court is designated in the district of each Higher Appeals Court to hear all the Child Abduction Convention and European Convention on Recognition and Enforcement cases for that district. . . . If the Central Authority refuses an application under Article 27, the denied applicant may appeal immediately to the Higher Appeals Court (Oberlandesgericht) of the district where the Cen-
man case law interpreting the Hague Convention, therefore, rests on a fuller understanding of the implications of a particular interpretation. In contrast, a United States federal court may not foresee the undesirable consequences of a particular novel treaty interpretation. The Second Circuit's ultimate resolution of Blondin v. Dubois, discussed below, is an excellent example of this phenomenon. Caution seems particularly appropriate when our treaty partners are interpreting the Convention in a fairly uniform manner, given the weight of expertise behind a particular conclusion.

Second, the Convention is premised on mutual trust between participating nations. Signatories trust each other to consider a child's best interest when adjudicating custody, to protect children who need protection, and to decide cases fairly when only one litigant is a national. Parties even trust each other to adjudicate the custody

tral Authority is located. This appeal is final unless the losing party raises a constitutional challenge. Should the court order the return of the child, the losing party, the child (if over 14), and the participating Youth Welfare Office may appeal to the Higher Appeals Court.

Id. (footnotes omitted).

There are twenty Oberlandesgerichte and they hear appeals from the district courts (Landgerichte), the family courts (Familiengerichte), and the family division of the county court (Amtsgericht). 2 Thomas H. Reynolds & Arturo A. Flores, Foreign Law: Current Sources of Codes and Basic Legislation in Jurisdictions of the World § 13 (1991). The Oberlandesgericht has a family law panel (Familiensenat) that hears these family cases. Dr. Anke Freckmann & Dr. Thomas Wegerich, The German Legal System 168 (1999).


29. I am not suggesting that only federal courts in the U.S. defer to the judicial decisions of our treaty partners. While that might appear to be my position if the analysis stopped with this first 'expertise' argument, my other arguments apply equally to state and federal courts. See infra notes 30–51 and accompanying text.

30. Courts in the United States have emphasized the notion of mutual trust. For example, the district court in Blondin v. Dubois (Blondin III), 78 F. Supp. 2d 283, 299 (S.D.N.Y. 2000), stated:

My decision to deny Blondin’s petition does not reflect any lack of trust in the French judicial and administrative systems. Chauveau wondered if I view the French as “undercivilized monkeys or responsible partners to an international convention.” (11/4/99 Chauveau Letter to J. Penta). I assure her and the French Central Authority that I view them as the latter. I have every confidence in the ability of the French administra-
of each others' nationals, children who have historically received
courts' maximum protection through liberal substantive and jurisdic-
tional rules.31 No logical reason exists why United States courts also
should not trust foreign courts' interpretation of legal questions
under the Convention.

In fact, the notion of comity, broadly conceived, supports such
deference. While comity typically refers to how courts of one country
should treat the decisions by courts of another country in the same
tive and judicial systems to protect and support Marie-Eline
and Francois pending the adjudication of the custody case. The
United States, too, is a "responsible partner to an international
convention."

The Convention sets up a framework for analyzing interna-
tional child abduction cases, and we must work within that
framework; I endeavor to do precisely that. The Convention
provides that if I find there is grave risk, I need not send the
children back. If I decide, as I do, that the children should not
be sent back under an exception to the Convention, it is not a
matter of American chauvinism, or a lack of trust in the French
court system, but a matter of working within the framework of
the Convention.

Id.

31. For examples of courts' broad assertion of jurisdiction, see, for example,
bond's challenge to court's jurisdiction and convenience of forum in child custody
action); Fantony v. Fantony, 115 A.2d 610 (N.J. Super. Ct. Ch. Div. 1955) (deny-
ing comity to Cuban decree); Hattoum v. Hattoum, 441 A.2d 403 (Pa. Super. Ct.
1982) (basing jurisdiction to determine custody on consent order which had been
entered in the jurisdiction seven years earlier even though children spent next
five years in Argentina). See generally J.V. Dempsey, Jurisdiction to Award Cus-
tody of Child Having Legal Domicile in Another State, 4 A.L.R.2d 7 (1949)
(concerning the power of a court in one state to make an award of custody of a
child who is a legal domiciliary of another state); C.T. Drechsler, Jurisdiction of
Court to Award Custody of Child Domiciled in State but Physically Outside It, 9
A.L.R.2d 434 (1950) (determining the effect of a child's physical absence from the
state of its domicile on the jurisdiction of the court of the child's domicile to make
a child custody award, or to modify a previous award). Cf. Re Willoughby, 30 Ch.
D. 324 (Eng. C.A. 1885) (court could adjudicate custody of British subject
domiciled in France with her mother following the death of her father); Re
to Draft a Successful Family Law Convention: Lessons from the Child Abduction
Conventions, in Children on the Move 47, 50 (Jaap Doek et al. eds., 1996)
("Traditionally, child custody judgments were ignored by international recog-
nition-of-judgments agreements.").
comity can also function as a canon of construction when a
foreign court has already decided the same legal issue in a different
case. Courts in the United States have recognized that this sort of
comity “is at the heart of the Convention,” and have, on occasion,
invoked it in this broader sense. Our treaty partners have done so

32. See, e.g., Diorinou v. Mezitis, 237 F.3d 133, 139 (2d Cir. 2001). Comity in
this more limited sense is not relevant to my argument. Sometimes there is not a
foreign judgment or ruling in the same matter, nor is the foreign court seized of
the matter.

33. Foreign decisions do not have the weight of precedent, although courts
can consult them and accord them ‘considerable weight’ when construing the
terms and scope of an international convention. See Air France v. Saks, 470 U.S.
392, 404 (1985) (determining what constitutes an “accident” within the meaning
of the Warsaw Convention) (quoting Benjamins v. British European Airways, 572
F.2d 913, 919 (2d Cir. 1978)); Maxwell Communication Corp. v. Société Générale,
93 F.3d 1036, 1047 (2d Cir. 1996) (affirming dismissal of complaint that sought to
use avoidable preference theory to set aside pre-petition transfers to certain credi-
tors) (“When construing a statute, the doctrine of international comity is best
understood as a guide where the issues to be resolved are entangled in interna-
tional relations.”); Westar Marine Serv. v. Heerema Marine Contractors, S.A., 621
F. Supp. 1135, 1138 (N.D. Cal. 1985) (noting that the court was not directed to
any foreign authority that would help interpret the phrase “all the persons inter-
ested” in the Brussels Convention of 1910, i.e., the Salvage Treaty). Foreign
decisions are “an accepted tool of treaty interpretation.” David J. Bederman, Revi-
valist Canons and Treaty Interpretation, 41 UCLA L. Rev. 953, 972 (1994) (citing,
inter alia, E. Airlines v. Floyd, 499 U.S. 530, 537–40 (1991) (using French cases,
treatises, and statutes to interpret the Warsaw Convention); Day v. Trans World
Airlines, 528 F.2d 31, 37 n.17 (2d Cir. 1975) (citing the Court of Appeal of Berlin,
in Blumenfeld v. BEA, 11 ZLW 78 (1962) to aid in interpretation of the Warsaw
Convention regarding whether passenger protection “ranks high among goals . . .
signatories look to the Convention to serve.”)). See also Diane M. Peters, Note,
Application of the Hague Convention to American Litigants: Incorporating the
Subsequent Interpretations of Signatory States into the Analysis of the U.S.
reliance upon subsequent interpretations by sister signatories of international
accords.”). Peters, however, gives a potent example of where sister signatories’
decisions were ignored. See Société Nationale Industrielle Aérospatiale v. U.S.
Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 538–40 (1987) (holding that the
procedures in the Hague Convention on the Taking of Evidence Abroad in Civil or
Commercial Matters were optional and that federal district courts need not follow
those procedures when ordering discovery of evidence physically located within
France in French defendants’ possession).

34. Diorinou, 237 F.3d at 142–43 (quoting Blondin v. Dubois, 189 F.3d 240,
248 (2d Cir. 1999)).

35. See, e.g., Friedrich v. Friedrich, 78 F.3d 1060, 1068–69 (6th Cir. 1996)
(citing international precedent and holding that the Article 13(b) grave risk of
as well.36 This type of comity does not require a factually intensive analysis of the fairness of the foreign system.37 Rather, comity as a canon of construction requires only an acknowledgment that the United States’ treaty partners are equally capable of resolving legal questions under the Convention. The result is a “process of collective judicial deliberation on a set of common problems,”38 which improves

harm exception should be narrowly construed because the child’s habitual residence may be relied on to protect the child).

36. The House of Lords decision in Re H. (Child Abduction: Rights of Custody), 2 All E.R. 1 (H.L. 2000), provides an example. The House of Lords there held that the father had ‘rights of custody’ affording him the remedy of return when the mother had an interim order awarding her custody, the father had access, and the father had an application pending seeking to appoint him guardian. Id. at 2. The court held that the phrase “any person, institution or other body claiming that a child has been removed or retained in breach of custody rights” may include a court as an “other body.” In so holding, the House of Lords emphasized the importance of uniformity. Id. (citing David Ty zach Q.C. and Catriona Murfitt, Attorneys for the father) (underlining there was a “need to construe the Convention, as an international treaty, in such a way that its construction in one legal system is consistent with its construction in another”). The attorneys for the father assured the court, “There is no reported decision in any jurisdiction, whether signatory to the Convention or not, that supports the mother’s proposition.” Id. (citing David Ty zach Q.C. and Catriona Murfitt, Attorneys for the father). The court cited various cases from other jurisdictions where courts found, in obiter or not, that a court can have ‘rights of custody,’ particularly when the court has issued an interim order. Id. at 25 (citing Thomson v. Thomson, [1994] 3 S.C.R. 551, 558 (Can.); Re S. (Abduction: Children: Separate Representation), [1997] 1 F.L.R 486 (N.Z. H.C.); H.I. v. M.G. [1999] 2 I.L.R.M. 1, 34, 40 (Ir.). The attorneys had also cited other English cases. See, e.g., B v. B (Abduction: Custody Rights), 2 All E.R. 144 (Eng. C.A. 1993). The court noted that it had not been referred to any contrary decision, and that a report of the Third Special Commission meeting to review the operation of the Hague Convention, which took place in March 1997, discussed Thomson v. Thomson, but did not mention any contrary decision. This “strongly suggests that there was none.” Id.

37. Restatement (Third) of Foreign Relations Law § 482(a)(b) cmt. b (1987). Such an analysis is fraught with difficulty and subject to charges of nationalistic bias. See, e.g., Diorinou, 237 F.3d at 143–47 (examining in detail Greek adjudication to determine whether Greek judiciary’s determination on prior Hague Convention petition was fair and reasonable).

the quality of those decisions and strengthens the sense of commitment to common values.39

Third, a uniform interpretation of the treaty is particularly important given its subject matter.40 The Convention deals with child abduction, and deterring this practice is a principal goal of the Convention.41 Absent a uniform interpretation, potential abductors may be encouraged to abduct, believing they can exploit divergent legal interpretations and thereby avoid the Convention's application and sanction. The Hague Conference on Private International Law drafted the Hague Convention in an effort to unify the law for this very reason.42 When Congress passed the International Child Abduc-

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39. Slaughter, supra note 38, at 133.


41. See Bruch, supra note 31, at 53 n.26 (calling one of the two overriding goals of the Convention that "[a]bductors are discouraged from self-help").

42. C v. C, 2 All E.R. 465, 472 (Eng. C.A. 1989) ("The whole purpose of [the Convention] is to produce a situation in which the courts of all contracting states may be expected to interpret and apply it in similar ways."). Cf. Uniform Child Custody Jurisdiction Act, 9 U.L.A. 580 (1968). As the Prefatory Note of the Uniform Child Custody Jurisdiction Act states:

> There is a growing public concern over the fact that thousands of children are shifted from state to state and from one family to another every year while their parents or other persons battle over their custody in the courts of several states. This unfortunate state of affairs has been aided and facilitated rather than discouraged by the law. There is no statutory law in this area and the judicial law is so unsettled that it seems to offer nothing but a 'quicksand foundation' to stand on.

Id.
tion and Remedies Act (ICARA), it recognized the international character of the Convention and "the need for uniform international interpretation of the Convention." Similarly, the Convention was also meant to be a speedy remedy. Judicial inconsistency will hamper the swift resolution of these cases. Increasing numbers of abductors will try novel arguments as these arguments find favor with the courts. The end result will be fewer voluntary returns, more appeals, and ultimately more delay.

Fourth, the maxim of treaty interpretation referred to as 'good faith' requires a presumption of uniformity. 'Good faith' refers

44. Id. § 11601(b)(3).
46. The rise in the number of federal cases is not attributable to an increased rate of abduction to the United States. Applications coming into the United States have remained relatively constant over time. According to the National Center for Missing and Exploited Children, 222 applications were received by the National Center in 1996, 206 in 1997, 249 in 1998, 213 in 1999, and 229 in 2000. Letter from Kathleen S. Ruckman, supra note 5. A different source indicates that there may even have been a decline in the number of abductions to the United States. Nigel Lowe's study indicates that there were 286 incoming applications in 1996. Lowe, supra note 21, at 149 app. I.

The upswing in federal cases may reflect litigants' perception that they have a better chance of prevailing if their cases are adjudicated in federal court. The Convention, which emerged from a drafting process characterized by negotiation and accommodation, has various gaps and ambiguities. For example, the term 'rights of custody' was left deliberately vague due to the drafters' failure to agree on a more precise definition. Pérez-Vera Explanatory Report, supra note 10, § 84 ("Since all efforts to define custody rights in regard to [particular situations] failed, one has to rest content with the general description given [in the text]."). See also A.E. Anton, The Hague Convention on International Child Abduction, 30 Int'l & Comp. L.Q. 537, 550 (1981) (calling the grounds of refusal "a compromise"). Lawyers exploit these gaps and ambiguities in their efforts to win. With the arrival of the Internet and electronic research databases, lawyers can now find legal precedents from other countries easily and quickly to further their clients' cases. For example, the Hague Conference sponsors INCADAT, the International Child Abduction Database, which is located at www.incadat.com. As federal trial or appellate courts reward these lawyers' efforts, one would expect the current trend of increased federal adjudication to continue and intensify.

47. See Bederman, supra note 33, at 966; Tucker v. Alexandroff, 183 U.S. 424, 437 (1902). As the Supreme Court explained:

It is said by Chancellor Kent in his Commentaries (vol. 1, p. 174): "Treaties of every kind are to receive a fair and liberal interpretation according to the intention of the contracting
to "the judicial desire to give credence to the meaning ascribed by one of our treaty partners." This approach supports U.S. foreign policy by "protecting the United States from a charge of treaty breach," and by ensuring that international agreements do not fall apart. Non-uniform interpretations may lead treaty partners to conclude that the United States has withdrawn its consent to be bound by the treaty since "persistently forwarded 'unconventional' construction of the treaty" can be seen as "implicit abrogation."

Fifth, the United States courts should follow the prevailing interpretation to ensure predictability—an essential component of fairness. Individuals need stable rules in order to structure their family relationships. A malleable Hague Convention presents difficulties for parents who want to travel abroad with their children. They may not know whether they have the right to do this without the other parent's permission, or whether they will become enmeshed in expensive litigation to keep their children with them. Uncertainty in interpretation also complicates matters for parents who face the risk of an abduction, as they might not know whether the child's trip abroad might threaten the visitation or custody arrangement already established. Judges should be particularly cautious, therefore, when considering whether to break from the prevailing interpretation of the Convention.

For these five reasons, federal courts should be inclined to resolve legal issues consistently with the prior decisions of our Convention partners on the same issues. Examining the case law of sister signatories is not required as a matter of stare decisis, but freedom from the doctrine of stare decisis does not, in and of itself, supply a good reason to ignore a consensus as to construction. Rather, as the Fifth Circuit explained with reference to the Warsaw Convention, "A multilateral treaty is rather like a 'uniform law' within the United

parties, and are to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts."


48. See Bederman, supra note 33, at 968.
49. Id.
States. The Court has an obligation to keep interpretation as uniform as possible.\textsuperscript{51} Since good policy dictates that courts should “follow the consensus as to construction,” courts need to “resort to legislative history and relevant extrinsic aids” when interpreting the Convention, particularly the case law of sister signatories.\textsuperscript{52}

Despite the importance of uniformity in the Convention’s interpretation, it would be foolish to suggest that a court should never depart from foreign precedent. In the United States, this approach would be suspect as a constitutional matter.\textsuperscript{53} More generally, this approach could perpetuate an interpretation that has proven problematic. The long-term success of a treaty requires that courts respond to problems in a treaty’s application.\textsuperscript{54} The difficult question,

\begin{itemize}
\item \textsuperscript{51} Block v. Compagnie Nationale Air France, 386 F.2d 323, 337–38 (5th Cir. 1967) (determining that plaintiffs’ recovery could not exceed liability limit referred to in Warsaw Convention where French air carrier entered into a charter agreement with a third party, supplied the craft and the staff, and issued each passenger a ticket that referred to the Warsaw Convention’s liability limit). \textit{Cf.} Choctaw Nation of Indians v. United States, 318 U.S. 423, 431–32 (1943) (stating that to ascertain the meaning of a treaty courts may “look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties”). \textit{See also} Restatement (Third) of Foreign Relations Law § 325 cmt. d (1986) ("Treaties that lay down rules to be enforced by the parties . . . should be construed so as to achieve uniformity of result despite differences between national legal systems.").

\item \textsuperscript{52} \textit{Block}, 386 F.2d at 338. The Fifth Circuit’s long analysis included a discussion of two French decisions, although the court’s holding was not based on these cases because the issues before the French courts differed. \textit{Id.} at 353. The extrinsic aids also included commentary by legal scholars. \textit{See id.} at 348–51.

\item \textsuperscript{53} Foreign precedents have no status under the Constitution as a source of law. \textit{Cf.} Article VI of the U.S. Constitution, which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

\textit{U.S. Const.}, art. VI, § 1, cl. 2.

\item \textsuperscript{54} As the Second Circuit said in the context of the Warsaw Convention, even a convention’s text should not be determinative if “when the words were first chosen the language accurately reflected the provision’s purpose but that today the same words imperfectly reflect this purpose because conditions have changed in the area to which the words of the provision refer.” \textit{Eck v. United Arab Airlines, Inc.}, 360 F.2d 804, 812 (2d Cir. 1966). The court explained that these princi-
however, is when the goal of uniformity should be subordinated to an effort to improve the Convention. I have no magic answer to this dilemma, only a tentative suggestion. The presumption of uniformity should be considered rebutted when the following two conditions are met: 1) the prevailing approach is unjust to a large number of individuals whose situation was not sufficiently considered by the Hague Conference at the time of the Convention's adoption or whose situation the drafters intended to be handled differently from the prevailing interpretation; and 2) the deviation is consistent with the object and purpose of the Convention.

B. Measuring Success (Part II): The Importance of Purposive Analysis

Assuming that the presumption of uniformity is rebutted, a court should justify any deviation from the prevailing international interpretation by emphasizing the Convention's object and purpose. Broadly speaking, there are two approaches to treaty interpretation, both approved by the Supreme Court: a strict constructionist approach and a 'purposive' approach (or, to use I.M. Sinclair's terminology, an "objective" approach and a "teleological" approach55). Loosely defined, a strict constructionist or objective approach requires that courts rely almost exclusively on the Convention's text to arrive at

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55. Michael S. Straubel, Textualism, Contextualism, and the Scientific Method in Treaty Interpretation: How Do We Find the Shared Intent of the Parties?, 40 Wayne L. Rev. 1191, 1195–96 (1994). The Constitution requires neither approach. Bederman, supra note 33, at 957 ("There are no rules of treaty interpretation which are mandated by the Constitution itself, or are legitimately derived directly from constitutional allocations of authority.").

56. Sir Ian Sinclair, The Vienna Convention on the Law of Treaties 114–19 (1984). A third approach mentioned by Sinclair and others is the 'subjective' or 'intentions of the parties' approach. I give this approach little attention because a strict subjective approach, where the court tries to follow the parties' subjective intent despite a contrary objective understanding of the text, is nowhere followed as a primary method of interpretation. See Kenneth J. Vandevelde, Treaty Interpretation from a Negotiator's Perspective, 21 Vand. J. Transnat'l L. 281, 293 (1988). In addition, intent of the parties is really a subset of the other two approaches. Straubel, supra note 55, at 1192–93 ("The goal of the Supreme Court when interpreting a treaty is to find the shared intent of the parties."). Further, Straubel contends that "the disagreement over interpretation can be viewed as one of means rather than ends." Id. at 1194.
the Convention's meaning. The Supreme Court has stated that, to the extent that a treaty's text is clear, the analysis must start and end there. This textual approach includes interpreting the words of a treaty in the context in which they are used. Only when the words and context are ambiguous can the judge look to extra-textual aids for assistance. A purposive construction, in contrast, requires that the decision-maker examine the 'object and purpose' of a treaty at the outset of the analysis. Therefore, there is no requirement of ambiguity before extra-textual sources can be consulted.

The advantage of a purposive approach is its superior ability to convince others that they should follow a court's novel interpretation of the treaty. Many Hague Convention signatories prefer a

57. See, e.g., Rocca v. Thompson, 223 U.S. 317, 331–32 (1912) (refusing to hold that consul had the right to administer the estate of its citizen who died abroad because intention was not explicit in treaty).

58. Air France v. Saks, 470 U.S. 392, 397–99 (1985) (finding that liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger, not merely the usual change in cabin pressure and the passenger's own internal reaction to it).

59. Nielsen v. Johnson, 279 U.S. 47, 52 (1929). These would include, for example, the records of the Convention's drafting and negotiation, the conduct of the parties to the Convention, each party's practical construction of the treaty, and the subsequent interpretation of the signatures. See, e.g., Air France, 470 U.S. at 403–04. It should be noted that the Court in Air France did not find the text ambiguous before it confirmed its understanding with these extra-textual sources.

60. For examples of this approach in the context of the Warsaw Convention, see, for example, Reed v. Wiser, 555 F.2d 1079, 1088 (2d Cir. 1977); Eck v. United Arab Airlines, Inc., 360 F.2d 804, 812 (2d Cir. 1966); Lisi v. Alitalia Linee Aeree Italiane, S.p.A., 370 F.2d 508, 511–12 (2d Cir. 1966); Denby v. Seaboard World Airlines, 575 F. Supp. 1134, 1139 (E.D.N.Y. 1983) ("[L]anguage is merely one relevant consideration in interpreting the Warsaw Convention . . . . The fundamental consideration in treaty interpretation is to 'effectuate the treaty's evident purposes.") (internal citations omitted).

61. This is not a legal mandate, but rather good sense. Compare Hague Convention on Child Abduction, supra note 1, with U.N. Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, art. 7(2), 19 I.L.M. 668–99 (1980) ("Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."). The drafters of this treaty said, "[W]hen interpreting the treaty, consideration should be given to its 'international character and to the need to promote uniformity.'" Straubel,
purposive methodology. Moreover, a strict constructionist approach focuses on the language of the document, thereby creating opportunities for disagreement. Courts impute their own nationally derived meanings to the words of the treaty. This type of analysis inevitably appears nationalistic and conceited, and is inappropriate in the context of a multilateral treaty. Its subliminal message is that the author of the opinion has a 'truer' understanding of language than do others. A purposive approach, in contrast, focuses on what the treaty partners hoped to accomplish (i.e., the common values that undergird the instrument). A purposive approach reminds the reader of the aspirations and goals of the reformers. As Ian Johnstone has noted:

The art of persuading another to accept a particular reading of a text does not entail demonstrating its "true meaning," but rather convincing the person that, in effect, he or she belongs to the same community of interpretation . . . . If the listener is persuaded, it is not because the truth of the interpretation has been demonstrated (although both people may perceive it that way), but because the listener and speaker have settled on certain common beliefs and categories of understanding, and therefore have become members of the same interpretative community.

In addition, a purposive analysis offers the best hope for maintaining uniformity and for identifying circumstances when a

supra note 55, at 1211 n.107.

62. Straubel, supra note 55, at 1205–07 (noting that the United Kingdom, Germany, France, Italy, Luxembourg, the Netherlands, Belgium, and the Court of Justice of the European Union all consider extra-textual sources when interpreting a treaty). For example, in Re H.—decided in the House of Lords and discussed supra in note 36—Lord Mackay of Clashfern engaged in a purposive analysis that examined the objects of the Convention. Although Schedule 1 to the Child Abduction and Custody Act of 1985 did not include Article 1 of the Convention, a purposive construction was required: "Since this is an international convention to be applied under a variety of systems of law it is right that it should be given a purposive construction in order to make as effective as possible the machinery set up under it." Re H. (Child Abduction: Rights of Custody), 2 All E.R. 1, 24 (H.L. 2000). Lord Mackay emphasized that the "phraseology chosen was deliberately wide." Id. Among other things, he noted that "the power to determine the child's place of residence being itself characterized as a right underlines the width that should be given to the word 'rights' in this Convention." Id. The House of Lords found that the father could vindicate the rights of the court, in order to facilitate "the smooth working of the Convention." Id. at 27.

deviation is warranted. Michael Van Alstine, in the context of the United Nations (U.N.) Sales Convention, has called upon courts to engage in a ‘general principles’ methodology. He persuasively explains, “A restrictive formalist approach to interpretation permits domestic adjudicators to embrace their natural bias for familiar domestic legal norms in filling such gaps. The inevitable consequence is a progressive disintegration of whatever international uniformity a convention has achieved in the first place.” Yet Van Alstine also acknowledges that the ‘general principles’ methodology will empower “domestic courts to participate in the fashioning of solutions on an international level.” Consequently, while a ‘general principles’ approach can help maintain uniformity, it can also justify a break from uniformity when necessary for progress. A justification free from nationalistic bias best assures that the new interpretation will gain international acceptance. Without purposive analysis, disunity will result and no real progress will ever occur.

C. The Proposal’s Grounding in Treaty Interpretation Doctrine

The recommendation that courts focus on treaty partners’ case law and use an ‘object and purpose’ analysis finds support in U.S. case law regarding treaty interpretation. I concede, however, that almost any proposal could find support in existing case law because American jurisprudence is remarkably conflicted about the proper method of treaty interpretation. In addition, the ‘strict


65. Id. at 693–94. Van Alstine describes treaty interpretation as part of the “enduring controversy over the powers of federal courts to develop statutory law.” Id. at 687, 688. The question whether the courts should be interpreting treaties with “restrictive formalism,” through “new textualism,” or with a more “dynamic” approach arises anew in connection with “unification on a transnational level.” Id. at 688–89.

66. Id. at 694.

67. The argument for a purposive analysis stands independently of my argument for when a break with prevailing precedent is warranted. While a purposive approach can convince others to follow a break from uniformity, it is also a better form of analysis for interpretation of international instruments when a court is adjudicating an issue that has never before been decided.

68. See, e.g., Straubel, supra note 55, at 1195 (calling “unsettled” Supreme Court case law on when extra-textual material can be consulted and determining
constructionist' and 'purposive' approaches are so inherently flexible that either could accommodate my recommendation that foreign case law be examined.

Courts in the United States either choose between a 'strict constructionist' and 'purposive' technique, or they employ both in their opinions. Simply put, "it is difficult to discern even a core set of domestically derived principles that U.S. courts faithfully employ in interpreting treaties." The United States has not ratified the Vienna Convention on the Law of Treaties, although its principles are embodied in the Restatement (Third) of Foreign Relations Law. The State Department has described the Vienna Convention as the "generally recognized... authoritative guide to current treaty law and practice," although "there exists little consistency in applying the Vienna Convention canons." Courts frequently select the interpretive tool that best supports the substantive result desired. To the extent that courts adhere to the Vienna Convention, both approaches find support there. Article 31 of the Vienna Convention says, "A treaty should be interpreted in good faith in accordance with

that the weight of authority is "even").

69. Id. at 1194 ("[M]any cases... use inconclusive language when stating the rules to be followed.").

70. Bederman, supra note 33, at 956.

71. See Restatement (Third) of Foreign Relations Law § 325 (1986), which states:

(1) An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

(2) Any subsequent agreement between the parties regarding the interpretation of the agreement, and subsequent practice between the parties in the application of the agreement, are to be taken into account in its interpretation.

Compare Restatement (Third) of Foreign Relations Law §§25(1) and §§25(2), with Vienna Convention, supra note 47, art. 31(1) and 31(3), respectively.


73. Bederman, supra note 33, at 956.

74. Id. ("[T]he search for first principles in treaty interpretation is fraught with peril. This is because a court's selection of an interpretative method for construing any legal instrument (whether a contract, statute, or treaty) is often driven by the substantive result desired.").
the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 75

Under either approach, the Vienna Convention permits consideration of sister signatory case law. Article 31(3) specifically requires courts to take into account, inter alia, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." 76 Moreover, when an evaluation under Article 31 "leaves the meaning ambiguous," the court can turn to "supplementary means" of interpretation, including the travaux préparatoires or the circumstances of its conclusion. 77 Ambiguity is a virtual certainty whenever there is a litigated dispute. 78 The Vienna Convention also allows extra-textual materials to be consulted to confirm an interpretation of the text, which "is in itself the antithesis of the textual method." 79 Courts should have no problem applying my proposed methodology given the enormous flexibility that currently exists in treaty interpretation methodology. 80

75. Vienna Convention, supra note 47, art. 31(1). To some extent, both approaches embody some of the other approach. For example, the Restatement (Third) of Foreign Relations Law is said to embody a purposive approach. Yet to determine purpose, the court looks at, among other things, the "ordinary meaning" of the words of the agreement in the context in which they are used. Restatement (Third) of Foreign Relations Law § 325(1) (1986). Even under the strict constructionist approach, a court is not bound by the text if "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." Maximov v. United States, 373 U.S. 49, 54 (1963) (finding that the income tax convention between the U.S. and the U.K. was intended only to prevent double taxation, not obtain equality in taxation, and that the treaty's text clearly sets forth this goal). In such cases, the court can look to "relevant materials instructive as to the intent of the parties to the Convention." Id. (mentioning the Convention preamble).

76. Vienna Convention, supra note 47, art. 31(3)(b).

77. Id. art. 32.

78. As the Supreme Court has stated, "Words generally have different shades of meaning." Vermilya-Brown Co. v. Connell, 335 U.S. 377, 386 (1948) (quoting Puerto Rico v. Shell Co., 302 U.S. 253, 258 (1937), and suggesting that the intent of lawmakers in using the word "possession" in the Fair Labor Standards Act is to be arrived at by considering the text, the context, the purposes of the law, and the circumstances under which the words were adopted).

79. Straubeil, supra note 55, at 1204–05. See also Vandevelde, supra note 56, at 296–97 (referring to this interpretive method as "a rule that borders on the absurd").

80. Others have canvassed well the flexibility in the methods of treaty interpretation. As I.M. Sinclair wrote, "There are few topics in international law which
Before I use the proposed framework to analyze the performance of the federal appellate courts in the United States, I briefly introduce the Hague Convention. This introduction will put their decisions in the proper context.

III. THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The Hague Convention on the Civil Aspects of International Child Abduction was completed by the Hague Conference on Private International Law in October 1980. The Convention is presently in force in more than sixty countries, including the United States.


82. As of April 2000, the Convention had been ratified or acceded to by Argentina, Australia, Austria, Bahamas, Belarus, Belgium, Belize, Bermuda, Bosnia & Herzegovina, Brazil, Burkina Faso, Canada, Chile, China (Hong Kong Special Administrative Region only), Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Federal Republic of Yugoslavia, Fiji, Finland, France, Georgia, Germany, Greece, Honduras, Hungary, Iceland, Isle of Man, Ireland, Israel, Italy, Liechtenstein, Luxembourg, Macedonia, Macau, Malta, Mauritius, Mexico, Moldova, Monaco, Montserrat, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, Slovenia, South Africa, Spain, St. Kitts and Nevis, Sweden, Switzerland, Turkmenistan, the United Kingdom, the United States, Uruguay, Uzbekistan, Venezuela, and Zimbabwe. See Anne-Marie Hutchinson & Henry Setright, International Parental Child Abduction 56–57 (1998); Permanent Bureau, Hague Conference on Private Int’l Law, Preliminary Document No. 6, Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Preparations for a Fourth Special Commission Meeting to Review the Operation of the Convention and a Description of the Work Currently Undertaken by the Permanent Bureau in Support of the Convention (2000), at 2; News: Child Abduction, 25 Fam. L. Rep. 1171 (1999).

83. The United States became a signatory of the Convention on December 23, 1981. See Parental Kidnapping: Hearing Before the Subcomm. on Juvenile
The Convention sets forth its objects in Article 1: "[T]o secure the prompt return of children wrongfully removed to or retained in any Contracting State; and . . . to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."\(^{84}\)

The Hague Convention applies to any child who was "habitually resident" in a Contracting State immediately before the child was abducted.\(^{85}\) The remedy of return, whereby a child is returned to his or her habitual residence, applies solely to a wrongful removal or retention of a child, and requires that the parent victimized by the abduction had rights of custody at the time of the abduction.\(^{85}\) The purpose of the return remedy is to reestablish the factual status quo

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\(^{84}\) Hague Convention on Child Abduction, supra note 1, art. 1.

\(^{85}\) Id. art. 4.

\(^{86}\) Id. arts. 3, 8.
as it existed prior to the abduction. Rights of access, in contrast, are vindicated in the state to which a child has been abducted. The State Department noted:

In contrast to the restoration of the legal status quo ante brought about by the application of the UCCJA, the PKPA, and the Strasbourg Convention [Council of Europe's Convention on the Recognition and Enforcement of Decisions Relating to the Custody of Children, adopted in Strasbourg, France in November 1979], the Hague Convention seeks restoration of the factual status quo ante and is not contingent on the existence of a custody decree. The Convention is premised upon the notion that the child should be promptly restored to his or her country of habitual residence so that a court there can examine the merits of the custody dispute and award custody in the child's best interests.


Since an order for the return of the child is not a determination on the merits of any custody issue . . . , the parent who removed the child still may contest custody on the merits in the courts of the child's habitual residence. The order simply restores the status quo as it existed before the child's removal or retention.


Hague Convention on Child Abduction, supra note 1, art. 21. See, e.g., Bromley v. Bromley, 30 F. Supp. 2d 857 (E.D. Pa. 1998) (holding that federal district court has no authority to enforce the father's rights of access through
Convention explicitly prohibits Contracting States from deciding the merits of a custody dispute until it has been determined that a child is not to be returned under the Convention.\textsuperscript{89}

To set out a prima facie case under the Convention, a petitioner must establish that there was a “wrongful removal or retention” of the child from his or her “habitual residence.”\textsuperscript{90} Article 3 of the Convention defines the removal or retention as “wrongful” when it was “in breach of rights of custody,” and “those rights were actually exercised.”\textsuperscript{91}

Articles 12, 13, and 20 provide several defenses to the remedy of return. Article 12 contains the ‘well-settled exception’: a court need not return a child if one year has elapsed since the wrongful removal or retention and “the child is now settled in its new environment.”\textsuperscript{92} Article 13(a) says that a country is not required to return the child if the person seeking the child’s return “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.”\textsuperscript{93} Article 13(b) provides that the court need not return the child if “there is a grave risk” that the “return would expose the child to physical or psychological harm or otherwise place the child in an intolerable remedy of return); Viragh v. Foldes, 612 N.E.2d 241 (Mass. 1993) (rejecting petition for return of child to Hungary since father only had rights of access, but making effective his rights of access in the United States). This distinction has not always been appreciated by courts in this country. See, e.g., Harliwich v. Harliwich, No. FA-9868308S, 1998 WL 867828 (Conn. Super. Ct. Dec. 3, 1998) (granting remedy of return even though father only had rights of access).

\textsuperscript{89} Hague Convention on Child Abduction, supra note 1, art. 16.

\textsuperscript{90} Id. pmbl.

\textsuperscript{91} Id. art. 3. Article 3 states that a removal or retention is wrongful when:

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

\textsuperscript{92} Id. art. 12.

\textsuperscript{93} Id. art. 13(a).
situation."\textsuperscript{94} A child need not be returned if the child objects to being returned and is of an age and maturity sufficient to consider the child's views.\textsuperscript{95} Finally, Article 20 permits a court to refuse to return a child when required by "the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."\textsuperscript{96}

A. Rights of Custody: A Broad Concept Narrowed

One of the difficult interpretative issues that has arisen is whether a \textit{ne exeat} clause can convert rights of access into rights of custody. A \textit{ne exeat} clause forbids a person from leaving a geographic area. In the custody context, these clauses typically forbid the custodial parent from removing the child from the court's jurisdiction without the court's or non-custodial parent's permission.\textsuperscript{97} The Convention provides that an order of return is available as a remedy for wrongful removals or retentions only for "breach of rights of custody," and not rights of access.\textsuperscript{98} Parents who have rights of access (i.e., visitation) and also have a \textit{ne exeat} clause in their favor argue that a custodial parent's departure from the jurisdiction undermines the court's order, frustrates the non-custodial parent's rights, and should be remedied by an order of return.

These non-custodial parents ground their argument in the Convention's text. The Convention defines "rights of custody" as "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."\textsuperscript{99} Conse-

\textsuperscript{94} Id. art. 13(b).
\textsuperscript{95} See id. art. 13 ("The judicial or administrative authority may also refuse to order the return of the child if it finds that 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.").
\textsuperscript{96} Id. art. 20.
\textsuperscript{97} This type of clause is also known as a 'restriction on relocation.'
\textsuperscript{98} Hague Convention on Child Abduction, \textit{supra} note 1, art 3(a).
\textsuperscript{99} Article 5 of the Convention defines rights of custody to "include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Hague Convention on Child Abduction, \textit{supra} note 1, art. 5(a). In addition, Article 3 states, "The rights of custody . . . may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." Id. art. 3.
sequently, to the extent that a *ne exeat* clause gives a non-custodial parent (or a court)\(^{100}\) the right to determine the child’s place of residence, the non-custodial parents claim that they qualify for the remedy of return.

The way in which the Hague Convention has been interpreted generally bolsters these non-custodial parents’ argument. The term ‘rights of custody’ typically receives a very wide interpretation. For example, the Explanatory Report of the Special Commission, written by Elisa Pérez-Vera,\(^{101}\) says the Convention does not enumerate all of the sources of the right, thereby “favouring a flexible interpretation of the terms used, which allows the greatest number of possible cases to be brought into consideration.”\(^{102}\) In addition, although Article 3 states that ‘rights of custody’ are to be determined “under the law of the State in which the child was habitually resident immediately before the removal or retention,”\(^{103}\) this requirement has been loosely applied.

The key concepts which determine the scope of the Convention are not dependent for their meaning on any single legal system. Thus the expression “rights of custody,” for example, does not coincide with the particular concept of custody in a domestic law, but draws its meaning from the definitions, structure and purposes of the Convention.\(^{104}\)

Consequently, courts have held that ‘guardianship’\(^{105}\) and ‘patria

\(^{100}\) Sometimes parents argue that a *ne exeat* clause retains jurisdiction in the trial court, giving the court rights of custody that can be enforced by the left-behind parent.

\(^{101}\) Elisa Pérez-Vera was the official reporter for the Hague Convention. “Her explanatory report is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention.” Hague International Child Abduction Convention, Text and Legal Analysis, 51 Fed. Reg. 10494, 10503 (Mar. 26, 1986).

\(^{102}\) *See* Pérez-Vera Explanatory Report, *supra* note 10, ¶ 67. For the relevant language of Article 3, see *supra* note 99.

\(^{103}\) Hague Convention on Child Abduction, *supra* note 1, art. 3(a).


potestas’ rights,\textsuperscript{106} for example, constitute ‘rights of custody.’\textsuperscript{107}

The non-custodial parents’ argument has found favor among courts around the world.\textsuperscript{108} The case most often cited for this propo-

\begin{flushleft}
\textit{reprinted in} 29 I.L.M. 219, 222 (1990) [hereinafter Overall Conclusions]. The Commission cited Australian law where only one parent may have an award of ‘custody,’ but both parents are left with a residential ‘guardianship,’ which would preclude one parent from unilaterally removing the child from the country. \textit{Id.}

\textit{See, e.g., Re Arthur, No. CA 1223/87} (Fam. 1988) (unpublished opinion) (discussing section 60A of Australia’s Family Law Act of 1975, and stating that when a mother and father are married an order for custody gives care and control to one party, but both parties continue to have the rights of a guardian, like in a joint custody arrangement in England), \url{http://www.hiltonhouse.com/cases/Arthur_uk.txt}.

\textsuperscript{106} Whallon v. Lynn, 230 F.3d 450 (1st Cir. 2000) (looking both to Mexican laws and Convention ideology to conclude that unwed father had rights of custody under doctrine of patria potestas, which gave father decision-making role in the child’s life).

\textsuperscript{107} \textit{See, e.g., H.I. v. M.G., [1999] 2 I.L.R.M. 1, 34, 40 (Ir.)} (holding unmarried natural father had ‘rights of custody’ under the Convention because of term’s broad scope despite contrary expert testimony on status of unmarried fathers’ rights in New York), \url{http://www.ucc.ie/ucc/depts/law/irlii_cases/33-98_e.htm}.


\begin{quote}
The Courts of various States which have interpreted this provision have concluded, almost unanimously, that if a person having access (or visitation) rights with a child, also has the legal right to be consulted and to give or withhold consent before the child’s residence may be moved to a different jurisdiction, he or she has ‘rights of custody’ within the meaning of the Convention, even if these rights are not viewed as being ‘custody’ rights under the law of the child’s place of habitual residence.
\end{quote}

\textit{Summary of Remarks by Adair Dyer on the Application of the Hague Child Abduction Convention to Questions of Access (Visitation), in} How to Handle International Child Abduction Cases 1, 2 (A.B.A. Ctr. on Children and the Law 1993). Participants at the 1993 Special Commission agreed that a \textit{ne exeat} clause created ‘rights of custody.’ \textit{See} Report of the Second Special Commission, \textit{supra} note 104, at 234 (commenting on disagreement by courts in Austria, Australia, the United Kingdom, and the United States with a view expressed by the Tribunal de Grande Instance de Perigueux that such a condition constituted only a “modality” attached to the right of custody and was not joint custody).
tion is the 1989 English decision in *C v. C (Minor) (Abduction: Rights of Custody Abroad)*. In *C v. C*, the divorce decree awarded the mother custody, made both parents guardians, and restricted both parents from removing the child from Australia without the other’s consent. The mother violated the order by taking the child to England. In granting the father’s petition for the return of the child, the Court of Appeals held that the *ne exeat* clause gave the father more than just a veto over the mother’s ability to leave Australia. Rather, it gave him a right to influence the child’s actual residence. It thereby satisfied the definition of “rights of custody” in the Convention, which specifically referred to “the right to determine the child’s place of residence.”

Lord Justice Neill explained:

This consent could be limited both as to the period of absence [from Australia] and as to the place to which the child could be taken. Thus, to take an example, the father could consent to the child residing with the mother for a period of a year or so in England or some other agreed country or even at some particular address.

Courts around the world have cited *C v. C*, and an even larger

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Scholars disagree on whether the courts’ interpretations are warranted. Compare, *e.g.*, Beaumont & McCleavy, *supra* note 21, at 80 (arguing that “the underlying principle should be that a veto over the removal of a child from its habitual residence should ordinarily amount to a right of custody, and its breach should be sufficient to successfully base a return petition”), *with* Bruch, *supra* note 31, at 52–53 & n.25 (“I would have considered a right to restrict the child’s location to be nothing more than a guarantee of access and would not, therefore, have equated it with custodial rights.”).


number of courts have followed its general holding: if the custodial parent needs permission from the court or non-custodial parent before removing the child from the country, a removal without such permission is ‘wrongful.’\footnote{See, e.g., Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 849 (Ky. Ct. App. 1999) (holding interim order prohibiting child’s removal from Greece conferred rights of custody); David S. v. Zamira S., 574 N.Y.S.2d 429, 432 (N.Y. Fam. Ct. 1991) (finding removal from Canada to United States to be ‘wrongful’ in absence of a formal custody declaration); B v. B. (Abduction: Custody Rights), 3 W.L.R. 865 (Eng. C.A. 1992); In re Resina, Appeal No. 52 (Fam. Ct. Austl. May 22, 1991) (LEXIS, Australian Commonwealth, State & Territory Case Law) (violations of court orders generally trigger return); H.I. v. M.G. [1999] 2 I.L.R.M. 1, 34, 40 (Ir.). See also Re H, (2000) 1 F.L.R. 374 (Austl.). ‘Rights of custody’ sometimes even exist when the custody decree did not have a ne exeat clause, but where the common law suggested that the non-custodial parent’s access rights could not be frustrated without court approval. See, e.g., C v. C (Minors) (Child Abduction), 1 Fam. L. Rep. 163 (Eng. Fam. 1992); Gross v. Boda, [1995] 1 N.Z.L.R. 569 (C.A.) (holding father had ‘rights of custody’ when mother had ‘sole custody’ but father had the right to the possession and care of the child during alternating holidays and summer vacations). Cf: Re F (Child Abduction: Risk if Returned), 2 Fam. L. Rep. 31 (Eng. C.A. 1995) (finding ‘rights of custody’ in father even though mother had court order giving her temporary custody, and no order or statute barred child’s removal).}

The Second Circuit's decision in \textit{Croll v. Croll}\footnote{229 F.3d 133 (2d Cir. 2000).} radically departed from this prevailing understanding of the Convention. As in many other cases, the court was called upon to decide whether a \textit{ne exeat} clause could convert rights of access into rights of custody. The parents in \textit{Croll} were both United States citizens, although their lives had been centered in Hong Kong since they married there in 1982. Their daughter Christina was born there in 1990. After the parties' separation in 1998, Christina lived with her mother, and her father visited regularly. Mr. Croll commenced divorce proceedings in 1998 in a district court in Hong Kong. That court issued a custody order granting the mother sole “custody, care and control” of Christina and granting the father a right of “reasonable access.”\footnote{\textit{Id.} at 135 (citing Croll v. Chiu, No. 7211 of 1998, Order at 1 (Dist. Ct. H.K. Spec. Admin. Reg., Feb. 23, 1999)).} The order also directed that Christina “not be removed from Hong Kong until she attains the age of 18 years” without leave of the court or
consent of the other parent. In 1999, Ms. Croll took Christina from Hong Kong to New York, ostensibly to look at schools for Christina. However, Ms. Croll decided that she and Christina should stay permanently. She filed an action in the Family Court in New York County seeking custody, child support, and an order of protection. She claimed that she was the victim of domestic violence and that Mr. Croll's violence had been severe. Mr. Croll filed a petition in the Southern District of New York seeking Christina's return to Hong Kong pursuant to the Hague Convention.

Mr. Croll contended that the *ne exeat* clause gave him rights of custody under the Convention. The federal district court granted Mr. Croll's petition, and ordered that Christina be returned to Hong Kong. The Second Circuit reversed, holding in favor of Ms. Croll. The Second Circuit stated, "[W]e hold that a *ne exeat* clause does not transmute access rights into rights of custody under the Convention. *Ne exeat* or not, Mr. Croll's rights include none of the powers (or burdens) of a custodial parent, and therefore are properly classified as rights of access."

As explained below, Croll reaches the right substantive result: a *ne exeat* clause does not convert rights of access into rights of custody. Yet, Croll is still a failure of American Hague Convention jurisprudence. Although I believe the substantive result was right, the opinion rests on, and emphasizes, the Convention's wording and the drafters' intent, and pays only minimal lip service to the purpose and design of the Convention and case law from sister signatories. For example, the court's discussion of the purpose and framework of the Convention filled only one and one half pages, and this discussion was not focused in any meaningful way on the issue before the court. The court's discussion of foreign case law was limited to less than a page in the reporter. The court then devoted three pages to justifying its holding as consistent with the language of the Conven-

116. *Id.*
117. The state court proceedings were stayed pending the outcome of the federal action.
118. *See infra* notes 214–17 and accompanying text.
119. Croll, 229 F.3d at 143.
120. *See infra* notes 190–97 and accompanying text.
121. Croll, 229 F.3d at 137–38.
122. *Id.* at 143.
tion,\textsuperscript{123} and another one and one-half pages discussing the drafters' intent.\textsuperscript{124} In addition, the court examined case law from sister signatories at the last stage of its analysis, thereby minimizing the importance, and the possibility, of a uniform treaty interpretation. It called the cases from our treaty partners "few, scattered, conflicting, and sometimes conclusory and unreasoned."\textsuperscript{125} By claiming that "no consensus view emerges from the opinions issued by the courts of the signatory nations,"\textsuperscript{126} it gave no deference to any of the foreign cases.\textsuperscript{127} The court's dismissal of foreign cases and the textualist methodology are now explored in more detail.

1. \textit{Croll}'s (In)Attention to the Case Law of Sister Signatories

The Second Circuit's characterization of the foreign case law as "conflicting" was unfounded.\textsuperscript{128} The court cited three cases—two from Canada and one from France—as evidence that some courts had held that a \textit{ne exeat} clause does not translate rights of access into rights of custody.\textsuperscript{129} Yet only one of those cases supports the Court of Appeals's claim that courts were divided, and that one case, \textit{Ministère Public v. Mme Y},\textsuperscript{130} was arguably wrongly decided.

\begin{itemize}
\item \textsuperscript{123} Id. at 138–41.
\item \textsuperscript{124} Id. at 141–43.
\item \textsuperscript{125} Id. at 143. The court ultimately thought the problem was that those cases vindicated rights of access with the same remedy that would vindicate rights of custody, and that this result was incompatible with the Convention. Of course, the court's reasoning was tautological. Only by defining the issue at hand as 'rights of access' could it reach this result.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id.
\item \textsuperscript{128} The characterization of the cases as "unreasoned" perhaps demonstrates a failure to appreciate the way in which some civil law countries report the outcome of disputes. For example, in France, decisions may not indicate all the grounds for the holding "for reasons of circumspection (e.g., decision on child adoption) or where the judges have exercised their discretionary powers (e.g., decision to suspend judgment), etc." Christian Dadamo & Susan Farran, The French Legal System 171 n.35 (1993).
\item \textsuperscript{130} Ministère Public v. Mme. Y, T.G.I. Périgueux, Mar. 17, 1992, D. 1992, p. 315 (Fr.). See \textit{infra} notes 138–57 and accompanying text for a discussion of this
In *D.S. v. V.W.*131 one of the cases cited by the Second Circuit, there was simply no *ne exeat* clause that accompanied the mother’s rights of access. In September 1988, the Circuit Court of Maryland awarded the father permanent custody of the child and granted the mother supervised access rights.132 As no restriction existed on the father’s movement with his child, the father then moved to Michigan. The father and mother next entered into a schedule of supervised visits, but that agreement did not contain a *ne exeat* clause either.133 It only contained the father’s promise that he would have the child undergo a psychiatric evaluation in Michigan. This agreement, in any event, was not even approved by the Maryland court until after the father moved to Quebec.134 Therefore, in *D.S. v. V.W.*, the Supreme Court of Canada was faced with an easier question: Were the mother’s rights of access remediable by an order of return? The answer to that question was clearly no.

In *Thomson v. Thomson*,135 another case cited by the Second Circuit, the issue was also different than in *Croll*. There the issue was whether a *ne exeat* clause in an interim order conferred ‘rights of custody.’ In November 1992, the Stranraer Sheriff Court in Scotland granted interim custody of the child to the mother and interim access to the father. The Sheriff ordered that the child remain in Scotland pending further court order. The Sheriff knew that the mother wanted to go to Canada to live with her parents when it issued its ruling. Despite the court’s order, the mother left for Canada with the child five days later. The Sheriff granted the father custody in February 1993, and the father shortly thereafter sought the return of his child under the Hague Convention. The Supreme Court of Canada concluded that in these circumstances, the *ne exeat* clause did confer rights of custody. Justice La Forest explained that the Scottish court had ‘rights of custody’ because the non-removal clause was meant to preserve its jurisdiction.136 In addition, the Supreme Court of Canada suggested in *obiter dictum* that it might answer differently if the *ne case.

132. *Id.* ¶¶ 5, 6, 50.
133. *Id.*
134. *Id.* ¶¶ 6, 50.
136. *Id.* at 553.
exeat clause were in a permanent order.\textsuperscript{137}

\textit{Ministère Public v. Mme. Y,}\textsuperscript{138} the third case cited by the court, better supports the Second Circuit's claim that the foreign case law was conflicting. The French court in that case held that a \textit{ne exeat} provision could not create rights of custody because a contrary interpretation would be "seemingly contrary to the clauses of the European Convention for the Protection of Human Rights as well as to the clauses in the Treaty of Rome, which envision eliminating borders within the European Union for commodities and also for men."\textsuperscript{139} The French court mentioned the importance of "the freedom for any person to leave a member State, including his own," and that "this freedom of expatriation has no limits other than those providing for the respect of laws necessary for guaranteeing public safety and public order."\textsuperscript{140} It then explained how the custodial parent's right of travel would be impinged if the \textit{ne exeat} clause established a right of custody in the non-custodial parent: "Mrs. Lynnette X... possesses this essential right to establish domicile outside of British territory, and accepting the petition examined here would lead to denying this fundamental freedom in which the mother would follow her child in the framework of forced return to England or Wales."\textsuperscript{141}

Yet, \textit{Ministère Public} is clearly distinguishable from \textit{Croll}. The French court's holding could be limited to cases where the relevant states involved are both members of the European Union and parties to the European Convention on Human Rights. After all, the French court's analysis required the integration of the Hague Convention with the European Convention on Human Rights. A French scholar explained the interpretative challenge facing the French court:

The two legal statutes are integrated, as a result of their ratification, into the internal legal system at the same high level assigned by art. 55 of the Constitution and the judge

\textsuperscript{137} \textit{Id.} at 589. It is ironic, given the court's reliance on \textit{Thomson}, that when Mr. Croll cited cases supporting his position that involved temporary custody orders, the court dismissed them as "distinguishable." See Croll v. Croll, 229 F.3d 133, 143 (2d Cir. 2000).

\textsuperscript{138} T.G.I. Périgueux, Mar. 17, 1992, D. 1992, p. 315 (Fr.).

\textsuperscript{139} \textit{Id.} at 316.

\textsuperscript{140} \textit{Id.} at 315.

\textsuperscript{141} \textit{Id.} at 316.
could not favor any regulation over any other and he had to, in seeking the legal will, apply the texts in their complementarity and in the mitigation of their principles.

The freedom of expatriation won out doubtless because it constitutes one of the foundations of private international law and especially because the litigation concerned member States from the European Union, thus generally accepting, more and more, a common public court system.\textsuperscript{142}

Distinguishing \textit{Ministère Public} on this basis would have been possible, but problematic. It would have created a split of opinion on this legal issue between Europe and the rest of the world, and thereby undermined uniformity in the Convention's application.\textsuperscript{143}

\textit{Ministère Public} is distinguishable from \textit{Croll} for other reasons. First, the mother in \textit{Ministère Public} alleged that the father had agreed that she take the child to France. The French court did not discuss this point, probably because the father's consent would have been irrelevant if he had no right to object to the mother's relocation. No such agreement existed in \textit{Croll}, and the \textit{Croll} court could have found that \textit{Ministère Public} reached the correct result, but with faulty reasoning. Second, and similarly, the court in \textit{Ministère Public} mentioned that the ten-year-old child had consented to move to France, and could be heard “in all issues affecting his personal life.”\textsuperscript{144} In \textit{Croll}, the nine-year-old child's opinion was not mentioned in the decision. Thus, the cases were perhaps distinguishable on this ground as well.

\begin{itemize}
\item \textsuperscript{143} France became a party to the Hague Convention on Child Abduction in 1983 (see Hague Conference on Private Int'l Law, Signatures, Ratifications, Accessions, \textit{at} http://www.hcch.net/e/members/signrat_fr.html (last visited Mar. 12, 2002)), after its ratification of the European Convention on Human Rights in 1974. \textit{See} Council of Europe, Legal Affairs, Treaty Office, \textit{at} http://conventions.coe.int/treaty/EN/cadreprincipal.htm (last visited Mar. 12, 2002). It was in 1974 that Protocol No. 4, which embodied the Right to Movement, came into force in France. \textit{See} \textit{id}. Under United States law, if the treaties were in conflict, the outcome would have differed. In such cases, two treaties enacted in succession are treated like two statutes enacted in succession. The latter enacted treaty provision prevails when an inconsistency arises. \textit{See} Restatement (Third) of Foreign Relations Law § 115 (1986).
\item \textsuperscript{144} Ministère Public v. Mme. Y, T.G.I. Périgueux, Mar. 17, 1992, D. 1992, pp. 315, 316 (Fr.).
\end{itemize}
More fundamentally, however, the Croll court could have dismissed Ministère Public because the French court arguably erred in its analysis of the European Convention. First, it is now questionable whether the Convention applies to private proceedings.\textsuperscript{145} Second, the mother’s freedom of movement would not have been affected if the ne exeat clause created rights of custody in the father. The mother could have lived anywhere; she just could not have lived outside England and maintained custody of her child. Similarly, an order of return would not have required the mother to accompany her child to England; the mother could have remained in France.\textsuperscript{146} Third, to the extent the mother’s freedom of movement would have been infringed, it only would have been infringed until an English court granted a request to relocate. There was no indication that the mother had sought this permission from an English court.

Moreover, the European Convention on Human Rights’s Article 2 exceptions to the freedom of movement seem applicable. Article 2 states:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.


\textsuperscript{146} Courts in the United States have faced a parallel issue and have resolved it variously. See Edwin J. Terry et al., Relocation: Moving Forward or Moving Backward?, 31 Tex. Tech. L. Rev. 983, 1029 (2000) (“Courts have disagreed over whether restrictions placed on a parent’s right to relocate with children infringe on personal constitutional rights.”) (comparing Jaramillo v. Jaramillo, 823 P.2d 299, 305–06 (N.M. 1991) (finding that restrictions on relocation violated the parent’s right to travel), with Carter v. Schilb, 877 S.W.2d 665, 667–68 (Mo. Ct. App. 1994) (finding the parent’s right to travel was not infringed by a court decree forbidding the parent from removing the child from the state)). See also, e.g., Carlson v. Carlson, 661 P.2d 833, 836 (Kan. Ct. App. 1983) (upholding restriction on the residence of the custodial parent); Rozborski v. Rozborski, 686 N.E.2d 546, 548 (Ohio Ct. App. 1996) (denying custodial parent’s constitutional arguments regarding infringement upon her right to travel). Arthur LaFrance is a chief proponent of the notion that a court cannot impinge the custodial parent’s constitutional right to travel with a ne exeat clause. See Arthur B. LaFrance, Child Custody and Relocation: A Constitutional Perspective, 34 U. Louisville J. Fam. L. 1 (1996).
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.\(^{147}\)

Certainly the restriction on the mother’s movement was imposed in accordance with law (e.g., during a judicially-resolved custody contest) and was arguably necessary in “a democratic society in the interests of . . . the prevention of crime . . . for the protection of the rights and freedoms of others.”\(^{148}\) The *ne exeat* clause protected the rights of the father and child with respect to visitation. Without the clause there would be a greater chance of interference with the father’s access rights, a crime in some European countries.\(^{149}\) In addition, the fourth paragraph of Article 2 sets forth a general exception that might have applied in this case.\(^{150}\)

The court in *Ministère Public* also gave no attention to the

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\(^{148}\) *Id.* art. 2(3).


\(^{150}\) *See* Protocol No. 4, *supra* note 147, art. 2(4).
competing rights of the father or child under the Convention. The court’s holding arguably burdens the father’s and child’s right to family life under Article 8 of the Convention.\textsuperscript{151} It may render visitation between the father and child less frequent or even impossible. The exceptions to Article 8 are almost identical to the exceptions to Article 2.\textsuperscript{152} If no exception applies to the mother’s Article 2 claim, then no exception applies either to the father’s or child’s Article 8 claim. In the case of competing rights, the French court would have been obligated to balance the parties’ interests, and engage in a more detailed analysis of the issue.\textsuperscript{153}

Finally, the ruling in Ministère Public is flawed because the child’s welfare should have been paramount in the court’s analysis. Article 3(1) of the U.N. Convention on the Rights of the Child states this principle,\textsuperscript{154} and “accordingly the jurisprudence of the European Court of Human Rights . . . recognizes the paramountcy principle.”\textsuperscript{155}

\begin{quote}
151. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.


152. Compare European Convention, supra note 151, art. 8, with Protocol No. 4, supra note 147, art. 2.

153. See Payne v. Payne, 2 W.L.R. 1826, 1839 (Eng. C.A. 2001) (discussing competing rights at issue when restrictions are put on custodial parent’s ability to relocate and stating in dictum, in relation to Article 8 and Article 2 of Protocol 4, that “each member of the fractured family has rights to assert and that in balancing them the court must adhere to the paramountcy of the welfare principle”).

154. Child Convention, supra note 151, art. 3(1).

Yet, the French court did not consider the child’s best interest. Had it done so, the court may have reached a different result, since the child’s best interest may have been inextricably bound up with the question of where the application for relocation should be heard.

All of the other foreign cases that addressed this issue supported Mr. Croll’s position. The Second Circuit, however, called the facts in those decisions “distinguishable,” and identified two cases as examples. The court’s reasoning again was unconvincing. For instance, it distinguished C v. C, discussed above, because the consent order granted ‘joint guardianship’ to both parents. Yet, the fact that the parties were joint guardians did not figure at all into the English Court of Appeal’s analysis. In fact, the trial court’s decision rejected the application for return, and premised its decision solely on its analysis of the parents’ joint guardianship. The Court of Appeal accepted that the joint guardianship rights did not themselves create ‘rights of custody’ in the father, but nonetheless found that the ne exeat clause did:

In respect of my first question, whether the removal was wrongful, Latey J heard argument as to the effect of the November 1986 order and in particular the effect of joint guardianship. He had before him the written opinion and oral evidence of an Australian Queen’s Counsel. The judge’s attention does not appear to have been sufficiently drawn to


157. Payne, 2 W.L.R. at 1836 (“[A] return following a wrongful retention allows a careful appraisal of welfare considerations on a subsequent application to relocate.”).


160. Croll, 229 F.3d at 143.
the effect on the definition in art 5 of the convention of cl 2 of the November 1986 order, that neither parent should remove the child from Australia without the consent of the other. Accordingly, the judge's attention was not drawn specifically to the question whether under Australian law cl 2 was capable of constituting a right of custody within the convention. In the absence of sufficient expert evidence on that point, this court must do its best to consider whether cl 2 comes within the definition given in art 5.

By cl 2 the father had, in my judgment, the right to determine that the child should reside in Australia or outside the jurisdiction at the request of the mother. The Court of Appeal, therefore, held that return was required.

The English case B v. B is the other example of a “distinguishable” case offered by the Second Circuit. The Croll court dismissed B v. B, saying that it involved a temporary custody award. Yet, not all cases which contradicted the Croll holding involved temporary custody awards. In fact, several of the cases cited by the father did not involve temporary awards. Moreover, the Second Circuit gave no explanation for why the type of award mattered.

2. Croll’s Treaty Interpretation Methodology

Assuming for the moment that the Second Circuit properly rejected a fairly uniform interpretation of the Convention, the Second Circuit failed to justify this departure appropriately. The way that the court justified its decision is the second failure of Croll. The Second Circuit adopted a formalist, strict-constructionist approach to

164. When an interim order contains a *exeat* clause, it is arguably appropriate to allow the court which is seized of the matter to conclude its adjudication. In a recent South African case, the Constitutional Court rejected the holding in Croll, in part, because Croll involved a final order and the question at issue in the South African case was an interim agreement. See LS v. AT, 2000 SACLR Lexis 20, *27 (CC Apr. 12, 2000). However, the Croll court offered no such explanation. Moreover, the Croll court relied on cases involving temporary orders to support its own analysis. See supra notes 135–37 and accompanying text.
arrive at its holding. Resting its analysis on the "textual and structural feature[s] of the Convention," the court resorted to three dictionaries (Black's Law Dictionary, Webster's Third, and the Random House Dictionary of the English Language) to discover the meaning of 'custody' and to conclude that it was more than a negative veto. The court thought that "the right to determine a child's place of residence," which was part of the definition of rights of custody, was simply an indicator of who had rights of custody. 'Rights of custody' must mean something more.

It is unhelpful and insufficient to think about the custodial right to designate a child's "place of residence" in terms of the power to pick her home country or territory. Such a power protects rights of custody and access alike, and is no clue as to who has custody. A custodial parent cannot discharge the responsibility of deciding a child's "place of residence" by picking a country or territory. Depending on many considerations, the custodial parent must place the child in a city, suburb, or countryside; in a particular dwelling unit at some address; at home, or in a boarding school, finishing school, military academy, or institution.

The court believed that every textual feature of the Convention supported its conclusion, i.e., that the Hague Convention adopted the "ordinary understanding of custody" and that the "ordinary understanding" entailed the provision of custodial care.

The Croll court, consistent with its strict-constructionist approach, also read the words in the context of the treaty. A 'wrongful removal' under the Convention required that the custodial rights of the petitioning parent "were actually exercised...or would have been so exercised but for the removal...." The court suggested that Mr. Croll had not 'actually exercised' the right conferred by the ne exeat clause. It also stated that it would be "circular to say that he would have exercised it but for Christina's removal, because the right

165. The court concluded that "custody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc., or the (revocable) selection of other people or institutions to give these things." Croll v. Croll, 229 F.3d 133, 138 (2d Cir. 2000).

166. Id. at 139.

167. Id. at 139, 141.

168. Hague Convention on Child Abduction, supra note 1, art. 3.
itself concerns nothing but removal itself, and would never have been exercised had Mrs. Croll been content to stay in Hong Kong during Christina’s minority.”

In analyzing the wording of the Convention, the court gave some attention to the impact of its interpretation on the Convention’s operation as a whole. Citing “a foundational assumption” of the Convention, it called a contrary interpretation “unworkable.”

A foundational assumption in the Convention is that the remedy of return will deliver the child to a custodial parent who (by definition) will receive and care for the child. It does not contemplate return of a child to a parent whose sole right—to visit or veto—imposes no duty to give care.

The court considered the drafters’ intent, and found the “ratification history” to be “entirely consistent” with its understanding of ‘rights of custody.’ In support of its position, the court quoted a statement by A.E. Anton, the chair of the Commission that drafted the Convention. He had stated:

[B]reach of a right simply to give or to withhold consent to changes in a child’s place of residence is not to be construed as a breach of rights of custody in the sense of Article 3. A suggestion that the definition of ‘abduction’ should be widened to cover this case was not pursued.

The court also cited the Pérez-Vera Report and the Letter of Submittal of President Reagan as support for the proposition that different remedies are available for breaches of access and breaches of custody.

The court’s analysis is weak. There is no “ordinary meaning” to the term ‘rights of custody,’ given both Article 3’s reliance on

169. Croll, 229 F.3d at 140.
170. Id.
171. Id.
172. Id. at 141.
174. Id. at 142.
175. Id. at 136 (citing Vienna Convention, supra note 47, art. 31(1)) (“[T]ext of the treaty must be interpreted ‘in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and
domestic law and the expansive approach to the concept under the Convention.\textsuperscript{176} Nor can American dictionaries credibly be used to define a term in a multilateral treaty. The argument that found favor in \textit{C v. C}, that the \textit{ne exeat} clause gave the non-custodial parent the ability \textit{to condition} the child’s departure from the country on a variety of factors, including the type and place of the child’s residence, was dismissed in a conclusory fashion. The Second Circuit acknowledged that a \textit{ne exeat} clause gave the non-custodial parent leverage, but said the clause “confers only a veto . . . which gives the non-custodial parent no say (except by leverage) about any child-rearing issue other than the child’s geographical location in the broadest sense.”\textsuperscript{177} The court’s statement that Mr. Croll’s argument on ‘actual exercise’ was “circular” illustrated unfamiliarity with the operation of these clauses. The clause required Mr. Croll’s permission prior to Christina’s departure. Therefore, Mr. Croll could have exercised his right to deny Ms. Croll the ability lawfully to depart with Christina, absent court approval for their departure.

The court’s textual analysis was also based on a fundamental misunderstanding of the Convention.\textsuperscript{178} The court identified the “foundational assumption” that the “remedy of return will deliver the child to a custodial parent.”\textsuperscript{179} This “foundational assumption” was supported by nothing—not the \textit{travaux préparatoires}, not foreign case law, not even analysis. Such an important assumption must have its roots somewhere, unless of course, it is not a foundational assump-

\textsuperscript{176} See supra notes 101–07 and accompanying text.

\textsuperscript{177} \textit{Croll}, 229 F.3d at 140.

\textsuperscript{178} Other types of problems could also be detailed. For example, the court exhibited some remarkably circular reasoning:

\begin{quote}
A \textit{ne exeat} provision protects parental rights of access or custody alike; it does not transmute one right into the other. Thus, to grant the remedy of return where the petitioning parent has no right but access (whether or not that right is aided by a \textit{ne exeat} clause) would effect a “substitution” of rights, something that the Convention expressly forbids.
\end{quote}

\textit{Id.} at 142 (citing Pérez-Vera Explanatory Report, \textit{supra} note 10, ¶ 65). Similarly, it suggested that overlooking the stated intentions of the drafters and amending judicially the Convention’s explicit textual distinction between rights of custody and rights of access “would be to make and not construe a treaty.” \textit{Croll}, 229 F.3d at 142.

\textsuperscript{179} \textit{Id.} at 140.
tion at all. This happens to be the case. Nowhere does the Convention suggest that the remedy of return delivers the child to a custodial parent. In fact, the Convention has no position on this issue, other than that children are to be returned typically to the habitual residence, and not to a particular person. The court was correct in assuming that the remedy of return might necessitate returning the child to a jurisdiction where the left-behind parent has no duty to give care. Yet courts in the habitual residence are generally trusted to protect children in this situation or, more commonly, the custodial parent voluntarily returns to the habitual residence with the child.

The court’s particular concern—that Ms. Croll might not return with her daughter to China and that it could not alter the custody arrangements ordered by the Hong Kong court—led the Second Circuit to conclude, “[W]e cannot plausibly read the Convention to compel the removal of a child from a parent who exercises all rights of care to a country in which no one has that affirmative power or duty.” The court failed to appreciate the actual relationship that existed between Mr. Croll and his daughter. Mr. Croll had lived with Christina for eight years before he and his wife separated. He claimed to have visited with Christina two to three times per week thereafter. Mr. Croll was not a non-custodial parent who would fail to care for his daughter. The court overlooked these facts and instead

180. In some cases, where the applicant no longer lives in the child’s habitual residence, the court can order the child returned to a particular person outside of the habitual residence. See Pérez-Vera Explanatory Report, supra note 10, ¶ 110 (discussing the places to which an abducted child may be returned).


182. The dissent suggested that Christina would not be neglected because Hong Kong could either require Mr. Croll to care for his child or the state could make the child a ward and afford the child protection until the custody dispute was resolved. Croll, 229 F.3d at 148. The majority, however, concluded, “No doubt, family courts in the United States would impose that obligation as a matter of family law—though of course a court cannot confer competence or fitness—but on this point the dissent is generalizing from local American law.” Id. at 141.

183. Id. at 140–41.

drew on broad stereotypes about non-custodial fathers. At one point, the court even appeared to equate a non-custodial parent with an unfit parent. 185 This analysis, as well as the court’s rhetorical flourishes, demonstrated unfamiliarity with family law. 186

The court misunderstood the Convention in other ways too. The father had argued that the mother’s position would mean that the custodial parent could “unilaterally circumvent the home country’s courts in search of a more sympathetic forum.” 187 The majority responded, unsupported by any authority, that “[t]he frustration of judicial power is not the touchstone for a return remedy under the Convention.” 188 While this statement is true because the Convention applies to pre-decree abductions, the court’s sole support was the fact that the Convention does not remedy frustration of a court’s order when the petitioner only has a right of access. However, the court forgot about Article 21 of the Hague Convention, which holds that Central Authorities are obligated to help secure access rights in the abducted-to country. 189 While the Convention offers different reme-

185. Croll, 229 F.3d at 141 (“The dissent’s analysis, however, would compel the return of the child to a parent...with access who has been found unfit to have custody.”).

186. For example, the court claimed that if rights of access were vindicated by the remedy of return, this would be “a good idea as a matter of child development, [but] incompatible with the terms of the Convention.” Id. at 143. It is unclear why this would be a “good idea as a matter of child development,” especially if the primary caretaker elected not to return with the child. Also, it is unclear how this court even knows about “child development.” No expert testimony was heard, and the parties did not cite to any child development literature. The implicit belief that theories of child development might be capable of judicial notice suggests an unfamiliarity with those theories.

187. Croll, 229 F.3d at 142.

188. Id.

189. Article 21 states, in part:

The Central Authorities are bound by the obligations of cooperation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of such rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.
dies for breaches of access and custody, both remedies are meant to effectuate the underlying order. Moreover, violation of a bare right to access was a poor analogy. Judicial power is not frustrated to the same degree, if at all, when a custodial parent leaves the jurisdiction and the non-custodial parent has bare access rights. However, a direct conflict exists when there is a *ne exeat* clause and the parent violates it, or when the non-custodial parent takes a child abroad without the custodial parent’s permission.

It is unclear whether all of the identified problems with the *Croll* decision could have been eliminated with a purposive analysis. However, a purposive analysis that explored why the Convention treats rights of custody and access differently would have shown that the underlying tenets of the Convention were not furthered by the prevailing interpretation. A purposive analysis would have explained why the radical conclusion—that a *ne exeat* clause does not convert rights of access into rights of custody—was, in fact, very principled.

First, the harm to children caused by a violation of a *ne exeat* clause, if any, was not the type of harm that the Convention was meant to address through a remedy of return. The framers were most concerned about, and most wanted to discourage, those abductions in which children are yanked away from their custodial parents, possibly hidden ‘underground,’ and thereby traumatized.\(^{190}\) While the

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190. Adair Dyer, former Deputy Secretary General at the Hague Conference on Private International Law, was very involved in the Convention’s formulation. He recently recalled “the problem to be addressed” when the Convention was formulated:

Child abduction is the pathological case of child custody. It is not the average, bitter child custody dispute. It is a child custody dispute that is so bitter that one parent has grabbed the children and run to another country with them, to try to get custody there, or that parent has taken the children for a visit in another country and tried to keep them there. So this is not your average ‘garden variety’ child custody case. It is the pathological case that we are dealing with in this Convention . . . .

[T]he Convention is the only legal game in town, and the only potentially effective alternative is to go back to the vicious cycles of kidnapping and re-kidnapping that existed when the Convention was drawn up—the law of the jungle. These cycles are dangerous and destructive for the children, and they lead to parents going underground with the children or sending them to school under an assumed name—which is hazardous for the
preamble suggests that the signatories wanted to "secure protection for rights of access," it only mentions protecting children "from the harmful effects of their wrongful removal or retention," not from the harmful effects of diminished access.\textsuperscript{191} The drafters thought that the remedy of return would minimize the harmful effects of abduction by parents seeking custody advantages; it would deter these type of abductions and reunite the child with his or her primary caretaker.\textsuperscript{192}

The Convention addresses an abduction that impedes access rights differently. Rights of access are made enforceable in the new country.\textsuperscript{193} This remedy may, in fact, render rights of access meaningless for many parents.\textsuperscript{194} Some children may be harmed when they no longer can see their non-custodial parents. Regardless, the Convention simply does not prohibit removal by the custodian when the other parent only has access rights.

A \textit{ne exeat} clause does not make access for a parent or child any more or less important than for others without such a clause. The underlying non-custodial relationship between parent and child is exactly the same whether or not a \textit{ne exeat} clause exists on a piece of paper. Courts impose \textit{ne exeat} clauses for many different reasons (e.g., where the clause is embodied in a stipulated agreement, even though the mother has reluctantly agreed to this clause and the

\begin{footnotesize}
\begin{itemize}
\item child's sense of personal identity.
\item Hague Convention on Child Abduction, supra note 1, pmbl.
\item Anton, supra note 46, at 543 ("The Commission started from the assumption that the abduction of a child will generally be prejudicial to its welfare. It followed that, when a child has been abducted...international mechanisms should be available to secure its return either voluntarily or through court proceedings.").
\item Hague Convention on Child Abduction, supra note 1, art. 21.
\item Unless the non-custodial parent wants to move to the new country, that parent will have less day-to-day access to the child over time. Financial constraints may render visitation altogether impossible. Members of the Hague Conference have recently acknowledged that the Convention's remedy for the denial of access is weak and that alternatives need to be adopted. See U.S. Dep't of State, Executive Summary: Common Law Judicial Conference on International Child Custody (2000) (reviewing recommendations of six common law countries for child abduction cases, especially those falling under the Hague Convention on Child Abduction), http://www.travel.state.gov/execsumm.html [hereinafter Executive Summary].
\end{itemize}
\end{footnotesize}
father's sole purpose was to control the mother's movement for his own selfish reasons). One cannot conclude that visitation is any more or less important to children whose custody orders contain such a clause than it is for other children. Consequently, the remedy of return makes no more sense for these cases than for cases where a *ne exeat* clause does not exist.

Second, Ms. Croll, and those like her, have not engaged in the type of action that the remedy of return was meant to deter. The drafters adopted the remedy of return to address the problem of abductors who seek to avoid an adverse *custody* determination. "The Convention's overriding goals are twofold: Abductors are discouraged from self-help and the custody trial is restored to the court at the child's pre-abduction habitual residence—a court that generally has maximum access to the facts needed for a trial on the merits of custody." 195 Ms. Croll did not move abroad to obtain a better outcome on the issue of custody. In cases like *Croll*, the court of the child's habitual residence has already awarded *custody* to the parent who left with the child. The *ne exeat* clause does not change that fact.

The Convention drafters believed that courts in the abducted-to nation could adjudicate certain issues as well as the courts in the habitual residence, and this sort of case falls within this category. The Convention recognizes that both access disputes and future custody disputes might be heard abroad when the custodial parent removes the child. 196 Since the Convention allows custody and access disputes to occur abroad when the custodial parent relocates, there is no reason to think disputes involving *ne exeat* clauses should be handled differently.

Third, a perverse effect occurs if courts classify rights of access that are secured by a *ne exeat* clause as 'rights of custody.' The Convention mandates the remedy of return for violations of 'rights of custody,' but only if an application is brought within one year. 197 There is no similar time restriction on enforcing rights of access. Consequently, a court potentially creates a hybrid category of rights when it holds that a *ne exeat* clause creates rights of custody in its beneficiary. The non-custodial parent may be entitled to both the remedy of return and the remedy in Article 21. The non-custodial parent

197. *Id.* art. 12.
would have the benefit of the remedy of return, if the action were instituted promptly, and the remedy in Article 21, if the action were not. This creates a new unprecedented category of rights, and gives some non-custodial parents greater remedies than either custodial parents or other non-custodial parents.

3. Rebutting the Presumption of Uniformity in Croll

Even though a purposive analysis supports Croll’s substantive outcome, it must be determined whether a sufficient reason existed to rebut the presumption of uniformity. After all, the predominant opinion among our treaty partners was exactly the opposite of Croll’s holding. Was it right for the Second Circuit to disagree with the generally accepted interpretation of the Convention? To rebut the presumption, the prevailing approach must be unjust to a large number of individuals whose situation was either not contemplated by the drafters, or contemplated by them and resolved differently than the prevailing approach. Using these criteria, the answer is ambiguous. A more concrete answer depends, in part, on how one defines the issue. It is unclear whether the drafters intended the remedy of return to apply to a custodial parent who violated a ne exeat clause. However, the drafters clearly did not consider whether the remedy of return should apply to a domestic violence victim when she violates a ne exeat clause trying to escape the violence. As explained below, Ms. Croll falls into this latter category. I consider each of these points in turn.

The travaux préparatoires are quite ambiguous as to the drafters’ intent on the broader issue. On the one hand, early documents by Dyer suggested that violation of a ne exeat clause would result in the remedy of return. For example, Dyer’s initial questionnaire for State Parties listed five types of situations that constituted ‘child abduction’ for the purposes of the questionnaire. The fifth situation was as follows: “The child was removed by a parent from one

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198. See supra note 54 and accompanying text.
199. See infra notes 214–17 and accompanying text.
200. Adair Dyer was a former Deputy Secretary General of the Hague Conference on Private International Law. After the Thirteenth Session of the Hague Conference adopted the topic of legal kidnapping, he was assigned the tasks of research and preparation of a questionnaire and report for Member States. See Dyer, supra note 190, at 4–5.
country to another in violation of a court order which expressly pro-
hibited such removal." 201 Dyer acknowledged that the “frequency and
importance” of these clauses were unknown and that including these
cases as ‘abduction’ “might create difficult drafting problems” because
the case is “the reverse of the usual child abduction case.” 202 He
personally favored subjecting these cases to the remedy of return, as
he thought visitation was very important for children. 203 The Special
Commission of March 1979 appears to have agreed with Dyer. It
said, “With regard to the five types of abduction described in the
Explanatory Note to the Dyer Report, the Convention should cover
all types.” 204

On the other hand, Elisa Pérez-Vera 205 authored two reports,
the 1980 Report of the Special Commission, issued after the
Preliminary Draft of the Convention, and the Explanatory Report,
issued after the approved Convention, and they both imply that a
violation of a ne exeat clause by a custodial parent was not to be
remediable by an order to return the child to his or her habitual
residence. These reports emphasize that the Convention is aimed
primarily at those situations “which derive from the use of force to
establish artificial jurisdictional links on an international level, with

201. Adair Dyer, Questionnaire on International Child Abduction by One Pa-
rent, Preliminary Document No. 1 of August 1978, Explanatory Note, reprinted in
Hague Conference on Private International Law, III Actes et Documents de la

202. Adair Dyer, Report on International Child Abduction by one Parent (Le-
gal Kidnapping), Preliminary Document No. 1 of August 1978, reprinted in
Hague Conference on Private International Law, III Actes et Documents de la

203. Id. at 41–43.

204. Conclusions Drawn from the Discussions of the Special Commission of
March 1979 on Legal Kidnapping, Preliminary Doc. No. 5 of June 1979, reprinted
in Hague Conference on Private International Law, III Actes et Documents de la
Quatorzième Session, October 6–25, 1980, at 163 (1980). See Elisa Pérez-Vera,
Report of the Special Commission, Preliminary Doc. No. 6 (1980), reprinted in
Hague Conference on Private International Law, III Actes et documents de la
Quatorzième Session, October 6–25, 1980 ¶ 37 [hereinafter Pérez-Vera Special
Commission Report] (“[T]he Special Commission quickly agreed on the advis-
ability of retaining, as subjects of its work, the four categories which involved the
existence of a custodial order prior to the child’s removal.”).

205. Professor Elisa Pérez-Vera is one of the ‘mothers’ of the Convention. See
Dyer, supra note 190, at 2. She was the official Reporter for the Convention.
a view to obtaining custody of a child." Professor Pérez-Vera stated that "two elements are invariably present in all cases": removal of the child from "the family and social environment in which [the child's] life has developed," and a removal motivated by the hope "to obtain a right of custody from the authorities of the country to which the child has been taken." These statements suggest that "the reverse of the usual child abduction case" did not ultimately qualify for the remedy of return.

Matters are further complicated by the conclusion of Professors Beaumont and McELeavy that the Convention's drafters generally did not consider this issue. They report that at the 14th Session of the Hague Conference on Private International Law, where the delegates met to consider the Preliminary Draft Convention proposed by the Special Commission, Mr. Eekelaar of the Commonwealth Secretariat raised the issue and suggested that a ne exeat clause might establish rights of custody. Yet, "no direct response was given." Mr. A.E. Anton, Chairman of the Special Commission that drafted the Preliminary Draft Convention, commented on Mr. Eekelaar's suggestion in a later article. He said "a suggestion that the definition of 'abduction' should be widened to cover this case was not pursued." Professors Beaumont and McELeavy conclude that "few delegates would have considered it as being more than a matter of minor importance." Although the Croll court gave great weight to Mr. Anton's quotation, the Croll court itself acknowledged "that the issue is not altogether clear."

Of course, even if the drafters had considered whether the remedy of return should apply to violation of a ne exeat clause, they certainly did not consider this question in the context of domestic violence. They did not consider at all the role that such violence plays

207. Id. See also Pérez-Vera Special Commission Report, supra note 204, ¶ 2 ("unalterable nucleus of the problem").
209. Beaumont & McELeavy, supra note 21, at 76 (citing Process-verbal No. 4, at 271; Process-verbal No. 3, at 266).
211. Beaumont & McELeavy, supra note 21, at 77.
212. Croll v. Croll, 229 F.3d 133, 141 (2d Cir. 2000).
in motivating abductions. Ms. Croll did allege that she was the victim of domestic violence. In describing why she sought a protective order in New York Family Court, she said the following:

On September 28, I had second notice of the school requesting for bus money, school bus money as well as lunch money. I went to his residence and asked for help and that’s when he beat me up, broke my finger, put a knife, a ten inch big knife on my throat and said that, if you do not sign the divorce, I’m not pay anything for you. The police had a record of it, and the police even told me to stay away from him. I was taken to the hospital by an ambulance from the police station. I had a broken finger on my left-hand side, and then I was punched all over, you know, my body as well as swelling on my leg because he sat on my leg and on my foot actually and it twisted around, and there is an x-ray to show the fracture of the bones to my hand, as well as bruises on my body.

Mr. Croll also struck her on another occasion in front of their daughter and “dragged [her] with an arm over [her] neck . . . to the master bedroom . . . Christina . . . started to scream daddy, daddy, please don’t hurt mommy, please don’t hurt mommy.” Her need to


214. Ms. Croll had filed an order for protection in New York state courts. At the hearing on the Hague petition, she testified that Mr. Croll assaulted her on September 28, 1998. Ms. Croll filed a complaint with the police relating to this incident, but the charges were dismissed due to an insufficiency of evidence. Ms. Croll also testified that on one occasion in November 1998, Mr. Croll forcibly dragged her into the bedroom where they struggled in front of Christina before the housekeeper intervened to stop the fight. There were also some allegations that Mr. Croll physically abused Christina. For example, Ms. Croll testified that while bathing Christina, she observed a red hand print on her daughter’s thigh that she had reason to believe was caused by Mr. Croll. Croll v. Croll, 66 F. Supp. 2d 554, 562 (S.D.N.Y. 1999).

215. Hearing, July 6, 1999, at 89, 98–99, Croll v. Croll, 66 F. Supp. 2d 554 (S.D.N.Y. 1999) (No. 99-CV-3566). Ms. Croll filed an incident report. Id. at 94–95. However, Mr. Croll told Ms. Croll that the charges were not going to be pursued. Id.

216. Id. at 101. The trial court did not resolve the factual dispute whether Mr. Croll was a batterer. Instead, it held that Christina was not present for the alleged abuse and the evidence was irrelevant. Croll v. Croll, 66 F. Supp. 2d 554, 561 (S.D.N.Y. 1999). The trial court dismissed the evidence of abuse that occurred in front of Christina and to Christina since Ms. Croll never filed a police report or instituted a legal action on Christina’s behalf. Id. at 562.
escape the violence led Ms. Croll to remain in New York.\footnote{217}

Does the Convention’s remedy of return work an injustice on domestic violence victims who are subject to a *ne exeat* clause? As I have argued elsewhere, the Convention generally operates unjustly when applied to domestic violence victims who abduct to escape the violence.\footnote{218} The remedy of return is particularly unjust in the subset of cases where the sole basis for returning the child is a *ne exeat* clause in a permanent order. In this situation, a court in the child’s habitual residence has already determined that sole custody should be awarded to the mother. A *ne exeat* clause in a final order may condemn the mother to a life of fear and danger. These clauses have been criticized generally,\footnote{219} and also particularly in situations involving domestic violence.\footnote{220} Professor Janet Bowermaster has


\footnote{218}{Weiner, \textit{supra} note 9, at 616–32.}

\footnote{219}{A *ne exeat* clause is equivalent, in many ways, to a court’s refusal to grant the custodian’s motion to relocate, another problematic practice. As participants from the Common Law Judicial Conference concluded:}

\begin{quote}
Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Hague Child Abduction Convention was drafted. Courts should be aware that highly restrictive approaches to relocation can adversely affect the operation of the Hague Child Abduction Convention.
\end{quote}

\footnote{220}{See, \textit{e.g.}, Janet M. Bowermaster, \textit{Relocation Custody Disputes Involving Domestic Violence}, 46 U. Kan. L. Rev. 433 (1998) (noting that moveaway restrictions give abusers the power to prevent their ex-partners from escaping).}
explained:

Moveaway restrictions give violent men the power to prevent their ex-partners from escaping and to continue controlling essential aspects of their lives after separation and divorce. Batterers use social isolation to maintain their power over their intimate partners. Moveaway restrictions often prevent custodial mothers from returning to their families of origin for support and protection. Batterers keep tight control of the families' money and interfere with women's efforts to become financially self-sufficient. Moveaway restrictions often prevent custodial mothers from moving to take new jobs or to continue their education in preparation for new jobs. Batterers are often irrationally jealous. When custodial mothers seek to move in order to remarry or to accompany their new husbands, relocation restrictions allow the violent ex-husbands to wreak havoc on the mothers' new relationships. Because batterers are exceedingly dependent on their intimate partners as the only source of their sense of control, they often go to great lengths to prevent their partners from getting away. Moveaway restrictions allow batterers to use the legal system to keep their ex-wives from leaving and to continue their domination through control of the children. 221

While Ms. Croll might have asked the Hong Kong court to modify its order and permit her move, the court may not have granted such a request. There did not appear to be changed circumstances warranting a modification of the order. 222 Nor is it clear that Ms.

221. Id. at 450–51 (footnotes omitted).


if, subsequent to the date of the making of an order such as this, circumstances arise which adversely affect the welfare of the child, there is nothing to prevent the mother hereafter from making another application (for custody) on the ground that the child was not really happy and getting sufficient benefit from living with the father) (Rigby, J.).

Ms. Croll was abused in September 1998. Divorce proceedings began sometime in 1998. The custody order was issued on February 23, 1999. Since the violence existed before the court entered its final order, it is unclear whether there would have been changed circumstances.
Croll's safety concerns would have led the court to conclude that relocation was in Christina's best interest, although it may have done so.\(^223\) Moreover, requiring Ms. Croll to modify her order prior to mov-

\(^{223}\) In Hong Kong, permission to relocate is based on two principles. The Hong Kong Court of Appeals said the following in *Wong Chiu Ngar-Chi v. Wong Hon-Wai, Linus*:

The basic principle is that the welfare of the infants is the first and paramount consideration for the court in any application of this kind. But there is a secondary principle, or what may be called a "guideline," well established by cases such as Poel v. Poel [1970] 1 W.L.R. 1469, Nash v. Nash [1972] 2 All E.R. 704 and Chamberlain v. de la Mare (1983) 4 F.L.R. 434. For example in Poel v. Poel Sachs, L.J. said this:

When a marriage breaks up, a situation normally arises when the child of that marriage instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as my Lord has pointed out, produce considerable strains which would not only be unfair to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results.

[1987] H.K.L.R. 454, 456–57 (H.K. C.A.). It is unclear whether the mother's concerns about her own safety would be enough of a legitimate interest to overcome the presumption that visitation in Hong Kong was best for the child. The "welfare of the minor" is the "first and paramount consideration." See The Guardianship of Minors (Amendment) Ordinance, No. 69, § 3(1)(a)(i) (1982). The court's original order suggests that the *ne exeat* clause was important to Christina's best interest. While the secondary principle described above works in Ms. Croll's favor, I have not found any cases that resolve a tension between the mother's safety and the child's access to the father. Of course, it is possible that the court would have viewed Ms. Croll's move as consistent with the child's best interest if it thought the child would be exposed further to violence. For a general discussion of remedies in Hong Kong for domestic violence, see Elizabeth Phillips, *Legal Remedies for Battered Wives in Hong Kong*, 12 H.K. L.J. 57 (1982).
ing would have kept her in danger, as court proceedings take time.\textsuperscript{224} Such a requirement may also have increased her danger, as the batterer may have perceived her request to move as a threat to his power and control. Requiring Ms. Croll (and others like her) to litigate issues of access in the abducted-from state, where she faces safety concerns, instead of in the abducted-to state, is unjust. At a minimum, a person in Ms. Croll's position should be able to seek from abroad the modification of her order from the issuing court, and the remedy of return should be stayed pending the outcome of that request.\textsuperscript{225}

In sum, the Second Circuit could have rejected the prevailing interpretation that had developed among our treaty partners, and thereby improved the Convention. The application of the remedy of return to this type of factual situation leads to unjust results for a large group of individuals whose situation was not considered by the drafters. Under these circumstances, the first requirement for rebutting the presumption was satisfied. The court could have satisfied the second requirement by justifying its analysis in terms of the Convention's object and purpose, which, as my discussion of purposive interpretation demonstrates, would have been more compelling than its strict constructionist approach.

4. Reading Tea Leaves

My suggested alternate analysis might have been acceptable to the \textit{Croll} court because the court seemed predisposed to adopt a radical holding. Two things are striking. First, this case involved a domestic violence victim. Applying the remedy of return in this case would have required that Ms. Croll, an American citizen, a victim of domestic violence, and the child's primary caretaker, return her child to Hong Kong. While domestic violence was not in the forefront in the \textit{Croll} case, either in advocacy or the courts' opinions, it was certainly a background fact of which the Second Circuit was aware.\textsuperscript{226} The

\textsuperscript{224} Bowermaster, \textit{supra} note 220, at 449 (explaining how a mother had to endure two-and-a-half more years of severe abuse before she could obtain permission to move).

\textsuperscript{225} See Weiner, \textit{supra} note 9, at 698–703 (arguing for this solution for all abductors who make credible allegations of domestic abuse).

\textsuperscript{226} The fact of violence was emphasized more at the trial level. At the trial court level, Ms. Croll had raised an Article 13(b) defense based on the violence. It was rejected by the trial court for lack of sufficient nexus between the violence
court’s decision allowed Ms. Croll to remain with her birth family, and to live her life with increased safety. The court may have been particularly fond of this result since one of the two judges comprising the majority was the Honorable Paul R. Michel, who was sitting by designation from the U.S. Court of Appeals for the Federal Circuit. Judge Michel was the second husband of Elizabeth Morgan, the plastic surgeon who hid her daughter in New Zealand to protect the daughter from Dr. Foretich, the child’s father and alleged abuser. No other judge would have better understood the importance of transnational safety for family abuse victims.

Second, the court seemed troubled by sending an American child back to the “People’s Republic of China.” 227 Although the child was born in Hong Kong, both of her parents were Americans. The court gratuitously included a footnote to “illustrate” that the Convention was not being uniformly interpreted, and presumably, therefore, to justify its refusal to heed the decisions of other nations. 228 This footnote identifies a double standard in the rate of return, which may have provided the court further encouragement to let Christina remain in the U.S. 229

My approach might also have persuaded the dissenting judge in Croll to join the majority. Judge Sotomayor’s dissent essentially employed my proposed methodology. Judge Sotomayor chastised the majority for citing American dictionaries to define ‘rights of custody,’ and harm to Christina. Croll v. Croll, 66 F. Supp. 2d 554, 561–62 (S.D.N.Y. 1999). See supra notes 214–16 and accompanying text. The record before the Second Circuit contained the evidence of the violence. In fact, the Second Circuit recognized that upon her arrival, “Mrs. Croll filed an action in Family Court in New York County seeking custody, child support, and an order of protection.” Croll v. Croll, 229 F.3d 133, 135 (2d Cir. 2000).

227. Croll, 229 F.3d at 140.

228. Id. at 143 n.6.

and then she justified a contrary result with her own purposive interpretation of the treaty. Judge Sotomayor began her dissent by exploring the Convention’s object and purpose. *Croll*, 229 F.3d at 144 (Sotomayor, J., dissenting) (citing Vienna Convention, supra note 47, art. 31(1) (stating general rule on the interpretation of treaties)). See also Restatement (Third) of Foreign Relations Law § 325 (1986) (stating the general law on the interpretation of international agreements). She thought “the construction of an international treaty...requires that we look beyond parochial definitions to the broader meaning of the Convention...” *Croll*, 229 F.3d at 145 (Sotomayor, J., dissenting). She had no difficulty identifying the object and purpose of the treaty: “[a]t its core... the Convention’s return remedy targets those individuals who cross international borders, presumably in search of a friendlier forum, flouting the custody law of the child’s home country in the process.” *Id.* at 147. She correctly suggests that the Convention strives to preserve the status quo ante, to deter international abductions, and to define rights of custody broadly to capture as many cases of wrongful removal as possible. She thought it was important that the Convention and its official history reflect a more expansive conception of custody rights. Citing the Pérez-Vera Explanatory Report, Judge Sotomayor concluded that “the Convention plainly favors a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration.” *Id.* at 146 (citing Pérez-Vera Explanatory Report, supra note 10, ¶ 67). There was “an intent of inclusion rather than exclusion, so as to effectuate the drafters’ goal of making the treaty applicable to all possible cases of wrongful removal.” *Id.* She concluded:

In light of the Convention’s broad purpose, the concept of “wrongful removal” clearly must encompass violations of *ne exeat* rights. When a parent takes a child abroad in violation of *ne exeat* rights granted to the other parent by an order from the country of habitual residence, she nullifies that country’s custody law as effectively as does the parent who kidnaps a child in violation of the rights of the parent with physical custody of that child. Moreover, where, as here, the parent seeks a custody order in the new country, she seeks to legitimize the very action—removal of the child—that the home country, through its custody order, sought to prevent. To read the Convention so narrowly as to exclude the return remedy in such a situation would allow such parents to undermine the very purpose of the Convention.

*Id.* at 147.

Judge Sotomayor’s analysis, while largely correct, was problematic in two regards. First, in no way does a custodian who takes a child from its habitual residence nullify the country’s custody law. Nor can one equate the custodian’s action with the parent who kidnaps a child in violation of the primary custodian’s rights. Second, one must ask why the Convention emphasized a broad conception of ‘custody,’ i.e., in what type of cases should custody be found to exist. This ana-
uniformity. Judge Sotomayor may have changed her vote if she had been shown why a purposive interpretation actually supported the majority’s holding, and if she had been aware of the injustice that had developed under existing doctrine.

My proposed analysis also may have encouraged other courts to follow Croll’s holding. It is perhaps no surprise that our treaty partners have already dismissed the opinion in Croll. For example, the South African Constitutional Court in *LS v. AT* rejected the *Croll* holding as “contrary to the weight of authority,” and instead quoted the reasoning of Judge Sotomayor in dissent. In addition, the federal district court for the Western District of Virginia refused to follow *Croll*.

Had the Second Circuit confronted the importance of uniformity and engaged in a purposive analysis, it would have met the dissent’s criticisms head-on, and could have respectfully departed from decisions like *C v. C*. It could have issued an opinion that other jurisdictions might be persuaded to follow. Instead, *Croll* appears nationalistic and smug. Rather than being an important contribution to making the Convention a more just instrument, *Croll* undoubtedly will have limited persuasive authority.

Analysis reveals that a parent with only a *ne exeat* clause and access rights would not qualify for the remedy of return.

231. *Croll*, 229 F.3d at 150 (Sotomayor, J., dissenting). Judge Sotomayor stated:

> While not essential to my conclusion that *ne exeat* rights constitute ‘rights of custody’ under the Convention, I note that my analysis is consistent with the decisions of most foreign courts to consider the issue. Given the desirability of uniformity in treaty interpretation, these cases lend support to my understanding of the Convention.

*Id.* (citations omitted).

232. *LS v. AT*, 2000 SACLIC Lexis 20, *26–27* (CC Apr. 12, 2000) (“This followed [ne exeat clause creates rights of custody], according to Sotomayor . . . because when a parent takes a child abroad in violation of *ne exeat* rights, that parent effectively nullifies the custody order of the country of habitual residence—exactly the mischief the Convention seeks to avoid.”).


234. *See supra* notes 109–13 and accompanying text.
Croll reflects a situation in which the Convention’s application had become unjust, thereby necessitating a shift in the Convention’s doctrine. Sometimes, however, the Convention’s application has become unjust, but an appropriate result can, and should, be fashioned within existing doctrine. The framework proposed in this Article helps a court recognize which type of case is before it. The next section discusses Blondin v. Dubois, an example of a case in the latter category.

B. Grave Risk of Harm: Getting Closer to a Merits Determination

Article 13(b) of the Convention allows a court to refuse to return the child if “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” Convention supporters have always feared that this provision would be the Convention’s Achilles heel. The Pérez-Vera Report called for a narrow interpretation of the exception. Courts and scholars around the world have echoed that sentiment. Courts have interpreted Article 13(b) so narrowly, in fact, that domestic violence victims who flee with their children to escape domestic violence have had difficulty successfully invoking the defense. That last fact makes the results of the Second Circuit’s re-
cent decision in Blondin v. Dubois (Blondin IV) welcome. In this case, a domestic violence victim successfully invoked Article 13(b).

Blondin IV, however, is problematic. It makes Hague Convention proceedings much more like custody contests, something courts have been uniformly resisting. Blondin IV dramatically widens the Article 13(b) defense, makes expert testimony a virtual necessity whenever the defense is raised, and undermines the potential usefulness of undertakings. These aspects of Blondin IV were un-

[but] the defense typically succeeds only in cases where there is more direct abuse of the children by the left-behind parent”). For cases where the defense is succeeding without any apparent risk of physical violence toward the child, see Re M (Abduction: Leave to Appeal), 2 Fam. L. Rep. 550 (Eng. C.A. 1999); Mok v. Cornelissson, [2000] N.Z.F.L.R. 582 (Fam. Ct.).


241. Overall Conclusions, supra note 105, at 228 n.4 (“In the great majority of cases from all countries, however, the courts have interpreted Article 13.b strictly and have adhered closely to the spirit of the Convention.”). See Report of the Second Special Commission, supra note 104, at 241 (noting that defenses are seldom successful). See also Walsh v. Walsh, 221 F.3d 204, 217 (1st Cir. 2000) (noting that “a systematic invocation of the [Convention’s] exceptions, substituting the forum chosen by the abductor for that of the child’s residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration”) (quoting Pérez-Vera Explanatory Report, supra note 10, ¶ 34).

242. Undertakings are verbal assurances given to the court by the petitioner as a condition of the child’s return. Undertakings have become a procedural shortcut to adjudicating Article 13(b) claims. See In re Tsarbopoulos, No. 00-35393, 2000 WL 1721800, at *2 (9th Cir. Nov. 17, 2000) (citing Blondin and saying that the court could impose appropriate protective measures as a condition of the children’s return without making a finding of grave risk). The reliance on undertakings to minimize an Article 13(b) inquiry is supported by some prominent academics. See Beaumont & McElevy, supra note 21, at 163, 170; Linda Silberman, Hague International Child Abduction Convention: A Progress Report, 57 L. & Contemp. Probs. 209, 267 (1994); Linda Silberman, Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis, 28 Fam. L.Q. 9, 33 (1994) [hereinafter Silberman, A Brief Overview]. But see Weiner, supra note 9, at 660–61, 677–81 (arguing that there are problems with relying on
necessary and are contrary to the purposes that underlie the Convention. The district court and the Second Circuit could have worked within the then-existing doctrine to reach the same result, and thereby avoided the negative aspects of Blondin IV.

1. An Overview of Blondin

The facts of Blondin are typical in many ways. Felix Blondin and Marthe Dubois were unwed, lived together in France, and had two children: Marie-Eline, born in May 1991, and François, born in August 1995. Blondin severely beat Dubois, starting in 1991. He also abused Marie-Eline. As a result of the abuse, Dubois and Marie-Eline lived in shelters for approximately nine months. After Blondin filed suit in France to obtain custody of Marie-Eline, the parties reconciled. The French court issued an order pursuant to their agreement that said that "the parental rights over the child will be exercised in common by both parents," and that "the child will have its usual residence at the fathers [sic]." In the event that Dubois chose to live outside Blondin's home, the court's order also provided for regular visitation by Dubois. Despite the reconciliation, Blondin continued his abuse.

Dubois took the children to the United States without notifying Blondin when Marie-Eline was six years old and François was

undertakings in cases of domestic violence).


244. This occurred "often." Blondin I, 19 F. Supp. 2d at 124–25. The abuse included hitting Dubois with a belt. Id. He also hit her when she was pregnant, so that she needed to seek medical treatment on one occasion for injuries near her eye, on her arm, and on her breast. Id. at 125. On another occasion, she sustained injuries to her jaw. Id. He "often threatened to 'kill everyone.'" Id.

245. Blondin II, 189 F.3d at 243 (The evidence suggested, for example, that Blondin "twisted a piece of electrical cord around Marie-Eline's neck, threatening to kill both the mother and the child.").

246. Id.

247. Id.

248. Id. (alteration in original).

249. Id.

250. Id. ("She testified that both during and after her pregnancy with François, Blondin repeatedly beat her and threatened her life, as well as the lives of the children. Dubois sought medical attention for her injuries on at least two occasions, and once summoned the French law enforcement authorities.").
almost two.\textsuperscript{251} When Blondin found them living in New York City, he invoked the Hague Convention to secure the children’s return to France.\textsuperscript{252} Dubois raised Article 13(b) as a defense. She claimed that she removed the children from France to protect the children from a physically abusive environment.\textsuperscript{253}

In Blondin \textit{I}, the district court determined that returning Marie-Eline and François to Blondin’s custody would expose the children to a grave risk of harm.\textsuperscript{254} Blondin had often beaten Dubois in the children’s presence, and also had beaten Marie-Eline.\textsuperscript{255} The court also found that Dubois and the children appeared to be well settled in the U.S.\textsuperscript{256} Finally, the court gave some weight to the views of Marie-Eline, who did not want to return to France.\textsuperscript{257} Finding that Dubois was financially destitute, the court concluded:

In France, Dubois and the children would be dependent upon Blondin. Under the circumstances, I would be extremely wary of requiring Dubois and the children to live in his home. Although one possibility would be to require Blondin to pay for their housing elsewhere, he represented to the Court, during discussions about scheduling a hearing, that he had “no more money” and could not afford the cost even of airfare . . . . Under these circumstances, requiring Dubois and the children to return to France for legal proceedings would present a grave risk of psychological harm or an intolerable situation.\textsuperscript{258}

The court also rejected Blondin’s suggestion that the children could be returned to France in the custody of some third party, ruling that the children would be returned, if at all, only in their mother’s custody.\textsuperscript{259} Blondin appealed.

The Second Circuit, in Blondin \textit{II}, vacated the judgment of the district court and remanded the case. The appellate court accep-

\begin{itemize}
\item \textsuperscript{251} See id.
\item \textsuperscript{252} See id.
\item \textsuperscript{253} \textit{Id.} at 242.
\item \textsuperscript{255} \textit{Id.} at 127.
\item \textsuperscript{256} \textit{Id.} at 128.
\item \textsuperscript{257} See id. at 128–29.
\item \textsuperscript{258} \textit{Id.} at 128.
\item \textsuperscript{259} Blondin v. Dubois, 189 F.3d 240, 242 (2d Cir. 1999).
\end{itemize}
ted the trial court’s findings regarding the abuse. It stated, “Ample record evidence supported the District Court’s factual determination regarding the risk of physical abuse that the children would face upon return to Blondin’s custody.” The Second Circuit, however, emphasized that undertakings might allow the children to be returned notwithstanding the risk of harm, and stressed the importance of trusting the French system to protect the children. It stated, “[T]he Hague Convention requires a more complete analysis of the full panoply of arrangements that might allow the children to be returned to the country from which they were (concededly) wrongfully abducted, in order to allow the courts of that nation an opportunity to adjudicate custody.” The trial court needed to take into account any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child’s repatriation. In the exercise of comity that is at the heart of the Convention (an international agreement, we recall, that is an integral part of the “supreme Law of the Land,” U.S. Const., art. VI), we are required to place our trust in the court of the home country to issue whatever orders may be necessary to safeguard children who come before it.

In particular, the district court needed to consider whether “other options are indeed available under French law” and whether the children “could return to France in the temporary care of some other person.”

On remand, in Blondin III, the district court heard from Dubois, Marie-Eline, François, Veronique Chauveau, a French lawyer with expertise in French family law and international law, and Dr. Albert J. Solnit, the world-famous expert in child psychiatry and psychology. The court also reviewed various letters submitted from

260. Id. at 247.
261. See supra note 242.
262. See Blondin II, 189 F.3d at 249.
263. Id. at 242.
264. Id. at 248–49.
265. Id. at 242.
266. Id.
French authorities in response to the judge’s questions about available social services and legal protection for Dubois and the children.\textsuperscript{268}

There was extensive testimony that France seemed able and willing to protect Dubois and the children from Blondin’s violence. The evidence suggested that Dubois would be able to obtain temporary custody of the children by modifying the existing French order.\textsuperscript{269} If there were an immediate danger to the children, the juvenile court could issue a protective order granting Dubois temporary custody.\textsuperscript{270} The French court would likely enforce undertakings that Blondin gave regarding Dubois’s living arrangement.\textsuperscript{271} Blondin was willing to give financial support for approximately three weeks, until Dubois could receive social services, housing, and revenue from the French government.\textsuperscript{272} Dubois was entitled to free legal assistance, and this assistance would commence almost immediately.\textsuperscript{273} The Office of the Public Prosecutor had stated that it would not criminally prosecute Dubois for the abduction if she returned to France.\textsuperscript{274} The district court conceded, “I have every confidence that France could protect the children from further physical abuse.”\textsuperscript{275}

Despite this evidence, the district court determined that Dubois had established the Article 13(b) defense.\textsuperscript{276} The trial court reaffirmed that returning the children to France would expose them to “a grave risk [of] ... physical or psychological harm or otherwise place [them] in an intolerable situation.”\textsuperscript{277} The trial court repeatedly spoke of the “extraordinary circumstances of this case,”\textsuperscript{278} and concluded that “any repatriation arrangements, including even the return

\begin{itemize}
\item 268. Id.
\item 269. Id. at 288. There was some evidence, however, that Marie-Eline might have to live with Blondin until the court granted Dubois’s motion for modification, which might take up to three months.
\item 270. Id. at 288 n.5.
\item 271. Id. at 289.
\item 272. Id.
\item 273. Id.
\item 274. Id. at 289–90. However, Blondin still could seek damages against Dubois in a civil suit. Id. at 289 n.6.
\item 275. Id. at 298.
\item 276. Id. at 299.
\item 277. Id. at 285.
\item 278. Id.
\end{itemize}
of the children in their mother’s temporary custody with financial support by Blondin and French social services, would expose Marie-Eline and François to a ‘grave risk’ of psychological harm.\textsuperscript{279} The protection that France could afford the children was irrelevant: "What France could not do, if the children were returned, is protect them from the trauma of being separated from their home and family and returned to a place where they were seriously abused, amidst the uncertainties of court proceedings and being on public assistance."\textsuperscript{280} The district court concluded, "Even a return in their mother’s temporary custody, with the social and legal support and protections detailed by Chauveau and the French Ministry, would not alleviate the risk of post-traumatic stress disorder, because the removal from where they are now would open up the recurrence of the trauma."\textsuperscript{281}

The expert testimony of Dr. Solnit was determinative for the trial court.\textsuperscript{282} The trial court gave it "great weight."\textsuperscript{283} Dr. Solnit testified about the effects of returning the children to France:

\textit{[It] would “almost certainly” trigger a recurrence of the traumatic stress disorder they suffered in France—i.e., a post-traumatic stress disorder. A return to France “would set them back in a very harmful way” in their recovery from their “severe trauma,” for “such a move would undo the benefit of the psychological and emotional roots they have established with their mother and her extended family.”}\textsuperscript{284}

The resulting developmental harm could be “long-term or even permanent.”\textsuperscript{285} The developmental risks included "not feeling safe," “feeling exposed to the traumatizing uncertainty about where they will live and who will provide them with loving care and safety,” and “having their fate determined by strangers.”\textsuperscript{286} Dr. Solnit concluded,

\begin{itemize}
\item \textsuperscript{279} \textit{Id.} at 286.
\item \textsuperscript{280} \textit{Id.} at 298.
\item \textsuperscript{281} \textit{Id.} at 291. The court concluded, “Any return of Marie-Eline and François to France, the site of their father’s sustained, violent abuse, including even a temporary one-to-three month return in the custody of their mother, would trigger this post-traumatic stress disorder.” \textit{Id.}
\item \textsuperscript{282} \textit{Id.} at 298.
\item \textsuperscript{283} \textit{Id.} at 295.
\item \textsuperscript{284} \textit{Id.} at 291 (quoting Solnit Report).
\item \textsuperscript{285} \textit{Id.} at 292.
\item \textsuperscript{286} \textit{Id.} at 291.
\end{itemize}
"[T]he risk of post-traumatic stress disorder would be present in any proposed arrangement for returning the children to France, 'however carefully organized.'\footnote{287}{Id.}

The impact of Dr. Solnit's testimony was also powerful for the Second Circuit, when the case again was appealed.\footnote{288}{Blondin v. Dubois, 238 F.3d 153, 163 (2d Cir. 2001).} The Second Circuit in \textit{Blondin IV} commented on Dr. Solnit's qualifications and expertise,\footnote{289}{Id. at 161. Circuit Judge Cabranes emphasized that in light of Dr. Solnit's qualifications and expertise, see, e.g., J. Goldstein, A. Freud, A. Solnit \& S. Goldstein, \textit{In the Best Interests of the Child} (1986); his examination of relevant documents; his interviews with Dubois and the children; and, we emphasize, the absence of any contravening evidence on point, we see no basis upon which to question the District Court's finding that the children will suffer from a recurrence of traumatic stress disorder if they return to France.} and correctly concluded, "Dr. Solnit's conclusions . . . stand uncontroverted."\footnote{290}{Id. at 160.} Since Mr. Blondin presented no expert evidence about the effect of return on the children,\footnote{291}{Id. Blondin indicated to the court that he would call a psychiatrist, Dr. Spencer Eth, as an expert witness. See Brief for Respondent-Appellee at 11, Blondin v. Dubois, 238 F.3d 153 (2d Cir. 2001) (No. 00-6066) (citing Wolfman letter to Court, dated Dec. 13, 1999). However, this witness was not called.} this case presented "a rare situation,"\footnote{292}{Blondin \textit{IV}, 238 F.3d at 160.} and the Second Circuit affirmed.

2. The Mistakes of \textit{Blondin}

The problem with the Second Circuit's opinion in \textit{Blondin IV} is multifold and rather complex. At first blush, this holding does not appear to deviate from the prevailing interpretation of the Convention because the exact holding is extremely fact dependent: Article
13(b) was satisfied by uncontroverted expert evidence that the children would suffer harm if they were separated from family and returned to a place where they had been seriously abused, and where they would be subject to protracted court proceedings and placed on public assistance. Rather, Blondin IV is troubling because aspects of its holding and its implications contradict some fundamental understandings about the Convention. In particular, Blondin IV suggests the following messages, all of which are contrary to the prevailing interpretation of the Convention: 1) that post-abduction stability can help establish an Article 13(b) defense; 2) that the unrefuted testimony of an expert is per se determinative; and 3) that ‘undertakings’ are not a potential solution to a 13(b) defense when the harm to the child stems from the instability accompanying return. Blondin IV’s broader implication is that an Article 13(b) inquiry is akin to a best interests ‘merits’ inquiry, and that Article 13(b) need not be interpreted narrowly. All of these novel messages are now explored in detail.

The Second Circuit’s opinion is problematic, in part, because it permitted the district court to consider the children’s need for stability in the context of Article 13. Dr. Solnit clearly said that the children’s removal from their new surroundings (i.e., reversing the abductor’s actions), would contribute to the children’s harm. The trial

294. Contra infra note 304.

295. Contra K v. K (Child Abduction), 3 Fam. Ct. Rep. 207, 213 (Eng. Fam. 1997) (refusing to recognize undisputed expert’s conclusions regarding impact on mother and child of returning to country of domestic violence because although “entitled to a good deal of respect,” because “fear of return is not the same thing as an inability actually to go” and anxiety at the prospect of return is “commonplace”).

296. Contra Re K (Abduction: Child’s Objections), 1 Fam. L. Rep. 977, 987 (Eng. Fam. 1995). See Beaumont & McElevy, supra note 21, at 156 (“References to undertakings or their equivalents have from the beginning littered the Convention case law of anglophone jurisdictions . . . .”)

297. Contra Friedrich v. Friedrich, 78 F.3d 1060, 1068 (6th Cir. 1996) (“The exception for grave harm is not license for a court in the abducted-to country to speculate on where the child would be happiest. That decision is a custody matter, and reserved to the court in the state of habitual residence.”); C v. C (Minor: Abduction: Rights of Custody Abroad), 2 All E.R. 465, 473 (Eng. C.A. 1989); Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 377–78 (8th Cir. 1995). See generally Anton, supra note 46, at 542 (“The Commission . . . thought that a provision allowing an inquiry at large into the merits of any custody dispute between the parties would frustrate the objectives of the Convention.”).
court said:

I also agree with Dr. Solnit’s conclusion that the insecurity of the transition to France and the uncertainties surrounding the custody proceedings there would exacerbate the trauma suffered by Marie-Eline and François should they be returned. If I return the children to France, they will be uprooted from their stable, predictable family setting and thrown into a maelstrom of uncertainty and insecurity.\(^{298}\)

As Blondin correctly argued on appeal, this consideration only should be relevant in the context of an Article 12 defense.\(^{299}\) Article 12 states, in relevant part:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

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.\(^{300}\)

Blondin argued that because less than one year had transpired between the abduction and the beginning of the proceedings, whether the children might be ‘well settled’ was irrelevant.

While Article 13(b) is phrased broadly, it is clear from the Explanatory Report authored by Eliza Pérez-Vera that the stability experienced by a child since his or her abduction is not to be part of that analysis. Rather, the court in its Article 13(b) analysis is to focus on those elements that precipitated removal:

[I]t has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to

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299. Brief for Petitioner-Appellant at 23, Blondin v. Dubois, 238 F.3d 153 (2d Cir. 2001) (No. 00-6066).
300. Hague Convention on Child Abduction, supra note 1, art. 12 (emphasis added).
do either with its person, or with the environment with which it is most closely connected. Therefore the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. 301

The Explanatory Report's commentary to Article 12 makes the merit of Blondin's position even clearer. The Report states:

[In so far as the return of the child is regarded as being in its interests, it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it—something which is outside the scope of the Convention. Now, the difficulties encountered in any attempt to state this test of 'integration of the child' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard. 302

Considering stability solely under Article 12 is consistent with the notion that Article 13(b) should be narrowly construed. 303 In fact, courts generally have disregarded stability as part of the Article 13(b) analysis, although some courts have considered it. 304

302. Id. ¶ 107.
303. See supra notes 237–39 and accompanying text. See also Blondin v Dubois, 189 F.3d 240, 246 (2d Cir. 1999) (reiterating that exceptions provided by the Hague Convention are to be narrowly construed).
304. See Report of the Second Special Commission, supra note 104, at 241. See also Walsh v. Walsh, 221 F.3d 204, 220 n.14 (1st Cir. 2000) (moving children who have settled in new country does not constitute grave risk of harm); Friedrich v. Friedrich, 78 F.3d 1060, 1067–68 (6th Cir. 1993) (explaining that "adjustment problems that would attend the relocation of most children" are not sufficient to warrant a denial of repatriation under Article 13(b)); Tahan v. Duquette, 613 A.2d 486, 488–89 (N.J. Super. Ct. App. Div. 1992) (finding that Article 13(b) injury "was not intended to cover factual matter which was subject to being considered in a plenary custody hearing" and suggesting that testimony regarding return of a child to country of habitual residence would disrupt child's life is a factual matter); Re C, 1 Fam. L. Rep. 1145 (Eng. C.A. 1999) (holding that children's concerns about moving from one family in one country to a family in another country "are inherent in their return [and t]here is nothing approaching the severity of harm which satisfies the stringent test" of the Convention). But see
The appellate court tried, albeit unsuccessfully, to limit its holding and reconcile it with contrary authorities by emphasizing the unique facts of *Blondin*: “Admittedly, a certain degree of uncertainty attends any custody proceeding, but in this case, the uncertainty associated with the custody proceedings is not an isolated issue; it stands against the backdrop of serious physical abuse by the father, who seeks to gain custody of the children.”

Yet, this ‘uncertainty-plus’ approach is insufficient to plug the huge loophole created by the Second Circuit’s ruling. First, a high percentage of cases involve domestic violence. Many abductors will be able to make the arguments that Dubois made. Second, even if there is not a background of domestic violence, there is likely to be another background fact that can satisfy the requirement of uncertainty-plus. The background fact might be that the left-behind parent is an alcoholic, or perhaps a workaholic. Exactly what would qualify as an adequate ‘plus,’ and why, is unclear. Finally, the ‘uncertainty-plus’ line is an uncomfortable one to defend to a child. Imagine two children, both immediately bonding with relatives in the abducted-to country, both fearing return and its attendant uncertainties, both facing return proceedings that were commenced within a year of the wrongful removal or retention, and only one child being permitted to stay because only his or her need for stability mattered in the eyes of the court.

*Blondin IV* also unfortunately turns Hague Convention proceedings into the equivalent of custody contests by suggesting that both parents in future cases should produce expert testimony. The court stated:

Our interpretation of Article 13(b) by no means implies that a court must refuse to send a child back to its home country in [any] case involving allegations of abuse, on the theory that a return to the home country poses a grave risk of psychological harm. Rather, we reach our conclusion on the basis of the specific facts presented in this case and, in particular, on the absence of testimony contradicting Dr.

\[305.\] *Blondin v. Dubois, 78 F. Supp. 2d 283, 296 (S.D.N.Y. 2000).\]
Solnit’s conclusions. 306

The emphasis on the importance of expert testimony was a shift from the Second Circuit’s approach in Blondin II. In Blondin II, the Second Circuit told the District Court to focus on the options for returning the child safely before ruling on the Article 13(b) defense. 307 In fact, Blondin must have been surprised that the appellate court later called his evidence “essentially inapposite” despite “the lengths to which both Blondin and the French authorities have gone to address the concerns raised by Dubois and by our courts.” 308 By emphasizing the one-sidedness of the expert testimony, the Second Circuit’s decision in Blondin IV reminds one, to some extent, of the Iowa Supreme Court’s decision in Painter v. Bannister, 309 which also suggested that expert testimony is essential to a litigant’s case. 310

The encouragement of expert testimony is troublesome. It will undermine to some extent the procedural accommodations devised for petitioners to make the Convention a convenient remedy. In


307. See Blondin v. Dubois, 189 F.3d 240, 249 (2d Cir. 1999) (holding that the District Court must examine “the range of remedies that might allow both the return of the children to their home country and their protection from harm, pending a custody award in due course by a [court in the home country] with proper jurisdiction”). The Second Circuit did reiterate that the court “must examine the full range of options that might make possible the safe return of a child” before it grants an Article 13(b) motion. Blondin IV, 238 F.3d at 163 n.11. On remand, the district court concluded, “No other options existed by which the children would be safely returned to France.” Blondin III, 78 F. Supp. 2d at 298.

308. Blondin IV, 238 F.3d at 161.


310. Id. at 156 (“We place a great deal of reliance on the testimony of Dr. Glenn R. Hawkes, a child psychologist.”). Painter v. Bannister is frequently assigned as reading for family law students in order to demonstrate the importance of expert testimony in child custody cases. There, the Supreme Court of Iowa reversed the trial court and found that the child’s best interests would be served by remaining with his grandparents in Iowa instead of returning to his “Bohemian” father in California. The trial court had disregarded the child psychologist’s opinion, the only expert testimony presented, calling it “exaggerated” and criticizing the witness’ “attitude on the stand.” Id. (quoting trial court). The Supreme Court of Iowa found “nothing in the written record to justify such a summary dismissal of the opinions of this eminent child psychologist,” and felt compelled to keep Mark with his grandparents “in the face of warnings of dire consequences from an eminent child psychologist.” Id. at 156–58. The trial court’s judgment probably would have been upheld had the father also presented testimony from a child psychologist.
many countries, for example, cases are summary proceedings where rulings are made predominately on the basis of affidavit evidence.\textsuperscript{311} The whole point of the procedure is that the left-behind parent should not have to travel in order to give the evidence needed to secure the children's return. A parent may now feel obligated to travel to meet with the foreign expert.\textsuperscript{312} In addition, expert testimony will probably delay the proceedings. Article 11 of the Convention implies that applications should be resolved within a six-week period.\textsuperscript{313} The United States already resolves adjudicated cases too slowly. The United States takes, on average, 143 days (approximately twenty weeks) to resolve cases—a record that is worse than all other States Parties.\textsuperscript{314} Delay is the primary reason "a number of experts" discourage courts' use of social welfare reports, something expressly permitted by Article 13.\textsuperscript{315} Expert testimony is also expensive and will render the proceedings more costly. Petitioners in the United States are already disadvantaged by the United States' reservation to Article 26, which assured that petitioners were spared the cost of bringing a petition (including the fees of an attorney).\textsuperscript{316}


\textsuperscript{312} Albert Solnit met with the mother and tried to meet with Blondin, but was unable to do so. See Brief for Respondent-Appellee at 26, Blondin v. Dubois, 238 F.3d 153 (2d Cir. 2001) (No. 00-6066).

\textsuperscript{313} Article 11 states:

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Hague Convention on Child Abduction, supra note 1, art. 11.

\textsuperscript{314} Statistical Analysis, supra note 8, at 20. England and Wales, in contrast, have an average case completed in fifty-eight days. Id.

\textsuperscript{315} Report of the Second Special Commission, supra note 104, at 241.

\textsuperscript{316} See Hague Conference on Private Int'l Law, Full Status Report Convention # 28 ("[T]he United States declares that it will not be bound to assume any
tioners may now forego the Hague Convention remedy, as they may be priced out of a successful claim.

Finally, Blondin IV renders irrelevant undertakings and governmental measures for the children’s protection, so long as the children will suffer trauma from the instability attending return to their habitual residence. “Undertakings have become a fairly common way for some courts to try to secure the child’s safety, and at times the abductor’s safety, when ordering the child’s return.”317 Courts should not brush aside credible protections merely because of the children’s need for stability. Otherwise, undertakings or governmental efforts will always be inadequate.

That is not to say, however, that undertakings and state protection are always adequate when domestic violence is involved. As I have argued elsewhere, these measures are often insufficient to protect the mother’s and children’s safety.318 Courts must inquire—and the courts in the Blondin cases should have inquired—whether the protections are sufficient notwithstanding the children’s need for stability. In Blondin III, the trial court assumed they were sufficient and failed to engage in a more searching inquiry. As discussed below, the court should have focused particularly on the father’s dangerousness, the father’s denial of the abuse, general statistical evidence on batterers’ recidivism, and the children’s and mother’s fear of Blondin.319

The Second Circuit’s lack of analysis compounds the problems of Blondin IV. The court did not explain how this decision comported (or not) with foreign case law, why a departure was justified (i.e., why the existing interpretation was unjust), and how the new approach

317. Weiner, supra note 9, at 676. See also Beaumont & McElevy, supra note 21, at 156–57 (discussing undertakings and the role they have played in English family law). See Report of the Second Special Commission, supra note 104, at 241 (commenting that participants stated that the requesting state should be trusted to make proper custody determination upon the return of the child and that the child could be protected during the pendency of the custody preceding by allowing the child to return in the custody of the abducting parent or by placing the child in the custody of a third party).

318. Weiner, supra note 9, at 690–92.

319. See infra section III.B.3, notes 335–55 and accompanying text.
comported with the Convention’s object and purpose. The court’s failure to consider foreign case law was, in part, the fault of the advocates. For example, the Department of Justice filed a brief *amicus curiae* supporting a reversal of the district court’s opinion.320 The brief stressed the importance of the Convention’s uniform interpretation and the importance of trust and cooperation between states.321 Yet, the government’s brief cited no foreign authorities at all. Blondin’s brief cited five foreign cases, but all were cited in the last three pages of a forty-eight-page brief.322 The Second Circuit itself is primarily at fault for failing to address the object and purpose of the Convention, and for failing to discuss the injustice experienced under the Convention by domestic violence victims who flee with their children to achieve safety.323 The court could have recognized, quite easily, that the object of the Convention “gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.”324 Simply, the Conven-

320. For the proposition that the government’s position is normally given substantial weight by the courts, see Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982). In Blondin *IV*, however, the Second Circuit gave it little notice.

321. Brief for Amicus Curiae United States of America at 15, Blondin v. Dubois, 238 F.3d 153 (2d Cir. 2001) (No. 00-6066).

322. Brief for Petitioner-Appellant at 45–46, Blondin v. Dubois, 238 F.3d 153 (2d Cir. 2001) (No. 00-6066). All of the foreign cases related to the scope of Article 13 and the importance of undertakings. Two foreign cases were cited in the reply. Only one dealt with the scope of Article 13(b), and that was cited merely for the proposition that the harm must be ‘substantial’ or ‘weighty’ to qualify as harm under Article 13(b). Dubois’s brief did no better.

323. It is interesting that in England, the judge has to address the factors relevant to the exercise of his or her discretion, as set out in *W v. W (Child Abduction: Acquiescence)*, 2 Fam. L. Rep. 211, 219 (Fam. 1993), and *H v. H (Abduction: Acquiescence)*, 2 Fam. L. Rep. 570, 575 (Eng. C.A. 1996), including “the extent to which the purpose and underlying philosophy of the Hague Convention would be at risk of frustration if a return order were to be refused.” No such requirement is imposed on our courts.

324. Pérez-Vera Explanatory Report, *supra* note 10, ¶ 29. The State Department’s legal analysis explains Article 13(b) in this way:

An example of an ‘intolerable situation’ is one in which a custodial parent sexually abuses the child. If the other partner removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child’s return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an
tion’s purposes were not going to be furthered by forcing the return of children who were the direct or indirect victims of domestic violence.

The damage caused by the Blondin IV decision is widespread. Blondin IV is the law in the Second Circuit. In addition, other courts outside the Second Circuit may seize on its language. Even if other courts dismiss the decision as an anomaly, the decision signals to our treaty partners that the United States is a renegade when it comes to this treaty’s interpretation. The decision in Blondin IV looks nationalistic and ethnocentric. It provides an excuse for other courts to act similarly, and sometimes those courts will be foreign courts adjudicating the return of American children. Probably most importantly, however, the Second Circuit lost the chance to demonstrate that Article 13(b) could be used, without experts and without doctrinal expansion, to create just outcomes for domestic violence victims and their children.

3. An Alternative Approach

If the Second Circuit had focused on the object and purpose of the Convention in considering the issues in Blondin IV, it probably would not have decided Blondin IV as it did. The court might have recognized that the remedy of return was intended to be expeditious, convenient, and affordable, and that an emphasis on the importance of expert testimony could undermine the Convention’s usefulness. It might have remembered that Article 13(b) was to be a narrow defense and not akin to a merits determination, and that an emphasis on stability would create a huge loophole in the Convention. It might have appreciated that undertakings can keep the Article 13(b) defense narrow and deflect a more protracted inquiry; it might not have minimized the importance of undertakings by referring to the child’s need for stability. In addition, had the court focused on the purpose of Article 13(b) itself—to protect children from severe physical or psychological danger—it could have recognized that domestic violence causes children real harm, regardless of the children’s need for stability. It then might have understood that the threat to the Blondin/Dubois children was sufficient for the Article 13(b) defense,

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*intolerable situation* and subjected to a grave risk of psychological harm.

regardless of the availability of undertakings and governmental protection, because Blondin still posed a real danger and engendered real fear. By stepping back and utilizing a purposive perspective, the court could have reached the same outcome but with an analysis that was more compatible with the future viability of the Convention.

The Second Circuit could have sidestepped the stability issue by focusing solely on the children’s objection to return. The Convention permits a court to “refuse to order the return of the child if it finds that 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.”325 Eight-year-old Marie-Eline clearly objected to being returned.326 An eight-year-old is not so young that her view can be discounted as a matter of law. The Convention sets no minimum age limit, and specifically the drafters wanted “to leave the application of this clause to the discretion of the competent authorities.”327 Marie-Eline herself was found to be a “bright, poised, intelligent child who has an understanding of the purpose of these proceedings and who spoke thoughtfully and expressively about her views on being returned to France.”328 The court said, “I find that Marie-Eline is a remarkably mature eight-year-old.”329 The court, however, did not rely “exclusively or extensively” on her views in rendering its decision not to send the children back.330 Had the district court done so, it could have denied Blondin’s petition with respect to both children. Simply put, Marie-Eline’s successful defense could have provided a basis for not returning François. Courts routinely find that the harm

326. See Brief for Respondent-Appellee at 15, Blondin v. Dubois, 238 F.3d 153 (2d Cir. 2001) (No. 00-6066) (citing A.378).
329. Id.
330. Id.
from separating siblings can trigger the Article 13(b) defense.\footnote{331}{See B v. K, 1 Fam. Ct. Rep. at 387–88.} Had the district court based its decision on Marie-Eline’s objection, its problematic interpretation of Article 13(b) could have been avoided.\footnote{332}{There was a dispute whether the trial court could consider Marie-Eline’s views as part of its Article 13(b) analysis. The Second Circuit ultimately resolved that the trial court could do so, as long as the child’s views were not the exclusive basis for the Article 13(b) ruling. Regardless of the propriety of that holding, Marie-Eline’s views could have been, and should have been, analyzed as part of the unnumbered portion of Article 13 regarding the child’s objections.}

Alternatively, and preferably, the Second Circuit could have sidestepped the stability issue by focusing instead on the real risk to the children and mother from Blondin’s violence. Sufficient evidence supported an Article 13(b) defense, regardless of how well-settled the children’s lives were post-abduction. The district court in Blondin I had found a threat to the children of serious physical or psychological abuse if they were returned to France, and the ‘grave risk of harm’ stemmed from their father’s potential violence toward them and their mother.\footnote{333}{Blondin v. Dubois, 19 F. Supp. 2d 123, 127 (S.D.N.Y. 1998).} The Second Circuit in Blondin II upheld this finding.\footnote{334}{Blondin v. Dubois, 189 F.3d 240, 250 (2d Cir. 1999).} Two factors rendered irrelevant the protection that the French could afford Dubois and the children: Blondin’s dishonesty and Blondin’s dangerousness. These factors should have been emphasized by the district court in Blondin III, and when it failed to do so, by the Second Circuit on appeal.\footnote{335}{An appellate court can rely on any basis in the record to affirm. Jack H. Friedenthal et al., Civil Procedure § 13.4 (3d ed. 1999).}

First, Blondin denied the abuse.\footnote{336}{See Blondin I, 19 F. Supp. 2d at 128 (“Blondin denied under oath ever having abused Dubois or his children, but I am firmly convinced that he was not telling the truth. Indeed, his testimony was incredible.”).} Since Blondin lied under oath, there could be no certainty that he would follow any protective orders entered in the children’s or Dubois’s favor. In fact, Blondin’s compulsive lying\footnote{337}{As the trial court stated, “Blondin also misrepresented or exaggerated facts in seeking relief from this Court.” See id. Moreover, in denying his abuse of Dubois or his children, he lied about collateral issues, including why Dubois had left him in August 1997. See id.} made him akin to the father in In re Walsh, who, the First Circuit concluded, could not be trusted to obey a restraining order in his wife’s favor because he had a history of violating or-
ders. Therefore, regardless of the protection France could afford, there was a real risk the children might still be harmed.

Second, Blondin was very dangerous. There was clear evidence that his violence had escalated over time, and that it had become more frequent. Many other indicators of dangerousness were also present. There was a prior history of domestic violence, consumption of alcohol, an attempt by the victim to separate from her

338. In Walsh v. Walsh, 221 F.3d 204, 209–11 (1st Cir. 2000), the First Circuit found an Article 13(b) defense meritorious in a case where the mother was a domestic violence victim and the father had a history of violating orders. The First Circuit found that the petitioner's undertakings were not sufficient protection for the mother. Id. at 220–21.

The First Circuit was very diplomatic in its approach, recognizing the way in which the case law of one country may influence the interpretation in another country, that the United States usually returns children under the Hague Convention, and that Ireland would undoubtedly enter orders to protect the mother and children. Id. at 221–22. It proclaimed, "We do not come to this conclusion lightly." Id. at 222. It rested its analysis on the "clearly established facts," including that the father had fled after indictment for threatening to kill another person in a different case, and "a documented history of violence and disregard for court orders." See also id. at 221–22 (citing Re F (A Minor) (Abduction: Rights of Custody Abroad), 3 All E.R. 641 (Eng. C.A. 1995)).

339. Blondin I, 19 F. Supp. 2d at 125 (citing mother's testimony that she left for the United States "[b]ecause Felix was worse and worse and worse. He would beat me very often, be angry all the time, always yelling, screaming.").

340. In a prior article, I suggested that the court should look at the batterer's lethality. Weiner, supra note 9, at 662. I have refined my position to accord with the current understanding of lethality assessment tools. As Neil Websdale, Associate Professor of Criminal Justice, writes:

Research into domestic homicides typically reveals these to be crimes of cumulation in which men's violence and women's entrapment seem to intensify over time. The absolute distinction between lethal and non-lethal cases is a false dichotomy; rather there is a range or continuum of violence and entrapment that underpins abusive intimate relationships. Indeed, it would be far more appropriate and useful to employ the term "dangerousness" rather than "lethality" assessment.


342. Id.
abuser,\textsuperscript{343} prior police contact with the parties,\textsuperscript{344} threats to kill the victim,\textsuperscript{345} the communication of those threats to others,\textsuperscript{346} the use of a weapon in prior abusive incidents,\textsuperscript{347} and prior serious injury.\textsuperscript{348} In addition, the most important indicator of all existed: the victim herself suggested that Blondin was a real danger, and his escalating violence was why she had to leave France.\textsuperscript{349} In short, there was a very substantial threat of harm to Dubois and the children if they returned to France.

Another ground existed for affirming the existence of a meritorious Article 13(b) defense. The Second Circuit could have relied on the children’s fear, emphasizing the trauma they would experience if required to live in the same country as their father. Marie-Eline was clearly fearful of her father. She told Dr. Solnit that she used to have nightmares and trouble eating and sleeping.\textsuperscript{350} Marie-Eline was acutely aware that reconciliations were historically followed by “a continuation of the violence and pain that she experienced.”\textsuperscript{351} She stated, “I never want to go back to my daddy.”\textsuperscript{352} Marie-Eline’s fear would exist regardless of how settled she was in America and regardless of the protections the French authorities would afford her.\textsuperscript{353}

Like the first two alternatives, the Second Circuit did not

\textsuperscript{343} Dubois’s move to the U.S. with the children constituted an attempt to separate.

\textsuperscript{344} See Brief for Respondent-Appellee at 6, Blondin v. Dubois, 238 F.3d 153 (2d Cir. 2001) (No. 00-6066).

\textsuperscript{345} Blondin I, 19 F. Supp. 2d at 124–25.

\textsuperscript{346} Id.

\textsuperscript{347} I classify both the belt used to beat Dubois and the electrical cord used to choke Marie-Eline as weapons. Id. at 124.

\textsuperscript{348} Id. at 125.

\textsuperscript{349} Id. at 125. See generally Weiner, supra note 9, at 662 (explaining why the victim may provide the best evidence of her batterer’s dangerousness).

\textsuperscript{350} Blondin v. Dubois, 78 F. Supp. 2d 283, 291 (S.D.N.Y. 2000).

\textsuperscript{351} Id. at 292.

\textsuperscript{352} Brief of Respondent-Appellee at 15, Blondin v. Dubois, 238 F.3d 153 (2d Cir. 2001) (No. 00-6066) (citing A.378).

\textsuperscript{353} Even if François had not articulated a similar fear, the courts still could have found that the Article 13(b) defense applied to him. Courts routinely find that separating children can trigger the Article 13(b) defense. See supra note 331. Therefore, if only one sibling had an Article 13(b) defense based on factors unrelated to the children’s relationship, neither child need be returned.
need to emphasize Dr. Solnit's testimony in order to affirm on this basis either. Marie-Eline testified about her own fear. 354 The court could have relied on the fact that the children expressed their fear to Dr. Solnit, without relying on his opinion. 355 These facts were also unrebutted, just like Dr. Solnit's testimony, and could have been emphasized by the courts instead of the expert's opinion.

Overall, the appellate court should have recognized that the Article 13(b) defense was established without emphasizing Dr. Solnit's testimony. The court could have used the case to explain the following important points: domestic violence and fear of domestic violence are themselves sufficient for application of the Article 13(b) defense; that a successful Article 13(b) defense did not require expert testimony to prove that children are fearful of the batterer; and that undertakings and a country's laws cannot always work to eliminate the grave risk of harm in the context of domestic violence.

Other courts have allowed an Article 13(b) defense under similar facts, without doctrinal modification. 356 Most of these decisions are very recent, as courts are only beginning to appreciate the injustice that can result from applying the Hague Convention to domestic violence victims. Rodriguez v. Rodriguez 357 provides an excellent example of how the Blondin court could have finessed the stability issue. In Rodriguez, the petitioner had consistently and severely abused his wife and one of their children. In fact, the expert in that case explained that the mother and two children had Post

354. See Blondin I, 19 F. Supp. 2d at 125 (including summary of Marie-Eline's testimony that she did not like living in France because "[my daddy] always hit me").

355. In commenting upon the credibility of Dr. Solnit's findings, the Amicus stated, "Those conclusions were supported as well by Judge Chin's own observations of Marie-Eline and other testimony about her." See Brief for Amicus Curiae NOW Legal Defense and Education Fund Supporting Respondent-Appellee and Affirmance of the Decision Below at 8, Blondin v. Dubois, 238 F.3d 153 (2d Cir. 2001). Other courts have emphasized the children's fear without relying upon an expert's conclusions. See, e.g., Mok v. Cornelisso, [2000] N.Z.F.L.R 582 (Fam. Ct.).

356. See Pollastro v. Pollastro, [1999] O.A.C. 169 (Ont. Ct. App.) (finding risk to mother, on whom child was dependent, and to child personally based upon father's past violence toward mother). However, more and more courts are entertaining expert psychiatric evidence. See Armstrong v. Evans, 2000 NZFLR LEXIS 38 (D.C. Aug. 24, 2000); Re G, 1 Fam. L. Rep. 64 (Eng. Fam. 1995).

Traumatic Stress Disorder (PTSD), the same diagnosis Dr. Solnit made regarding Marie-Eline. In Rodriguez, however, the court focused on the effect of return, not on the benefit of remaining, even though the doctors had stated that the children's "only hope of recovery from PTSD is to be placed in a secure and safe environment." The court explained that the grave risk of harm stemmed from the children's fear: "Returning the children to Venezuela, even if it did not result in the children's physical abuse at the hands of their father, would result in psychological trauma because of the children's fear of physical harm, a fear well grounded in their experience." In addition, the petitioner in Rodriguez had also denied the abuse. The court recognized that this denial meant that there was a real risk of repeated violence: "Petitioner's deportment in the courtroom and his complete denial of any culpability in this matter leaves little doubt that he would make no effort to alter the destructive manner in which he interacts with his family." Finally, the court recognized that "the risk to his wife and children has increased exponentially as a result of these proceedings."

The commendable analysis in Rodriguez is attributable to advocates and a judge who understood domestic violence. Ms. Rodriguez had the advantage of being represented by Marguerite Angelari, a clinical professor from the Family Law Clinic at the University of Baltimore School of Law, and someone who has thought extensively about domestic violence. Professor Angelari was assisted by Professor Jane C. Murphy, another individual knowledgeable about the realities of domestic violence. The judge in that case was William M. Nickerson, who, as a former Associate Judge on the Baltimore

358. Id. at 461.
359. Id.
360. Id.
361. Id. at 462.
County Circuit Court for five years, would have heard protection order cases.\textsuperscript{364}

Similarly, the English Court of Appeals in \textit{Re F}\textsuperscript{365} held that the Article 13(b) defense was successfully made out, and premised that holding on the father's violent behavior toward the mother and their four-year-old child.\textsuperscript{366} The violence had a "serious" impact on the child, an asthmatic, who suffered from bed-wetting, nightmares, tantrums, and aggression. This behavior had subsided after the abduction, but flared up again when the mother told the boy about the Hague Convention proceedings and the remedy of return. Although the father gave undertakings to the judge, the Court of Appeals was concerned about whether he would follow these or any court orders,\textsuperscript{367} even though the father did not contest the mother's allegations. The English court mentioned "security" and "stability" only once,\textsuperscript{368} and did not rest its decision on the need to maintain stability for the child. Rather, it based its decision on the effects of violence on the child and the child's response to a renewed possibility of violence.\textsuperscript{369} The English court also did not rely on expert testimony. It relied solely upon lay affiants to reach its result.\textsuperscript{370}

In conclusion, \textit{Blondin IV} was a failure because it unnecessarily departed from the established Article 13(b) jurisprudence, and did so in a manner that has severe negative implications for the Convention. Instead of focusing on Blondin's violence, and the parties' own testimony about the effects of that violence, the district and appellate courts were swept up in Dr. Solnit's testimony. The result was

364. The court in Baltimore County had concurrent jurisdiction with the district court for protection order cases. \textit{See} correspondence from Jane C. Murphy to Merle Weiner, July 17, 2001 (on file with author).


366. Although the violence is not to be minimized, the child abuse was not extreme. Most of the allegations related to acts such as destroying the child's toys and pinching the child's leg. On one occasion, however, the father did threaten to kill the child and his mother. \textit{Id.} at 38.

367. Unlike \textit{Walsh v. Wash}, 221 F.3d 204 (1st Cir. 2000), \textit{see supra} note 338, there was no specific evidence suggesting why the court would have this concern.


370. \textit{Id.} at 33.
a novel decision that aided one domestic violence victim and her children, but also expanded the defense in a way that could undermine the Convention. Abductors and their experts will now argue that returning abducted children will cause psychological harm, and link the harm, in part, to the child’s removal from the abductor or the abducted-to location. Acceptance of this argument is a major, and unjustified, shift in the Convention’s application, although admittedly a lack of stability can cause terrible psychological harm to children. Even if most respondents do not ultimately succeed using such psychological testimony, courts still will have to hear the testimony, and will have to spend time and resources applying a rather strained boundary line between stability considerations that matter and those that do not.

IV. CONCLUSION

The Second Circuit deserves commendation for its efforts to avoid the Hague Convention’s remedy of return in situations where the abductor was a victim of domestic violence. The Second Circuit is an example of a court trying to navigate the road between uniformity and progress. In both Croll v. Croll and Blondin v. Dubois, the Second Circuit managed to reach the right substantive outcome.

Yet the Second Circuit deserves criticism for the process by which it arrived at its conclusions. Croll, which properly changed existing doctrine, failed to give sufficient consideration to the decisions of our treaty partners. Nor did it justify its departure from those cases with a purposive analysis. Blondin improperly changed existing doctrine. Had the Blondin court done a purposive analysis, it would have seen that changing existing doctrine was problematic, and that the same result was achievable without doing so.

This Article has shown that it is difficult for courts to navi-

371. There is “general consensus ... that a child’s need for continuity of care cannot give rise to a viable defense under Article 13(b).” Weiner, supra note 9, at 659 n.380.

372. See West v. Lawson, 951 P.2d 1200, 1203–04 (Alaska 1998) (reversing trial court’s award of joint physical custody to parents, one of whom lived in Anchorage and the other in Las Vegas, because expert noted importance of “stability and consistency of caregiver and surroundings” for three-year-old child and how a six-month alternating period with each parent would be “destructive” to the child).
gate the road between uniformity and progress without a roadmap. The courts are apt either to issue novel opinions that undermine the Convention, or to abide by existing case law even when it is unjust to do so. This Article has suggested a template for guiding courts. The guidelines are grounded in treaty interpretation doctrine and offer a methodology that will allow courts to improve the Convention without threatening the important international framework.