CLEAR ERROR IN *MONASKY V. TAGLIERI*: THE NEED TO INCLUDE COERCION AND DOMESTIC VIOLENCE IN HABITUAL-RESIDENCE DETERMINATIONS

Lauren C. Lummus[*]

Drawing from the realities of domestic violence in international child custody disputes, this Note is primarily motivated to expose the hypocrisy of the U.S. Supreme Court's logic in the case *Monasky v. Taglieri*. In her opinion, the late Justice Ruth Bader Ginsburg mapped outdated conceptions of the Hague Convention onto an international child abduction case in which the "abducting" mother claimed she was escaping domestic violence from the child's father. I argue that responsible jurisprudence should accommodate the modern demographics of Hague Convention cases and the challenges courts face in addressing domestic violence allegations within child custody disputes. My argument contemplates the global epidemic of domestic violence, common experiences of battered mothers in Hague Convention cases, and the traumatic effects on children exposed to domestic violence.

Justice Ginsburg's reasoning undermined the potential of the totality of the circumstances standard to accommodate allegations of domestic violence at the habitual-residence determination stage in future Hague Convention cases. While conducting a close reading of the *Monasky* decision, I demonstrate through examples of recent scholarship and global jurisprudence that the habitual-residence determination should be thought of as a tool, not a barrier, to safely and efficiently resolve international abduction disputes.

TABLE OF CONTENTS

> *"The boys had always been her reason to stay, but now for the first time they were her reason to leave. She'd allowed violence to become a normal part of their life."*[1]

I. INTRODUCTION

While many international child abduction cases are litigated in the United States every year,[2] it is extremely rare that U.S. federal appellate courts hear such

---

* J.D. Candidate, James E. Beasley School of Law, 2022; B.A., English with Minor in Political Science, Haverford College, 2017. Thank you to Professor Theresa Glennon and the wonderful TICLJ staff for their guidance and painstaking edits. Thank you to my Downingtown, Haverford, and Temple friends for their never-ending love and support throughout law school. Thank you especially to Carlos, Heather, Scott, and Andrew for always listening and never doubting.

1. LIANE MORIARTY, BIG LITTLE LIES 391 (Penguin, 2014).

2. In 2019 alone, U.S. Department of State officers opened 485 new abduction cases and managed a total of 716 outgoing cases. *See* U.S. DEP'T OF STATE, 2020 ANNUAL REPORT ON INTERNATIONAL CHILD ABDUCTION 1 (2020), https://travel.state.gov/content/dam/NEWIPCAAssets/2020%20Annual%20Report%20and%20Appendices%201MAY2020.pdf (explaining volume of international parental abduction cases U.S. Department of State must investigate and resolve each year, focusing on statistics from 2018 and

cases.[3] On February 25, 2020, the United States Supreme Court decided *Michelle Monasky v. Domenico Taglieri*, a case that depicted an exceedingly sympathetic—and shockingly common—narrative of a battered mother who took her child with her when she fled from her abuser, the child's father.[4] It is only the fourth international child abduction case ever heard by the U.S. Supreme Court.[5]

Generally, if parents have shared or settled intent to raise their child in a particular country—that child's "habitual residence"—then a parent is barred from unilaterally moving with that child to another country.[6] However, domestic violence often affects a parent's decision to stay or settle in a new country. This Note argues that habitual-residence determinations under the Convention on the Civil Aspects of International Child Abduction (Hague Convention)[7] should give more weight to a mother's domestic violence allegations by considering the impact that the allegations, if true, could have on the appearance of parents' settled intent to continue to reside and raise a child in that country.[8] *Monasky* contained credible allegations of domestic violence and coercion[9] that, if fully considered, would be significant—perhaps even dispositive—factors in determining the habitual residence of an infant child.[10]

This Note will also demonstrate that the logic of *Monasky* did not fully appreciate that the scope of a totality of the circumstances review for an infant child necessarily includes *all* relevant evidence of the parents' settled intent to live in that

---

2019).

3. There have only been thirty-five such federal appellate cases since 2016. *1980 Hague Convention on International Child Abduction: A Resource for Judges: Recent Cases*, FED. JUD. CTR., https://www.fjc.gov/content/309862/recently-decided-cases (last visited Nov. 16, 2020).

4. 140 S. Ct. 719 (2020). *Content warning:* the allegations of physical and sexual violence in that case, and this Note's discussions of the same, may be distressing to some readers.

5. Prior to *Monasky v. Taglieri*, the U.S. Supreme Court had only heard three Hague Convention cases in the past decade. Kimberly Strawbridge Robinson, *Justices Will Take International Child Custody Case*, BLOOMBERG L. (June 10, 2019, 9:54 AM), https://news.bloomberglaw.com/business-and-practice/justices-will-take-international-child-custody-case.

6. *See* Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (Oct. 25, 1980) [hereinafter Hague Convention] (defining wrongful removal or retention of a child); PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 36–42 (P.B. Carter QC ed., 1999) (defining removal and retention as it relates to a child's "habitual residence").

7. Hague Convention, *supra* note 6. For an introduction and discussion of this Convention, see *infra* Section IV.A.

8. See *infra* Section III.B for a discussion of common experiences of battered mothers abroad.

9. *See* Taglieri v. Monasky, No. 1:15 CV 947, 2016 WL 10951269, at *13 (N.D. Ohio Sept. 14, 2016) ("The [trial] court finds Monasky's testimony with respect to the domestic abuse to be credible.").

10. The Sixth Circuit recognized the possibility that another court could balance the factors differently, when it said that "[f]aced with this two-sided record, [the district court] had the authority to rule in either direction. [The district court] could have found that Italy was A.M.T.'s habitual residence or . . . that the United States was her habitual residence." Taglieri v. Monasky, 907 F.3d 404, 409 (6th Cir. 2018). See *infra* Section V.B.1 for an evaluation of those factors in the *Monasky* case and how they could otherwise be characterized in light of domestic violence allegations.

country.[11] The circumstances underlying a mother's experience of domestic abuse or coercion in a new country are especially relevant to her true intent to remain there.[12] Thus, a mother should not have to prove her claims of domestic abuse with clear and convincing evidence[13] for a court to critically evaluate how that abuse might affect the mother's autonomy and intent to stay in the left-behind country.[14]

Additionally, it is critically important for courts to give significant weight to allegations of domestic violence when determining a child's habitual residence.[15] Habitual-residence determinations ought to consider the serious psychological effects in children exposed to domestic violence[16] and the limited protection of the Hague Convention's "grave risk" defense for children who are not themselves the primary targets of violence.[17] Given the recent and projected worsening of the global epidemic of domestic violence,[18] the *Monasky* Court missed a critical opportunity[19] to demonstrate[20] that the totality of the circumstances review in habitual-residence determinations provides the court with discretion to assign meaningful weight to credible allegations of abuse and coercion.[21] Ultimately, a court's failure to conduct

11. See *infra* Section IV.B for a discussion of the criteria used in determining an infant's habitual residence and Section IV.C for a discussion about the scope of the totality of the circumstances review for habitual-residence determinations.

12. See *infra* Section III.B for a discussion of circumstances and legitimate concerns that may prevent mothers from leaving a foreign country when they otherwise would.

13. *See Taglieri*, 2016 WL 10951269, at *11 (discussing the clear and convincing standard of proof required for certain defenses under the Hague Convention). See *infra* Section IV.D for a discussion of the 13(b) grave risk defense.

14. It is controversial whether, and to what degree, domestic violence allegations should be considered in the habitual-residence determination. *But see* Monasky v. Taglieri, 140 S. Ct. 719, 729 (2020) ("Domestic violence should be an issue fully explored in the custody adjudication upon the child's return.").

15. See *infra* Section IV.A for a discussion of why the habitual-residence determination is an early, vital stage in Hague Convention cases.

16. See *infra* Section III.D for a discussion of the psychological and sociological evidence which could support drawing this indirect connection in custody determinations.

17. See *infra* Section IV.D for a discussion of the grave risk defense.

18. See *infra* Section III.A for information about how COVID-19 lockdowns are increasing the rates and severity of outcomes of domestic violence.

19. See *supra* notes 3 and 5 and accompanying text for statistics illustrating the rarity of this type of case. Because cases of this nature are so rare, the Court is unlikely to have a chance to reconsider this issue in the near future.

20. Ideally, such a showing would have taken the form of a remand for the trial court to *fully* consider Monasky's circumstances in light of the new standard for habitual-residence determinations and new circuit precedent for such determinations for infants. At a minimum, the U.S. Supreme Court should have provided instruction about the importance of fully and fairly considering the mother's circumstances—including her allegations of abuse—within the habitual-residence determination. *See* Andrew A. Zashin, *Domestic Violence by Proxy: A Framework for Considering a Child's Return Under the 1980 Hague Convention on the Civil Aspects of International Child Abduction's Article 13(b) Grave Risk of Harm Cases Post* Monasky, 33 J. AM. ACAD. MATRIM. LAWS. 571, 574 (2021) (discussing the Court's refusal to consider circumstances of abuse in their analysis).

21. This discretion exists insofar as the credible allegations unsettle the presumption of the mother's settled intent to raise her child in the left-behind country. See *infra* Sections IV.A–B for a discussion of the traditional presumptions of habitual-residence determinations.

a full review of the totality of the circumstances could prohibit the battered mother from receiving full and fair access to custody proceedings in the country where she sought refuge and intended to raise her child.[22]

Part II of this Note will outline the central facts and procedural history of *Monasky*. Part III then positions the analysis within a growing wave of progressive scholarship advocating for child custody proceedings to better address a mother's allegations of intimate partner violence. Part III will explain this progressive scholarship, with an emphasis on recent developments in the social science of domestic violence, and describe how public policy and courts fail to adequately address domestic violence issues within custody disputes.[23] Part IV provides an overview of the law governing Hague Convention petitions and the limitations on domestic violence allegations in such cases.[24] This overview will walk through the process of locating a child's habitual residence in Hague Convention cases, with a particular focus on courts' flexibility in evaluating parents' shared intent for the residence of their infant children.[25] Part V then undertakes a critical close reading of portions of *Monasky* and discusses how it could have more fully and fairly appreciated the totality of the circumstances.[26] Part VI synthesizes the arguments made over the course of this Note and forecasts the import of cases similar to *Monasky* involving claims of domestic violence and coercion.[27] Due to the high burden of proof related to allegations of domestic violence, battered mothers will likely face additional obstacles in fleeing to the United States in the wake of the Court's decision.[28]

This Note will focus on Hague Convention cases within United States' courts, so the discussion hereafter will be centered within the United States unless otherwise noted. The subject of this Note is limited to mothers, like Michelle Monasky, who "abduct" their children while fleeing domestic violence and are confronted with Hague Convention petitions requesting the children's return. In Hague Convention cases, it is overwhelmingly common for children to be "abducted" by mothers moving back to their countries of origin.[29] Like Monasky, the majority of mothers

22. This would provide much-needed relief to battered mothers, a demographic often lacking any direct remedies in Hague Convention cases. See *infra* Section IV.D and the accompanying footnotes for a discussion of the limited availability of most affirmative defenses and the conservative application of the 13(b) defense for situations involving domestic abuse.

23. See *infra* Part III for a broad introduction to the U.S. and global epidemic of domestic violence, common experiences shared by battered mothers in Hague Convention cases and the hidden influence of coercion, the general operation of child custody proceedings involving perpetrators of domestic violence, and the harm to children exposed to domestic violence.

24. See *infra* Sections IV.B–D for discussions of the operation of the Hague Convention and the ways that it touches on and could accommodate domestic violence allegations.

25. See *infra* Sections IV.A–E for various discussions of the intended operation and flexibility of habitual-residence determinations.

26. See *infra* Sections V.A–C for a critical close-reading of the *Monasky* decision.

27. See *infra* Part VI for a summary of my arguments and for my recommendations to judges and litigants.

28. See *infra* Part VI for a discussion of the obstacles that the *Monasky* decision created for battered mothers.

29. BEAUMONT & MCELEAVY, *supra* note 6, at 3–4, 9.

in Hague Convention cases claim that they were fleeing domestic violence.[30] Accordingly, this Note uses the term "battered mother" and the personal pronouns "she," "her," and "hers" in anecdotal reference to the typical "abducting" parent. Similarly, the terms "father," "abuser," and the personal pronouns "he," "him," and "his," are used to reflect the typical "left-behind" parent.[31] This terminology is given special emphasis since the demographics of Hague Convention cases have long been unknown, ignored, misunderstood, and mischaracterized.[32]

In choosing to use the word "mothers," this Note does not mean to deny the reality that *many* abductors in Hague Convention cases are fathers,[33] nor to dismiss the wide variety of circumstances found in other Hague Convention cases.[34] With this word choice, this Note does not mean to suggest that fathers are not also survivors of domestic violence[35] or that abusers do not also kidnap their children,[36] nor does it intend, in any way, to minimize the experiences of trauma[37] that do not fit neatly into the categories referenced herein. Finally, though this Note uses the labels "battered mothers" and "women survivors of domestic violence" interchangeably, neither descriptor is intended to minimize the subject's agency or

30. *See* Kyle Simpson, *What Constitutes a "Grave Risk of Harm?": Lowering the Hague Child Abduction Convention's Article 13(b) Evidentiary Burden to Protect Domestic Violence Victims*, 24 GEO. MASON L. REV. 841, 846–47 (2017) (discussing that most abductors are women escaping domestic violence despite the belief of Hague Convention's drafters that the abducting parent would be a man who was dissatisfied with the actual or probable outcome of custody determination).

31. This Note assumes that the mothers' allegations of domestic violence underlying the statistics are true.

32. *See generally* Simpson, *supra* note 30 (discussing how these mischaracterizations have resulted in entrenched structural bias against battered mothers and restricted the available grounds for relief).

33. In 2015, fathers represented an estimated 24% of all abducting parents globally. Nigel Lowe & Victoria Stephens, *Part I — A Statistical Analysis of Applications Made in 2015 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Global Report* 7, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH) (No 11A, revised Feb. 2018) https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf (analyzing statistical trends regarding operation of Hague Convention over 16-year period).

34. There is extensive global, regional, and national empirical data available that illustrates various collective attributes of Hague Convention cases. *See id.* at 3 (analyzing statistical trends regarding operation of Hague Convention over 16-year period).

35. According to data from 2003 to 2012, men are estimated to account for 24% of domestic violence victims. Jennifer L. Truman & Rachel L. Morgan, *Nonfatal Domestic Violence, 2003-2012*, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 6 (April 2014). This statistic, like many domestic violence statistics, might be inaccurate given the inability to perfectly control for variables such as underreporting. *See id.* at 13-14

36. In one study of 97 left-behind parents, 84 reported the abductor had threatened their lives or those of other family members. JEFFREY L. EDLESON ET AL., MULTIPLE PERSPECTIVES ON BATTERED MOTHERS AND THEIR CHILDREN FLEEING TO THE UNITED STATES FOR SAFETY: A STUDY OF HAGUE CONVENTION CASES 23 (2010), https://www.ncjrs.gov/pdffiles1/nij/grants/232624.pdf.

37. *See* U.S. DEP'T. OF JUST., *The Crime of Family Abduction: A Child's and Parent's Perspective* ix (May 2010), https://www.ojp.gov/pdffiles1/ojjdp/229933.pdf ("Misperceptions about family abduction can potentially cause further trauma to the abducted child . . . [and] lead to an increase in the incidence and duration of family abductions.").

to reduce a survivor to her experience of trauma.[38]

II. FACTS AND PROCEDURAL HISTORY

The story behind *Monasky v. Taglieri* begins in the United States, where Michelle Monasky met and married Domenico Taglieri and resided with him for almost two years before moving with him to Italy—his home country.[39] Monasky testified that Taglieri began to be severely physically and sexually abusive in their first year in Milan, and this abuse continued for years, including while she was pregnant with her daughter and after giving birth.[40] Over time, Taglieri hit Monasky "harder" and "more frequently," and Monasky grew increasingly terrified of him.[41] Monasky also testified that Taglieri forced her to become pregnant with their daughter, A.M.T., despite her resistance.[42] Taglieri admitted to striking Monasky in the face on one particular occasion, but denied that he was violent at any other point thereafter.[43]

Monasky and Taglieri remained married despite living separately in apartments in different towns for long stretches of time, which "further strained the parties' marriage."[44] Monasky secured employment in Italy but was ultimately unsuccessful in her years-long efforts to receive formal Italian recognition of her (American) Ph.D. in Biophysics.[45] Without the requisite credentials in Italy, Monasky could not pursue comparable jobs for which she was qualified in the United States, and consequently, she was either unemployed or underemployed for her entire time in

38. There are many available resources that discuss the importance of terminology in discussing sexual assault and domestic violence. *See, e.g.*, Constance Grady, *The Complicated, Inadequate Language of Sexual Violence*, VOX (Nov. 30, 2017) https://www.vox.com/culture/2017/11/30/16644394/language-sexual-violence (critiquing terminology that sexualizes or neutralizes sexual violence); *WordWatch*, KINGS CNTY. SEXUAL ASSAULT RES. CTR., https://www.kcsarc.org/wp-content/uploads/2021/08/WordWatch-Handout.pdf (last visited Sept. 19, 2021) (recommending phrases and language to use when discussing sexual violence).

39. Taglieri v. Monasky, No. 1:15 CV 947, 2016 WL 10951269, at *1 (N.D. Ohio Sept. 14, 2016). The trial court found that Monasky and Taglieri agreed to move to Italy for the mutual benefit of their careers, for an "undetermined period of time." *Id.* at *7. Monasky contends that neither she nor Taglieri intended this to be a permanent move. *Id.*

40. *Id.* at *1–2.

41. *Id.* at *1.

42. As the trial court put it, "[t]he parties dispute whether the pregnancy was voluntary." *Id.* at *1. Monasky testified that Taglieri "forced himself upon [her] multiple times, and [she did not] know which particular time was the time [she] got pregnant." *Id.* at *13 n.3. The district court did not find as a fact but left open the possibility that Taglieri raped Monasky on several occasions. *Id.* at *1, *13 n.3.

43. *Id.*

44. *Id.* at *1 (citations omitted).

45. *Id*. *Cf.* Michelle Monasky Curriculum Vitae, CASE W. UNIV., https://physiology.case.edu/media/staff_cvs/cv_staff_michelle_monasky_20160421.pdf (summarizing Monasky's skills and experience, including a B.S. in Molecular Biology, with Minors in Biochemistry and Physics, from Ohio Northern University; an M.S. in Biophysics from The Ohio State University; and a Ph.D. in Biophysics, with a thesis in Cardiac Physiology, from The Ohio State University).

Italy.[46] Further, Monasky could not speak Italian and was pursuing, but never obtained, an Italian driver's license.[47] As a result, "she struggled to perform certain basic tasks and felt that Taglieri was not doing enough to help her."[48] In February of 2015, Monasky gave birth to their daughter, A.M.T., after struggling with a complicated pregnancy and increasingly frequent and heated arguments with Taglieri.[49] On multiple occasions, Monasky applied for jobs in the United States, looked into American healthcare and childcare options, and researched American divorce lawyers.[50] After living in a safe house for about two weeks, Monasky fled with two-month-old A.M.T. to her parents' house in Ohio.[51]

Taglieri responded by filing suit in Italy, and—despite Monasky's absence from the proceedings and despite a police complaint documenting Taglieri's abuse—the Italian court ordered that Monasky's parental rights be terminated.[52] Taglieri then proceeded to the United States District Court for the Northern District of Ohio, where he petitioned for A.M.T.'s return to Italy[53] under the Hague Convention.[54] In response, Monasky argued that Italy should not be considered A.M.T.'s country of habitual residence because she made no agreement with Taglieri to permanently settle in Italy, and further, because the parties lacked a shared intent to raise A.M.T. in Italy.[55] Monasky attested that on multiple occasions, both before and after A.M.T.'s birth, she clearly communicated to Taglieri her intent to divorce him and to return to the United States with A.M.T.[56] Monasky also pointed to the fact that days before giving birth to A.M.T., she had requested quotes from international moving companies to move back to the United States.[57]

After a bench trial, the United States District Court for the Northern District of Ohio determined that Monasky and Taglieri had settled intent to raise A.M.T. in Italy; therefore, Italy was A.M.T.'s habitual residence under the Hague Convention.[58] The court then ordered A.M.T.'s return to Italy, where she still lives today.[59] On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the district court's return order.[60] After rehearing *en banc*, the Sixth Circuit again affirmed.[61]

---

46. *Taglieri*, 2016 WL 10951269, at *1.
47. *Id.* at *1–4.
48. *Id.* at *1.
49. *Id.* at *2–4.
50. *Id.* at *2
51. *Id.* at *4.
52. *Id.*
53. Taglieri's petition was filed on May 15, 2015. *Id.* at *4.
54. See *infra* Section IV.D for a discussion of the Hague Convention's return mechanism.
55. *Taglieri*, 2016 WL 10951269, at *7.
56. *Id.* at *7.
57. *Id.* at *8.
58. *Id.* at *10.
59. *Id.* at *14.
60. Taglieri v. Monasky, 876 F.3d 868, 879 (6th Cir. 2017), *reh'g granted en banc, opinion vacated* 867 F.3d 868 (6th Cir. 2018).
61. Taglieri v. Monasky, 907 F.3d 404, 411 (6th Cir. 2018).

On appeal to the United States Supreme Court, Monasky made an additional argument that habitual-residence determinations in Hague Convention cases should be subject to the actual agreement standard in order to accommodate children born into domestic violence.[62] The Court's opinion, authored by Justice Ruth Bader Ginsburg, rejected Monasky's argument and declared that habitual-residence determinations should be made only after considering the totality of the circumstances.[63] In affirming the district court's return order,[64] the Court also decided that because a child's habitual residence is a "mixed question of law and fact," appellate review must apply the clear-error standard instead of the *de novo* standard.[65] Given this application, the Supreme Court did not substantively display, as it would have in a *de novo* review,[66] how the totality of the circumstances analysis *should have* proceeded under these facts.[67]

III. DOMESTIC VIOLENCE IN THE INTERNATIONAL SPHERE

> *"If we are to fight discrimination and injustice against women we must start from the home for if a woman cannot be safe in her own house then she cannot be expected to feel safe anywhere."*[68]

Section A of this Part provides a broad introduction to the epidemic of domestic violence in the United States and across the world. Next, Section B discusses common experiences shared by battered mothers in Hague Convention cases and the hidden influence of coercion. Then, Section C considers the influence that domestic violence can have in child custody matters and surveys some of the difficulties associated with domestic violence allegations in court proceedings. Lastly, Section D discusses the traumatic effects on children exposed to domestic violence.

A. The Domestic Violence Epidemic

Courts hearing Hague Convention cases should be aware of domestic violence and its effect on both parents and children, especially given the epidemic of domestic violence in recent years.[69] Domestic violence has many legal definitions, both within

62. Monasky v. Taglieri, 140 S. Ct. 719, 723 (2020). See *infra* Part IV.C for a discussion of the actual agreement standard.

63. *Monasky*, 140 S. Ct. at 726–30. See *infra* Section IV.C for a discussion of the totality of the circumstances standard.

64. The U.S. Supreme Court affirmed 9-0 the district court's return order, and both Justice Thomas and Justice Alito filed opinions concurring in part and in the judgment. *Monasky*, 140 S. Ct. at 731.

65. *Id.* at 730. See *infra* Section IV.E for discussion of the clear error standard and the *de novo* standard.

66. *See, e.g.*, Mozes v. Mozes, 239 F.3d 1067, 1073–81 (9th Cir. 2001) (applying *de novo* standard of review).

67. See *infra* Section IV.E for comparison of the clear error and *de novo* standards of review.

68. *The Domestic Violence Epidemic amid COVID-19*, WOMEN'S FOUND. (Aug. 4, 2020), (quoting Aysha Taryam), https://twfhk.org/blog/domestic-violence-epidemic-amid-covid-19.

69. The former Deputy Secretary General of the United Nations stated, "[N]owhere in the

the United States and across the world.[70] For example, the United Nations (U.N.) has recently described domestic violence as having the following characteristics:

> Domestic abuse, also called "domestic violence" or "intimate partner violence", can be defined as a pattern of behavior in any relationship that is used to gain or maintain power and control over an intimate partner. Abuse is physical, sexual, emotional, economic or psychological actions or threats of actions that influence another person. This includes any behaviors that frighten, intimidate, terrorize, manipulate, hurt, humiliate, blame, injure, or wound someone. Domestic abuse can happen to anyone of any race, age, sexual orientation, religion, or gender. It can occur within a range of relationships including couples who are married, living together or dating. Domestic violence affects people of all socioeconomic backgrounds and education levels.[71]

Domestic violence is also "one of the greatest human rights violations."[72] While violence against women and girls is widely under-reported,[73] the World Health Organization (WHO) has estimated that about one in every three women will experience physical or sexual violence in their lifetime.[74] Intimate partners are overwhelmingly responsible for the majority of this violence.[75] The United Nations has estimated that globally, 243 million women and girls experience sexual and physical violence from intimate partners every year.[76]

---

world is a woman safe from violence . . . . The strengthening of global commitment to counteract this plague is a movement whose time has come." Asha-Rose Migiro, *Remarks by the Deputy Secretary-General to the International Conference on Violence Against Women,* UNITED NATIONS (Sept. 9, 2009), https://www.un.org/sg/en/content/dsg/statement/2009-09-09/remarks-deputy-secretary-general-international-conference-violence.

70. *See* 25 AM. JUR. 2D *Domestic Abuse and Violence: Definitions, What Constitutes "Domestic Abuse or Violence,*" § 2, Westlaw (database updated August 2021) (illuminating the wide variety of definitions for domestic abuse and violence in the United States by conducting an extensive review of U.S. statutes and case law); *see also* Rebecca Adams, *Violence Against Women and International Law: The Fundamental Right to State Protection from Domestic Violence*, 20 N.Y. INT'L L. REV., Winter 2007, at 57, 74–89 (providing a comprehensive discussion of domestic violence in various countries around the globe).

71. *What is Domestic Abuse?*, UNITED NATIONS, https://www.un.org/en/coronavirus/what-is-domestic-abuse (last visited Nov. 20, 2021).

72. Phumzile Mlambo-Ngcuka, *Violence Against Women and Girls: The Shadow Pandemic*, UN WOMEN (Apr. 6, 2020), https://www.unwomen.org/en/news/stories/2020/4/statement-ed-phumzile-violence-against-women-during-pandemic.

73. *COVID-19 and Ending Violence Against Women and Girls*, UN WOMEN (Apr. 4, 2020), https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/issue-brief-covid-19-and-ending-violence-against-women-and-girls-en.pdf?la=en&vs=5006; *Devastatingly Pervasive: 1 in 3 Women Globally Experience Violence*, WORLD HEALTH ORG. (Mar. 9, 2021), https://www.who.int/news/item/09-03-2021-devastatingly-pervasive-1-in-3-women-globally-experience-violence.

74. *Violence Against Women*, WORLD HEALTH ORG. (Mar. 9, 2021), https://www.who.int/news-room/fact-sheets/detail/violence-against-women.

75. *Id.*

76. *See* Mlambo-Ngcuka, *supra* note 72, at 1 (providing statistics from the twelve months leading up to the COVID-19 pandemic of women and girls aged 15-49 years old who have been subjected to violence and predicting an increase of violence with the COVID-19 pandemic).

The WHO considers this a public health emergency, an "epidemic" in its own right—as "[i]ntimate partner (physical, sexual and emotional) and sexual violence cause serious short- and long-term physical, mental, sexual and reproductive health problems for women. [This violence] also affect[s] their children's health and wellbeing . . . [and] leads to high social and economic costs for women, their families and societies."[77] To address this emergency, the WHO advocates for "promot[ing] gender equality" by ending discrimination against women in marriage, divorce and custody laws and "prevent[ing] [the] recurrence of violence through early identification of women and children who are experiencing violence and providing appropriate referral and support."[78] Moreover, targeted legislation is desperately needed: a quarter of all countries still have no specific laws to protect women from domestic violence.[79]

Domestic and gender-based violence only worsened in 2020 with the rise of the COVID-19 pandemic: "[n]o country has been spared [COVID-19], nor the scourge of domestic violence which has surged during lockdowns . . . ."[80] In April 2020, the U.N. Population Fund (UNFPA), an international agency focused on improving reproductive and maternal health, predicted that COVID-19 lockdowns would lead to a sharp increase in gender-based violence and inequalities in health and safety.[81] The coronavirus pandemic trapped women and children at home with their abusers and overloaded health systems, limiting valuable resources available to women and girls dealing with gender-based violence.[82] The UNFPA's prediction of huge spikes in unintended pregnancies and women facing domestic violence is a strong warning sign for a potential corresponding increase in filings of Hague Convention petitions, as higher numbers of battered mothers may soon be increasingly likely to flee.[83]

---

77. *Violence Against Women*, *supra* note 74, at 4.

78. *Id.*

79. Mlambo-Ngcuka, *supra* note 72.

80. The "scourge" of lockdown-related domestic violence and reporting can be seen around the world—Nigeria and South Africa have seen a drastic increase in rapes; Brazil and Mexico have reported higher rates of murdered women; and domestic violence complaints are up 25% in Argentina, 30% in Cyprus and France, and 35% in Singapore. *Global Covid-19 Lockdowns Inflame Violence Against Women*, FRANCE 24 (Nov. 25, 2020, 7:47 AM), https://www.france24.com/en/europe/20201125-global-covid-19-lockdowns-inflame-violence-against-women.

81. *New UNFPA Projections Predict Calamitous Impact on Women's Health as Covid-19 Pandemic Continues*, UNITED NATIONS POPULATION FUND (Apr. 28, 2020), https://www.unfpa.org/press/new-unfpa-projections-predict-calamitous-impact-womens-health-covid-19-pandemic-continues.

82. *See id.* (predicting that if COVID-19 lockdowns last over six months, forty-seven million women will be unable to access contraceptives, resulting in seven million unintended pregnancies; thirty-one million new cases of gender-based violence will occur; and over the next decade, two million female genital mutilations and thirteen million child marriages will occur that could have otherwise been avoided if prevention efforts had not been disrupted).

83. *Id.*; *see* HCCH PERMANENT BUREAU, HAGUE CONF. ON PRIV. INT'L L., COVID-19 TOOLKIT 12 (2020), https://assets.hcch.net/docs/538fa32a-3fc8-4aba-8871-7a1175c0868d.pdf (compiling resources in response to COVID-19 pandemic to encourage HCCH to operate effectively to ensure improved access to justice around the globe due to the anticipated increase of filings).

Progressive judicial practices, which expand the role of domestic violence allegations in Hague Convention cases, are perhaps more vital now than ever before.

B. Common Experiences of Battered Mothers in Foreign Countries

> *I am living in hell from one day to the next. But there is nothing I can do to escape. I don't know where I would go if I did. I feel utterly powerless, and that feeling is my prison. I entered of my own free will, I locked the door, and I threw away the key.*[84]

Domestic abuse is often accompanied by coercion.[85] For instance, 40% of mothers who defended against Hague Convention petitions in U.S. courts have asserted that they were coerced or forced to live in the country that they eventually fled with their child.[86] As one domestic violence expert has explained, since "it is common for a battering spouse to be the primary decisionmaker as to the parties' residence, the relocation itself is arguably not a 'mutual decision,' but an extension of the abuser's 'coercive control.'"[87] As illustrated in the circumstances of Monasky, who did not speak Italian and had neither an Italian driver's license nor recognized academic credentials,[88] battered mothers in foreign countries may also have significant day-to-day challenges besides abuse which further impact their freedom and ability to independently thrive.[89]

Attempting to leave an abuser presents additional risks, especially of economic or physical harm. In both the United States and abroad, "[f]or survivors fleeing violent relationships, considerations about where to go are determined far more by safety, resources, and support networks than by state boundaries."[90] In Monasky's case, she likely lacked adequate local options in Italy to escape Taglieri's abuse

---

84. HARUKI MURAKAMI, 1Q84, at 167 (Jay Rubin & Philip Gabriel trans., New York 2011).

85. Coercive control has been described as "controlling behavior [that] is designed to make a person dependent by isolating them from support, exploiting them, depriving them of independence and regulating their everyday behaviour." *See What is Coercive Control?,* WOMEN'S AID FED'N ENG., https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/coercive-control (last visited Jan. 15, 2021) (illuminating the "invisible chains" of coercive control by providing defining criteria, statistics, and resources for survivors).

86. EDLESON ET AL., *supra* note 36, at viii.

87. Pamela Brown, *No Good Deed Goes Unpunished*, 25 DOMESTIC VIOLENCE REPORT, Oct./Nov. 2019, at 1, 19 (citing EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE (Oxford Univ. Press, 2007)). Frequently, coercive control can camouflage the victim's lack of mutual agency through the very "power and control dynamics of an abusive relationship" that enable the abuser to "[make] the victim a 'virtual prisoner' in the country of habitual residence." Brian Quillen, *The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction*, 49 TEX. INT'L L.J. 621, 634 (2014).

88. *See* Taglieri v. Monasky, No. 1:15 CV 947, 2016 WL 10951269, at *1–2 (N.D. Ohio 2016) (explaining restrictions on Monasky's residency in Italy).

89. *See* Brown, *supra* note 87, at 18 ("[W]omen and their children [can be trapped] in desperate conditions in countries where they have no independent source of money, cannot work legally, and often lack the language skills to identify resources that might help.").

90. Courtney Cross, *Criminalizing Battered Mothers*, 2018 UTAH L. REV. 259, 281 (2018).

during the time they lived together.[91] After fleeing the home shared with Taglieri and filing a police report, Monasky and A.M.T. moved into an Italian women's shelter and lived there for about two weeks.[92] For women without adequate financial resources or a strong local social support network, fleeing an abuser may mean some period of homelessness, or, like Monasky, time spent living in a "safe house."[93] Unfortunately, temporary shelters come with their own set of concerns:

> Battered-women's shelters can be a temporary safe haven, but, due to limited resources, the closest shelter may be full when needed. Staff does work to place women elsewhere when this is the case, but "elsewhere" can be farther away from work, children's schools, and supportive family and friends than a victim feels she should go. Some women, for whom communal living arrangements are foreign, may find a shelter stay intimidating.[94]

The risks of physical harm associated with leaving are also very apparent. For many battered mothers, the most dangerous time is when they actually attempt to leave the abuser.[95] Frequently,

> [c]oncerns over physical safety are supported by threats that if she ever tries to leave him he will beat her harder than ever before, kill her, or harm or kill the children, family members or friends, anyone who tries to help her, and/or himself. He also may threaten to kidnap the children or deny her access to them through a custody fight, or he may threaten to harm or kill companion animals. Many batterers issue one or more of these threats in an effort to coerce the victim not to leave or to come back. Given the behavior of the batterer during the relationship, there is no reason for a battered woman to doubt that he at least will try to make good on these promises. Unfortunately, as crime and hospital statistics attest, and as can be observed in news headlines, some abusive men succeed.[96]

Today, as a response to the COVID-19 lockdowns, Italian courts have adopted a new measure to give battered women some degree of stability and normality.[97]

---

91. *Taglieri*, 2016 WL 10951269, at *1.

92. *Id.* at *4.

93. Vera E. Mouradian, *Battered Women: What Goes into the Stay-Leave Decision?*, 26 WELLESLEY CTRS. FOR WOMEN 34, 35 (2004) https://www.wcwonline.org/Past-years/battered-women-what-goes-into-the-stay-leave-decision.

94. *Id.*

95. *See Why Do Victims Stay?*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/why-do-victims-stay (last visited Jan. 10, 2021) ("One study found in interviews with men who have killed their wives that either threats of separation by their partner or actual separations were most often the precipitating events that lead to the murder.").

96. Mouradian, *supra* note 93.

97. *See COVID-19 and Ending Violence Against Women and Girls*, *supra* note 73 (providing responses to rise of domestic violence from various legal institutions and governments globally during COVID-19 pandemic). Unlike prosecutors in the United States, Italian prosecutors are members of the judiciary with special investigative and prosecutorial duties. *See generally*, Michele Caianiello, *The Italian Public Prosecutor: An Inquisitorial Figure in Adversarial Proceedings?* (December 23, 2011), in TRANSNATIONAL PERSPECTIVES ON PROSECUTORIAL POWER, (E. Luna, M. Wade, eds., Oxford University Press, 2011) (discussing the official duties and practices of Italian prosecutors).

Prosecutors have ruled that perpetrators of domestic abuse must leave the home they share with the survivor.[98] If Italy had implemented this measure earlier, Monasky may not have needed to leave her apartment, much less Italy, when and how she did.

C. The Role of Domestic Violence in Child Custody Matters and Court Proceedings

Perhaps the most consequential factor in a decision to leave is the fact that a battered mother well knows and fears the consequences of "abducting" her child. From the risk of losing her child in subsequent custody hearings to the looming threat of the Hague Convention's mandatory return mechanism requiring its swift return of her child back to the abuser,[99] battered mothers often choose to remain in abusive relationships and inadequate living conditions because they believe it is the best option to ensure the safety of their children and to preserve their custody rights.[100] If a mother takes her child with her, she could risk the same fate as the mother in *Monasky v. Taglieri*[101]—the act of "abduction" could cause her to lose her custodial, or even parental rights, for good.[102] In the alternative, a mother may fear that if she flees *without* her child, she will no longer be able to protect her child from the abuser.[103] She may justifiably worry that in her absence, the abuser may abuse the child as he did her.[104] A mother may also reasonably believe that she will have a

98. *See* Emma Graham-Harrison, et al., *Lockdowns Around the World Bring Rise in Domestic Violence*, GUARDIAN (Mar. 28, 2020, 1:00 PM) https://www.theguardian.com/society/2020/mar/28/lockdowns-world-rise-domestic-violence ("In many countries there have been calls for legal or policy changes to reflect the increased risk to women and children in quarantine.").

99. *See* Sarah Thomas, *Mothers Forced to Stay in Same Country as Abuser or Risk Persecution Under the Hague Convention,* ABC NEWS (Oct. 27, 2020, 12:26 AM), https://www.abc.net.au/news/2020-10-24/hague-convention-traps-domestic-violence-victims/12807342 (discussing battered mothers and their limited options under the Hague Convention); *see also Facts and Figures: April 2019,* GLOB. ACTION ON RELOCATION & RETURN WITH KIDS, https://www.globalarrk.org/facts-and-figures/ (last visited Feb. 1, 2021) (providing statistics about international custody disputes and support for parents and children "stuck" in a foreign country).

100. *See, e.g.*, Gina Masterson, *Fleeing Family Violence to Another Country and Taking Your Child is Not 'Abduction,' But That's How the Law Sees It,* CONVERSATION (Jan. 21, 2019, 7:25 PM), https://theconversation.com/fleeing-family-violence-to-another-country-and-taking-your-child-is-not-abduction-but-thats-how-the-law-sees-it-109664 (interviewing mothers who fled domestic violence with their children and were subsequently ordered to return their children to the abusers).

101. Monasky v. Taglieri, 140 S. Ct. 719, 731 (2020).

102. *See* Amelia Hill, *The Mothers Fighting to Get Their Children Back Home Again*, GUARDIAN (May 16, 2015, 2:00 PM), https://www.theguardian.com/lifeandstyle/2015/may/16/the-mothers-fighting-to-get-their-children-back-home-again (interviewing British mothers who believed that their British citizenship allowed them to flee to Britain with their children after experiencing domestic violence abroad but instead lost custody of their children when they were returned to the country of the "left-behind" parent).

103. Sudha Shetty & Jeffrey L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction*, 11 VIOLENCE AGAINST WOMEN 115, 116 (2005).

104. *Id.*

worse chance of later obtaining full custody or a safe, dependable custody agreement with her abuser if she leaves.[105]

It is well documented that perpetrators of domestic abuse also abuse the judicial processes that continue to connect them to their partners after their relationship has ended.[106] Abusers may attempt to manipulate, and often succeed at manipulating, the formal processes that their ex-partners initiated to facilitate escape from the abuser.[107] This continued abuse and manipulation can be effectuated through a variety of measures both inside and outside the courtroom, including protection-from-abuse matters, formal divorce proceedings, and even extra-judicial matters like supervised mediations or negotiations regarding settlement agreements.[108] Abusers who share children with ex-partners often use their children to stay connected to their ex-partner, and they may attempt to exploit custody agreements and court proceedings in order to coerce and control their ex-partners.[109] These attempts could have serious consequences, since "[d]espite a perception that the courts disproportionately favor mothers, one study has shown that fathers who fight for custody win sole or joint custody in seventy percent of these contests."[110]

In the United States, a growing number of states have passed statutes creating a presumption against granting sole or even joint custody to a perpetrator of domestic violence, if a judge deems the claims credible.[111] The increasing adoption of these statutory presumptions clearly exhibits growing public awareness and political will to address the body of social science that shows abusers frequently do not just harm their primary victims—they traumatize the entire household.[112] Judicial implementation of these presumptions also demonstrates that judicial practices are capable of extending the analysis of domestic violence beyond the primary abusive relationship of the parents.[113] Nevertheless, courts are generally slow to recognize

---

105. S*ee Why Do Victims Stay?, supra* note 95 (discussing mothers' fears about custody arrangements after leaving country).

106. *See, e.g.*, Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations,* 36 JUDGES' J. 38, 38–40 (1997) (noting abusers' use of judicial process to force ex-partners to stay in communication with them after separation).

107. *Id.*

108. *Id.*

109. *Id.* at 40 ("Fathers who batter the mother are twice as likely to seek sole custody of their children than are nonviolent fathers . . . . An abusive partner will often threaten to take the children in order to keep the mother in the relationship. If she leaves, he may continue efforts to harass and control her by manipulating custody litigation.").

110. *See id.* (surveying outcomes of custody determinations involving domestic violence in United States).

111. *See* 67A C.J.S. *Parent and Child* §113 (2020) (providing general overview of state statutory presumptions against awarding custody to perpetrators of domestic violence).

112. *See, e.g.*, UNICEF, *Behind Closed Doors: The Impact of Domestic Violence on Children* (2006), https://www.unicef.org/media/files/BehindClosedDoors.pdf (reporting on psychological and social effects in children who have witnessed violence).

113. *See* JERRY J. BOWLES ET AL., NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, A JUDICIAL GUIDE TO CHILD SAFETY IN CUSTODY CASES 6–8 (2008) (explaining that abusive behavior directed at parent affects best interest of child); Debrina Washington, *The Impact of Domestic Violence on Child Custody Cases*, VERYWELL FAMILY,

domestic violence and reform their practices to adequately address it.[114] One study found that clinicians were twice as likely as courts to substantiate child sexual abuse allegations, and further, that courts penalize nearly one-fifth of parents who merely *raise* claims of child sexual abuse.[115] These challenges are magnified in Hague Convention cases.[116]

Scholars like Gabrielle Davis, a leading expert in domestic abuse cases, have proposed a multitude of frameworks informed by social science to improve outcomes when domestic violence is alleged in child custody proceedings.[117] Davis believes that the strength of her framework is that it takes a holistic, multi-step approach to analyzing domestic abuse, and in so doing makes no assumptions that abuse is automatically present when alleged.[118] Instead, her framework instructs practitioners to examine the specific circumstances of each case to determine the presence of abuse, the effect of that abuse on the various household relationships, and the proper intervention plan.[119]

D. Child Trauma through Exposure to Domestic Violence

Although A.M.T. was not yet born for the overwhelming majority of the time that Taglieri abused her mother, she did spend the first month of her life in her parents' shared apartment and was exposed to domestic abuse on at least one

---

https://www.verywellfamily.com/domestic-violence-in-child-custody-cases-2997623 (May 23, 2020) (stating that judges in custody proceedings may consider instances of violence affecting or directed at child).

114. *See* Terrence Rogers, *Exposure to Domestic Violence as a Form of Child Abuse Under Domestic and International Law*, 34 WOMEN'S RTS. L. REP. 358, 365 (2013) (describing historical evolution of domestic and international law to recognize domestic violence and protect victims). *See generally* Mary A. Kernic et al., *Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence*, 11 VIOLENCE AGAINST WOMEN 991 (2005) (examining effects that history of intimate partner violence may have on custody cases).

115. Kathleen Coulborn Faller & Ellen DeVoe, *Allegations of Sexual Abuse in Divorce*, 4 J. CHILD SEXUAL ABUSE 1, 1–2 (1995).

116. *See* Eric Lesh, *Jurisdiction Friction and the Frustration of the Hague Convention: Why International Child Abduction Cases Should Be Heard Exclusively by Federal Courts*, 49 FAM. CT. REV. 170, 175 (2011) (arguing that most U.S. judges and attorneys lack experience and expertise with Hague Convention cases); *see also* Catherine Norris, *Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses Under the Hague Convention on International Child Abduction*, 98 CAL. L. REV. 159, 190 (2010) ("[M]any federal judges who hear Hague petition cases have little to no experience with . . . domestic violence claims, or interviewing children.").

117. *See generally* Debra Pogrund Stark et al., *Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform Proposal*, 26 MICH. J. GENDER & L. 1 (2019) (conducting a literature review of such frameworks and their application in U.S. statutes and case law).

118. Gabrielle Davis, *A Systematic Approach to Domestic Abuse-Informed Child Custody Decision Making in Family Law Cases*, 53 FAM. CT. REV. 565, 567–68 (2015).

119. *Id.*; s*ee also* JESSICA S. GOLDBERG & SUDHA SHETTY, REPRESENTING BATTERED RESPONDENTS UNDER THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A PRACTICE GUIDE FOR ATTORNEYS AND DOMESTIC VIOLENCE VICTIM ADVOCATES (2015) (providing information about domestic violence dynamics in Hague Convention cases and recommending litigation strategies to battered mothers and their advocates).

occasion.[120] A.M.T. then spent the second month of her life in a safe house with her mother.[121] Surprisingly, despite the district court's finding that Monasky's testimony of domestic abuse was "credible,"[122] the U.S. Supreme Court concluded that Taglieri had never "abused A.M.T. or otherwise disregarded her well-being."[123]

Since the establishment of the Hague Convention, the extent to which research is being conducted about trauma in children who have witnessed domestic violence has exploded.[124] A child who witnesses physical violence or verbal abuse can suffer trauma, even if they were not the target of that violence or abuse themselves.[125] This experience includes children who are preverbal when they witness the abuse, like two-month-old A.M.T.[126] A child's exposure to domestic violence, in itself, has been described as a form of child abuse.[127] Further, "[t]he majority of children in [the United States] who are identified as having been exposed to violence never receive services or treatments that effectively help them to stabilize themselves, regain their normal developmental trajectory, restore their safety, and heal their social and emotional wounds."[128]

The potential trauma to children exposed to intimate partner violence shows that we cannot overstate the need for full judicial recognition of battered women's circumstances. Courts run the risk of imposing devastating, long-term harm to children if they refuse to properly account for domestic violence claims and fail to intervene to protect children.[129] Children who have lived around domestic violence

120. *See* Taglieri v. Monasky, 907 F.3d 404, 406 (6th Cir. 2018) (noting Taglieri and Monasky had heated dispute after A.M.T.'s birth).

121. *Id.*

122. Taglieri v. Monasky, No. 1:15 CV 947, 2016 WL 10951269, at *13 (N.D. Ohio Sept. 14, 2016).

123. *See* Monasky v. Taglieri, 140 S. Ct. 719, 729 (2020) ("But the District Court found 'no evidence' that Taglieri ever abused A.M.T. or otherwise disregarded her well-being.").

124. *See* Jeffrey L. Edleson, *The Role of Expert Witnesses in Proving Grave Risk to Children*, 25 DOMESTIC VIOLENCE REP., Oct./Nov. 2019, at 5, 5 (discussing increase in this research and its effects on public policy and judicial process).

125. *See generally* UNICEF, *supra* note 112.

126. Studies suggest that preverbal child witnesses do get triggered later in life but do not recognize the triggers because the associated trauma-processing part of their brain was not sufficiently developed to process the trauma at that time it was experienced. *See generally* Dorothy Dreier Scotten, Pre-Verbal Trauma, Dissociation and the Healing Process (Nov. 1, 2002) (Ph.D. dissertation, Lesley University) (on file with Lesley University Digital Commons) (discussing effects of trauma experienced by pre-verbal children). *See also* Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757, 789–91 (discussing various symptoms and behavioral issues of different age groups of children exposed to domestic violence).

127. *See* Haddix, *supra* note 126, at 789 (quoting Bonnie Westra & Harold P. Martin, *Children of Battered Women*, 10 MATERNAL-CHILD NURSING J. 41, 50 (1981)) ("In fact, some social scientists have described domestic violence as a form of child abuse, reasoning that the child who witnesses violence is 'for all intents and purposes, exposed to the same emotional milieu as the battered child.'").

128. ROBERT L. LISTENBEE, JR. ET AL., U.S. DEP'T OF JUST., REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 81 (2012).

129. *See id.* (noting children exposed to domestic violence who do not receive treatment become stuck in cycle of survival and defense).

need to receive additional services and support:

> For many victimized children, living in survival mode (constantly reacting in the flight-or-fight response, even when danger is not imminent) may fundamentally alter the rest of their lives, derailing their psychological, physical, and social-emotional development. Even after the violence has ended, these child survivors suffer from severe problems with anxiety, depression, anger, grief, and posttraumatic stress that can mar their relationships and family life and limit their success in school or work, not only in childhood but throughout their adult lives. Without services or treatment, even children who appear resilient and seem to recover from exposure to violence still bear emotional scars that may lead them to experience these same problems years or decades later . . . .[130]

The WHO corroborates these findings:

> Children who grow up in families where there is violence may suffer a range of behavioural and emotional disturbances. These can also be associated with perpetrating or experiencing violence later in life. Intimate partner violence has also been associated with higher rates of infant and child mortality and morbidity (through, for example diarrhoeal disease or malnutrition and lower immunization rates).[131]

While this scholarship is extremely pertinent to the many Hague Convention cases involving domestic violence allegations, it is often completely ignored or underutilized by courts.[132] Many legal scholars and experts hypothesize that this oversight is due to the scholarship's incongruity with prominent traditional views about the operation of the Hague Convention.[133] The traditional view of the "best interests" of the child in Hague Convention cases was shaped by the outdated, now-inaccurate assumption that the typical abductor was the non-primary caregiver—usually a lonely father upset at the loss of daily contact with his child.[134] In such cases, the child's return to the primary caregiver was typically assumed to be the best outcome in order to "restore the status quo" and protect the stability of the child's life.[135]

Just as the Hague Convention did not anticipate that today's "abductors" would be mothers fleeing domestic violence, it also does not allow courts to easily recognize that the best interests of a child could warrant "abduction" from the left-behind parent solely because of the "abducting" parent's experience of abuse. It is perhaps impossible to fully reconcile these principles of the Hague Convention with the modern child custody framework, which allows a child's best interests to be determined *indirectly* through abuse of the "abducting" parent.[136] Courts are wary

130. *Id.*

131. *Violence Against Women, supra* note 73.

132. *See* Edleson, *supra* note 124, at 5 (explaining need for decades of social science research to be taken into account in Hague Convention cases and noting that lawyers rarely use such scholarship in court).

133. *Id.*

134. Brenda Hale, *Taking Flight—Domestic Violence and Child Abduction*, 70 CURRENT LEGAL PROBS. 3, 4 (2017), https://academic.oup.com/clp/article/70/1/3/4082282.

135. *Id.*

136. *See* Shetty & Edleson, *supra* note 103, at 123 ("In practice, drawing the line between

of situations in which they might have to make inferences connecting the "abducting*"* parent's experiences to the best interests of the child, despite the abundance of prominent scholarship providing strong psychological and sociological bases that compel recognition of this connection.[137]

IV. LITIGATION PROCESS FOR INTERNATIONAL CHILD CUSTODY DISPUTES

On October 25, 1980, the United States, along with twenty-two other countries, unanimously adopted the Hague Convention[138] at the fourteenth session of the Hague Conference of Private International Law.[139] The Hague Convention's purpose is 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."[140] Under the Hague Convention, the phrase "international child abduction" is "synonymous with the unilateral removal or retention of children by parents, guardians or close family members."[141] The Hague Convention does not intend to resolve custody disputes[142]—it only allows for the resolution of the preliminary abduction claims by empowering courts of member states to determine a child's country of habitual residence and, if necessary, to order the child's expedient return to that habitual residence via the mandatory return provision.[143] Because only the country of the child's habitual residence will have jurisdiction over underlying custody disputes,[144] the initial abduction inquiry is limited to a determination of whether the child has been wrongfully removed or retained from their habitual

---

custody decisions and decisions to return the child to a country of habitual residence seems to be much more difficult. Judges are being asked to decide what is in the best interests of the child, which is not so different from the issues raised in custody and visitation determinations in local family courts.").

137. *See* GOLDBERG & SHETTY, *supra* note 119, at ii ("A parent who flees across international borders due to domestic violence often does so for reasons involving her own safety and security and the safety and security of her children. Instead, they frequently find themselves faced with a court battle under the Hague Convention in which they are viewed as an 'abductor,' by a court that may not understand the dynamics of domestic violence or how those dynamics are relevant to the safety of the parties' children and the exceptions to return under the Convention.").

138. Hague Convention, *supra* note 6. Currently, the Hague Convention has 101 state parties. *See also 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HCCH https://www.hcch.net/en/instruments/conventions/status-table/?cid=24 (July 19, 2019) (listing all Contracting Parties to the Hague Convention as of July 2019).

139. *See* BEAUMONT & MCELEAVY, *supra* note 6, at 2–3 (describing adoption of the Hauge Convention).

140. Hague Convention, *supra* note 6, pmbl. The Convention defines "rights of access" as the right "to take a child for a limited period of time to a place other than the child's habitual residence." *Id.* art. 5(b).

141. BEAUMONT & MCELEAVY, *supra* note 6, at 1.

142. *See* Hague Convention, *supra* note 6, art. 19 ("A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.").

143. *See id.* art. 8–20 (describing Hague Conventions return provisions and limitations on courts to consider custody rights during habitual-residence determinations).

144. Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. DAVIS L. REV. 1049, 1063 (2005).

residence.[145] This limited inquiry generally means that courts do not consider arguments or evidence about the best interests of individual children in determinations of a child's habitual residence.[146]

The United States ratified the Hague Convention in 1988 and subsequently passed the International Child Abduction Remedies Act (ICARA).[147] ICARA implements the Hague Convention into U.S. domestic law by granting original jurisdiction to both state and federal courts to hear cases under the Hague Convention, and provides them with statutory procedures and remedies.[148] Generally speaking, parents or guardians seeking the return of wrongfully removed or retained children may attempt to do so with or without the Hague Convention and ICARA, using such common methods as voluntary agreements, litigation, or other alternative dispute resolution methods.[149] To successfully petition for a return of a child under the Hague Convention, a left-behind parent must prove the following elements by a preponderance of the evidence: that the child (1) is less than 16 years old and (2) has been wrongfully removed or retained (3) from his or her habitual residence, (4) in violation of the custody rights of the left-behind parent.[150] Another significant constraint is that the Hague Convention must be in force between the two countries—the county from which *and* the country to which the parent and child fled—at the time of the alleged abduction.[151] Further, the Hague Convention's return

145. ELISA PÉREZ-VERA, EXPLANATORY REPORT BY ELISA PÉREZ-VERA 431 (offprt. from *ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION* (1980), BOOK III, *CHILD ABDUCTION* 1981).

146. *See* Hale, *supra* note 134, at 8 ("In Hague Convention proceedings, there has always been a potential conflict between the best interests of the individual child involved and the best interests of all the children who have been abducted or are at risk of abduction. Some argue that the welfare of the individual child should not be sacrificed to the greater good of the many. Others argue that the courts of the home country are almost always better placed to decide where the child's true welfare lies, so there is no real conflict. The Convention is as much a choice of forum instrument as it is an instrument about the best interests of children."); s*ee also* Melissa S. Wills, *Interpreting the Hague Convention on International Child Abduction: Why American Courts Need to Reconcile the Rights of Non-Custodial Parents, the Best Interests of Abducted Children, and the Underlying Objectives of the Hague Convention*, 25 REV. LITIG. 423, 434–436 (2006) (explaining structure of the convention).

147. International Child Abduction Remedies Act, 22 U.S.C. §§ 9001–9011.

148. *Id. See generally* Lesh, *supra* note 116 (arguing federal courts are more competent in handling Hague Convention cases and consolidating the number of courts hearing such cases would help judges to acquire much-needed experience and expertise).

149. *See* U.S. DEP'T OF STATE, *supra* note 2, at xiii–xiv (listing number of cases initiated through extra-judicial proceedings in member countries).

150. JAMES D. GARBOLINO, FED. JUD. CTR., THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR JUDGES, at xii (2d. ed. 2015).

151. The Hague Convention is automatically in force between all "member states" (i.e., those states which participated in the Hague Convention and ratified it). Hague Convention, *supra* note 6, at pmbl. For the Hague Convention to be in force between a member state and a "party state" (i.e., a state that did not participate in the Convention but subsequently acceded to the Convention), the member state must expressly accept that accession of the particular party state. *See* GARBOLINO, *supra* note 150, at 17–19 (explaining application of Hague Convention); *see also* Tom Harper, *The Limitations of the Hague Convention and Alternative Remedies for a Parent Including Re-Abduction*, 9 EMORY INT'L L. REV. 257, 264 (1995) ("[I]f a child is abducted from the United States to a non-Hague nation, no redress under the [C]onvention is available."). The United States

mechanism can only be applied to cases in which a child has been abducted to a member state that is not the child's habitual residence.[152]

A. Process for Determining a Child's Habitual Residence

> *"[T]he fact that the best interests of the child are not expressly made a primary consideration in Hague Convention proceedings does not mean that they are not at the forefront of the whole exercise."*[153]

Under the Hague Convention, a child may have only one country of habitual residence at the time of their removal or retention.[154] The habitual-residence determination functionally controls whether the child was wrongfully removed or retained.[155] The selection of a child's habitual residence is therefore a matter of central importance for a petition under the Hague Convention.[156] Curiously, the Hague Convention does not define the term "habitual residence,"[157] but courts commonly understand that a habitual-residence determination is "fact-intensive [and] cannot be reduced to a predetermined formula and necessarily varies with the circumstances of each case."[158] Traditionalists emphasize that the intended operation

---

currently has seventy-nine treaty partners. *U.S. Hague Convention Treaty Partners,* U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/abductions/hague-abduction-country-list.html (last visited Sept. 18, 2020).

152. *See* Rhona Schuz, *Policy Considerations in Determining the Habitual Residence of a Child and the Relevance of Context*, 11 J. TRANSNAT'L L. & POL'Y 101, 113–114 (2001) (footnotes omitted) ("In removal cases, this will generally involve finding that the child has acquired a habitual residence in the country where he was living before the removal; whereas in the retention cases it will involve finding that the child has not acquired a habitual residence in the country where he was living immediately before the retention.").

153. Hale, *supra* note 134, at 8.

154. *See* Mozes v. Mozes, 239 F.3d 1067, 1075 n.17 (9th Cir. 2001) ("This is consistent with the view held by many courts that a person can only have one habitual residence at a time . . . ."); Didon v. Castillo, 838 F.3d 313, 321 (3d Cir. 2016) ("We conclude that the text of the Hague Convention unambiguously contemplates that a child may have only one habitual residence country at a time.").

155. *See* Hague Convention, *supra* note 6, art. 3 (stating removal of child is wrongful where it violates law of state of habitual residence).

156. *See* Redmond v. Redmond, 724 F.3d 729, 742 (7th Cir. 2013) ("[E]very Hague Convention petition turns on the threshold determination of the child's habitual residence; all other Hague determinations flow from that decision.").

157. *See* Tai Vivatvaraphol, *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases under the Hague Convention*, 77 FORDHAM L. REV. 3325, 3338 (2009) ("Despite the importance that determining a child's habitual residence plays in Child Abduction Convention proceedings, it is a tradition of the Hague Conferences not to define this term.").

158. THE MEANING OF HABITUAL RESIDENCE UNDER THE HAGUE CONVENTION, 2A MASS. PRAC., FAMILY LAW AND PRACTICE § 65:3 (4th ed., June 2020). A prominent Hague Convention case from the United Kingdom attests that "[it] is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions." *In Re* Bates, 1989 WL

of the Hague Convention depends on relatively consistent determinations of a child's habitual residence across similar fact-patterns,[159] and they complain that the broad scope of judicial discretion and growing variations in habitual-residence determinations frustrate the primary purpose of the Hague Convention.[160] The Hague Convention's purpose, they argue, is not merely to provide injunctive relief but also to generally discourage unilateral decisions made by one parent to move their child out of the country in violation of the custody or visitation rights of the other parent.[161]

Courts in the United States and across the world disagree about the extent to which subjective parental intent should be considered in habitual-residence determinations, or whether they should only consider objective factors.[162] Some scholars argue that consideration of parents' shared subjective intent regarding their child's habitual residence "complicates an otherwise easy determination of habitual residence."[163] Factors for determining a child's habitual residence fall into one of two general categories: (1) factors regarding parental intent or (2) factors regarding acclimatization of the child to the country of residence.[164] For the first category, in addition to considering parents' express agreements or declarations when evaluating parental intent, courts may also consider factors like employment, home ownership, relocation efforts, location of bank accounts, driver's licenses, professional licenses,

---

1683783, at *13 (quoting 1 DICEY & MORRIS ON THE CONFLICT OF LAWS 166 (Lawrence Collins et al. eds., 11th ed. 1987)).

159. ICARA recognizes "the need for uniform international interpretation of the Convention." 22 U.S.C. § 9001(b)(3)(B).

160. *See* Vivatvaraphol, *supra* note 157, at 3361 (arguing for analysis that both realizes the goals of the drafters of the Hague Convention and provides the certainty and consistency required to resolve international child abduction cases).

161. *See* Miller v. Miller, 240 F.3d 392, 400 (4th Cir. 2001) ("[A] parent cannot create a new habitual residence by wrongfully removing and sequestering a child."); Friedrich v. Friedrich, 78 F.3d 1060, 1064 (6th Cir. 1996) ("[T]he Hague Convention is generally intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court.").

162. *See, e.g.*, Vivatvaraphol, *supra* note 157, at 3328 (concluding that the Second, Third, Eighth, Ninth, and Eleventh Circuits consider shared parental intent, while the Sixth Circuit adhered to an objective-evidence-only standard). This disagreement could also be framed in terms of the "degree to which habitual residence should be determined from the perspective of the child versus the perspective of the parents." Jeff Atkinson, *The Meaning of "Habitual Residence" Under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children*, 63 OKLA. L. REV. 647, 650 (2011); *see also* Nicolson v. Pappalardo, 605 F.3d 100, 103–04 (1st. Cir. 2010) ("[T]he majority of federal circuits . . . have adopted an approach that begins with the parents' shared intent or settled purpose regarding their child's residence.").

163. Vivatvaraphol, *supra* note 157, at 3329. Parental relationships may also be so tumultuous that they cannot make joint decisions about a child's living arrangements. *See, e.g.*, Arndt v. Arndt, 100 A.D.3d 879, 880 (N.Y. 2012) (finding child's best interests resulted in court awarding sole custody to only one parent because the parents were in such an argumentative relationship that they could not make the kind of joint decisions required to maintain a custody agreement).

164. *See* Atkinson, *supra* note 162, at 654–57 (describing parent-related factors as parental employment, professional licenses and driver's license, citizenship, and immigration status; and child-related factors as school enrollment, length of stay, and child's age).

marriage stability, and immigration status.[165] For the second category, factors illustrating the acclimatization of the child could include school enrollment, social activity, length of time in the country, and age.[166]

A growing number of scholars call for courts to also give meaningful consideration to the possibility that the child's presence in a country is the result of one parent's coercion of the other.[167] Some courts have acknowledged the influence of coercion and have given it weight when determining a child's habitual residence in limited cases wherein the evidence established that the coercion included physical use of force and was not solely psychological abuse or manipulation.[168] In addition to the reasons discussed earlier, claims of coercion should be taken particularly seriously in determinations of habitual residence for infant children because the parents' decisions and future plans are some of the most substantive factors.[169]

B. Habitual-Residence Determinations for Infant Children

> *Courts' continued treatment of these child-protecting abductions as child-harming abductions, and the Treaty's underlying emphasis on return, have resulted in harmful return orders, particularly in domestic violence cases. Such harms are inevitably compounded where the child is an infant . . . .*[170]

Habitual-residence determinations for very young children, like A.M.T., may be significantly shaped by how heavily a court weighs the child's age.[171] The Sixth Circuit has observed that "a very young or developmentally disabled child may lack

---

165. *Id.* at 654–56.

166. *Id.* at 656–57.

167. *See, e.g.*, Karen Brown Williams, *Fleeing Domestic Violence: A Proposal to Change the Inadequacies of the Hague Convention on the Civil Aspects of International Child Abduction in Domestic Violence Cases*, 4 J. MARSHALL L.J. 39, 43–44 (2011) (stating connection between child abduction and domestic violence between parents).

168. *See, e.g.*, Application of Ponath, 829 F. Supp. 363 (Dist. Ct. Utah 1993) (finding that habitual residence of minor child was in Utah because child was born in Utah; mother voluntarily took child to visit father in Germany; and father used verbal, emotional, and physical abuse to detain mother and child against mother's wishes, which demonstrated sufficient coercion to compromise the legitimacy of mother's choice and possibility of settled purpose in the child's stay in Germany). *But see* Catherine Klein et al., *The Implications of the Hague International Child Abduction Convention: Cases and Practice*, NAT'L IMMIGRANT WOMEN'S ADVOC. PROJECT (NIWAP) 10, https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/pdf/FAM-Man-Ch6.3-HagueIntlChildAbduction7.12013.pdf (last visited Sept. 25, 2021) ("Other courts have refused to take any coercion or abuse into account when determining habitual residence.").

169. *See supra* Part III for discussions of the influence of coercion in both intimate partner violence and custody cases.

170. Joan Meier & Bryan Walsh, *Uncertain Intent: The Difficulties of Applying a Shared Intent Analysis for Habitual Residence to Infants in Families with Domestic Violence*, 25 DOMESTIC VIOLENCE REP., Oct./Nov. 2019, at 1, 11 https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/webinar-ppt/hague/hague2/dvreport.pdf.

171. *Id.* at 3.

cognizance of their surroundings sufficient to become acclimatized to a particular country or to develop a sense of settled purpose . . . ."[172] Given an infant's limited ability to acclimate to a country, courts usually use the "shared parental intent" standard to consider the underlying circumstances of the parents when explaining an infant's presence in a country as a proxy for the factors demonstrating "acclimatization."[173] In these determinations, however, courts both within the United States and abroad differ in how much weight they generally attribute between objective factors, parent's actions, and subjective intent.[174]

When the district court heard *Taglieri v. Monasky*, the Sixth Circuit's preference for a "shared parental intent" analysis for younger children was not yet established precedent. This preference was established by the case *Ahmed v. Ahmed*, which found that "virtually all children who lack cognizance of their surroundings are *unable* to acclimate, making the [acclimatization] standard generally unworkable."[175] In *Ahmed*, the Sixth Circuit upheld the trial court's finding that a father had not carried his burden to prove there was shared parental intent.[176] In so doing, the court found that it was completely irrelevant that the mother and father had settled intent to live in the left-behind country *before* their twins were conceived.[177] Rather, the court was looking for a showing of settled mutual intent for where the parents intended their twins to live during the mother's pregnancy and the two-month period in which the twins lived with both parents in the left-behind country.[178] Had the district court in *Monasky* applied the *Ahmed* rule to the strikingly similar facts of *Monasky*, Taglieri might not have carried his burden to show that Monasky shared his intent to raise A.M.T. in Italy during her pregnancy and for the two months A.M.T. lived in Italy.[179] In the *Monasky* decision, the Sixth Circuit's *en banc* majority acknowledged that possibility but refused to remand so that the district court could reweigh the facts in light of *Ahmed*.[180] The Sixth Circuit disclaimed that the district court in *Monasky* had properly presumed the need to look for shared parental intent.[181] Further, the Sixth Circuit reasoned that they had upheld the trial court's decision in *Ahmed* and were similarly obliged to defer to the findings of the

172. Robert v. Tesson, 507 F.3d 981, 992 n.4 (6th Cir. 2009).

173. Joe Digirolamo & Manal Cheema, Monasky v. Taglieri*: The (International) Case for a True Hybrid Approach*, 60 VA. J. INT'L L. ONLINE 1, 5–8 (2020); *see also* Stephen I. Winter, *Home is Where the Heart Is: Determining Habitual Residence Under the Hague Convention on the Civil Aspects of International Child Abduction*, 33 WASH. U. J. L. & POL'Y 351, 381 (2010) ("[A] habitual residence determination must consider parental intent when very young children are involved, as they are incapable of forming attachments independent of their primary caretaker.").

174. *See id.* (discussing strengths of different approaches for determining habitual residence in U.S. circuit courts: (1) shared parental intent, (2) child-centered acclimatization, and (3) hybrid standards, and outlining preferences of various U.S. treaty partners).

175. Ahmed v. Ahmed, 867 F.3d 682, 689 (6th Cir. 2017).

176. *Id.* at 690.

177. *Id.*

178. *Id.*

179. Supplemental Reply Brief of Appellant Michelle Monasky on Reh'g en Banc at 12, Taglieri v. Monasky, 907 F.3d 404 (6th Cir. 2018) (No. 1:15-cv-00947).

180. Taglieri v. Monasky, 907 F.3d 404, 410 (6th Cir. 2018).

181. *Id.* at 420.

district court in *Monasky* unless those findings were clearly erroneous.[182]

C. The Totality of the Circumstances Review vs. the Actual Agreement Standard

Monasky argued that an actual agreement standard ought to be applied in the determination of A.M.T.'s habitual residence, offering that she and Taglieri never had a "meeting of the minds" to determine that they would raise A.M.T. in Italy.[183] In rejecting Monasky's argument for the actual agreement standard, the Supreme Court reasoned that the standard was too narrow and would not necessarily expedite habitual-residence determinations.[184] Instead, the Supreme Court declared that a totality of the circumstances standard should be adopted for habitual-residence determinations since a "wide range of facts other than an actual agreement, including [those] indicating that the parents have made their home in a particular place, can enable a trier [of fact] to determine whether an infant's residence has the quality of being 'habitual.'"[185]

It is widely recognized that habitual-residence determinations should be "sensitive to the unique circumstances of the case and informed by common sense."[186] In defense of its choice of the totality of the circumstances standard, the Supreme Court surveyed the habitual-residence frameworks of courts in the United Kingdom, the European Union, Canada, Australia, Hong Kong, and New Zealand and concluded there is a "clear trend among [U.S.] treaty partners . . . to treat the determination of habitual residence as a fact-driven inquiry into the particular circumstances of the case."[187] In rejecting the actual agreement standard, the Supreme Court failed to address whether and to what extent allegations of domestic violence and child abuse should be considered within the totality of the circumstances.[188]

D. 13(b) Affirmative Defense: "Grave Risk to Child"

The Hague Convention's mandatory return mechanism requires a court to order

182. *Id.* See *infra* Section IV.E for a discussion of the clear-error standard for appellate review.

183. *Monasky*, 907 F.3d at 410.

184. Monasky v. Taglieri, 140 S. Ct. 719, 723 (2020).

185. *Id.* at 729.

186. Redmond v. Redmond, 724 F.3d 729, 744 (7th Cir. 2013).

187. *Monasky*, 140 S. Ct. at 728 (2020) (citation omitted) (drawing support from Hague Convention cases in Supreme Court of the United Kingdom, Court of Justice of the European Union, Supreme Court of Canada, High Court of Australia, and intermediate appellate courts in Hong Kong and New Zealand).

188. One scholar's survey of international case law found that "narrow[ing] the interpretation of the provisions of the Hague Convention to a simple determination of jurisdiction, regardless of the circumstances, ignores [the reality of the impact of domestic violence and child abuse in international abduction cases]. Under such a narrow construction without regard for the circumstances under which victims of domestic violence and child abuse flee their abusers across international borders, the Hague Convention governs their re-victimization." Jeanine Lewis, *Hague Convention on the Civil Aspects of International Child Abduction: When Domestic Violence and Child Abuse Impact the Goal of Comity*, 13 TRANSNATL. LAW. 391, 449 (2000).

the child returned to the State of the non-abducting parent.[189] There are only five qualifying defenses[190] a parent may raise for an exemption to the mandatory return mechanism.[191] If domestic violence allegations are not considered within the context of a totality of the circumstances review for habitual residence, they are effectively limited to an affirmative Article 13(b) defense, commonly known as the grave risk exception:

> [T]he judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body that opposes its return establishes that . . . 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.[192]

The scope of judicial discretion to grant exceptions to the mandatory return mechanism of the Hague Convention is limited by design.[193] Courts often justify their reluctance to apply the 13(b) defense by citing the maxim that only the country of the child's habitual residence has jurisdiction to adjudicate custody disputes.[194] Therefore, only that country is responsible for, and thus *permitted to*, consider the best interests of each child.[195]

It is true that the drafters of the Hague Convention did not intend for fleeing parents to use the 13(b) defense "as a vehicle to litigate (or relitigate) the child's best interests."[196] This traditional argument has been widely adopted in the United States

---

189. *Id.* at 406.

190. *See* Erin Gallagher, *A House Is Not (Necessarily) A Home: A Discussion of the Common Law Approach to Habitual Residence*, 47 N.Y.U. J. INT'L L. & POL. 463, 466–67 (2015) ("First, if the 'left-behind' parent does not commence proceedings for return of the child within one year from the date of the wrongful removal or retention, a court is not required to order the return of the child if he or she is now settled in the new environment. Second, if the left-behind parent either consented to or subsequently acquiesced to the removal or retention, a court does not have to order the return of the child. Third, a court is not bound to order the return of 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.' Fourth, if the court finds that the child is mature enough and objects to being returned, it can take into account his or her views and refuse to order return. Finally, the requested State may refuse to return the child if it would not be permitted by its principles relating to the protection of human rights and fundamental freedoms.").

191. These defenses are applied after an adverse habitual-residence determination in order to override the mandatory return mechanism. *See generally id.* (describing defenses to Hague Convention return mechanism). They are brought by the parent whose country was rejected as the child's habitual residence and consequently is facing the imminent return of their child to the habitual residence (i.e., the foreign country). *Id.*

192. Hague Convention, *supra* note 6, art. 13.

193. *See* Gonzalez Locicero v. Nazor Lurashi, 321 F. Supp. 2d 295, 297 (D.P.R., 2004) (explaining that exceptions to Hague Convention's return mechanism should be interpreted narrowly).

194. *See* Hale, *supra* note 134, at 5 (indicating disputes over custody rights are best settled in child's home country, as all evidence and witnesses are likely to be situated there). *But see* Van De Sande v. Van De Sande, 431 F.3d 567, 571 (7th Cir. 2005) ("If handing over custody of a child to an abusive parent creates a risk of grave harm to the child . . . the child should not be handed over, [no matter how] severely the law of the parent's country might punish such behavior.").

195. *Id.*

196. Text and Legal Analysis of the Hague International Child Abduction Convention, 51

and prioritizes the following concerns to support a narrow reading of the 13(b) defense:

> [E]xpansion of the defense in Hague Convention cases with alleged spousal or child abuse may result in comprehensive, full-scale hearings that use expert testimony and individualized best-interest assessments. This extended litigation would frustrate the Convention's objective of providing a prompt return mechanism that does not delve into the merits of custody determinations.[197]

In U.S. courts, a fleeing parent must meet a clear and convincing evidentiary standard to establish a grave risk of physical or psychological harm to their child.[198] The burden of proof for this affirmative defense is thus significant.[199] The United States is one of only a few countries in the world that applies the clear and convincing evidence standard—most countries apply the less onerous preponderance of the evidence standard instead.[200]

In the United States, the clear and convincing evidence standard is met only in cases in which there is significant evidence demonstrating that the *child* had already been the victim of the parent's physical abuse,[201] which aligns with the conservative view of the 13(b) defense by only granting those defenses which make the strongest showings of foreseeability with traditional evidence.[202] Problematically, this approach largely prioritizes evidence about the likelihood that harm will recur over its potential magnitude.[203] U.S. courts commonly refuse to apply the 13(b) defense in situations in which the alleged domestic violence was directed solely at a parent

---

Fed. Reg. 10494 (Mar. 26, 1986).

197. Wills, *supra* note 146, at 449.

198. *See* 22 U.S.C. § 9003(e) (stating party opposing child's return must satisfy exception in article 13(b) by clear and convincing evidence); Merle H. Weiner, *A Note from the Guest Editor,* 25 DOMESTIC VIOLENCE REP., Oct./Nov. 2019, at 1, 3, https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/webinar-ppt/hague/hague2/dvreport.pdf.

199. The narrow application of the 13(b) defense has created considerable—sometimes insurmountable—obstacles for survivors of domestic violence to meet the high burden of proof required in Hague Convention cases. *See* Edleson, *supra* note 124, at 5–6 (explaining that focus on child's best interests was sometimes detrimental to survivors' cases).

200. *See* Lewis, *supra* note 188, at 409–14 (discussing different standards employed by member states to define grave risk of harm exception).

201. Some courts have found that only the risk of physical harm, as opposed to psychological harm, was grounds for granting an exception under the Hague Convention. *See e.g.*, Flynn v. Borders, 472 F. Supp. 2d 906 (E.D. Ky. 2007) (finding that grave risk was not established despite older sibling's assertion that mother of young girl was drunk and psychologically abusive toward her when they lived together, because the Irish court could consider the psychological abuse claims in subsequent custody proceedings).

202. *See* Lauren Cleary, *Disaggregating the Two Prongs of Article 13(b) of the Hague Convention to Cover Unsafe and Unstable Situations*, 88 FORDHAM L. REV. 2619, 2633–37 (2020) (outlining conservative nature of U. S. courts' interpretation of 13(b) defense).

203. *Id.* at 2634–35 (citing Simcox v. Simcox, 511 F.3d 594, 608 (6th Cir. 2007)) ("For situations that fall in between these two extremes, the court must conduct a fact-driven inquiry to decide whether the defense is satisfied, considering the frequency of the violence, the likelihood that the abuse will recur, and whether the court can implement any conditions to adequately protect the children.").

or caregiver,[204] even when that violence was lethal[205] and occurred in the presence of the child.[206] Courts have used this justification even when fleeing parents claim that the dangers in the child's country of habitual residence, *in addition to* the corresponding failure of that country's judiciary and law enforcement to protect children from those dangers, create a grave risk to the child.[207]

E. Standards of Appellate Review: Clear Error vs. De Novo

The Supreme Court held in *Monasky v. Taglieri* that the Sixth Circuit's *en banc* majority had properly "reviewed the District Court's habitual-residence determination for clear error and found none."[208] In the Sixth Circuit, reviewing a lower court's decision for clear error entails maintaining that court's findings of fact unless the circuit court has "the definite and firm conviction that a mistake has been committed."[209] However, the Sixth Circuit dissent argues that the habitual-residence

---

204. Courts have not found a grave risk to the child when a parent's abuse is directed solely to the other parent, or even another sibling, absent allegations that the parent has actually abused the child. *See, e.g.*, Soto v. Contreras, 880 F.3d 706, 713 (5th Cir. 2018) (stating that bright-line rule that spousal abuse allegations constitute grave risk to child would frustrate Hague Convention's fundamental principle that the child's best interest requires custody decisions to be made in the child's country of habitual residence); Ambrioso v. Ledesma, 227 F. Supp. 3d 1174, 1185–91, (D. Nev. 2017) (finding allegations that father raped mother did not establish grave risk of harm to child in returning child to father because of absence of any allegations that father had directly abused child); *see also* Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 376–77 (5th Cir. 1995) (finding mother's allegations that she suffered physical, sexual, and mental abuse by husband and feared for her child's safety were not specific enough for grave risk defense); Ibarra v. Quintanilla Garcia, 476 F. Supp. 2d 630, 635 (S.D. Tex. 2007) (finding insufficient evidence of grave risk to child to support mother's defense that father physically abused child in addition to physically abusing mother).

205. Courts have refused to apply the 13(b) defense even when the left-behind parent has pending criminal homicide charges in the country of habitual residence. *See* March v. Levine, 136 F. Supp. 2d 831, 852 (M.D. Tenn. 2000), *aff'd* 249 F.3d 462 (6th Cir. 2001) (concluding that maternal grandparents' allegation that father had killed mother, thereby depriving the children of her love and guidance, was not grave risk when no evidence showed father had ever abused children).

206. *See* Miltiadous v. Tetervak, 686 F. Supp. 2d 544 (E.D. Pa. 2010) (finding father's physical and emotional abuse of mother satisfied affirmative defense that returning children to habitual residence of Cyprus would expose them to grave risk of physical or psychological harm or otherwise intolerable situation, since father beat mother repeatedly, drank heavily, displayed bouts of unreasonable rage toward mother and children, and psychologist testified that one of the children had PTSD stemming from her witnessing father's abuse of mother); *see also* In re D.T.J., 956 F. Supp. 2d 523 (S.D.N.Y. 2013) (finding that returning wrongfully removed child back to habitual residence in Hungary with father posed grave risk of inflicting serious emotional damage because, although child was mentally healthy, child had been traumatized by father's previous verbal assaults on mother).

207. *See* Mlynarski v. Pawezka, 931 F. Supp. 2d 277 (Dist. Ct. Mass. 2013), *aff'd* 2013 WL 7899192 (1st Cir. 2013) (finding that a U.S. government report about Poland's history of domestic violence did not prove child would face grave risk of harm since that risk could be evaluated in the Polish court's custody proceedings). Such a claim would likely be more successful as an Article 20 defense, which allows a court to refuse to return a child to a country when it violates "human rights and fundamental freedoms." Hague Convention, *supra* note 6, art. 3, 20.

208. Monasky v. Taglieri, 140 S. Ct. 719, 725 (2020).

209. United States v. Yancy, 724 F.3d 596, 598 (6th Cir. 2013).

determination of the district court should have been remanded *de novo*.[210]

While some circuit courts have used *de novo* review to evaluate habitual-residence determinations, there was no clear consensus on the preferred standard of review prior to the Supreme Court's decision in *Monasky*.[211] The standard of review used by appellate courts in other countries is mixed, but a majority of appellate courts of U.S. treaty partners appear to use some form of deferential review for habitual-residence determinations.[212]

In *Monasky*, the Supreme Court selected clear-error review because of its popularity and because of the Hague Convention's emphasis on the need for an expedient return of a child to their habitual residence.[213] The Supreme Court explained that "[a]s a deferential standard of review, clear-error review speeds up appeals and thus serves the Convention's premium on expedition."[214]

V. THE LOGIC OF MONASKY V. TAGLIERI

This Section argues that the Sixth Circuit's opinion, affirmed by the Supreme Court, uses misguided and outdated logic because it (1) defers consideration of domestic violence allegations to the habitual-residence jurisdiction, (2) limits the application of the 13(b) defense, (3) prevents victims of domestic violence from meaningful litigation, and (4) relies on outdated concepts of gender roles and child abduction. *Monasky* contains several passages that are representative and illustrative examples of this misguided logic.

A. The Proper Place for Domestic Violence Allegations

Far from delivering her characteristically vigorous defense of women's rights, Justice Ginsburg makes scant mention of the role of an "abducting" parent's domestic violence allegations in a totality of the circumstances review. She opines that "[s]ettling the forum for adjudication of a dispute over a child's custody, of course, does not dispose of the merits of the controversy over custody. Domestic violence should be an issue fully explored in the custody adjudication upon the child's return."[215] Justice Ginsburg suggests that domestic violence allegations should be partially—and perhaps totally—deferred since they can be "fully explored in the custody adjudication upon the child's return" to the country of habitual residence.[216]

The *Monasky* decision portends that domestic violence allegations may be addressed in only two places: within an affirmative 13(b) defense[217] or else in

210. *See e.g.*, Taglieri v. Monasky, 907 F.3d 404, 419 (6th Cir. 2018) (Moore, J., dissenting) (opining that the case should have been remanded to district court in light of *Ahmed*).

211. Vivatvaraphol, *supra* note 157, at 3338 n.103.

212. *Monasky,* 140 S. Ct. at 730.

213. *Id.*

214. *Id.*

215. *Id.* at 729.

216. *Id.*

217. See *supra* Section IV.D for a discussion of the viability of a 13(b) defense with domestic violence allegations. See *infra* Section V.A.2 for a discussion of the import of Monasky's failure

subsequent custody proceedings in the child's habitual residence.[218] This effectively excludes it from "full" consideration in habitual-residence determinations. By limiting the scope of the habitual-residence determination, *Monasky* could limit the discretion taken by lower courts in undertaking a thorough totality of the circumstances review and in giving due consideration to best interests of children by explicitly considering the experiences of battered mothers.

The Supreme Court threw away a rare opportunity in *Monasky*[219] to incorporate modern, mainstream concerns for battered mothers[220] into Hague Convention cases. The Supreme Court should have utilized the opportunity to model a more inclusive totality of the circumstances review and to critically examine the lower courts' treatment of factors for circumstances often associated with domestic violence complaints. The international epidemic of domestic violence and the modern reality of Hague Convention cases[221] provide significant imperative to expand considerations for battered mothers—as is done in modern child custody adjudications—within the totality of the circumstances review for habitual-residence determinations. Even though the district court held that there was insufficient evidence to support Monasky's 13(b) defense,[222] the Supreme Court could have taken a more contemporary approach in its decision.

1. Subsequent Proceedings in the Left-Behind Country

The Supreme Court's suggestion that Monasky may fully pursue her domestic violence claims in subsequent custody proceedings after A.M.T.'s return to Italy is outdated and dangerous. It overlooks the legitimate reasons that battered mothers often flee to begin with[223] and ignores the foreseeability that a habitual-residence determination will be dispositive of the outcome of future custody proceedings in the country of habitual residence.[224] Here, Monasky filed a complaint with the Italian police that was never resolved and was later discredited by the Italian court in subsequent hearings.[225] Further, the Italian court terminated Monasky's parental

---

to satisfy the 13(b) defense.

218. See *supra* Section III.C for a discussion of the limited viability of an abducting mother's domestic violence allegations in custody proceedings.

219. *Monasky* is only the fourth case the Supreme Court has heard concerning the Hague Convention in the past decade. Robinson, *supra* note 5, para. 3.

220. See *supra* Part III for a discussion of the growing awareness of issues involving domestic violence within U.S. domestic law.

221. See *supra* Section III.A for statistics on the worsening epidemic of domestic violence and for a discussion of the prominence of battered mothers treated as abductors of their children under the Hague Convention.

222. Taglieri v. Monasky, No. 1:15 CV 947, 2016 WL 10951269 (N.D. Ohio 2016).

223. See *supra* Section III.B for a discussion of the often-shared circumstances of battered mothers living abroad.

224. Justice Ginsburg's characterization of this decision overlooks the possibility that custody decisions could be made *de facto* in the left-behind country. See *supra* Section III.B for a discussion of the circumstances often shared by abducting battered mother. See *supra* Section III.C for a discussion of common challenges these mothers face in both domestic and foreign child custody proceedings.

225. *Taglieri*, 2016 WL 10951269, at *4.

rights ex-parte, almost immediately after her departure from Italy.[226] Therefore, the *Monasky* Court's refusal to properly account for the effect of domestic violence and coercion within the totality of the circumstances review was actually dispositive of the only two matters at issue: (1) the Italian court's treatment of Monasky's domestic violence claims and (2) Monasky's parental and custodial rights.[227] Considering these facts, Justice Ginsburg's claim that such allegations could be deferred and "fully explored in the custody adjudication upon the child's return"[228] is mere lip service. To this day, Monasky still has not regained custody of A.M.T.[229]

2. The 13(b) Grave Risk Defense

The U.S. Supreme Court gave the following justification for their failure to consider

Monasky's allegations of coercion and domestic violence:

> The Hague Convention, we add, has a mechanism for guarding children from the harms of domestic violence: Article 13(b) . . . . Monasky raised . . . an Article 13(b) defense to Taglieri's return petition. In response, the District Court credited Monasky's "deeply troubl[ing]" allegations of her exposure to Taglieri's physical abuse. But the District Court found "no evidence" that Taglieri ever abused A.M.T. or otherwise disregarded her well-being. That court also followed Circuit precedent disallowing consideration of psychological harm A.M.T. might experience due to separation from her mother.[230]

The 13(b) defense has long been criticized as an inadequate and undependable contingency to protect survivors of domestic violence or children born into domestic violence.[231] When 13(b) defenses are rejected, as in *Monasky*, battered mothers often have no other means to justify their flight from domestic violence.[232] Despite the fact that the district court claimed to credit the "'deeply troubl[ing]' allegations of exposure to Taglieri's physical abuse," it found "no evidence" that Taglieri posed a grave risk to A.M.T.[233] By limiting the application of the 13(b) defense to only cover

---

226. *Id.*

227. *See* Joan Meier & Bryan Walsh, *Uncertain Intent: The Difficulties of Applying a Shared Intent Analysis for Habitual Residence to Infants in Families with Domestic Violence*, 25 DOMESTIC VIOLENCE REP., Oct./Nov. 2019, at 1, 11 (explaining implications of the Italian court's treatment of Monasky's domestic violence claims).

228. Monasky v. Taglieri, 140 S. Ct. 719, 729 (2020).

229. *See* Meier & Walsh, *supra* note 227, at 11 (explaining that since Monasky returned to Italy she has been deprived of any parental rights, which made the return order a *de facto* custody order).

230. *Monasky*, 140 S. Ct. at 729.

231. See *supra* Section V.A for criticism of the 13(b) defense as a fail-safe.

232. *See* Quillen, *supra* note 87, at 634 ("The combination of an unsupported, artificial two-prong test, a strict reading of Article 13(b) that makes abuse of the mother practically irrelevant, and a conceptualization of habitual residence that reinforces an abuser's power over the victim all unjustly disfavor a domestic-violence victim abducting her child to escape a violent relationship."). See *supra* Section V.A for supporting case law and for a discussion of the limited applications of the 13(b) defense for situations involving domestic violence.

233. *Monasky*, 140 S. Ct. at 729 (citations omitted).

direct abuse between the abusive parent and the child—in keeping with the conservative tradition of Hague Convention cases—the district court disregarded the growing awareness and body of scholarship that discusses trauma in children who witness domestic violence, including pre-verbal infants like A.M.T.[234] The gravity of that trauma urges recognition of credible claims of violence between parents as evidence of grave risk to the child.[235] Monasky's abuse by Taglieri lacked evidence which arguably should have satisfied the 13(b) exception.[236] Therefore, the 13(b) defense here did not function as a "mechanism for guarding children from the harms of domestic violence," despite Justice Ginsburg's promise.[237] Just as the district court did not appreciate A.M.T.'s trauma from witnessing the abuse experienced by her mother, the 13(b) grave risk defense did not fully appreciate all of the "harms of domestic violence."[238]

In contrast, most U.S. treaty partners have implemented a lower bar for the 13(b) grave risk defense than the United States.[239] The United States unnecessarily increases the risk of harm to their citizens by choosing to artificially limit the scope of the totality of the circumstances review in situations involving domestic violence.[240] Monasky's evidence of her own abuse would be more likely to satisfy the grave risk defense for A.M.T. in almost any other country; demonstrably, those countries have better fail-safe procedures in place to overcome the mandatory return provision when a court does not fully consider domestic abuse or coercion within the totality of the circumstances.[241] What weight then, if any, does the trial court attribute to Monasky's circumstances (i.e., her traumatic abuse) in a totality of the circumstances review when deciding the country of A.M.T.'s habitual residence? Unfortunately, it's given practically none.[242]

B. The Role of Domestic Violence Allegations in A.M.T.'s Habitual-Residence Determination

As Monasky's story demonstrates, battered mothers often cannot secure adequate living conditions or a meaningful intervention by authorities in the child's left-behind country, both while they are experiencing violence and while they are fleeing violence.[243] The scope of the totality of the circumstances review is capable

234. See *supra* Part III for a discussion of this growing body of scholarship and its influence over domestic U.S. child custody proceedings.

235. See *supra* Section III.D for a discussion of the trauma suffered by children who witness abuse.

236. *Monasky*, 140 S. Ct. at 729.

237. *Id.*

238. *Id.*

239. *See* Cleary, *supra* note 202, at 2634–35 (explaining additional steps required by U.S. courts in order to raise 13(b) defense).

240. *Id.*

241. *Id.*

242. See *infra* notes 245–247 and accompanying text for a description of Justice Ginsberg's sparse treatment of Monasky's domestic violence allegations.

243. See *supra* Section III.B for a discussion of the shared circumstances of battered mothers in Hague Convention cases.

of considering the alleged abusive and coercive circumstances that may have compromised Monasky's free will in her choice to raise A.M.T. in Italy.[244]

1. Characterizing and Categorizing Evidence for Shared Parental Intent

The Sixth Circuit listed the following factual findings in defense of their finding of no clear error in the district court's conclusion that Monasky and Taglieri mutually intended to raise A.M.T. in Italy:

> Monasky and Taglieri agreed to move to Italy to pursue career opportunities and live "as a family" before A.M.T.'s birth. The couple secured full-time jobs in Italy, and Monasky pursued recognition of her academic credentials by Italian officials. Together, Monasky and Taglieri purchased several items necessary for raising A.M.T. in Italy, including a rocking chair, stroller, car seat, and bassinet. Monasky applied for an Italian driver's license. And Monasky set up routine checkups for A.M.T. in Italy, registered their family to host an au pair there, and invited an American family member to visit them there in six months.[245]

This conclusion was made despite the trial court's acknowledgement that other evidence indicated the contrary: "Monasky at times expressed a desire to divorce Taglieri and return to the United States. She contacted divorce lawyers and international moving companies. And Monasky and Taglieri jointly applied for A.M.T.'s passport, so that she could travel to the United States."[246] The characterization and categorization of the facts found by the Sixth Circuit above demonstrate a strong bias against Monasky and a severe under-acknowledgment of circumstances that were related to domestic abuse.[247] Further, the district court failed to account for the possibility that domestic violence and coercion frequently influence the choices of battered mothers living in foreign countries with their abusers.[248] This failure destabilizes the image of the fair playing field that the Sixth Circuit projected when it disclaimed that "faced with this two-sided record, [the district court] had the authority to rule in either direction. [It] could have found that Italy was A.M.T.'s habitual residence or [it] could have found that the United States

244. See *supra* Section IV.C for a discussion of the totality of the circumstances review.

245. Taglieri v. Monasky, 907 F.3d 404, 409 (6th Cir. 2018) (citations omitted).

246. *Id.*

247. For example, the fact that both parents bought such necessary items for taking care of a child as a rocking chair, stroller, car seat, and bassinet in Italy, are objective but arbitrary factors given disproportionate weight in demonstrating "settled mutual intent" in favor of the left-behind country. Taglieri v. Monasky, 1:15 CV 947, 2016 WL 10951269, at *8 (N.D. Ohio 2016). The Court inexplicably categorized Monasky's pursuit of these necessities as indicative of intent to raise A.M.T. in Italy instead of merely demonstrating intent to stay in Italy for the time being. *Id.* Tellingly, the Court does not dwell on the implications that she ultimately never received or had the benefit of an Italian driver's license or Italian recognition of her American academic credentials while living in Italy. See *supra* Sections III.A, III.B, and III.D for discussions of the traditional bias against battered mothers as abducting parents.

248. See *supra* Section III.B for a discussion of common experiences of battered mothers living abroad.

was her habitual residence."[249] Yet, if Monasky's account was deemed credible, and the record was truly two-sided, the district court should have had every incentive to consider the domestic violence claims to ensure the infant's safety before applying the Hague Convention's return mechanism.

2. The Scapegoat of the Clear Error Standard for Appellate Review

The clear error standard does not prevent the Sixth Circuit or the Supreme Court from evaluating, on some meaningful level, the weight attributed to some of the factual findings in the district court's analysis.[250] The weight given to findings of fact—which might have turned out differently if considered in light of the allegations of domestic violence and coercion—should likewise have been reviewed for clear error as part of the original habitual-residence determination. Instead, Justice Ginsburg's argument that domestic violence was a consideration to be "fully explored in the custody adjudication" [251] gave a dangerous and high-profile justification for the district court's totality of the circumstances review which had not "fully explored"[252] domestic violence allegations and related considerations.[253]

C. Outdated Conceptions of and Prohibited Arguments for an Infant's Best Interests

> *[The] possibility [of applying a "meeting of the minds" standard] offers a sufficient, not a necessary, basis for locating an infant's habitual residence. An absence of a subjective agreement between the parents does not by itself end the inquiry. Otherwise, it would place undue weight on one end of the scale. Ask the products of any broken marriage, and they are apt to tell you that their parents did not see eye to eye on much of anything by the end. If adopted, Monasky's approach would create a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected.*[254]

First, it should be noted that failing the actual agreement test is not the equivalent of—or a necessary precursor to—the finding of a "presumption of no habitual residence for infants."[255] Failing to meet the actual agreement standard does not call for the outright rejection of a default presumption of a particular country of habitual residence—it merely weakens the default presumption of the habitual residence in cases in which there was no subjective agreement, in order to allow for

249. *Monasky*, 907 F.3d at 409.

250. See *supra* Section IV.B and Section V.B.2 for discussions of the operation of the clear error standard of review in the Sixth Circuit.

251. Monasky v. Taglieri, 140 S. Ct. 719, 729 (2020).

252. *Id.*

253. See *supra* Section IV.B for a discussion of the *Ahmed* decision and its analysis for evaluating an infant's habitual residence.

254. *Monasky*, 907 F.3d at 410.

255. *Id.*

further inquiry into the circumstances.[256]

When the Sixth Circuit rejected the actual agreement standard as a matter of law, it stated that doing so was to protect infants, who it claims are the "most vulnerable to abduction."[257] The Sixth Circuit *en banc* majority concluded their argument by noting:

> a preference for creating a presumption *against* finding a habitual residence for infants . . . . is the worst of all possible worlds because it turns the Convention upside down. It would deprive the children most in need of protection—infants—of any shelter at all and encourage self-help options along the way, creating the risk of "abduction ping pong" at best, or making possession 100% of the law at worst.[258]

In effect, this appears to be a disguised best interests of the child argument, which is used to deny, at the very outset, any meaningful review of evidence supporting the eligibility of the United States as A.M.T.'s habitual residence. As discussed previously, it is widely accepted that best interests of the child arguments have no place in initial habitual-residence determinations,[259] since consideration of a child's best interests is usually reserved for subsequent proceedings in the jurisdiction of the child's habitual residence.[260] Hypocritically, *Monasky* heavily relies on this "best interests" argument in the habitual-residence determination to refuse U.S. jurisdiction over the future proceedings under the Hague Convention.[261]

Tellingly, the Sixth Circuit offers a controversial and outdated perspective of the best interests of an infant when it argues that infants are more vulnerable than other children and require more protection from abduction under the Hague Convention.[262] Its conception of a child's best interests appears to be closely intertwined with traditional, gendered preconceptions about the target demographics and the intended purposes of the Hague Convention.[263] The Hague Convention was intended to prevent fathers from abducting children, leaving mothers at home without a remedy to get them back.[264] In reality, it is frequently the mothers who are fleeing domestic violence and abusive fathers who are exploiting the Hague Convention to try and get their children back.[265] The Sixth Circuit seems to apply the Hague Convention's protecting function to an outdated, unrepresentative picture

256. See *supra* Section IV.C for a discussion of the actual agreement standard.

257. *Monasky*, 907 F.3d at 410.

258. *Id.* at 411 (citation omitted).

259. See *supra* Section IV for a discussion of courts' use of "best interest" arguments when determining whether to apply the affirmative 13(b) defense and override the mandatory return mechanism.

260. See *supra* Section III.D and Section IV.A for discussions of when courts should consider a child's best interests in Hague Convention cases.

261. *See* Monasky v. Taglieri, 140 S. Ct. 719, 723 (2020) (explaining Court's belief the child's best interests are served by deciding custody in the child's country of habitual residence).

262. *Id.* at 728.

263. See *supra* Section III.A–D for discussions of outdated gender demographics of abducting parents and the Hague Convention's intended purpose when drafted.

264. BEAUMONT & MCELEAVY, *supra* note 6, at 3–4.

265. *Id.* at 3–4.

of the modern demographics of the most common "abductors,"[266] by assuming that the "abducting" parent is not acting in the best interests of the child, instead of protecting the child's best interests by rescuing them from domestic violence.

In effect, the logic of *Monasky* precludes a habitual-residence determination from taking into account allegations that a left-behind parent engaged in domestic violence or coercion. By failing to evaluate the full context of each individual parent's intent, this logic appears to arbitrarily reward the left-behind father, despite unexplored allegations that he was the only perpetrator of abuse. The logic of *Monasky* also fails to consider how a battered mother is left with only three realistic choices: (1) reside in the left-behind country, (2) raise her child in that country, or (3) leave that country with her child. Informed of, but unpersuaded by, growing advocacy for domestic violence in Hague Convention cases,[267] the *Monasky* Court's decision re-entrenches the traditional framework that intrinsically discriminates against mothers fleeing domestic violence. In so doing, *Monasky* enables domestic abusers to take advantage of the Hague Convention's return mechanism. This decision in turn perpetuates the underlying domestic abuse complained of by the fleeing parent and fails the court's obligation to adequately protect survivors of abuse—both women and children.

VI. CONCLUSION & RECOMMENDATIONS

All three courts that reviewed *Monasky* approached the habitual-residence determination as an unbalanced seesaw that strongly tipped in favor of finding that Italy was A.M.T.'s habitual residence.[268] They justified their decisions by a subversive "best interests" argument: that a default presumption was necessary to ensure that the Hague Convention protects infants who are more vulnerable to abduction.[269] The problem is that this traditional view of the best interests of the child—and the framework of this case—foreclosed a legitimate totality of the circumstances review by giving too much weight to the presumption of the infant's habitual residence.[270]

The goal of protecting the child cannot always be effectuated by applying a strong presumption of an infant's habitual residence.[271] A real balancing of the two countries, in the spirit of the intended habitual-residence determination, can also

266. See *supra* Section III.A–D for discussions of the modern demographics of the abducting parents and the consequences of reverting back to old conceptions of those demographics.

267. See *supra* Part III for a description of the epidemic of domestic violence against women and children and of current advocacy efforts to get courts to take more responsibility for recognizing and intervening in those situations.

268. See *supra* Section V.C for a discussion of the *Monasky* Court's justification for both the default presumption and its strength in A.M.T.'s situation.

269. See *supra* Section III.D and Section V.C for discussions of impropriety and bias associated with arguments for the child's best interests.

270. See *supra* Section IV.C for a discussion of the framework and capacity of a totality of the circumstances review.

271. *See generally* Hale, *supra* note 134 (describing Hague Convention's potential limitation in satisfying a child's best interest while attempting to accommodate best interests of children in general).

properly empower the court to protect the infant. The Supreme Court could have better protected A.M.T. by acknowledging that allegations of domestic violence and coercion complicated the recognition of evidence supporting a "shared settled intent" and by calling for a "full exploration" of those allegations in a totality of the circumstances review. This more robust review would still comply with and maintain the purpose and logic of the Hague Convention, while also expanding protection for abused women and children. Unfortunately, it appears that only a full evaluation of the alleged circumstances and their effect on a shared settled intention could overcome the default presumption of an infant's habitual residence.

The impact of *Monasky* will only hurt battered mothers considering flight, or defending their flight to the United States, to save themselves and their children from domestic abuse. It now seems likely that without sufficient evidence to satisfy the 13(b) grave risk defense, a battered mother will not be able to rely on a litigation strategy structured around the very legitimate reasons that caused her to flee her abuser in the first place.

The *Monasky* decision could broadcast to the United States' partners in the Hague Convention that—going forward—the United States will take more of a hardline approach in refusing to allow allegations of domestic violence or coercion to overcome the Hague Convention's return mechanism. Some U.S. courts could interpret *Monasky* as giving a proverbial green light to foreclose all consideration of domestic violence allegations outside of the 13(b) defense unless the court is in the presumptive jurisdiction of the infant's habitual residence.

In the alternative, more sympathetic U.S. courts may circumvent *Monasky* by indirectly considering—or giving more weight to—other circumstances that account for the influence of domestic violence or coercion in habitual-residence determinations. Such courts could compensate for *Monasky* by expanding their 13(b) grave risk defense to allow it to overcome the Hague Convention's mandatory return provisions with greater frequency. This expansion could be particularly effective in cases in which the habitual-residence determination had created a disparity by giving disproportionate weight to factors subject to the influence of domestic violence or coercion.[272] Thus, in situations involving domestic violence and coercion, it unfortunately may be necessary to rely more upon alternative evidence of a mother's circumstances, if available, to demonstrate that she faced such significant challenges in the left-behind country that she could not reasonably have intended to reside there with her child for much longer.[273]

Ultimately, the outdated, conservative, and warped logic of the *Monasky* decision—and the surprising fact that it was written by Justice Ruth Bader Ginsburg, one of the United States' most progressive jurists—indicates that U.S. courts still

272. *See generally* Simpson, *supra* note 30 (discussing detrimental effects of outdated gendered concepts of abducting parent on factors influencing habitual-residence determinations).

273. Such alternative evidence might include language fluency, disability status, immigration status, ability to obtain significant employment, access to adequate healthcare and childcare, or lack of financial resources that would reasonably prohibit a mother from remaining in a foreign country. *See* Atkinson, *supra* note 162, at 654–57 (discussing relevant factors in habitual-residence determinations).

have a long journey ahead before they can be trusted to fairly accommodate battered mothers fleeing from abusers and to protect the children fleeing with those mothers.[274]

274. *See generally* Wills, *supra* note 146 (discussing competing interests U.S. courts must balance to fairly accommodate battered mothers and their children).