BRINGING OUR KIDS HOME: INTERNATIONAL PARENTAL CHILD ABDUCTION & JAPAN'S REFUSAL TO RETURN OUR CHILDREN

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INTRODUCTION

Currently, Japan is the only major industrialized nation that has not ratified the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Treaty").[1] Designed to "secure the prompt return of children wrongfully removed" and to "ensure that the rights of custody and access" are respected by all signatory nations, this international treaty facilitates the return of wrongfully removed children to their respective nations of "habitual residence"[2] and also settles custody and visitation disputes.[3] Since the Hague Conference adopted the Hague Convention in 1980, the Japanese government has avoided ratifying the Treaty by persistently maintaining that Japan has "been studying [the Treaty] since its ratification."[4] Concurrently, Japanese spokespeople have argued that the Hague Convention could hinder the nation's ability to shield Japanese women and their children fleeing abusive foreign husbands.[5] As a result of Japan's refusal to ratify the Hague Convention, Japan serves as a haven for Japanese citizens of international marriages who seek sole-custody by absconding with their

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[1] Charlie Reed, *Parents Hope Japan's New Leaders OK Abduction Treaty*, STARS AND STRIPES, September 23, 2009, *available at* http://www.stripes.com/article.asp?section=104&article=64950 (last visited Feb. 25, 2010) [hereinafter *Parents Hope*].

[2] According to Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction, a "habitual residence" is the nation-state the child resided in "immediately before the removal and retention." *See* Hague Convention on the Civil Aspects of International Child Abduction, December 1, 1983, 11 T.I.A.S. 670, at art. 3, *available at* http://www.hcch.net/index_en.php?act=conventions.pdf&cid=24 (last visited Feb. 25, 2010) [hereinafter Hague Convention or Treaty].

[3] *Id.* art. 1. According to the Scope of the Convention, these are the twin objects of the Hague Convention.

[4] Randy Collins, *Randy Collins and Child Abduction in Japan*, THE SEOUL TIMES, September 9, 2009, *available at* http://theseoultimes.com/ST/?url=/ST/db/read.php?idx=8793 (quoting Doug Struck & Sachiko Sakamaki, *Divorced From Their Children in Japan*, WASHINGTON POST, July, 17, 2003, at A9).

[5] Associated Press, *Japan Drops Child-Snatching Case Against US Man*, Nov. 12, 2009, http://abcnews.go.com/US/wireStory?id=9064455 (last visited Nov. 19, 2009).

children back to Japan.[6] According to the Assembly for French Overseas Nationals for Japan, over 160,000 foreign and Japanese separated or divorced parents in Japan are unable to see their children.[7] In 2007, the National Center for Missing and Exploited Children ("NCMEC") reported over 1,800 open cases of international parent-child abduction in the United States.[8] Of this amount, about 80 of the active cases involve 118 children abducted from the United States to Japan.[9]

Once in Japan, custody battles are subject to the jurisdiction of Japanese courts; to date, not a single foreign spouse has successfully repatriated his or her children from Japan.[10] Moreover, the Department of State is "not aware of any case in which a child taken from the United States by one parent has been ordered returned to the United States by Japanese courts, even when the left-behind parent has a United States custody decree."[11] Although several nations have recently begun pressuring Japan to sign the convention[12] and the former Japanese Prime Minister Yukio Hatoyama, expressed his support of ratifying the Treaty,[13] non-Japanese parents in these cases have generally been left with two options: to either resort to the Japanese family court system or kidnap their child(ren) back. Neither of these options is particularly promising.

To combat this growing epidemic, these parents are rallying and taking action. Notably, in June of 2009, New Jersey Congressman Christopher Smith introduced the International Child Abduction Prevention Act of 2009 ("Act of 2009"), a bill which purports to "set a strong example for other Hague Convention

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[6] *See* Colin P.A. Jones, *In the Best Interests of the Court: What American Lawyers Need to Know About Child Custody and Visitation in Japan*, 8 ASIAN-PAC L. & POL'Y J. 166, 167 (2007) [hereinafter *Best Interests*].

[7] Minoru Matsutani, *Custody Laws Force Parents to Extremes*, JAPAN TIMES, October 10, 2009, *available at* 2009 WLNR 20130476.

[8] Jennifer Zawid, *Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators*, 40 U. MIAMI INTER-AM. L. REV. 1, 5 (2008).

[9] Reed, *Parents Hope*, *supra* note 1.

[10] *See Rapid Increase in Child Abductions to Japan*, AMERICAN VIEW, (U.S. Embassy, Tokyo, Japan), Winter 2010, *available at* http://tokyo.usembassy.gov/e/p/tp-20100122-85.html.

[11] International Parental Child Abduction Flyer: Japan, *available at* http://travel.state.gov/abduction/country/country_501.html.

[12] *See* Mari Yamaguchi, *Japan Pressured to Sign Agreement on Child Custody; Canada Among 8 Nations Urging Tokyo to Change Laws on Parental Access*, TORONTO STAR, October 17, 2009, at A33, *available at* http://www.thestar.com/news/world/article/711757--japan-pressured-to-sign-agreement-on-child-custody. On October 16, 2009, U.S. Ambassador John Roos, as well as the Ambassadors of Australia, Canada, France, Italy, New Zealand, Spain and the United Kingdom, met with the Japanese Minister of Justice, Keiko Chiba, to urge Japan to ratify the Hague Convention, already recognized by 81 nations. Ambassadors from these eight nations met with Japan's Foreign Minister Katsuya Okada in Tokyo on January 30, 2010, to express continued concern over parental abduction and to "submit our concerns over the increase of international parental abduction cases involving Japan and affecting our nationals," according to a joint statement. *See Eight Countries Press Japan on Parental Abductions*, AFP, January 30, 2010, *available at* http://www.bangkokpost.com/news/asia/166975/eight-countries-press-japan-on-parental-abductions (last visited Feb. 25, 2010).

[13] Reed, *supra* note 1. In July, Prime Minister Hatoyama told the Japan Times Herald blog that, "he supports ratifying the Hague treaty 'and involved in this is a sweeping change to allow divorced fathers visitation of their children. That issue affects not just foreign national fathers, but Japanese fathers as well. I believe in this change.'"

countries in the timely location and return of children wrongly removed from and retained in the United States"[14] by allowing for economic sanctions against countries that have shown a "systemic failure"[15] to either take action in international child abduction cases or, like in the case of Japan, refuse to comply with the Treaty.[16] While Congressman Smith's bill, which was referred to the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law in September of 2009, may not survive the legislation process, as most proposed bills do not, its timely proposal during the 2009 international media frenzy surrounding the arrest and subsequent release of American Christopher Savoie for attempting to "kidnap" his two kids in Japan,[17] has certainly drawn international attention to the growing problem of parental child abduction and Japan's refusal to sign the Hague Convention.

The purpose of this Note is to discuss the issues surrounding Japanese parental child abduction and to explore the root causes and proposed solutions to this increasingly prevalent epidemic. First, this Note briefly explains the Hague Convention and the processes by which the Treaty purports to address and resolve international custody disputes. Next, the Note discusses Japanese familial structure by exploring the social tenets, historical context and legal mechanisms behind the Japanese concepts of divorce, visitation and custody. This is followed by discussions on the implications associated with attempts by left-behind parents to kidnap their children back and the repercussions of resorting to the Japanese family court system in the alternative to kidnapping attempts. Finally, the Note addresses several efforts to resolve and curb this growing problem, including the proposed Act of 2009 and international efforts to pressure Japan into acceding to the Treaty.

I. JAPAN VS. THE HAGUE CONVENTION: WHY JAPAN REFUSES TO SIGN

To understand why the problem of international parental child abduction exists, one must understand the nature, goals, procedures and implications of the Hague Convention. Then, to understand why this problem is especially common

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[14] International Child Abduction Prevention Act of 2009, H.R. 3240, § 2(a)(b), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h111-3240 [hereinafter H.R. 3240].

[15] H.R. 3240 defines a "pattern of noncooperation" as:

> [A] national government's systemic failure, evidenced by the existence of ten or more parental child abduction cases which, after having been properly prepared and transmitted by the Central Authority for the United States remain unresolved within its borders after 18 months or, where there are fewer than ten unresolved cases, any cases still unresolved after nine months from the time of receipt and transmittal by the Central Authority for the United States of a request to fulfill its international obligations with respect to the prompt resolution of cases of child abduction.

H.R. 3240, § 3(12).

[16] *See* H.R. 3240, § 201(a)(1).

[17] Jones, *Signing Hague Treaty No Cure-all for Parental Abduction Scourge*, THE JAPAN TIMES, Oct. 20, 2009, *available at* http://search.japantimes.co.jp/cgi-bin/fl20091020zg.html.

and troubling in Japan, one must understand Japan's approach to divorce, child visitation and child custody.

A. Hague Convention on Civil Aspects of International Child Abduction

In 1980, the Hague Conference on Private International Law adopted the Hague Convention on Civil Aspects of International Child Abduction.[18] To date, 82 nations have joined the treaty by ratification or accession,[19] including every major industrialized nation.[20] The Treaty aims to "secure the prompt return of children wrongfully removed to or retained in any Contracting State" and to "ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."[21] Ultimately the Treaty's 'simple' approach to solving the international child abduction problem centers on the Treaty's prompt restoration of the "factual situation that existed prior to a child's removal or retention."[22] This is accomplished by:

> [P]romptly restoring the *status quo ante,* subject to express requirements and exceptions, the Convention seeks to deny the abductor legal advantage in the country to which the child has been taken, as the courts of that country are under a treaty obligation to return the child without conducting legal proceedings on the merits of the underlying conflicting custody claims.[23]

Notably, the Treaty "does not seek to settle disputes about legal custody rights, nor does it depend upon the existence of court orders as a condition for returning children."[24] Rather, the Treaty simply denies the abductor the legal advantage of the second country by returning the child to the country of habitual

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[18] *See* Hague Convention, *supra* note 3.

[19] According to the United Nations Treaty Reference Guide, ratification "defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act." Moreover, the ratification process for multilateral treaties involves the collection of ratifications from all states and keeping all the parties informed of the process and status. While accession has the same legal effect as ratification, accession differs from ratification in that it is "the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states." *See United Nations Treaty Collection: Treaty Reference Guide, available at* http://untreaty.un.org/English/guide.pdf (last visited on February 28, 2010) (citing the Vienna Convention on the Law of Treaties 1969, art. 2(1)(b), 14(1), 15, 16).

[20] *See* Status Table 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, *available at* http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24 (last updated June 4, 2010).

[21] Hague Convention, *supra* note 3, at art. 1.

[22] Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10, 494 (Mar. 26, 1984). On October 30, 1985, President Reagan urged the Senate to give "early and favorable consideration" of the Hague Treaty and "accord its advice and consent to U.S. ratification." *See* 51 Fed. Reg. 10,494.

[23] *Id.* In a Letter of Submittal to President Reagan, sent on October 4, 1985, the Secretary of State, George P. Shultz, presented the 1980 Hague Convention "with the recommendation that it be transmitted to the Senate for its advice and consent to ratification." *See id.*

[24] *Id.*

residence, essentially restoring any legal custody dispute to the nation of the left-behind parent.

To file a claim under the Hague Convention, several requirements must be fulfilled: (1) the child must be under the age of sixteen, (2) the removal or retention of the child must be wrongful and must breach "the other parent's rights of custody," and (3) claimant parent must have "exercised custody over the child prior to the abduction."[25] To establish custody, these rights may "arise by operation of law, by judicial or administrative decision, or by an agreement that has legal effect."[26] By allowing parents to supplement their claims with "administrative decision[s] or legal agreement[s] . . . a certificate or affidavit from a competent authority of the state of the child's habitual residence explaining the relevant domestic law . . . [or] *any other relevant document*," the broad parameters of custody rights cover "the important area of pre-litigation child-snatchings in which rights are less certain and no existing order has been breached."[27]

The Treaty requires prompt return of the child upon the petitioning parents successful demonstration that the removal or retention of the child was wrongful, with several exceptions:

> (1) [T]he person requesting removal was not, at the time of the retention or removal actually exercising custody rights, or had consented to, or subsequently acquiesced in, the removal or retention; (2) the return would result in great risk of physical or psychological harm; (3) the child's return would not be permitted by the fundamental principles of the requesting State relating the protection of human rights and fundamental freedoms; (4) the return proceedings commenced more than one year after the abduction and the child has become settled in the new environment; and (5) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take into account his or her views.[28]

These exceptions have garnered great criticism and concern; mainly that these available defenses may be construed too broadly by many nation states, thereby providing excuses to avoid ordering the return of children to their respective nations of habitual residence."[29] While some nations' courts could possibly invoke these exceptions to avoid returning children to left-behind parents, Japanese courts do not acknowledge the terms and exceptions provided by the Hague Convention.[30] Furthermore, Japanese courts have yet to "honor overseas court orders granting custody to the non-Japanese parent."[31]

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[25] *See* Zawid, *supra* note 8, at 7-8 (citing Hague Convention, *supra* note 3, at art. 3-4).

[26] *Id.*

[27] *Id.* (citing Richard E. Crouch, *Resolving International Custody Disputes in the United States,* 13 J. AM. ACAD. MATRIM. LAW, 229, 242 (1996)).

[28] *Id.* (citing Hague Convention, *supra* note 3, at arts. 12, 13(a), 13(b) and 20).

[29] *Id.* at 9 n.32 (citing Michael R. Walshand & Susan W. Savard, *International Child Abduction and the Hague Convention,* 6 BARRY L. REV. 29, 50 (2006)).

[30] *See* Debito Arudou, *Savoie Case Shines Spotlight on Japan's 'Disappeared Dads,'* THE JAPAN

B. Japan's Approach to Divorce and Custody

A main reason why Japan has refused to ratify the Hague Convention on Child Abduction is rooted in the legal system and tradition of sole-custody divorces, "wherein one parent makes a complete and lifelong break from his or her children when a couple splits . . . [and] the parent who has physical custody at the time of the divorce tends to keep the children.[32] Furthermore, in accordance with tradition and law, Japanese police will not intervene in custody cases.[33]

This practice is rooted in the model of family that has controlled Japan's governmental policy since the late 1800s,[34] and is often characterized by its "patrilineal tracing of descent . . . [and] predominance of male decision making."[35] Moreover, this family model is structured as a "patriarchal chain of authority extending between the eldest sons of successive generations."[36] This patriarchal chain of authority originates from the Samurai culture of the warrior caste that largely controlled Japanese government from the 12th Century until the Meiji Restoration in 1868 and is often associated with its "disciplined culture."[37] Although only Samurai and some merchant families followed the practice of patrilineal descent tracing before 1872, the requirement of family registration permeated and enforced this family structure throughout Japanese society.[38]

Originally created as a household registration system for security purposes in Kyoto when it was the capital city,[39] this registration system required the "recordation of personal status events, such as marriage, birth, adoption, and death."[40] Codified by the Family Registration Law, this practice required that these family events, including custody of children after divorce, be recorded in the household registry, a "frequently required identity document."[41]

TIMES (Oct. 6, 2009), *available at* http://search.japantimes.co.jp/cgi-bin/fl20091006ad.html.

31 *See id.*

32 Charlie Reed, *Overseas Custody Rights: American Parents Struggle to Reunite with Children in Japan*, STARS AND STRIPES (Aug. 4, 2009), *available at* http://www.stripes.com/article.asp?section=104&article=64003 (last visited Feb. 25, 2010) (quoting Michelle Bond, Deputy Assistant Secretary for Overseas Citizens Services at the U.S. State Department).

33 *Id.*

34 *See* Taimie L. Bryant, *Family Models, Family Dispute Resolution and Family Law in Japan*, 14 UCLA PAC. BASIN L.J. 1 (1995).

35 *Id.* at 4.

36 *Id.* at 1.

37 *See id.* Samurai culture is often associated with its contributions to modern Japanese culture, including the traditional tea ceremony, flower arrangements and most notably, the patriarchal family structure. *See Samurai (Japanese Warrior)*, Encyclopedia Britannica, *available at* http://www.britannica.com/EBchecked/topic/520850/samurai.

38 *See id.* at 2.

39 *See Best Interests*, *supra* note 6, at 202.

40 *See* Bryant, *supra* note 34, at 2.

41 *See Best Interests*, *supra* note 6, at 202. Japanese citizens are often required to submit certified copies of this household registry to schools, prospective employers and lenders. *See id.* at n.144 (citing JOHN HALEY, THE SPIRIT OF JAPANESE LAW 121, 25 (1998)).

This recordation practice has become a "core source of the identity of Japanese people and sets forth their relationship with parents, spouses and children."[42] Moreover, the traditional approach of recordation created a "chain of accountability in which the head of the household . . . had apparent control within the [family] and was, in turn, accountable to the government for the acts of [family] members."[43] This instilled sense of accountability seems to be a plausible explanation for the stringent adherence to traditional practices amongst Japanese citizens.

Two areas of Japanese law to which citizens strictly adhere are the traditions, processes and consequences relating to divorce and custody. The Japanese tradition of voluntarily adhering to the traditions of these practices is especially important as Japanese family court orders are largely unenforceable because Japanese courts have no "equitable or enforcement powers," and Japanese police traditionally stay out of family disputes.[44]

In Japan, legal custody is "determined by the formatting of the paperwork," as the Registration of Divorce document has exactly two columns, one for the names of the children for whom the father will be the legal custodian and one for the names of the children for whom the mother will be the legal custodian."[45] As a result of physical format of the Registration of Divorce, the concept and practice of joint custody of individual children does not exist. Also, the Registration of Divorce form does not allow for "notations regarding visitation."[46] Therefore, in Japanese culture, the concept and practice of visitation rights does not exist either.[47] As a result of this system, custody arrangements are "all-or-nothing affairs with virtually no third-party supervision."[48] Furthermore, most divorces are consensual and the Registration of Divorce process is virtually hassle-free, in that there is no minimum residency period requirement. Should the parties agree to the divorce, "they simply affix their seal to a Registration of Divorce [form] and submit it to the local government."[49] Most citizens abide by and follow the practice of sole custody without visitation, without any contest.[50]

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[42] *Best Interests*, *supra* note 6, at 202.

[43] *Bryant*, *supra* note 34, at 2.

[44] *See Best Interests*, *supra* note 6, at 246.

[45] *Best Interests*, *supra* note 6, at 205.

[46] *See id.*

[47] *Id.* One possibility for joint custody is through a family court designation. However, this requires actually going through the court system. Rather, because joint custody does not exist by statute or judicial precedents and because the Registration of Divorce form provides no room for notations, parents have no "legally operative manner" by which to establish "formal joint, shared, or split custody in a consensual divorce." *See id.* at 212.

[48] *Id.* As a result of the simple divorce process, which requires only that both parties agree, divorce cases rarely require judicial supervision. *See id.*

[49] *See id.* at 204-05. Approximately 90% of divorces in Japan are accomplished by filling out the Registration of Divorce form. *Id.*

[50] *See id.*

1. Custody

The concept of custody in Japan is divided into *kangoken,* physical custody, and *shinken*, legal custody.[51] However, since *shinken* and *kangoken* are rarely separated formally, the term *shinken* usually refers to full legal and physical custody.[52] *Shinken* encompasses the rights and responsibilities in *kangoken*, including "the ability to conduct legal acts and manage property on behalf of a child, and the rights and obligations associated with raising a child, including the right to decide his or her education and place of residence."[53] Also, *shinken* vests in both parents from the time of their child's birth and continues until it terminates as a result of "divorce, the child reach[ing] the age of majority, generally 20, or is terminated judicially, for reasons such as child abuse."[54] Since *shinken* is recorded in the family register and on the Registration of Divorce, it is of greater significance than *kangoken* because it is "readily provable" and because once it is decided in a consensual divorce, it "cannot be changed without further proceedings in family court that include mandatory mediation."[55] Moreover, the fact that legal custody, *shinken*, is recorded in the Registration of Divorce, is especially important because:

> Parents who lose both physical and legal custody in a divorce have virtually no rights with respect to their children. They may not know where their children live, and custodial parents can change the children's names and have the children adopted by either a grandparent or a new spouse without the non-custodial parents' consent.[56]

While sole-custody is the more common practice in Japan, *kangoken* can be separated from *shinken* by means of a court arrangement in accordance with Article 766 of the Japanese Civil Code, thereby "designating one parent, typically the father, as the legal custodian, and the other parent as the physical custodian, typically the mother."[57] Historically, the practice of separating *kangoken* from *shinken* was sometimes done to "allow mothers to continue acting as caregivers for younger children, even though fathers were usually awarded legal custody."[58] However, as courts now recognize and allow women to be legal custodians, this mechanism has become antiquated.[59]

While *shinken* may be more important after divorce, designation of *kangoken* is arguably more important prior to divorce, especially in cases involving

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[51] *See id.* at 213.
[52] *Best Interests*, *supra* note 6, at 214.
[53] *Id.* at 215.
[54] *See id.*
[55] *See id.* at 214-15.
[56] *See id.* at 215.
[57] *See id.* at 216.
[58] *Id.*
[59] *See id.*

separation.[60] In *kangoken* proceedings, which include "mediation sessions and subsequent judicial decrees that can be based solely on the written findings of mediators and court investigators, if assigned," in cases involving separation and the award of *kangoken* pending divorce, parents can reasonably assume that the "parent awarded *kangoken* prior to divorce will also be awarded *shinken* upon the divorce."[61] Considering *kangoken* includes "the sole right to determine all aspects of the child's day-to-day life, education, and place of residence," and the parents awarded *kangoken* can essentially "exclude the non-custodial parent from all aspects of their child's upbringing."[62] By creating a situation in which the non-custodial parent may retain "hypothetical rights as a joint legal custodian prior to divorce," such rights are essentially "meaningless" because the custodial parent will almost certainly be awarded *shinken* upon the divorce.[63] This creates a system which renders non-custodial parents an "optional part of a child's life," and "under the current legal regime of sole custody, all that can be done is to make non-custodial parents aware of their position, and strongly convince them of their natural support obligations as parents."[64]

Due to the inexistence of a statutory guideline for judicial determinations of custody, family courts and mediators rely on a "best interest of the child" standard, which is largely left to the discretion of family court judges.[65] In fact, these "best interest of the child" determinations are often made based on a single "court investigator's visit to the children's home to observe their living environment," often conducted without ever evaluating both parents.[66] The court's preference for awarding custody to the mother, especially during the "tender years," is the only exception to the best interest standard with a "clear and long-standing" history.[67] According to a Japanese family law expert's manual for family court personnel,[68] on the tender years doctrine:

> When a child is small, it is thought that the mother should generally be designated custodian. For a young child, the mother's existence is irreplaceable, and in mediation, custody designations should usually proceed from this basis . . . . Unless the conditions in which a mother lives are judged unsuitable for the child, as a general rule, I cannot approve of awarding sole custody to fathers.[69]

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[60] *See id.* at 217.

[61] *Id.*

[62] *Best Interests*, *supra* note 6, at 217.

[63] *Id.* at 217-18.

[64] *Id.* at 226 (citing Takao Sato, *Shinkensha Shitei/Henko no Kijun [Criteria for Making and Changing Custody Awards], in* GENDAI KAJI CHOTEI MANYUARA [A MANUAL FOR MODERN FAMILY MEDIATION], at 221 (Numabe, et al. eds., 2002).

[65] *See id.* at 218.

[66] *Id.* at 219.

[67] *See Best Interests*, *supra* note 6, at 220.

[68] *See id.* at 222.

[69] *Id.* at 221-22 (citing Sato, *supra* note 64, at 220).

Considering that this passage on the tender years doctrine is fairly authoritative as a guide for family court personnel, it is interesting that this is "the only criteria for initial custody decisions offered in the manual's chapter on custody determinations," yet it has no formal statutory basis.[70]

Despite the lack of a formal guideline for custody determinations and the court's penchant for awarding custody to mothers, even in cases where the child is past the tender years,[71] parents still have the option of circumventing legal proceedings by agreeing to their own custody and visitation arrangements in their consensual divorce.[72] However, this agreement would be not documented on the Registration of Divorce and would therefore probably not be judicially enforceable should the custodial parent refuse to cooperate.

2. Visitation Rights

Like custody rights, formal visitation rights do not exist in consensual divorces because the Registration for Divorce paperwork simply does not permit notations beyond the child's name.[73] Therefore, like custody arrangements, the parents can presumably agree upon visitation rights. However, should the custodial parent, documented in the Registration for Divorce, choose to not cooperate with this agreement, the non-custodial parent must choose between giving up or filing for visitation rights through formal family court proceedings.[74] Although there is no statutory provision that provides for visitation rights, since the 1960's Japanese family courts have granted visitation, *mensetsu koshoken*, to resolve marital cases.[75] However, resorting to family court offers no guarantees of visitation. Rather, "involving the family court may actually result in formal termination or denial of visitation rights if the custodial parent is hostile or uncooperative."[76]

Even when parents can agree on visitation schedules or when the court grants visitation rights, the Japanese concept of visitation differs drastically from that of the American vision of visitation, by which most American left-behind parents may presume or hope to gain. In a study of the 2,025 Japanese family court cases granting visitation rights in 2003, only 14.5% involved overnight stays and of those, only 4.7% involved extended visits.[77] Of that same group, the most common frequency, at 52.1%, of visitation was "once a month or greater," as opposed to 21.9% of cases that involved visitation once every two to six months.[78] More importantly, as noted above, court ordered visitation rights are largely

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[70] *Id.* at 222.
[71] *Id.* at 220-21.
[72] *See Best Interests*, *supra* note 6, at 218.
[73] *See id.* at 229.
[74] *See id.*
[75] *See id.* at 228.
[76] *See id.* at 229.
[77] *See Best Interests*, *supra* note 6, at 234.
[78] *See id.*

unenforceable because Japanese courts have no "equitable or enforcement powers" and Japanese police traditionally stay out of family disputes. Visitation and custody orders are largely voluntary and dependent on custodial cooperation.[79]

II. WHAT NOW?: IMPLICATIONS OF JAPAN'S TREATMENT OF ABDUCTION CASES AND OPTIONS FOR FOREIGN PARENTS

Left-behind parents are really only left with two options once their children are kidnapped and removed to Japan. First, these parents can try to kidnap their children back from Japan. Unfortunately for the left-behind parents, this act violates Japanese criminal law. Moreover, Japanese family law protects the custodial rights of the Japanese parents. Consequently, left-behind parents are forced to turn to the Japanese family law system that governs all petitions regarding child abductions and custody rights. Beyond the differences between American and Japanese family law, the overarching Japanese family legal structure poses a complicated system, which foreign parents must navigate.

A. Kidnapping the Child Back

Left with few options, some parents have gone to Japan to kidnap their children and bring them back to their home country. However, because Japan has not signed the Hague Convention, these cases are subject to the jurisdiction of Japanese courts. When a child is abducted by a non-Japanese parent, Japanese courts have three measures by which they can return the child to the Japanese parent.[80] First, the family court can order the abducting parents to return the child to the resident parent, as this kind of action is widely recognized in Japan to be within the authority of family courts.[81] Second, the resident parent is entitled to file a civil litigation action against the abducting parent.[82] Third, the resident parent may resort to the Habeas Corpus Act of 1948.[83] Although not originally intended to apply to abduction cases, the Act has gained increasing popularity for the resolution of abduction cases because it grants the abducted child an independent representative, prompt proceedings and allows the court to issue an order to retain an abducting parent in prison should that parent fail to obey a court's order to return the child to the plaintiff parents.[84] As broad and varied as these methods seem, they are still flawed, as Japanese courts are not entitled to physically

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[79] *See id.* at 246.

[80] *See* Satoshi Minamikata, *Resolution of Disputes Over Parental Rights and Duties in a Marital Dissolution Case in Japan: A Nonlitigious Approach to Chotei (Family Court Mediation)*, 39 FAM. L.Q. 489, 503 (2005).

[81] *See id.*

[82] *See id.*

[83] *See id.* n.85 (citing Habeas Corpus Act, Law of 1948, L. No. 199 *translated in* 1 EHS LAW BULLETIN SER. No. 1030, *available at* http://www.unhcr.org/refworld/docid/3fbe03634.html (last visited February 26, 2010)).

[84] *See id.*

remove the child from the abducting parent's custody and return the child to the resident parent. Whether incidentally or intentionally, Japanese courts and law enforcement have found alternate routes of returning children to resident parents, methods that often offer quick and final solutions.

When foreign parents try to abduct their children back to their country of habitual residence, they are met with great hostility by Japanese courts and law enforcement. In 2000, Japanese immigration officers arrested a Dutch man trying to leave Japan by ferry with his two-year-old half-Japanese daughter.[85] While his conviction, later affirmed by the Supreme Court of Japan, came as no surprise, considering the conviction rate for all criminal cases in Japan is over 99%,[86] the violation for which he was arrested and convicted for is odd. The Dutch father was charged with violating Article 226 of Japan's Penal Code, "a pre-war section of the Penal Code originally enacted to prevent the trafficking of minors to China for prostitution,"[87] which in 2000 still "imposed criminal penalties for 'a person who kidnaps or abducts another for the purpose of transporting the same to a foreign country.'"[88]

One author on the subject of Article 226 noted that this case was particularly interesting considering the Dutch father still retained full joint custody rights because he and his wife were still legally married, and *shinken* and *kangoken* vests jointly and severally in both parents until it terminates for reasons of court order, divorce or the child reaching the age of majority, as discussed above.[89] Therefore, because the Dutch father was still married at the time with no court orders in effect regarding custody or visitation, the father "should have retained full joint custody rights under Japanese law, yet he was arrested and convicted for attempting to exercise those rights."[90]

Interestingly, Article 226 of Japan's Penal Code was amended and expanded in 2005, to cover "all conduct involving kidnapping or abduction for purposes of transporting a person away from the country they are in."[91] The amendment of Article 226, now broadly covering all abductions for the purpose of removing a person from their pre-abduction nation, provides immigration and police officers

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[85] *See* Jones, *No More Excuses: Why Recent Penal Code Amendments Should (But Probably Won't) Stop International Parental Child Abduction to Japan*, 6 WHITTIER J. CHILD & FAM. ADVOC. 351, 354 (2007) [hereinafter *No More Excuses*].

[86] *See id.* (citing Supreme Court of Japan statistics from 2005 which revealed that of 78,881 criminal prosecutions, 77,297 resulted in guilty convictions and 63 resulted in full, not guilty holdings, with other dispositions accounting for the remainder. Sup. Ct. of Japan, ANNUAL REPORT OF JUDICIAL STATISTICS FOR 2005, Volume 2 Criminal Cases, 20-21 (2006)).

[87] *Best Interests*, *supra* note 6, at 257-58.

[88] *No More Excuses*, *supra* note 85, at 354.

[89] *See id.* at 355 (addressing *Shin Hanrei Komentaru Keiho* proffered study of "three pre-2000 criminal law treatises/annotations, all of which cited only pre-war cases in their explanation of Article 226." H. Otsuka & H. Kawabata, 5 SHIN HANREI KOMENTARU KEIHO 543, 544 (1997)).

[90] *Id.*

[91] *No More Excuses*, *supra* note 85, at 357.

greater power to make arrests like that of the Dutch father.[92] The purpose of this amendment was to address and combat Japan's human trafficking problem by giving Japanese courts statutory support for any future arrests and convictions of parents like the Dutch father. However, it is highly unlikely that the Japanese police will start getting involved in family disputes by arresting parents involved in international child abduction cases.

Much like the Dutch father, in November 2009, an American father, who happened to be a naturalized Japanese citizen, was arrested by Japanese police officers at the front gate of the U.S. consulate's compound in Fukuoka, while still on Japanese soil, for allegedly abducting his two young children.[93] The father, Christopher Savoie, a Tennessee native, and his wife, the children's mother, Noriko Savoie, had lived in Japan for a number of years before moving to the United States.[94] Shortly after Noriko Savoie received custody of the two children and agreed to remain in the U.S., she violated this U.S. court custody decision and fled to Japan with the children.[95] Christopher Savoie was then granted full custody, at which point the police department of Franklin, Tennessee issued an arrest warrant for Noriko Savoie. Unfortunately, this warrant for arrest was not recognized by the Japanese Government as the nation is not a signatory to the Hague Convention.[96]

Further complicating the arrangement, the Savoie's were still considered married in Japan, having never officially divorced there.[97] After spending eighteen days in jail, the Fukuoka District Prosecutors Office dropped the charge of abduction of minors[98] because "Savoie's intent was to see his children."[99] This seemingly empty reason for releasing Savoie could be explained by the facts that Christopher Savoie is still a Japanese citizen and the couple is still considered married. Therefore, Christopher Savoie was still entitled to custody of the children.[100] Furthermore, although the criminal charges have been dropped, Savoie, now back in the United States, will probably not be reunited with his children, who are still in Japan.[101] His only options, or hopes, are that Japan

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92 *See id.* The amendment to Article 226 of Japan's Penal Code was a "logical" solution, "since Japan's economic status renders it far more likely that women who have been forced into prostitution will be imported into the country rather than exported out of it." *See id.*

93 *See* Kyung Lah, *Charges Dropped Against American Father in Japan Custody Battle*, CNN, Nov. 12, 2009, *available at* http://www.cnn.com/2009/WORLD/asiapcf/11/11/japan.custody.battle/ (last visited Nov. 19, 2009).

94 *See id.*

95 *See id.*

96 *See id.*

97 *See id.*

98 *See* Michael Inbar, *U.S. Dad Jailed in Japan in Child Custody Battle*, MSNBC, Sept. 30, 2009, *available at* http://www.msnbc.msn.com/id/33086856/ns/today-parenting_and_family/ (last visited Nov. 19, 2009).

99 Associated Press, *supra* note 5.

100 *See* Lah, *supra* note 93. According to Savoie, "I actually still have, and had at that time, legal custody in Japan — fifty-fifty custody." *See id.*

101 *See* Associated Press, *supra* note 5.

changes its policies and joins the Hague Convention, or that Noriko Savoie, now a "fugitive from American justice," will leave Japan, at which point she will likely be returned to the U.S. to face her own criminal charges.[102]

B. Resorting to Japanese Courts

Having established that attempting to abduct a child back from Japan is not the most practical or prudent of options, most parents are left to resort to the Japanese family court system. As discussed above, the Japanese family court has jurisdiction over all petitions relating to wrongful abduction and custody because Japan has yet to accede to the Hague Convention.[103] Considering that the structure, scope and procedures of Japan's family court system differ from the American system, these factors play a tremendous role in the overall experience of foreign litigants entrenched in the Japanese legal system. Ultimately, these significant differences in the Japanese and American family court systems, affect the processes, reasonable expectations and outcomes for these litigating parties.

Parents must understand the structure of the family court system to fully understand the process to which all family court cases are subject. First, the scope of Japan's family court system is remarkably broad, as it handles "any and all disputes between relatives, regardless of the existence of a legal basis for the dispute."[104] Moreover, "any individual may file a petition about any problem as long as the disputants are relatives or could be relatives by birth, marriage or adoption."[105] The Supreme Court of Japan's belief that, "the family court is 'a court in which the principles of law, the conscience of the community, and the social sciences, particularly those dealing with human behavior and personal relationships, work together'" best explains the breadth of cases and litigants that end up in the family court system.[106] Despite the great range of issues family court encompasses and the incredible influence family court has on Japanese society, unfortunately, many judges do not agree with this sentiment.[107]

1. Family Court: The Cadre

As one scholar noted,[108] because of the far-reaching scope of issues handled by Japan's family court system many of the family court's personnel are

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[102] *See* Inbar, *supra* note 98.

[103] *See* discussion *supra* Part I.A.

[104] Bryant, *supra* note 34, at 6.

[105] *Id.* at 7.

[106] *Best Interests*, *supra* note 6, at 179 (citing SUPREME COURT OF JAPAN, GUIDE TO THE FAMILY COURT OF JAPAN, 4 (2004)).

[107] *See* discussion *infra* Part II.B.1.b.

[108] Colin P.A. Jones is a U.S. attorney and professor at Doshisha Law School in Kyoto, Japan. He has studied and written extensively on the topic of parental child abduction relating to Japan. Jones is the author of several sources of this note. *See supra* notes 6, 17, 85; *infra* note 213.

"effectively generalists, if they have any special training at all."[109] This point is important to remember considering what important roles judges, mediators and family court investigators play in the process and outcome of every case.

a. Mediators & Mediation

Of these family court actors, mediators are arguably the most important and influential players. Generally, family court panels are comprised of two mediators and a family court judge. The judges, though, are often too busy to attend these mediation sessions.[110] Furthermore, family court mediation, usually a time consuming process, is often required before a suit can even be filed in court.[111] The power that mediators possess in family court cases seems almost ironic and disheartening, knowing that, according to the Supreme Court of Japan's rules, mediators are required only to have "rich knowledge and experience in public life, be of a highly regarded character, have good judgment, and be between the age of 40 and 70."[112] According to one scholar, mediators are "volunteers who need not have training in law, social welfare, or psychology."[113]

The fairly undemanding requirements and lack of proper vetting for mediators are controversial and a source of discontent and complaints from litigants.[114] Often conducted without a judge present, mediation frequently results in "mediator-managed mediation by mediators who do not always recognize important psychological or legal issues in the dispute."[115] Moreover, the potentially harmful power that mediators yield without an informed, legally educated and experienced judge present is often exacerbated by the fact that mediators are "rarely the peers of the clients."[116] Rather, mediators are selected "on the basis of recommendations from people the Supreme Court respects."[117] Further complicating the mediation process:

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[109] *Best Interests*, *supra* note 6, at 179.

[110] *See id.* at 181. According to one study, most judges "carry a case load of about 200 at any given time." *See id.* at 176 (citing KAZUFUMI TERANISHI ET. AL., SAIBANKAN WO SHINJIRU NA! [DON'T TRUST JUDGES!], 66 (2001)). Also, judges often only attend the final mediation session. *See* Bryant, *supra* note 34, at 9.

[111] *See* Bryant, *supra* note 34, at 8.

[112] *Best Interests*, *supra* note 6, at 182 (citing Minji chotei I'in oyobi kai chotei I'in kisoku [Regulations for Civil Mediators and Family Court Mediators], Sup. Ct. Rule No. 5 of 1974). Interestingly, mediators are chosen "from among the general public, usually upon the recommendation of community authorities, bar associations, and other citizens or organizations." *See id.* at 181-2 (citing SUPREME COURT OF JAPAN, *supra* note 106, at 15).

[113] *See Best Interests*, *supra* note 6, at 182 (citing Bryant, *supra* note 34, at 9).

[114] *See Best Interests*, *supra* note 6, at 183.

[115] Bryant, *supra* note 34, at 9.

[116] *Id.*

[117] *Id.* at 9-10. The author discusses how this mediator selection process limits the eligible applicant pool to "a narrow socio-economic band of the population." As a result of the age limitations for mediators, mediators tend to be considerably older than the average age of clients. Moreover, mediators are generally more highly educated and more financially privileged than most of the clients. *See id.* at 10.

> A lack of training in these areas also reduces the number of perceived psychological, legal, or social welfare avenues available for resolving disputes even if all psychological or legal issues are identified. Untrained individuals rely heavily on their own experience or notions of appropriate resolutions to family problems and they are encouraged to do so within a system in which they were selected according to indicia of good morals and common sense.[118]

As a result of this lack of expertise, "complaints about the mediators' gender bias and outdated notions of family are common."[119] More importantly, although mediators are untrained and often operate without a legal or psychological skill-set, they often control the ultimate results. This control is especially evident when judges are unable to attend mediation sessions,[120] while the mediators rally "clients to participate assertively in the search for mutually satisfying solutions and they rarely encourage clients to look outside the family court mediation for assistance in resolving their disputes."[121] This is particularly troubling when mediators operate in a manner that not only reflects their own personal desires and moral expectations, but also in manner which they believe will satisfy the judges.[122] Unfortunately, the result is superficial counseling, as mediators "do not probe below the surface of disputes, primarily for fear that an agreement will not be reached as quickly as the mediators perceive the judge wants the dispute resolved."[123]

b. Family Court Judges

As mentioned above, family court judges are often too busy to attend every mandatory mediation session.[124] This can be explained by the fact that according to some studies, Japanese judges typically deal with an average load of 200 cases at a time.[125] Of that caseload, Japanese judges are incentivized to 'resolve' the cases

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[118] *Id.* at 9.

[119] *Best Interests*, *supra* note 6, at 183 (citing TAICHI KAJIMURA, RIKON CHOTEI GAIDOBUKKU [GUIDEBOOK TO DIVORCE MEDIATION], 5 (2004); KURUMI NAKAMURA, RIKON BAIBURU [DIVORCE BIBLE], 287-288 (2005)).

[120] *See Best Interests*, *supra* note 6, at 183. Especially when judges are absent for the bulk of mediation proceedings, mediators can mold their findings to reach the results they desire or "find appropriate. *See id.* In fact:

> even though the issue [of visitation] arose, some mediators rarely reported it to judges because mediators convinced clients to drop the matter before concluding sessions with judges. The judge would not know that visitation had become a significant issue by virtue of the number of reported client proposals. Similarly no mention of the proposal remained in the record so that subsequent research would not uncover current non-custodial parents' requests for post-divorce contact with their children.

See id. at 183-4 (citing Bryant, *supra* note 34, at 19-20).

[121] Bryant, *supra* note 34, at 9.

[122] *Id.* at 10.

[123] *See id.*

[124] *See supra* note 110.

[125] *Best Interests*, *supra* note 6, at 176.

as quickly as possible, as the court system tends to award and promote judges who complete the most cases.[126] Moreover, the tremendous caseloads and added pressure to resolve these cases as quickly as possible, often "prevents judges from functioning properly and contributes to the trial errors endemic . . . ."[127]

On a related note, according to the Supreme Court of Japan, "[o]nly judges possessing sufficient enthusiasm, ability and understanding to deal with family and juvenile cases are designated as judges of the family court . . . ."[128] However, most judges find themselves in at least one rotation of family court during their careers,[129] and "prolonged tenure" in family court is often associated with "inferior status[es]," "undistinguished career[s]" and "limited career prospects."[130] According to one judge, "[t]hose of us who graduated from law faculties felt that it was our role to debate the great affairs of the nation . . . . Matters such as those between men and women seemed like trivia, mere trivia."[131] Considering this low regard with which family law is held by some judges, judges are often incentivized to move quickly out of their family court postings. This is often achieved by resolving as many cases as possible with the goal of being promoted, thereby sacrificing the integrity of the judicial process.[132]

Unfortunately, the authority and enforcement powers are limited for judges, including those who are sincerely committed to family law and their postings in family court:

> Judges . . . have limited authority to find parties in contempt or use other equitable powers, and have no court marshals with police-like powers to carry out their order. The police themselves have a long-standing policy (without foundation in any statute) of avoiding involvement in civil matters. Therefore, compared to their American counterparts, judges in Japan may have difficulty compelling litigants to do things necessary to resolve a case.[133]

Because judges lack the enforcement powers and the police steer clear of domestic issues, thereby refusing to enforce family court holdings, court orders are often recognized by the parties as recommendations or suggestions the parties can choose to follow, rather than mandates they must obey.

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126 *See id.* at 177 n.35. According to two experts, judges with the highest "batting average"—known in Japan as "*daritsu*"—a term used within the Japanese judicial system and is calculated by dividing the number of cases a judge "finishes" in a year by the number of cases that judge handled that year, are reportedly promoted sooner than their peers with lower batting averages. *See id.*

127 *Id.* at 177.

128 *Id. supra* note 6, at 180 (citing Supreme Court of Japan, Guide to the Family Court of Japan, 11 (2004)).

129 *Id.* at 180.

130 *Id.*

131 *Id.* at 181.

132 *See supra* note 126.

133 *Id.* at 177-78.

c. Family Court Investigators

Another key player in the Japanese family court system is the family court investigator.[134] Family court investigators are essentially responsible for "conduct[ing] factual investigations when necessary,"[135] and "help[ing] resolve family court cases and help judges clear their dockets."[136] When assigned to cases, these investigators "can and do play a significant, even determinative, role in the proceedings."[137] Moreover, "[t]hey may have the most facts and, because of their relative expertise in family matters, their reports to presiding judges—who might not participate substantively in the proceedings—may significantly influence the judges' decisions."[138] Most family court judges give great weight to the factual and substantive findings of investigators as judges have incredibly large caseloads and therefore rely heavily on the findings of both mediators and investigators.

However, the potential influence of family court investigators is troubling considering the level of expertise most investigators actually possess. Although the family court investigators exam covers a myriad of subjects including psychology, sociology and law, family court investigators are not "child psychologists, psychiatrists, therapists, independent custody evaluators, guardians ad litem, or independent advocates of children or anyone else involved in [American] family court proceedings."[139] Moreover, the depth of the psychology portion of the family court investigator exam is "no greater than that required by national public service exams for government jobs unrelated to the family court system."[140] Beyond passing the family court investigator exam, the only other requirements are that applicants be "Japanese nationals between the age of 21 and 30[;]" the applicants need not even be university graduates.[141] Although the Supreme Court of Japan claims that family court investigators are "expected to have extensive professional knowledge and skills in medical science, psychology, sociology, pedagogy and other human sciences . . . [n]othing in their background . . . renders them equivalent to licensed child psychologists or psychiatrists."[142] Rather, most family court investigators' psychology education and knowledge are often limited to what is learned in the mandatory two-year program of "study and practical training" from the Supreme Court of Japan's Court Personnel Training Institute.[143]

The lack of psychology and psychiatry expertise is especially unfortunate considering "in most divorce and child custody cases, if family court investigators

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134 *See Best Interests*, *supra* note 6, at 184.
135 *Id.*
136 *Id.* at 187.
137 *Id.*
138 *Id.*
139 *Id.* at 185.
140 *See Best Interests*, *supra* note 6, at 186.
141 *See id.* at 185.
142 *Id.* at 186.
143 *See id.* at 185-6.

become involved, they most likely will be the only ones in the entire process with any psychological training."[144] Despite, this incredibly low-level of expertise and lack of formal education, judges and mediators presumably follow and trust the findings of family court investigators.[145] In fact, "the fact that family court investigators have some training may [ironically] hinder parents from involving professionals with more formal qualifications."[146] Therefore, by assigning family court investigators to cases, judges may in fact be further undermining the integrity of the judicial process.

2. Proceedings

As discussed above, court-sponsored mediation known as "Conciliation [Mediation] First Principle" is a mandatory first step before divorce litigation.[147] This step is a "core principle of Japanese family law."[148] Moreover, this principle expands across all of family law. Therefore, if parties are seeking court orders in regards to divorce, visitation and child custody, these parties will likely "g[o] through at least one court-sponsored mediation session" for each of these actions sought.[149] This requirement applies even if parties are already in agreement on the issue and are simply seeking the court's order for formality purposes.[150]

Although the mediation requirement was probably drafted with good intentions, as its goal is to help the parties communicate, the process is often a time consuming roadblock from divorce litigation.[151] Mediation sessions usually occur every few weeks, each session lasting between one to two hours, and usually meet for two to three sessions until either a settlement is reached or until the mediation panel deems a resolution is unattainable.[152] Interestingly, although the mediation process is generally led by the parties, whether a settlement is possible is left to the judgment of the mediators and the judge.[153] This arrangement may lead parties to feel pressured to continue on the mediation process even if they know that a resolution is not possible.[154] Conversely, every unfruitful mediation session, if not officially deemed unsuccessful by the mediation panel, results in another four to six

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144 *Id.* at 186.

145 *See Best Interests*, *supra* note 6, at 187.

146 *Id.* at 186. According to the author's discussion with a Japanese lawyer, "most family court investigators consider themselves as having 'expertise' in psychology . . . [therefore] not only is it difficult to convince [investigators] of the need to involve a practitioner with more extensive qualifications and experience, but one may insult them in the process of attempting to do so." *See id.* at 186 n.79.

147 *Id.* at 191 (alteration in original).

148 *Id.* at 190-1.

149 *Id.* at 191.

150 *See id.*

151 *See Best Interests*, *supra* note 6, at 191.

152 *See id.* at 192.

153 *See id.* at 193.

154 *See id.* at 193-4.

weeks without judicial action.[155] Therefore, parties may feel pressured to settle on objectionable terms, for the sake of time. For parties disputing visitation or custody, the added pressure of time is especially significant, considering an additional mediation session could mean another month, if not longer, of a child having no contact with one of his parents.[156] Unfortunately, as one expert notes,[157] this timing factor of mediation, could then be used as a means for delaying visitation, as every unresolved mediation session could mean another month without settlement.[158]

Should mediation be declared unsuccessful, the parties are "deemed to have requested the family court to issue a decree;"[159] such decrees are issued at the sole discretion of a single judge, made perhaps with the controlling opinions of the mediation panel and family court investigators.[160] This is especially troubling considering the proceedings before a family court decree are non-public and there are "no adversarial proceedings, no oral arguments, and no opportunity to cross-examine the other party in front of the mediation panel—including the judge who may never hear either party speak before issuing a decree—."[161] Therefore, should the possibly biased mediation panel or an unsophisticated family court investigator favor one parent over the other, which is not unfathomable if one parent is foreign, the outcome could be left to the sole discretion of a lone judge with nothing more than the biased opinions resulting from earlier proceedings. Moreover, considering the parties' statements are not given under oath, and parties are not subject to liability for perjury, the ultimate decree could be subject to the lies, embellishments or accusations of one, or both parties.[162] As one expert noted,[163] in cases involving physical custody and visitation rights,

> it is possible for parents to be formally denied all contact with their children in proceedings where there is no opportunity to directly head the other parties speak, let alone challenge their assertions, little or no opportunity to be heard by the judge before he or shoe issues a decree, and limited ability to even know all of the evidence upon which that decree is based.[164]

For foreign parents, this can be particularly disturbing, when language barriers, expectations of different judicial proceedings and formalities, social biases and even racism on the part of family court actors may play a role. Furthermore,

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155 *See id.* at 194.

156 *Id.*

157 *See Best Interests*, *supra* note 6, at 194. *See also supra* note 108.

158 *See Best Interests*, *supra* note 6, at 194.

159 *See id.*

160 *See id.* at 195.

161 *Id.*

162 *See id.*

163 *See id. See also supra* note 108.

164 *See Best Interests*, *supra* note 6, at 196.

theoretically, even if a foreign parent was to win custody of his child by family court decree, all decrees can be appealed, thereby further delaying that parent from even seeing his child and further complicating the entire custody process.[165]

III. EFFORTS TO REMEDY THE INTERNATIONAL PARENTAL CHILD ABDUCTION PROBLEM AS IT RELATES TO JAPAN

Since the 1980 inception of the Hague Convention on International Child Abduction, Japan has continually refused to ratify the treaty, despite there being over 160,000 foreign and Japanese separated or divorce parents in Japan unable to see their children.[166] To tackle this growing problem, international efforts have been made including the introduction of the International Child Abduction Act by Congressman Christopher Smith of New Jersey and continued international pressure from ambassadors of several nations.

A. The International Child Abduction Prevention Act of 2009

In July 2009, New Jersey Congressman Christopher Smith introduced the International Child Abduction Prevention Act of 2009, ("Bill" or "Act").[167] According to Congressman Smith, this legislation "empowers the United States to more aggressively pursue the resolution of abduction cases . . . [as] our current system is not providing justice for left behind parents."[168] Moreover, Congressman Smith insists that "Congress must act so that more children are not further traumatized by parental abduction."[169] If passed, this bill would create the Office on International Child Abduction, and the position of Ambassador at Large for International Child Abduction within the State Department to advise the Secretary of State on related cases and issues.[170] The Ambassador at Large would also be charged with the responsibility of pursuing agreements with nations that have not signed the Hague Convention on Child Abduction.[171] Furthermore, the legislation would require the President to place economic sanctions and other penalties on nations that have "shown a pattern of non-cooperation in resolving

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165 *See id.* at 196-97.

166 *See* Matsutani, *supra note* 7.

167 *See* Charlie Reed, *Parents Hope Japan's New Leaders OK Abduction Treaty*, STAR AND STRIPES, Sept. 23, 2009, *available at* http://www.stripes.com/article.asp?section=104&article=64950 (last visited Feb. 25, 2010). On September 14, 2009, the Bill was referred to the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law. *See* H.R. 3240, The International Child Abduction Prevention Act of 2009, Status of the Legislation, *available at* http://www.washingtonwatch.com/bills/show/111_HR_3240.html (last visited Feb. 25, 2010).

168 Press Release, Congressman Christopher Smith, Father Arrested in Japan Underscores Need for Reforms, Sept. 30, 2009, *available at* http://chrissmith.house.gov/News/DocumentSingle.aspx?DocumentID=147346 (last visited Feb. 25, 2010).

169 *See id.*

170 *See id.*

171 *See id.*

child abduction cases."[172] According to the proposed legislation, a pattern of noncooperation means:

> [A] national government's systemic failure, evidenced by the existence of *ten or more* parental child abduction cases, which after having been properly prepared and transmitted by the Central Authority for the United States remain unresolved within its borders after 18 months or, where there are fewer than ten unresolved cases, any cases still unresolved after nine months from the time of receipt and transmittal by the Central Authority for the United States of a request to fulfill its international obligations with respect to the prompt resolution of cases of child abduction.[173]

Considering an estimated 80 American cases involving 118 children in Japan remain unresolved, if successful, this bill may pressure the President of United States to place economic sanctions against Japan.[174]

Amongst these economic sanctions, the Bill proposes to amend the Foreign Assistance Act of 1961 to effect the "withdrawal, limitation or suspension" of United States security and development assistance to nations that have engaged in patterns of non-cooperation, as defined above.[175] Similarly, the Bill proposes to amend the International Financial Institutions Act of 1977, an act which enables the United States government to promote "the human rights cause" by "channel[ing] money towards countries other than those whose governments engage in . . . a pattern of gross violations of internationally recognized human rights."[176] Congressman Smith's bill directs United States executive directors of international financial institutions to oppose actions that would ultimately benefit the government, or an agency or instrumentality of such government as determined by the President, to be responsible for such pattern of noncooperation."[177]

While this amendment may not greatly impact an industrialized and thriving nation like Japan, it will likely affect smaller developing non Hague Convention signatories. Nevertheless, Japan would certainly bear the brunt of the Bill's proposal to amend the Trade Act of 1974, to consider—for tariff preference purposes—whether the nation has engaged in a pattern of noncooperation regarding international child abduction.[178] If the nation is found to have engaged in a pattern of noncooperation, the Bill requires the subsequent "denial, withdrawal, suspension or limitation of benefits" provided to that nation. Similarly, the Bill would prohibit appropriate U.S. agencies from issuing licenses and exporting any goods or

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[172] *Id.*

[173] H.R. 3240, emphasis added, *supra* note 14.

[174] *See* Reed, *Overseas Custody Rights*, *supra* note 32. The number of open cases in Japan involving American left-behind parents continues to grow. In 2008, there were 40 open cases involving 50 children. By 2009, the number of unresolved cases grew to 80 cases involving 118 children. *See id.*

[175] *See* H.R. 3240, *supra* note 14, §204(a)(13).

[176] *See* 22 U.S.C. § 262d(a)(1) (2000).

[177] *See id.*

[178] *See* H.R. 3240, *supra* note 14, §204(a)(15).

technology covered by either the Export Administration Act of 1979, the Arms Export Control Act, the Atomic Energy Act of 1954, or "any other statute that requires the prior review and approval of the United States Government as a condition for the export or re-export of goods or services" to governments determined by the President to be engaging in patterns of noncooperation.[179] Furthermore, the Bill would prohibit *any* United States financial institution "from making loans or providing credits totaling more than $10,000,000 in any 12-month period" to governments determined to be engaging in patterns of noncooperation.[180] The Bill would also prohibit the U.S. government from "procuring, or entering into any contract for the procurement of, any goods or services" from such governments.[181] The Bill, as proposed could essentially cut all financial, trade and military-service related ties—with the exception of "medicine, medical equipment, or supplies, food or other humanitarian assistance"—to any nation deemed to have engaged in patterns of noncooperation regarding children abducted from their American parents.[182]

While the message of the Bill is certainly creating controversy, its economic sanction approach seems to be overly aggressive when it comes to international diplomacy. One expert in the field raises the concern that,[183] "American pressure can very well be counterproductive . . . if Japan sees the world community upset with them, that will be better than the perception that the American government is trying to bully them."[184] Rather than this aggressive approach, the expert suggests, "continued diplomacy is key to not persuade Japan to sign the Hague treaty but also to change its family legal system, which is crucial if the treaty is to function properly."[185]

While the economic sanctions proposed by the International Child Abduction Prevention Act of 2009 may be overly aggressive, numerous other proposals within the Bill, which apply more to the families affected are practicable and relevant. The Bill would authorize greater resources for a new office within the State Department to offer assistance to left-behind parents.[186] This assistance would provide legal advice to case managers for left-behind parents, a toll-free number that goes directly to the new State Department office, and a similar telephone line for left-behind parents who do not speak English.[187] Also, the State Department would provide a training course for Federal and State judges likely to hear Hague

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[179] H.R. 3240, *supra note* 14, §204 (a)(16)(A)-(D).

[180] *Id.* at §204 (a)(17).

[181] *Id.* at §204 (a)(18).

[182] *See id.* at §204 (C).

[183] Jeremy D. Morley is the author of *International Family Law Practice*, a leading treatise on international family law. Morley is also co-chair of the International Family Law Committee of the International Law Section of the American Bar Association.

[184] *See* Reed, *Overseas Custody Rights*, *supra* note 32 (quoting Morley, *supra* note 183).

[185] *Id.*

[186] *See* Press Release, *supra* note 168.

[187] *See* H.R. 3240, *supra* note 173, at §101(c)(9)(a)-(b).

Convention cases, while also mandating that no fewer than four specially trained judges remain available on an as needed basis to advise other Federal and State judges dealing with Hague Convention cases.[188] These proposed responsibilities for the State Department would drastically help left-behind parents with both handling their actual claims and dealing with the emotional and psychological trauma of losing contact with their children. Moreover, the proposed programs and mandates regarding Hague trained judges would help alleviate the burden placed on judges who are not as familiar with Hague Convention cases, while also streamlining cases brought under Hague and making the overall process of Hague Convention cases more efficient and timely.

Congressman Smith's Bill has already garnered support from members of the U.S. armed forces specifically for the proposed section requiring the Defense Department to create an official support network for members of the military. The Act would require the creation of a database to track cases and a system of uniform legal advice for service-members regarding divorces from foreign nationals.[189] Providing uniform legal advice throughout the "whole chain of command" is especially important, as Congressman Smith notes that often, service-members are "getting bad advice."[190]

One such case involves Navy Commander Paul Toland who has been tangled in a six-year long custody battle with his Japanese-American spouse who moved their daughter out of their home on the Yokosuka Naval Base, where he is stationed.[191] Toland believes that the advice he received from a military attorney, to pursue the case in Japanese court, "doomed [him] in the end," as it ultimately resulted in an American court later refusing to hear the case, citing Japanese jurisdiction.[192] Like Congressman Smith's insight, Toland believes that, "the lack of knowledge" hurt his case.[193]

The proposed Bill could benefit parents currently in these unfortunate circumstances, as well as all service-members married to, or contemplating marriage to, foreigners by streamlining the advice and services offered to military parents dealing with parental child abduction. Furthermore, these efforts are especially needed for service-members, as many open parental-child abduction cases in Japan involve active-duty troops or former members of the armed forces who met their spouses while stationed in Japan.[194]

While the International Child Abduction Prevention Act of 2009 is far from becoming a law, as it currently remains idle in the House subcommittee's pile of

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188 *See* H.R. 3240, *supra* note 173, at §101(c)(10)(a)-(b).

189 Reed, *Overseas Custody Rights*, *supra* note 32.

190 *Id.*

191 *See id.*

192 *Id.*

193 *Id.*

194 Reed, *Overseas Custody Rights*, *supra note* 32.

bills, the proposed legislation has garnered national and international attention for the ever-escalating problem of international child abduction.[195] Japan's refusal to sign the Hague Convention on Child Abduction is a tremendous source of this international press attention. Also, with the 2009 headlines regarding parental abduction from the United States, especially the United States House of Representative's unanimous passage of a Resolution that nearly ordered the Government of Brazil to expedite the Hague petition and immediately return a young boy, the overarching issue of parental abduction has certainly captured the attention of Congress.[196] Finally, with the recent passing of a resolution by the House of Representatives specifically condemning Japan for its position on parental child abduction, it may only be a matter of time until the International Parental Child Abduction Act is passed or until Japan signs the Hague Convention.[197]

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[195] Congressman Christopher Smith plans to reintroduce this bill in early 2011. *See* Charlie Reed, *More Countries Join Fight Against Japan in Child Abduction Cases*, STARS AND STRIPES, Oct. 25, 2010, *available at* http://www.stripes.com/news/more-countries-join-fight-against-japan-in-child-abduction-cases-1.122971.

[196] *See* Remarks by Michele Thoren Bond, Deputy Assistant Secretary of State for Overseas Citizen Services, Symposium on International Parental Child Abduction, U.S. Embassy Tokyo, Japan, May 21, 2009, *available at* http://travel.state.gov/pdf/das_bond_remarks_at_may_2009_symposium_on_ipca_and_japan.pdf. In December of 2009, after a five year custody battle, the president of Brazil's Supreme Court ruled that Sean Goldman must be returned to his American father. Bruna Bianchi, the Brazilian wife of American David Goldman and mother of Sean Goldman, took Sean to visit her family in Brazil in 2004 and never returned to the U.S. She then divorced David Goldman and married a well-known Brazilian attorney. Despite David Goldman's attempts to regain custody, the Brazilian courts held that the son's relationship with his mother was his primary bond. Even after Bruna Bianchi's death in 2008, her husband's family refused to return Sean to David Goldman, arguing that the returning the child to a father he hardly knew would be cruel. After a Rio de Janeiro Federal Appeals Court gave the stepfather forty-eight hours to return the boy to his father, a Supreme Court judge overruled that holding. Days later, Gilmar Mendes, President of the Federal Supreme Court of Brazil classified the case as urgent and ruled that Brazil was obliged to return the boy, as Brazil is a signatory to the Hague Convention. Prior to this order, the presidents of both the U.S. and Brazil publicly proclaimed that the boy should be returned to his father. *See generally* Andrew Downie, *Sean Goldman: Home by Christmas*, TIME, Dec. 24, 2009, *available at* http://www.time.com/time/world/article/0,8599,1949829,00.html (last visited Feb. 25, 2010).

[197] As this Note was going to publication, the U.S. House of Representatives passed a resolution that condemns Japan for its position on international parental child abduction. Officially titled, "Calling on the Government of Japan to address the urgent problem of abduction to and retention of United States citizen children in Japan, to work closely with the Government of the United States to return these children to their custodial parent or to the original jurisdiction for a custody determination in the United States, to provide left-behind parents immediate access to their children, and to adopt without delay the 1980 Hague Convention on the Civil Aspects of International Child Abduction," and sponsored by Rep. Jim Moran of Virginia, the House passed this Resolution on September 30, 2010. The Resolution condemns Japan for its retention of children from the United States who have been abducted and are being held in Japan. Moreover, the Resolution calls on the Japanese government to immediately facilitate the return of these children and to accede to the Hague Convention. Furthermore, the Resolution addresses the House of Representatives' "sense" that the United States recognizes international parental child abduction as an "issue of paramount importance," and the U.S. should revise its advisory services offered to parents both before abduction, in the form of preventive measures, as well as post-kidnapping.

Arguably, as a House Resolution does not require Senate approval or a signature by the President, this Resolution does "not carry legislative weight." However, parents could theoretically use the House

B. Other Efforts

In May 2009, ambassadors from the United States, Canada, France and the United Kingdom met in Tokyo to urge Japan to accede to the Hague Convention on Child Abduction.[198] Moreover, emphasizing the importance of Japan as an international ally and partner, the four nations in a joint statement, urged Japan to "identify and implement measures to enable parents who are separated from their children to maintain contact with them and visit them."[199] In January 2010, officials from the U.S. Embassy and State Department met with officials from the Ministry of Foreign Affairs to once again discuss the importance of Japan's accession to the Hague Convention.[200] Held in the context of a working group, during the January 2010 meeting the group addressed issues such as American children removed from the United States to Japan without prior consent or knowledge of the left-behind parents, as well as the inability of American parents to "have any meaningful access to their abducted children in Japan."[201] The group discussed ways to improve or provide American parents access to or visitation with their children and general ways to resolve the greater issue of child abduction.[202] Once again taking a simpler approach to dealing with parental-child abduction, the working group focused on tragic effects on the individual families after the left-behind parent is completely cut off from his or her child(ren).

Focusing on the visitation rights of left-behind parents is also the method the United Kingdom is taking in their latest efforts to aid British parents either seeking the return of their children to the U.K. or parents already denied access to their children by Japanese courts.[203] The British Foreign Office believes that Japanese courts could be breaching Article 10.2 of the United Nations Convention on the Rights of the Child, which states that a "child whose parents reside in different

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Resolution to prevent their children from being abducted by bringing "'the resolution . . . to a [U.S.] judge and get[tting] special protections' . . . such as forbidding contested children from traveling to Japan if the court suspects a parent is disguising plans to abscond with the children." While it is unclear how effective this strategy would be, the actual passing of this House Resolution could, according to Congressman Christopher Smith, "pave the way for passage of the International Child Abduction Prevention Act." Moreover, the passing of this House Resolution is a strong indicator of the growing support behind efforts to combat the issue of Japanese-American parental child abduction. *See* H.Res.1326, 111th Cong. (2010), *available at* http://thomas.loc.gov/cgibin/query/D?c111:2:./temp/~c111HFtMtv::. *See also*, Charlie Reed, *House Calls for U.S.-Japan SOFA Change on Parental Child Abduction*, STARS AND STRIPES, Sept. 30, 2010, *available at* http://www.stripes.com/news/pacific/japan/house-calls-for-u-s-japan-sofa-change-on-parental-child-abduction-1.120145.

198 *See* Joint Press Release, Following the Symposium on International Parental Child Abduction, Canada, France, UK, United States (May 21, 2009), *available at* http://tokyo.usembassy.gov/e/p/tp-20090521-79.html (last visited Feb. 28, 2010).

199 *See id.*

200 *See* Press Release, U.S. Renews Call for Japan to Accede to Hague Convention Concerning International Child Abduction (Jan. 22, 2010), *available at* http://tokyo.usembassy.gov/e/p/tp-20100122-72.html (last visited Feb. 28, 2010).

201 *Id.*

202 *See id.*

203 *See* William Hollingworth, *U.K. to Press for Rights of Fathers*, THE JAPAN TIMES, Nov. 3, 2009, *available at* http://search.japantimes.co.jp/cgi-bin/nn20091103f1.html (last visited Feb. 25, 2010).

countries shall have the right to maintain on a regular basis . . . personal relations and direct contacts with both parents."[204] According to a child abduction caseworker at the British Foreign Office, the British Ambassador in Japan is charged with discussing with the Japanese government "the obligations of states to develop and undertake all actions and policies in the best interests of the child, referring in particular to Article 10.2."[205] Nevertheless, British officials readily acknowledge that no method of "international enforcement" exists, even if Japan is found to be violating its U.N. Convention obligations.[206] Until Japan joins the Hague Convention on child abduction, which does provide for an "enforcement mechanism" unlike the U.N. Convention, left-behind parents are stuck, cut off from their children and with no promise of visitation, contact or a fair custody hearing.[207]

As bleak as these efforts seem, the U.S. step-by-step working group method and the British attempt to invoke the U.N. Convention seem to be fairly practicable and possibly realistic approaches to drawing further international attention to the problem and to remedying the escalating parental-child abduction problem with Japan. Unfortunately, a hasty accession to the Hague Convention by Japan would be neither helpful nor productive; according to one expert in the field, "[a]s soon as they sign it, they'll be in violation of it . . . [t]hat's why they haven't signed it; they're not set up for it."[208] Moreover, Japanese accession to the Treaty could have adverse effects, as this could "remove a red flag" from view of judges in foreign nations who might otherwise reconsider allowing custody or visitation arrangements that involve or could involve travel to Japan.[209] Drastic changes in Japan's legal system and cultural expectations are required for a successful and honest ratification and implementation of the Hague Convention.

One suggestion for Japan's realistic accession to the obligations and responsibilities of the Hague Convention is to abolish the *koseki* system all together.[210] This would ostensibly remove the paperwork-created requirement of sole-custody and extend legal ties to both parents, regardless of nationality.[211] Another suggestion for the remedying of this epidemic is the improvement and creation of a more "professional domestic-dispute enforcement" and mediation mechanisms.[212] Presumably, by improving these stages of the Japanese legal

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204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 Reed, *supra* note 32 (quoting Jeremy D. Morley).

209 *No More Excuses*, *supra* note 85, at 352. The author believes this consequence is likely because of the lack of enforceability; which also explains the existence of the problems of parental abduction, visitation denial and parental alienation which already plague the current Japanese family law system. *See id.*

210 *See* Arudou, *supra* note 30.

211 *See id.*

212 *Id.*

custody process, both parents and children could benefit from a more fair and professional proceeding. A further recommendation for the improvement of the parental child abduction problem in Japan would require a clear definition, by means of statute or judicial rules, for the "best interest of the child" standard to apply in custody disputes.[213] Until a clear definition for this standard is offered, judges in custody proceedings are "free to resolve cases in whatever way is most convenient for the court . . . which more often than not is the status quo, which they have little power to change."[214] Therefore, until that clear definition is given, judges are likely to continue to reinforce the cultural expectations favoring sole custody and Japanese nationals.

In January of 2010, the ambassadors from eight nations, the U.S., Australia, Britain, Canada, France, Italy, New Zealand and Spain, met with Foreign Minister Katsuya Okada to urge Japan to accede to the Hague Convention.[215] Looking to capitalize on this idea of changing the Japanese status quo, these nations are hoping to garner the support of Japan's newly elected "centre-left" government, which recently ended nearly fifty years of conservative rule.[216] Moreover, these governments are hoping that after twenty years of "studying the issue," Japan will finally sign the 1980 Hague Convention on Civil Aspects of International Child Abduction and attempt to make Japan "more compatible with the legal conventions used internationally."[217] While Japan has not yet acceded to the Treaty, the efforts of the international community to pressure Japan have been successful. On February 25, 2010, Prime Minister Yukio Hatoyama instructed his ministers to "quickly decide" whether to join the Hague Convention.[218] In a statement to reporters, Prime Minister Hatoyama proclaimed that, "now that the world is beginning to regard Japan as a peculiar country, it is important to draw a conclusion as soon as possible regarding the Hague Convention to show that is not the case."[219] While Prime Minister Hatoyama declined to offer an estimated ratification date, the public declaration of his intent to address this issue is a step in the right direction.

CONCLUSION

Japan's failure to accede to the 1980 Hague Convention on Civil Aspects of International Child Abduction has impacted the lives of hundreds of thousands of

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213 Jones, *supra* note 17.

214 *Id.*

215 *See Eight Countries Press Japan on Parental Abductions*, *supra* note 12.

216 *Id.*

217 Terrie Lloyd, *Japan Inches Toward Signing Hague Treaty on Child Abductions*, JAPANTODAY, Apr. 4, 2009, *available at* http://www.japantoday.com/category/commentary/view/japan-inches-toward-signing-hague-treaty-on-child-abductions.

218 *Lean Toward Hague: Hatoyama Says*, THE JAPAN TIMES, Feb. 26, 2010, *available at* http://search.japantimes.co.jp/cgi-bin/nn20100226a6.html (last visited Feb. 28, 2010).

219 *Id.*

parents and children worldwide. While simply signing this Treaty seems like the easiest solution to the ever-escalating problem of parents of international marriages absconding with their children back to Japan, this would not serve as a concrete or productive solution to the greater issue. Ultimately, Japan's failure to join the Hague Convention is deeply rooted in the nation's legal system, cultural expectations and traditions. While the Treaty may dictate the legal parameters of international abduction cases, with which Japan would be required to abide by until the Japanese government makes significant changes to Japanese family and criminal laws, Japanese courts would not even be able to feasibly apply these conventions. Nevertheless, until Japan accedes to the Hague Convention, foreign left-behind parents of children removed to Japan are left with few options, no realistic chance of repatriating their children, or of having any contact or visitation with their children, at least not until their kids have grown up.

As the media swarmed over the Japanese case involving Christopher Savoie and the Brazilian case involving David Goldman, these stories have drawn international attention to the problems of parental child abduction. Combined with the efforts of U.S. Congressman Christopher Smith's proposed International Child Abduction Prevention Act of 2009, Britain's study of the United Nations Convention on the Rights of the Child and the recent efforts of Ambassadors of several nations, these actions have placed the necessary pressures on Japan to finally address a truly unfortunate black hole in Japan's family law system.