Loyola of Los Angeles Law Review

Volume 11 | Number 4 Article 5

9-1-1978

Prevention of Child Stealing: The Need for a National Policy

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PREVENTION OF CHILD STEALING: THE NEED FOR A NATIONAL POLICY

I. INTRODUCTION

Each year some 900,000 children are affected by their parents' divorce.[1] For many of these children the divorce and custody determination is the beginning of a long nightmare: the losing parent, dissatisfied with the custody decision, seizes the child and flees to another state in search of a more favorable decree. The sister state's court then modifies the prior decree and rewards the parent's action. The child becomes a pawn in a conflict between the embattled parents which may continue for years:

> [T]he struggle between divorced spouses over the custody of their children has transcended the brutality and irregularity of guerrilla warfare. The child is filched from the classroom, playground, public street, or his home, transported out of the state and perhaps across country by the abducting parent, there to be held pending a counterforay by the other parent. Meanwhile, each parent recruits the assistance of his home court, sometimes of courts elsewhere, seeking by various procedures to strengthen his grip on the child and to loosen that of the other parent.[2]

The willingness of courts to modify the custody decrees of sister states has encouraged parents losing custody battles to abduct their children and to remove them to another jurisdiction to obtain a new custody determination. Further, the increasing divorce rate portends a corresponding increase in the incidence of such child stealing. This comment will examine the scope of the problem of child stealing,[3] analyze current methods for handling parental abductions, discuss suggested reforms designed to curb child stealing,[4] and propose a national policy aimed at reducing the incidence of such abductions.

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1. 123 CONG. REC. S2982 (daily ed. Feb. 24, 1977) (remarks of Sen. McGovern); Farr, *Van de Kamp Hits FBI on 'Stolen Children' Policy*, L.A. Times, Sept. 5, 1977, § 2, at 2, col. 6.

2. Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379, 392-93 (1959) (footnotes omitted) [hereinafter cited as Hazard].

3. For the purposes of this comment, the terms "child stealing," "child snatching," "parental kidnapping," and "parental abduction" will be used synonymously. These terms refer to a situation where one parent removes (and sometimes secrets) a child from the other parent (or lawful custodian) in violation of a custody decree or in violation of the parent's natural custody rights.

4. Several solutions, including legislation currently before Congress, have been proposed. *See* text and authorities accompanying notes 178-81 *infra*.

II. THE PROBLEM

Parental kidnapping is reaching appalling proportions. Although no precise figures are available to indicate the number of children annually kidnapped by one of their parents, conservative estimates place the number at 25,000[5] while other figures range as high as 100,000.[6]

The tragedy of parental kidnapping lies not merely in the fact that it occurs, but also in the effects it has upon the children. The Commissioners on Uniform Laws have noted:

> The harm done to children by these [abduction] experiences can hardly be overestimated. It does not require an expert in the behavioral sciences to know that a child, especially during his early years and the years of growth, needs security and stability of environment and a continuity of affection. A child who has never been given the chance to develop a sense of belonging and whose personal attachments when beginning to form are cruelly disrupted, may well be crippled for life, to his own lasting detriment and the detriment of society.[7]

Environmental stability is fundamental to the normal development and maturation of a child.[8] Consequently, a child who has been shifted between parents without a stable home environment is likely to be slowed in both intellectual and emotional development. Lack of continuity in homelife may create severe conflicts within the child. A divorce alone is likely to divide the child's loyalties between parents resulting in a retardation of the development of positive relationships

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5. 124 CONG. REC. S501 (daily ed. Jan. 25, 1978) (remarks of Sen. Wallop); 123 CONG. REC. E6151 (daily ed. Oct. 6, 1977) (remarks of Rep. Sawyer); Molinoff, *Divorced Parents Who Kidnap Their Own Children*, Wash. Post, Oct. 16, 1977, § Parade, at 10 [hereinafter cited as Molinoff]; Trescott, *Child-Snatching: A Legal 'Crime'*, Wash. Post, Dec. 27, 1976, § B, at 1, cols. 1-2; *Kidnappings: A Family Affair*, NEWSWEEK, Oct. 18, 1976, at 24; *Moving to Stop Child Snatching*, TIME, Feb. 27, 1978, at 85.

6. 123 CONG. REC. H54 (daily ed. Jan. 4, 1977) (remarks of Rep. Moss); Goodman, *Child-Snatching*, Wash. Post, Mar. 26, 1976, § A, at 27, col. 6; Most, *The Child-Stealing Epidemic*, 224 NATION 559 (1977); Peterson, *Child Snatching: The Extralegal Custody Battle After Divorce*, N.Y. Times, Oct. 17, 1977, § C, at 36, col. 2; Smith, *Retrieving Stolen Children—For a Fee*, L.A. Times, Sept. 28, 1977, § 4, at 1, col. 2; Trescott, *Child-Snatching: A Legal 'Crime'*, Wash. Post, Dec. 27, 1976, § B, at 1, col. 1.

7. *Commissioners' Prefatory Note*, UNIFORM CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 99-100 (1973) [hereinafter cited as *Commissioners' Note*].

8. One authority has argued that stability is "practically the principle [*sic*] element in raising children, especially pre-puberty ones." He has further indicated that "a child can handle almost anything better than he can handle instability." PROCEEDINGS OF SPECIAL COMMITTEE ON UNIFORM DIVORCE AND MARRIAGE ACT, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 98, 101 (Dec. 15-16, 1968) (remarks of Dr. Andrew Watson), *cited in* Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1208-09 (1969) [hereinafter cited as Bodenheimer, *Legislative Remedy*].

with either or both of the parents.[9] The disorientation generated by the circumstances of a parental abduction is likely to exacerbate these effects.[10]

Child stealing is a gesture of hostility between the parents. The child, confused by this highly emotional situation, may begin to believe that he or she has been the cause of all of the problems and, as a result, develop a severely negative self image.[11] Such tragic results have led one psychologist to label child stealing as "one of the most subtle and brutal forms of child abuse."[12]

The seriousness of the problem of parental kidnapping is clear. But while few scholars or legislators would deny that such activity should be discouraged, the law in most jurisdictions actually facilitates parental abductions.

III. CURRENT LAWS REGARDING CHILD STEALING

While violations of custody decrees may lead to criminal sanctions,[13] child custody, under current law, is considered primarily a civil matter. This approach has proven woefully inadequate to handle the problem of parental kidnapping. The situation has been succinctly summarized as follows: "[U]nder the existing law of most states and countries, child-snatching by a parent usually is condoned, often rewarded, and rarely punished. Moreover, federal authorities and the Constitution to date have displayed a 'hands off' attitude."[14]

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9. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 37-38 (1973) (footnote omitted). This treatise contains an excellent discussion of the child's need for stability.

10. Dr. Anthony Atwell, director of Stanford University's Family Law Consultation Service, has observed: "More often than not, the children are already torn in their loyalties and [a parental abduction] may permanently prevent the child from having a realistic view of both parents." Young, *Parents Who Steal Children*, PLAYGIRL, Feb. 1978, at 84.

11. *Id.* (comments of clinical psychologist Dr. Cassandra Brothers).

12. *Moving to Stop Child Snatching*, TIME, Feb. 27, 1978, at 85 (quoting psychologist Dr. Philip Weeks).

13. *See* text and authorities accompanying notes 72-84 *infra*.

14. Foster & Freed, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act*, 28 HASTINGS L.J. 1011, 1011 (1977) (footnote omitted) [hereinafter cited as Foster & Freed]. This situation has changed little in the past few years. A decade ago the Commissioners on Uniform Laws commented:

> [T]hose who lose a court battle over custody are often unwilling to accept the judgment of the court. They will remove the child in an unguarded moment or fail to return him after a visit and will seek their luck in the court of a distant state where they hope to find—and often do find—a more sympathetic ear for their plea for custody.
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> . . . .
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> In this confused legal situation the person who has possession of the child has an enormous tactical advantage. Physical presence of the child opens the doors of many courts to the petitions and often assures him of a decision in his favor. It is not surprising then that custody claimants tend to take the law into their own hands, that they

There are two primary explanations for the incidence of parental kidnapping under the current law. First, present custody adjudication procedures promote forum-shopping. Custody decrees generally lack finality and so may be disregarded or modified by foreign states. Second, there are no effective sanctions for parental kidnapping. Current civil and criminal penalties have proven ineffective in deterring child stealing.

A. Custody Adjudication Procedures

Current custody adjudication procedures facilitate child stealing because more than one state may be able to claim subject matter jurisdiction in an individual custody case.[15] A state with concurrent jurisdiction may be unwilling to recognize and enforce a sister state's custody decree and may modify the prior decree or render a new one.[16] Thus, the parent who loses a custody battle in the primary jurisdiction might be motivated to abduct and transfer the child to another jurisdiction in search of a more favorable custody decree.

1. Jurisdiction in Custody Cases and Modification of Custody Decrees

While there is no universal formula for determining jurisdiction in child custody cases, most states claim subject matter jurisdiction on the basis of the domicile of the child, the presence of the child, or personal jurisdiction over the child's parents. Any one of these bases is sufficient to confer jurisdiction.[17] Consequently, this permits two or more states to exercise concurrent jurisdiction in a child custody case. Even when a second state could not initially have exercised jurisdiction, a losing parent need only remove the child to another state where a court may claim jurisdiction based on the child's presence. As a result, jurisdictional limits do not bar a parent from abducting the child and fleeing to a foreign state in search of a more favorable custody decree.

Since one of the primary motives for child stealing is to seek a more favorable custody decree, some parental abductions would be deterred

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resort to self-help in the form of child stealing, kidnapping, or various other schemes to gain possession of the child.

Commissioners' Note, supra note 7, at 99, 101.

15. *See* text accompanying note 17 *infra*.

16. *Commissioners' Note, supra* note 7, at 100. For a discussion of the effect of full faith and credit see text and authorities accompanying notes 31-50 *infra*.

17. This position was first established in Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948). It was subsequently adopted by the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971).

if state courts were willing to enforce the custody decrees of sister states. Unfortunately, trial courts are frequently unwilling to defer to the judgments of other states.[18] This phenomenon is probably largely due to each judge's feeling that he or she can render a decree which is more fully informed than that rendered by the previous judge.[19] Modifications have also been common because courts have tended to overemphasize the need for fluidity (instead of stability) in custody decrees.[20]

Courts usually depend upon one of three reasons in refusing to recognize or enforce the custody awards of sister states. The first reason is that the sister state lacked subject matter jurisdiction.[21] Reexamination is allowed in this instance because the child was neither domiciled nor present in the state making the award (rendering the decision a nullity) or because both parents were not before the court and hence the rights of the absent parent could not be determined.[22] The second justification relied upon for reexamining a custody adjudication is that a change in circumstances affecting the welfare of the child has occurred.[23] A decree may be viewed as binding only at the time it was rendered and the decision easily reconsidered. The third rationale for a custody modification is that since states have concurrent jurisdiction over child custody, a prior decree from a foreign state is not binding on a sister state.[24] On this basis, the custody issues may be completely readjudicated. These approaches provide the grounds upon which

18. *See* Bodenheimer, *Multiplicity of Child Custody Proceedings—Problems of California Law*, 23 STAN. L. REV. 703, 719-20 (1971); Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 348 (1953) [hereinafter cited as Ehrenzweig]; Hudak, *The Plight of the Interstate Child in American Courts*, 9 AKRON L. REV. 257, 273 (1975) and cases cited therein [hereinafter cited as Hudak, *Interstate Child*].

19. Address by Justice Fairchild of the Supreme Court of Wisconsin, Conference of Chief Justices (Aug. 1969), *cited in* Bodenheimer, *Legislative Remedy, supra* note 8, at 1211.

20. *Commissioners' Note, supra* note 7, at 100.

21. Hudak, *Interstate Child, supra* note 18, at 271; Hudak, *Seize, Run, and Sue: The Ignominy of Interstate Child Custody Litigation in American Courts*, 39 MO. L. REV. 521, 533 (1974) [hereinafter cited as Hudak, *Seize, Run, and Sue*].

22. Hudak, *Interstate Child, supra* note 18, at 271; Hudak, *Seize, Run, and Sue, supra* note 21, at 533.

23. Hudak, *Interstate Child, supra* note 18, at 271; Hudak, *Seize, Run, and Sue, supra* note 21, at 533-35; Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 798, 813 (1964) [hereinafter cited as Ratner]; Comment, *Legalized Kidnapping of Children by Their Parents*, 80 DICK. L. REV. 305, 317-18 (1976) [hereinafter cited as *Legalized Kidnapping*]. *See, e.g., In re* Guardianship of Rodgers, 100 Ariz. 269, 413 P.2d 744 (1966) where the court apparently found that the mother had reformed from past criminal behavior. *See also* Ehrenzweig, *supra* note 18, at 352. Ehrenzweig found that the changed circumstances doctrine was "rarely more than a manner of speech supporting a preconceived result." *Id.*

24. Hudak, *Interstate Child, supra* note 18, at 271-72; Hudak, *Seize, Run, and Sue, supra* note 21, at 534. *See, e.g.*, Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948).

courts will reexamine the decrees of sister states. The ability of courts to claim jurisdiction based on the child's presence and the willingness of courts to modify the decrees of sister states combine to provide an incentive for a parent, discouraged by the loss of a custody battle in one state, to abscond with the child to another jurisdiction seeking a reassessment of the original decree or a new custody determination in his or her favor.[25]

The doctrines of res judicata, full faith and credit,[26] or comity[27] could arguably prevent readjudication of custody decrees by allowing or requiring recognition and enforcement of sister states' decrees. These doctrines, however, have proven ineffectual in preventing custody decree modifications.

2. Res Judicata and Full Faith and Credit in Custody Cases

In theory, the doctrine of res judicata bars relitigation by preventing a rehearing on issues previously decided in another court. In reality, however, the doctrine has done little to bar modification of custody decrees. While some states recognize a prior custody decree as res judicata as to those facts and conditions before the court when the decree was granted,[28] many courts allow a decree to be modified on the basis of changed circumstances.[29] Accordingly, even a custody decree considered res judicata may still be altered by a sister state. Other courts take the position that custody decrees are, by their very nature, not final decrees and so are not res judicata as to any matters involved.[30] As a result, courts adhering to this position are willing to reexamine foreign custody decrees. Thus, despite the recognition of the doctrine of res judicata, a custody decree may be readjudicated in a second forum.

While the doctrine of res judicata is designed to prevent a rehearing of previously adjudicated issues, the doctrine of full faith and credit is designed to provide recognition and enforcement of the decrees of sis-

25. *See* Ratner, *supra* note 23, at 813.

26. For a discussion of the application of res judicata and full faith and credit to custody decrees see text and authorities accompanying notes 28-50 *infra*.

27. For a discussion of the application of comity to custody decrees see text and authorities accompanying notes 51-52 *infra*.

28. *See* McMillin v. McMillin, 114 Colo. 247, 158 P.2d 444 (1945); Wilburn v. Wilburn, 210 A.2d 832 (D.C. Ct. App. 1965).

29. *See* Lyerla v. Lyerla, 195 Kan. 259, 403 P.2d 989 (1965); *In re* Leete, 223 S.W. 962 (Mo. Ct. App. 1920).

30. *See* Kovacs v. Brewer, 356 U.S. 604 (1958); Langan v. Langan, 150 F.2d 979 (D.C. Cir. 1945); Proctor v. Proctor, 245 A.2d 684 (Pa. Super. Ct. 1968); Anderson v. Anderson, 36 Wis. 2d 455, 153 N.W.2d 627 (1967).

ter states. The United States Constitution states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[31] Although, in theory, this language would seem to provide a basis for the protection of child custody decrees, the Supreme Court has yet to recognize such protection. On four occasions the Supreme Court has been confronted with cases where the full faith and credit clause might have been applied to bar reexamination of a custody decree, but in each case the Court failed to apply the clause to prevent custody modifications.

In the first of these cases, *Halvey v. Halvey*,[32] the Court was presented with a New York modification of a Florida custody decree. In 1945 Mrs. Halvey filed for a divorce in Florida. The day before the decree was granted giving Mrs. Halvey a divorce and permanent custody of her son, Mr. Halvey removed the son to New York. Mrs. Halvey then brought a habeas corpus action in New York to regain custody of the child. The New York court ordered that custody remain with the mother but granted the father visitation rights not provided in the Florida decree. While not directly addressing the issue of full faith and credit for custody decrees, the United States Supreme Court upheld the New York court's action, concluding that since Florida could modify the decree, New York could also modify the decree. The Court stated that: "the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered."[33]

The *Halvey* decision is unfortunate because it allows endless forum-shopping in custody cases. Whenever a custody decree could be altered by the rendering court, and another state's court is able to claim subject matter jurisdiction,[34] that state can ignore the custody decision of the original forum and relitigate any custody issues on which new information has arisen subsequent to the original hearing. This result may occur even though the second state may have limited access to relevant information. The *Halvey* decision thus encourages judicial competition in custody matters. In addition, the case provides an incentive for child snatching. The unhappy parent may perceive that the possibility of a more favorable custody determination is greater in another jurisdiction and so snatch and transport the child to a foreign

31. U.S. CONST. art. IV, § 1.
32. 330 U.S. 610 (1947).
33. *Id.* at 615.
34. *See* text and authorities accompanying note 17 *supra*.

jurisdiction to petition the courts there for custody.[35]

The Supreme Court had another opportunity to analyze the custody/full faith and credit issue in *May v. Anderson*.[36] In that case, Mr. Anderson had been granted a divorce and custody of his children in an ex parte Wisconsin proceeding. In that proceeding, the Wisconsin court did not have jurisdiction over the children's mother. Some years later, the mother refused to surrender the children after they visited with her in Ohio. Mr. Anderson then brought a habeas corpus action in Ohio (relying on the Wisconsin decree) and was granted possession of the children; the United States Supreme Court reversed this decision. Illustrating the difficulty the Court has had in this area, the justices divided four ways. Justice Burton, writing for the plurality, framed the issue as follows: "the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*."[37] Justice Burton continued by stating that "a mother's right to custody of her children is a personal right" which could not be taken without personal jurisdiction over her.[38] Only the plurality embraced this view. Justice Frankfurter, in a concurring opinion, reasoned that since a state's primary duty was to the child, custody decrees were never entitled to full faith and credit: "[T]he child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time."[39] On the other hand, the dissenting justices assumed that full faith and credit should be applied to custody decrees.[40]

The plurality opinion in *May* has been severely criticized.[41] The approach taken therein seemingly promotes parental abductions. Justice Jackson, dissenting in *May*, argued that the failure to grant full faith and credit "seems to reduce the law of custody to a rule of seize-and-run."[42] He further indicated that under the plurality approach "[t]he convenience of a leave-taking parent is placed above the welfare

35. *See* the concurring opinion of Justice Rutledge in *Halvey*, 330 U.S. at 619-20.
36. 345 U.S. 528 (1953).
37. *Id.* at 533.
38. *Id.* at 534.
39. *Id.* at 536.
40. *Id.* at 537, 539 (Jackson & Reed, JJ., dissenting); *id.* at 543 (Minton, J., dissenting).
41. *See* Hazard, *supra* note 2; Comment, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 COLUM. L. REV. 289, 310-11 (1973).
42. 345 U.S. at 542.

of the child, but neither party is greatly aided in obtaining a decision."[43] Justice Jackson concluded that "[a] state of the law such as this, where possession apparently is not merely nine points of the law but all of them and self-help the ultimate authority, has little to commend it in legal logic or as a principle of order in a federal system."[44] While more limited readings of *May* have been suggested,[45] the case has done little to clarify the effect of the doctrine of full faith and credit on custody decrees.

Two later cases also presented an opportunity for the Supreme Court to bar foreign custody relitigation through the doctrine of full faith and credit, but in both cases the Court declined to do so. Both *Kovacs v. Brewer*[46] and *Ford v. Ford*[47] followed the *Halvey-May* line of thinking. In addition, *Kovacs* recognized a court's ability to modify a sister state's custody decree on the rationale that circumstances had changed since the prior decree was rendered.[48]

43. *Id.* at 539.

44. *Id.*

45. *See, e.g.*, Commissioners' Note to Section 13, UNIFORM CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 103, 121 (1973); Ratner, *supra* note 23, at 805; Comment, *The Jurisdiction of Texas Courts in Interstate Child Custody Disputes: A Functional Approach*, 54 TEX. L. REV. 1008, 1012-13 (1976).

46. 356 U.S. 604 (1958). In *Kovacs* the initial custody decree, rendered in New York with all parties present, granted custody to the paternal grandfather. Subsequently, the grandfather and the child established residence in North Carolina. Nearly four years after the initial decree, and with all concerned parties before the court, the New York court modified the original decree and granted custody to the mother. When the mother sought enforcement of the decree fourteen months after the New York court's action, the grandfather refused to surrender the child. The mother then sued in North Carolina to recover her child. The North Carolina court determined, especially with reference to events that had occurred after the New York court's modification of the order, that the best interests of the child would be ensured by allowing the grandfather to retain custody. The United States Supreme Court remanded the case to the North Carolina courts to determine the issue of changed circumstances. The Court concluded that under the *Halvey* doctrine, if the North Carolina courts found that a change in circumstances indicated that the best interests of the child would be served by the grandfather's custody of the child, then a decision on the constitutional issues would be unnecessary. *Id.* at 607-08.

47. 371 U.S. 187 (1962). In *Ford* the husband filed a writ of habeas corpus in Virginia alleging that the mother was unfit and asking that he be awarded custody. On the basis of a mutual agreement dividing custody, the Virginia court dismissed the case. Some nine months later, when the children were with her, Mrs. Ford filed suit in South Carolina to gain full custody of the children. The South Carolina court awarded custody to the mother and refused to treat the Virginia court order as res judicata on the issue of fitness. The United States Supreme Court held that the Virginia custody award was not res judicata in Virginia, so that South Carolina was not required to treat the issue of custody as res judicata. *Id.* at 192-94. *See also* Note, *Ford v. Ford: Full Faith and Credit to Child Custody Decrees*, 73 YALE L.J. 134 (1963).

48. *See* text and authorities accompanying notes 23 & 29 *supra*.

These cases illustrate that the Supreme Court has been consistently reluctant to apply the full faith and credit clause to child custody cases.[49] Taken together, the cases seem to say that the courts of one state may refuse to recognize a prior custody decree of another state if one of the following conditions is present: (1) the first state could modify the decree for any reason, (2) circumstances have changed since the prior decree was rendered, or (3) the defendant had possession of the child and the initial court lacked personal jurisdiction over the defendant. The effect of these cases is such that even if the applicability of the full faith and credit clause to custody decrees were now recognized, a court in a second state could still find grounds (such as the changed circumstances doctrine) to modify a prior decree of another state.[50]

3. The Application of Comity to Custody Cases

Another doctrine which permits recognition of the decrees of a sister state is that of comity.[51] Under the doctrine of comity, a court, by exercising its discretion, may recognize and enforce a foreign decree. The doctrine is designed to promote respect for the decisions of the courts of sister states; however, such recognition is permissive. A state court might refuse to relitigate a prior sister state's custody decree. Yet even in those jurisdictions which follow the doctrine, an allegation of changed circumstances will allow review and modification of a prior custody decree.[52] As a result, comity does little to bar custody award modification.

In an attempt to discourage parental abductions, some courts have adopted a "clean hands" approach,[53] refusing to reexamine a sister state's custody award when the plaintiff parent has wilfully violated the decree.[54] In a landmark decision, *Ex parte Mullins*,[55] the Washington

49. *See generally Actions Taken By Supreme Court*, N.Y. Times, Jan. 26, 1977, § A, at 14, col. 1.

50. As one commentator has stated: "The consequences of these four vapid decisions by the United States Supreme Court have been disastrous to countless children of broken homes. Increasing chaos and confusion have continued to be the products of child custody litigation in American courts." Hudak, *Interstate Child, supra* note 18, at 270.

51. At least eleven states have applied this doctrine in child custody litigation. Comment, *Conflict of Laws: Child Custody and Foreign Judgments*, 11 WASHBURN L.J. 305, 307 n.13 (1972).

52. *See* Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3 FAM. L.Q. 304, 309 (1969) [hereinafter cited as Bodenheimer, *Uniform Act*]. *See, e.g.*, Guardianship of Cameron, 66 Cal. App. 2d 884, 153 P.2d 385 (1944).

53. This doctrine was first proposed by Ehrenzweig, *supra* note 18, at 357.

54. *See* Leathers v. Leathers, 162 Cal. App. 2d 768, 328 P.2d 853 (1958); Crocker v. Crocker, 122 Colo. 49, 219 P.2d 311 (1950).

55. 26 Wash. 2d 419, 174 P.2d 790 (1946).

Supreme Court, applying the clean hands rule, declared: "All reasonings and ideas of fair play and justice demand a holding that a parent acting in disobedience to an order of a court, cannot secure a new domicile for his or her child."[56] Unfortunately, those states which recognize this clean hands limitation have not been consistent in its application.[57] Courts have refused to apply the doctrine on the ground that it would be inequitable to punish the child for parental wrongs.[58] Other courts have excused abductions as not being so serious as to bar a judicial determination based upon the merits and predicated upon the welfare and interest of the child.[59] While the application of the clean hands doctrine might be helpful in discouraging parental kidnapping, the failure of courts to apply the doctrine consistently has virtually eradicated any deterrent effect.

Clearly, res judicata, full faith and credit, and comity have not solved the problem of parental kidnapping. Neither full faith and credit nor the doctrine of res judicata require the recognition and enforcement of foreign custody decrees. Moreover, the doctrine of comity is not applied to bar relitigation of custody issues with sufficient frequency to deter potential child stealers. In an effort to find another means to discourage child stealing and custody relitigation, courts have experimented with the use of monetary incentives.

4. The Use of Bonds as a Method to Prevent Child Stealing

Some courts have attempted to prevent parental abductions and custody readjudication through the use of bonds. Under this procedure, a court may require a noncustodial parent to post a bond when the court grants permission for that parent to remove the child temporarily from the court's jurisdiction. Return of the bond is conditioned upon compliance with the terms of the order and return of the child.[60]

Although ostensibly providing an incentive to return the child, the bond posting procedure is insufficient to prevent child stealing. It may, for instance, be impossible to enforce the bond if the parent remains beyond the boundaries of the court— only money is lost. As

56. *Id.* at 445, 174 P.2d at 804.

57. Bodenheimer, *Legislative Remedy, supra* note 8, at 1215-16; *Legalized Kidnapping, supra* note 23, at 319-21. *Compare* Leathers v. Leathers, 162 Cal. App. 2d 768, 328 P.2d 853 (1958) *with In re* Walker, 228 Cal. App 2d 217, 39 Cal. Rptr. 243 (1964).

58. *See In re* Guardianship of Rodgers, 100 Ariz. 269, 413 P.2d 744 (1966); Smith v. Smith, 45 A.2d 879 (Del. Super. Ct. 1946).

59. *See* Commonwealth *ex rel.* Schofield v. Schofield, 98 A.2d 437 (Pa. Super. Ct. 1953).

60. Hudak, *Interstate Child, supra* note 18, at 279; Hudak, *Seize, Run, and Sue, supra* note 21, at 541.

Page v. Page[61] noted, the bond may ensure a monetary payment but not the return of the child. Further, bonds are often set too low to have any real effect.[62]

Review of the custody adjudication procedures indicates that they not only fail to deter parental abductions, but, in fact, they encourage such behavior. Since courts frequently do not recognize and enforce sister states' prior custody decrees through res judicata, full faith and credit, or comity, and readily modify these decrees through such doctrines as changed circumstances, a losing parent is motivated to flee with the child to another jurisdiction to attempt to obtain a favorable decree. Moreover, neither the application of the clean hands rule nor the use of bonding appears likely to deter such parental behavior.

The failure of the custody adjudication process to handle the problem of parental abductions adequately might seem less important if there were effective sanctions for such parental conduct. Unfortunately, effective sanctions for child stealing do not exist.

B. The Lack of Effective Sanctions

Parental abductions could be punished through the use of contempt proceedings, civil liability, or criminal penalties. Yet, as presently utilized, none of these measures has proven effective in the area of parental kidnapping. The use of each of these punitive sanctions presents serious difficulties.

1. Contempt

Civil contempt proceedings are designed to compel compliance with a court order. Generally, however, fines and imprisonment will be imposed only where there is continuing noncompliance with a court order.[63] Criminal contempt is punitive in nature and may also result in fines and imprisonment. While a parent who has abducted his or her child in defiance of a court order can be held in contempt (based on either civil or criminal proceedings), this remedy has had little effect in the child custody area.[64] First, many abducted children are taken beyond the boundaries of the court's jurisdiction, so the court has no method of enforcing contempt.[65] Second, a subsequent out-of-state

61. 166 N.C. 90, 81 S.E. 1060 (1914).

62. Hudak, *Interstate Child, supra* note 18, at 279; Hudak, *Seize, Run, and Sue, supra* note 21, at 541.

63. *Legalized Kidnapping, supra* note 23, at 312.

64. *Id.*; Note, *The Problem of Parental Kidnapping*, 10 WYO. L.J. 225, 233 (1956).

65. *Legalized Kidnapping, supra* note 23, at 312-13. *See also* note 177 *infra*.

custody decree may remove the contempt charge. While some authorities recognize the validity of a contempt order even in the face of a subsequent custody order,[66] others have argued that the subsequent custody decree negates the contempt order.[67] Thus, contempt would not seem to be an effective remedy for parental abductions.

2. Civil Liability

Theoretically, civil liability might provide a sanction against parental kidnapping. Liability could arise between parents for intentional infliction of emotional distress.[68] Unfortunately, this remedy requires that the custodial parent locate the abducting parent and bring suit in a court which has personal jurisdiction over the abductor. If a new custody decree has been granted, it seems unlikely that a court in that jurisdiction would look favorably upon such a suit. In addition, not all states recognize this tort.[69]

Civil liability might also arise between the child and the abducting parent. However, a suit by a child against his or her parents is possible only in the thirteen states which have abrogated parental immunity.[70] Even in those states which have eliminated parental immunity, recovery may be denied if the court concludes that the act was not intended to harm the child or that the parent's action was within the purview of proper parental discretion.[71]

3. Criminal Law

The criminal law might also furnish sanctions for parental kidnapping; unfortunately, obtaining a criminal conviction for child stealing is fraught with difficulties. The first difficulty is the nature of the offense — child stealing is not a federal crime. An amendment to the federal kidnapping statute—the Lindbergh Act—specifically exempts parental abductions.[72] Some states also exempt parents from kidnapping laws.[73] In other states, parental kidnapping is not expressly cov-

66. Brooks v. Brooks, 300 A.2d 531 (Vt. Sup. Ct. 1973).

67. *See, e.g.*, Brocker v. Brocker, 241 A.2d 336, 345 (Pa. Sup. Ct. 1968) (Roberts, J., concurring).

68. *Legalized Kidnapping, supra* note 23, at 311-12.

69. *See, e.g.*, Prosch v. Yale, 306 F. Supp. 524 (E.D. Mich. 1969).

70. Those states include: Alaska, Arizona, California, Hawaii, Illinois, Kentucky, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, and Wisconsin. *Legalized Kidnapping, supra* note 23, at 309, 309 n.32, 310.

71. *Id.* at 310-11.

72. 18 U.S.C. § 1201 (1971).

73. *See, e.g.*, MD. ANN. CODE art. 27, § 337 (1976); S.D. COMPILED LAWS ANN. § 22-19-1 (1967); TEX. PENAL CODE ANN. tit. 5, § 20.03 (Vernon 1974).

ered or is governed by a child stealing statute.[74] In most instances, a parent may not be found guilty of child stealing where no custody decree has been awarded since both parents are legally entitled to custody.[75] Where a decree has been awarded, a parent may be found guilty.[76] However, since child stealing is usually a misdemeanor,[77] when the abducting parent flees from a jurisdiction, he or she is generally not subject to extradition.[78] Even when extradition is technically possible, it is unlikely that a state which has granted a new custody order will be willing to extradite the parent.[79] Moreover, police and prosecutors tend to regard child stealing as a purely "domestic matter" and are reluctant to intervene.[80]

Another problem with criminal prosecutions is the difficulty of locating the child and the abducting parent. Since an abducted child is usually taken into another state, local law enforcement officials from the child's home state (even if willing) are powerless to try to find the child. The Federal Bureau of Investigation (FBI) generally will not attempt to locate offending parents because it maintains that since child stealing is exempt from the federal kidnapping statute, the agency lacks jurisdiction to pursue abducting parents.[81] Moreover, the FBI adheres to the position that parental abductions are primarily domestic matters and should not be within the province of federal law enforce-

74. Foster & Freed, *supra* note 14, at 1015. A report issued by the Los Angeles County District Attorney's Office cited a survey which indicated that six states had no criminal penalties for child stealing. Van de Kamp, Los Angeles County District Attorney's Office, Child Stealing Report 19 (Aug. 1977) [hereinafter cited as Van de Kamp]. California has a specific statute governing child stealing: CAL. PENAL CODE §§ 278-278.5 (West Supp. 1977).

75. State v. Elliott, 171 La. 306, 131 So. 28 (1930).

76. Lee v. People, 127 P. 1023 (Colo. 1912).

77. Van de Kamp, *supra* note 74, at 19; Smith, *After All the Anguish, They Still Fight*, L.A. Times, Apr. 11, 1977, § 4, at 8, col. 1.

78. The Federal Extradition Act, implementing article IV, § 2, cl. 2 of the United States Constitution, provides for the extradition of persons charged with "treason, felon[ies] or other crime[s]." 18 U.S.C. § 3182 (1970). Because states may enact more liberal extradition procedures than the federal requirements, forty-six states have adopted the Uniform Criminal Extradition Act. W. LAFAVE & A. SCOTT, CRIMINAL LAW 126 n.66 (1972). However, this Uniform Act contains the same requirement: "treason, felony or other crime." UNIFORM CRIMINAL EXTRADITION ACT § 2, 11 U.L.A. 54 (1974).

79. Foster & Freed, *supra* note 14, at 1018; Van de Kamp, *supra* note 74, at 18.

80. Bernstein, *Officials Rapped on Child-Stealing Issue*, L.A. Times, Mar. 26, 1977, § 3, at 13, col. 6; Goodman, *Child-Snatching*, Wash. Post, Mar. 26, 1976, § A, at 27, col. 6; Peterson, *Child Snatching: The Extralegal Custody Battle After Divorce*, N.Y. Times, Oct. 17, 1977, § C, at 36, col. 2; Smith, *Kidnaping With Impunity*, L.A. Times, Apr. 19, 1976, § 4, at 4, col. 2.

81. Farr, *Van de Kamp Hits FBI on 'Stolen Children' Policy*, L.A. Times, Sept. 5, 1977, § 2, at 1, col. 4, to 2, col. 1; Goodman, *Child-Snatching*, Wash. Post, Mar. 26, 1976, § A, at 27, col. 6; Smith, *Kidnaping With Impunity*, L.A. Times, Apr. 19, 1976, § 4, at 10, col. 1.

ment officials.[82] In rare cases, where a parent can prove that a child is in serious danger, an "unlawful flight to avoid prosecution" warrant[83] may be obtained; however, the Department of Justice has a policy against issuing such warrants.[84] Thus, even when local law officials are willing to treat child stealing as a serious problem, there is little they can do.

While current child stealing sanctions offer some potential, as presently used, they can do little to punish or deter parental abductions. Contempt proceedings are difficult to enforce. Civil liability cases are difficult to win. Criminal prosecutions are difficult to initiate. Since neither traditional custody adjudication procedures nor parental kidnapping penalties has proven effective in dealing with the problem of child stealing, other alternatives must be considered.

IV. ALTERNATIVE APPROACHES TO THE PROBLEM OF CHILD STEALING

Many alternatives to handle the problem of parental abductions have been suggested. The three most commonly proposed alternatives are the Uniform Child Custody Jurisdiction Act, congressional action to ensure full faith and credit to child custody decrees, and new criminal sanctions for child stealing.[85] While none of these alternatives

82. Farr, *Van de Kamp Hits FBI on 'Stolen Children' Policy*, L.A. Times, Sept. 5, 1977, § 2, at 1, col. 4, to 2, col. 1; Molinoff, *supra* note 5, at 10.

83. If a state files a felony charge against a person and that person is believed to have fled the state, the Department of Justice has the authority to file a federal charge of unlawful flight to avoid prosecution (UFAP) and obtain a UFAP warrant. 18 U.S.C. § 1073 (1970); Van de Kamp, *supra* note 74, at 17. This warrant grants the FBI authority to search for suspected fugitive state felons.

84. Van de Kamp, *supra* note 74, at Exhibit B (letter from the office of Benjamin R. Civiletti, Assistant United States Attorney General, Criminal Division of the United States Department of Justice); Smith, *After All the Anguish, They Still Fight*, L.A. Times, Apr. 11, 1977, § 4, at 8, col. 2; Smith, *Kidnaping With Impunity*, L.A. Times, Apr. 19, 1976, § 4, at 4, col. 2. Still, one fortunate California parent, Shirley Ryan, is one of the very few parents who has been able to secure a UFAP warrant. After issuance of the warrant the FBI arrested her ex-husband; he was then extradited from Massachusetts, convicted in California of child stealing, and sentenced to three years probation. Ms. Ryan also secured the return of her child. Smith, *After All the Anguish, They Still Fight*, L.A. Times, Apr. 11, 1977, § 4, at 11, col. 3. Smith claims that Ms. Ryan is the only parent currently in the United States to have enjoyed such success. *Id. See also* Smith, *In Search of Jolie: A Paper Chase*, L.A. Times, Apr. 20, 1976, § 4, at 1, col. 2. *See generally Amendments to the Federal Kidnapping Statute: Hearings on H.R. 4191 and H.R. 8722 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 55, 62, 72 (1974).

85. For another proposal see Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings*, 64 MICH. L. REV. 1 (1965).

alone is sufficient to cope with the problem of parental kidnapping, each proposal offers some merit.

A. The Uniform Child Custody Jurisdiction Act

The Uniform Child Custody Jurisdiction Act[86] (UCCJA) was first proposed in 1968. The Act is designed to ensure fully informed custody decrees by providing that the custody decision is made in the state with the closest connection to the child and by bringing all relevant parties together for the custody decision. The Act is also designed to promote recognition and enforcement of foreign custody decrees and to ensure that modifications of a decree will generally be made only in the court initially rendering the decree.[87] Deterring parental abductions is one of the basic purposes of the Act,[88] and, as a result, many of the

86. UNIFORM CHILD CUSTODY JURISDICTION ACT §§ 1-28, 9 U.L.A. 103 (1973) [hereinafter cited variously as UCCJA or the Act].

87. The UCCJA is based on six fundamental considerations:

1. In order to insure that the initial decree is trustworthy enough to justify respect and recognition by the courts of other states, it must be a fully informed decree.
2. When custody claimants and the child are scattered over two or more states, a decision based on full information is attainable if jurisdiction is taken in a state which has maximum access within its borders to relevant evidence about the child and his potential future custodians, and if provision is made to channel essential out-of-state evidence into the adjudicating court.
3. When a custody decision is reached in accordance with these safeguards, the courts of other states should recognize and enforce it.
4. If a modification of the decree is desired, application should be made to the original court, unless the child and family no longer have contact with the state.
5. Any interstate jurisdictional conflict that might arise can be resolved by the priority-in-time principle or the inconvenient forum rule, aided by interstate judicial communication.
6. In order to avoid continuing controversies over custody, all known custody claimants should be joined in one proceeding and should receive reasonable notice and an opportunity to be heard, coupled with strong encouragements (including payment of travel expenses) to appear personally before the court.

Bodenheimer, *Uniform Act, supra* note 52, at 306.

88. The basic purposes of the UCCJA are to:

(1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(2) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

(3) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

(4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) *deter abductions and other unilateral removals of children undertaken to obtain custody awards*;

basic provisions of the Act are designed to eliminate current incentives for child stealing.

1. Provisions of the UCCJA

The Act attempts to implement the preceding objectives in several ways. First, the jurisdictional provisions are designed to provide single-state jurisdiction in a child custody case. The jurisdictional rules apply both to the initial proceeding and to the modification of a custody decree.[89] The first and primary basis for jurisdiction is the child's home state, defined as the state in which the child has lived with a parent or guardian prior to the proceeding for at least six months.[90] The home state's jurisdiction remains for six months after the child has moved to another state.[91] If there is no home state, and/or the best interests of the child would be served thereby, jurisdiction will be determined under a "significant connection" test. This test requires that the child and at least one contestant have a significant connection with the forum state and that there is substantial evidence within that state concerning "the child's present or future care, protection, training, and personal relationships."[92] It is not necessary for the child to be physically present within the forum state nor is physical presence sufficient to confer jurisdiction.[93]

While it is theoretically possible that the home state and the substantial connection rules might allow more than one state to claim jurisdiction in a custody case, provisions of the Act are designed to prevent concurrent jurisdiction. Priority of time in filing a petition will confer jurisdiction upon the state of the initial petition.[94] In addition, the Act codifies provisions for rejecting or declining jurisdiction when a court is an inconvenient forum.[95] The jurisdictional provisions are also

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(6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;

(7) facilitate the enforcement of custody decrees of other states;

(8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

(9) make uniform the law of those states which enact it.

UCCJA, *supra* note 86, § 1(a) (emphasis added).

89. *Id.* § 3(a).

90. *Id.* § 3(a)(1).

91. *Id.*

92. *Id.* § 3(a)(2).

93. *Id.* §§ 3(b)-3(c). In addition, a state may have jurisdiction if the child is physically present within the state and has been neglected or subjected to an emergency situation which might lead to abuse of the child. *Id.* § 3(a)(3).

94. *Id.* § 6(a).

95. Determination of an inconvenient forum may be based on several factors:

designed to discourage child stealing since the home state will retain jurisdiction even if the child is removed. Should the home state fail to assert jurisdiction, the mere fact of the child's physical presence in another state is not alone sufficient to allow that state to assume jurisdiction—a significant connection with a forum state is required.[96] As a result, it is unlikely that a parent could abduct his or her child and transport the child to another state which could claim jurisdiction under the Act.[97]

In addition to the jurisdictional requirements, the provisions for modification and enforcement of a sister state's decree should help to deter parental abductions. The Act codifies the principles of res judicata and full faith and credit by providing that recognition of a sister state's decree is mandatory where that decree was rendered by a court assuming jurisdiction under the Act or in circumstances meeting the jurisdictional standards of the UCCJA.[98] Discretionary recognition of other decrees is not prohibited, but decrees which violate the purposes of the Act (such as a decree issued after an abduction) should not be recognized under the standards provided for in section 1 of the Act.[99] A custody decree of a foreign state which is recognized becomes enforceable in the recognizing state when a copy of the decree is filed with the clerk of the appropriate court.[100] This process seems to convert the decree into a local decree which is enforceable by any means available in the state in which it is filed (*e.g.*, contempt proceedings).

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(1) if another state is or recently was the child's home state;
(2) if another state has a closer connection with the child and his family or with the child and one or more of the contestants;
(3) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;
(4) if the parties have agreed on another forum which is no less appropriate; and
(5) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 1.

Id. § 7(c).

96. *Id.* §§ 3(a)(2), (b).

97. *See* Bodenheimer, *Uniform Act, supra* note 52, at 307-08.

98. UCCJA, *supra* note 86, §§ 12-13. The Act assumes that the proper interpretation of *May*, text accompanying notes 36-45 *supra*, is that the Constitution permits (but does not require) a state to recognize a decree of a sister state with respect to persons over whom the court did not technically have personal jurisdiction. Bodenheimer, *Uniform Act, supra* note 52, at 315; Bodenheimer, *Legislative Remedy, supra* note 8, at 1232. The Act also attempts to ensure procedural due process by providing reasonable notice and the opportunity to be heard to any parent whose custodial rights have not been terminated and to any person in possession of the child. Personal service within the home state is favored but provisions for out-of-state service are also included. UCCJA, *supra* note 86, §§ 4-5. *See also* Foster & Freed, *supra* note 14, at 1022.

99. *See* Bodenheimer, *Legislative Remedy, supra* note 8, at 1235.

100. UCCJA, *supra* note 86, § 15.

Although a state may enforce a sister state's decree, the ability to enforce does not grant the court jurisdiction to modify the decree. A decree may be modified by the court of a sister state only if the original court no longer has jurisdiction or has declined jurisdiction, and the second state meets the jurisdictional requirements of the Act.[101] These procedures should discourage abductions since a court will normally deny a petition for modification of a foreign decree and direct the petitioner back to the original court.[102]

The UCCJA also codifies the "clean hands" rule.[103] Under the Act a court may decline jurisdiction when a child is wrongfully detained on a visit or is wrongfully taken from another state. This principle applies even when no official custody award has been made in another state. While a court may decide not to apply this rule to bar litigation if the interests of the child so require,[104] the expenses of other parties having to travel to assert their rights against an abducting party in a foreign state may be charged to the abducting parent.[105]

Since the time that the UCCJA was first proposed, twenty states have enacted it.[106] Most of the enacting states have done so within the last

101. *Id.* § 14. For example, the Superior Court of Santa Clara County in Morgan v. Morgan (No. P. 28817, Sept. 16, 1975) denied jurisdiction to hear a father's claim to custody and returned the child to his mother in Spain (to whom custody had been awarded in a Swiss court). The court found that Switzerland had continuing jurisdiction and California had no legal basis for jurisdiction. Bodenheimer, *The International Kidnapping of Children: The United States Approach*, 11 FAM. L.Q. 83, 94 (1977).

102. Bodenheimer, *Uniform Act, supra* note 52, at 311.

103. *See* text accompanying notes 53-59 *supra*.

104. UCCJA, *supra* note 86, § 8. For example, if a parent could prove that he or she had kidnapped the child to protect the child from physical abuse by the custodial parent, the clean hands provision might not bar a custody suit by the kidnapping parent.

105. *Id.* In addition to these jurisdictional provisions, the Act attempts to ensure fully informed decrees by providing that one state can request the court of another state to hold a hearing or investigation relevant to a child's custody and forward certified copies of the results to the forum court. *Id.* § 19(a). The Act contains the following provisions which encourage bringing all parties together in one suit: (1) parties must inform the court of anyone who claims visitation or custody rights or who possesses the child and any persons so identified must be joined as parties, *id.* §§ 9-10, and (2) a court may request a court of another state to order its resident to appear in the custody determination procedure and travel expenses for a party so ordered may be advanced or reimbursed, *id.* § 19(b). The Act also provides that the clerk of a state court maintain a registry of custody decrees of sister states and other related records to provide a complete history of the custody procedures concerning a given child. *Id.* § 16.

106. Alaska, ALASKA STAT. §§ 25.30.010-.30.910 (1977); California, CAL. CIV. CODE §§ 5150-5174 (West Supp. 1977); Colorado, COLO. REV. STAT. §§ 14-13-101 to 13-126 (1973); Delaware, DEL. CODE tit. 13, §§ 1901-1925 (Supp. 1976); Florida, 1977 Fla. Sess. Law Serv., ch. 77-433; Hawaii, HAW. REV. STAT. §§ 583-1 to -26 (1976); Idaho, IDAHO CODE §§ 5-1001 to -1025 (Supp. 1977); Indiana, IND. CODE ANN. §§ 31-1-11.6-1 to .6-24 (Burns Supp. 1977); Iowa, 1977 Iowa Legis. Serv. 128-13; Maryland, MD. ANN. CODE art. 16, §§ 184-207 (Supp.

two years so that there is little judicial interpretation of the Act. Those extant cases which do interpret the Act, while having mixed results, demonstrate that the Act has the potential to discourage out-of-state custody adjudications (and thus child stealing). Still, judicial interpretation can also severely reduce the effectiveness of the Act.[107]

2. Judicial Interpretation of the UCCJA

To date most of the appellate opinions interpreting the UCCJA have been from the state of Colorado, so this examination will primarily focus upon the Colorado cases. Although all of the enacting states may not follow Colorado's interpretation of the Act, these cases do illustrate how the Act has been construed thus far. The first of the Colorado cases, *Wheeler v. District Court*,[108] foreshadowed a trend in the courts to interpret the home state and significant connection provisions of the Act as co-equal alternative bases for jurisdiction. In that case, an Illinois decree awarded custody of the Wheeler's three children to the father. Thereafter, the father and the children moved to Colorado. After their move to Colorado, Illinois twice modified the custody award and granted custody of the children to the mother. The father then petitioned the Colorado courts for custody and the Colorado Supreme Court held that Colorado had jurisdiction to modify the Illinois decree.[109] The court noted that the home state and significant

1977); Michigan, MICH. COMP. LAWS ANN. §§ 600.651-.675 (1976); Minnesota, MINN. STAT. ANN. §§ 518A.01-.25 (West Supp. 1978); Montana, MONT. REV. CODES ANN. §§ 61-401 to 61-425 (Supp. 1977); New York, 1977 N.Y. Laws, ch. 493; North Dakota, N.D. CENT. CODE §§ 14-14-01 to 14-26 (1971); Ohio, OHIO REV. CODE ANN. §§ 3109.21-.37 (Page Supp. 1977); Oregon, OR. REV. STAT. §§ 109.700-.930 (1975); Pennsylvania, 1977 Pa. Legis. Serv. §§ 2301-2325; Wisconsin, WIS. STAT. ANN. §§ 822.01-.25 (West 1977); Wyoming, WYO. STAT. §§ 20-143 to -167 (Supp. 1975). Arizona has adopted jurisdictional criteria substantially similar to those of the UCCJA, ARIZ. REV. STAT. §§ 25-331 to -336 (1976), as has Kentucky, KY. REV. STAT. §§ 403.260 to .350 (Supp. 1976).

107. *See* text and authorities accompanying notes 108-157 *infra*. *See generally* Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978 (1977).

108. 526 P.2d 658 (Colo. 1974).

109. The facts were as follows: the Wheelers were divorced in Illinois in January of 1969 and the mother was awarded custody of the three children. In July, 1969 the custody award was modified and the husband was granted custody. In July, 1973 the father and the children moved to Colorado. During August, 1973 the Illinois court again modified the custody award, granting custody of one child to the mother; thereafter the child was voluntarily relinquished to her. In November, 1973, in an ex parte proceeding, the Illinois court ordered the other two children returned to their mother. The mother filed an enforcement action in Colorado in March, 1974, and the father cross-petitioned for custody. The trial court dismissed the father's petition, but the Colorado Supreme Court reversed the dismissal.

connection tests were alternative grounds for jurisdiction under the UCCJA. The court observed that the father had been domiciled and steadily employed in Colorado for eight months when the Colorado action was initiated. Further, mention was made that the children had been in the father's care for almost five years and had attended Colorado schools while residing there. Therefore, the court reasoned that the children's domicile had moved with the father, giving "this state . . . both a significant connection and enough information to assume jurisdiction."[110] While the conclusion reached, that Colorado had a "significant connection," is acceptable, the court's reasoning has rather dubious underpinnings. At the time that the final Colorado modification of the custody decree was rendered, Colorado had become the home state of the children living with their father (they had lived in Colorado for eight months); the court thus might have reached the same conclusion on the basis of the home state analysis.[111] Instead, it based its decision on the significant connection test and ignored the home state analysis, thereby circumventing the weight to be given to the home state as a jurisdictional base. The court's reasoning thus expanded jurisdiction so as to include states which were either the child's home state or which had a significant connection with the child and at least one litigant.[112]

110. 526 P.2d at 660.

111. This decision might also be questioned on the rationale that Colorado should have deferred to the continuing jurisdiction of Illinois. The Commissioners' Note to section 14 of the UCCJA states: "In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of the Act." Commissioners' Note to Section 14, UCCJA, *supra* note 86, at 122. Even though Illinois had ceased to be the home state of the two children who were living with their father, Illinois might still have had continuing jurisdiction under the significant connection test.

112. The Oregon courts have reached similar results in two cases. In *Moore v. Moore*, 546 P.2d 1104 (Or. App. 1976), an Oregon divorce was granted in 1972 and the father was awarded custody of the Moores' child. The father and child subsequently moved to Washington. In 1975 the Oregon court entered an ex parte order awarding custody to the mother. The father refused to surrender the child and instituted a Washington custody proceeding which determined that the father should retain custody. The father filed a motion in Oregon to enforce the Washington order and to vacate the Oregon order (because the Oregon court had lacked jurisdiction at the time the order was rendered). The trial court denied the father's motion and the Oregon Court of Appeals remanded the case for a determination of whether Oregon's assumption of jurisdiction was consistent with the UCCJA—seemingly ignoring the fact that Washington was clearly the child's home state and that the child had not lived in Oregon for several years.

In *Carson v. Carson*, 565 P.2d 763 (Or. App. 1977), the Oregon Court of Appeals declined jurisdiction to modify a California decree despite the fact that Oregon was the child's home state. Subsequent to a 1973 California divorce awarding custody of the child to the father,

The Colorado Supreme Court further expanded the significant connection test in *Nelson v. District Court*.[113] Subsequent to an Oklahoma divorce which awarded custody of the child involved to a guardian, the child and the guardian resided in Montana. Some months later, while the child was visiting his mother in Colorado, the mother petitioned the Colorado courts for custody.[114] Despite the fact that the child was domiciled in Montana and only temporarily visiting in Colorado, the Colorado Supreme Court upheld Colorado jurisdiction by stating: "[b]oth parents have a significant connection with Colorado. They are both domiciled in this state."[115] While acknowledging that the child was not domiciled in Colorado, the court seemed to ignore the fact that the Act requires that both the child and his parents must have a substantial connection with the state.[116] The court left the child's connection with Colorado undiscussed.[117]

The *Nelson* decision is also troublesome because it circumvents the purpose of the clean hands rule. The child came to Colorado to visit his mother and at the end of the visitation time the mother refused to surrender the child to his lawful custodian. Additionally, the Colo-

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the father and child moved to Oregon. In 1976, while the child was visiting her mother in California, the mother refused to return the child unless the father appeared in a California custody suit. The father appeared and the trial court awarded custody to the mother. The father instituted a custody proceeding in Oregon but the court declined jurisdiction. Recognizing that Oregon was the child's home state, the Oregon Court of Appeals nonetheless upheld the dismissal on the rationale that California had properly assumed jurisdiction since the child and the mother had a significant connection with California. Actually, the child's only connection with California was her visit with her mother so that Oregon would have been a better forum for the custody litigation.

113. 527 P.2d 811 (Colo. 1974).

114. In the *Nelson* case, the facts were as follows: Denise and Richard Schweitzer were divorced in Oklahoma in February, 1974. Temporary custody of their son was awarded to Jean Nelson of Bainville, Montana, who took immediate custody of the child and returned to Montana. In July, when the child was visiting his mother in Denver, the mother refused to return him to Nelson. Subsequently, in Colorado, Nelson filed a habeas corpus petition and the mother petitioned for permanent custody of the child. Nelson then sought a writ of mandamus for an immediate hearing on her habeas corpus petition and a writ of prohibition to prevent the trial court from hearing the mother's petition for custody.

115. 527 P.2d at 813.

116. UCCJA, *supra* note 86, § 3(a)(2).

117. Chief Justice Pringle, with whom two other justices joined in the dissent, did take note of the child's connection:

> The statute requires that *both* the child and the parents have a significant connection with the state before the Colorado court is competent to decide the custody matter. Here, admittedly, the child per se has no conceivable nexus to Colorado. His only significant contact is that his parents live here. But that is already required by the statute as an element separate and apart from the child's nexus. It cannot, of itself, therefore, supply the nexus required of the child.

527 P.2d at 814 (Pringle, C.J., dissenting).

rado court ruled that it might hear the mother's petition for custody. While the court does discuss the clean hands issue, it concludes:

> The Child Custody Jurisdiction Act provides that unclean hands, however, do not deprive the trial court of jurisdiction. Improper retention of the child should affect only the court's decision to exercise its jurisdiction . . . . The paramount consideration must be the best interests of the child, not the wrongdoing of the parent . . . .
>
> In the case at bar, the trial court exercised its jurisdiction notwithstanding the mother's unclean hands. It did not commit an abuse of discretion in so deciding.[118]

This language seems to suggest that if a court determines that jurisdiction attaches under the significant connection test, unclean hands will not bar the petition. This result would further seem to suggest that the lawful custodian would have been wiser not to let the child visit his mother in the first place—a consequence which hardly seems desirable.[119]

Not all of the Colorado cases have expanded jurisdiction under the UCCJA. Two cases decided by the Colorado Court of Appeals appear to apply the Act in a manner consistent with the framers' intent. In the first of these cases, *In re Custody of Glass*,[120] a 1973 California divorce awarded custody of the Glass' child to the mother. In February, 1974 the mother sent the child to visit his father in Colorado. In April, 1974, while the child was still in Colorado, the father successfully petitioned the Colorado courts for custody. However, reasoning that since

118. *Id.* (citations omitted).

119. *Id.* at 815 (Pringle, C.J., dissenting). The Oregon Court of Appeals, in *Brooks v. Brooks*, 530 P.2d 547 (Or. App. 1975), reached a result similar to the *Nelson* case. In *Brooks* the mother was granted custody of the children in a 1972 Montana proceeding. In 1973 she secretly moved the children to Oregon, preventing the father from visiting them. In August of 1973 the father petitioned the Montana courts for custody of the children. Although the mother was served in Oregon, she did not appear and the Montana court granted custody of the children to the father. In January, 1974 the father petitioned the Oregon courts for enforcement of the new Montana decree granting him full custodial rights. The trial court recognized the validity of the Montana order but nonetheless modified that order to grant custody to the mother. The Oregon Court of Appeals denied enforcement of the Montana decree concluding that since the decree was punitive (a response to the mother's disappearance and her failure to appear in the Montana court), it need not be enforced. The court also argued that Montana did not have jurisdiction at the time of the Oregon modification action so there were no reasons why Oregon should not modify the decree. While this opinion has the strength of discouraging ex parte proceedings under the Act, it failed to recognize the importance of the home state criterion—Montana was the children's home state at the time of the Montana modification. The court, additionally, failed to apply the clean hands doctrine to sanction parental wrongdoing. Here, the children had been removed from Montana to avoid enforcement of the father's visitation rights. Nonetheless, the Oregon court fails to address the clean hands issue.

120. 537 P.2d 1092 (Colo. App. 1975).

California was the child's home state under the UCCJA, the Colorado Court of Appeals ruled that Colorado lacked jurisdiction to decide the child's custody.[121]

In the second case, *In re Custody of Thomas*,[122] a 1968 Kansas divorce proceeding awarded custody of the Thomas' child to his mother. The child and his mother remained domiciled in Kansas but the father moved to Colorado. In 1974, when the child was visiting his father in Colorado, the father petitioned the Colorado courts for custody of the child. The petition was dismissed for lack of jurisdiction and the dismissal was affirmed by the Colorado Court of Appeals. Reasoning that since Kansas had jurisdiction over the custody of the child, the court held that under the UCCJA, the Colorado courts could not modify the Kansas decree.[123] Both *Glass* and *Thomas* demonstrate instances when the Colorado courts have properly declined jurisdiction when another state continued to be the child's home state.

The Colorado Supreme Court declined jurisdiction to modify a California decree in *Fry v. Ball*.[124] In that case, the paternal grandmother had been appointed as the guardian of the Frys' child by a California court in 1972. In 1974, the grandparents removed the child to Colorado, but shortly thereafter the California court terminated the guardianship.[125] The grandparents then petitioned the Colorado courts for custody. The Colorado Supreme Court, observing that both parents (who had been awarded custody) were domiciliaries of California, that the child had been a domiciliary of California until September of 1974, that the child's guardianship was determined under a California order, and that the California social agencies had accumulated much information regarding the child and his parents, concluded that California had had jurisdiction at the time it terminated the guardianship and that it currently retained jurisdiction. Since "[t]he Act attempts to limit

121. *Id.* at 1094.

122. 537 P.2d 1095 (Colo. App. 1975).

123. *Id.* at 1097.

124. 544 P.2d 402 (Colo. 1975).

125. More specifically, when the Frys learned of the grandparents' intentions to move to Colorado and take the child, they secured a temporary restraining order to prevent removal of the child from California. However, the grandparents left California with the child before they could be served with the order. Nearly seven months after the child had been removed to Colorado, the Frys successfully petitioned in California for the termination of the guardianship and then traveled to Colorado to recover their child. While the guardian had been willing to surrender the child, an altercation occurred when the parents arrived and this resulted in the subsequent arrest of the parents for assault. The grandparents then filed a petition in Colorado for a determination of the child's custody. In response, the Frys instituted the instant proceeding to enjoin the Colorado trial court from exercising jurisdiction.

'custody determination to only one state' " and reflects "a general policy which favors the continuing jurisdiction of the court rendering the original custody decree," the Colorado court determined that it must defer to the California courts.[126]

Despite denying jurisdiction to hear the custody suit, the court, utilizing its equity powers, allowed the child to remain in the temporary custody of the grandparents pending the disposition of a petition for modification in the California courts.[127] The rationale for this decision was that stability for the child would be promoted by allowing him to remain with the grandparents. The goal of promoting stability for the child is a laudable one, but this decision is unlikely to have that effect. Since custody had already been awarded to the parents by the California courts, it is at least as likely (if not more so) that another California proceeding would reach the same result. The longer the child remains with the grandparents, the more difficult the transition to life with his parents will be.[128] Since the UCCJA requires enforcement of foreign judgments, the California termination of guardianship should have been enforced.

The most recent Colorado Supreme Court case construing the UCCJA is *Brown v. District Court*.[129] In *Brown*, the Colorado Supreme Court again declined jurisdiction to modify a foreign state's custody decree.[130] Responding to the mother's petition for the modification of a Missouri custody decree, the court noted that the Act mandates recognition of out-of-state decrees rendered by courts having jurisdiction and that the Act encourages continuing jurisdiction by the original court; thus the court concluded that Missouri retained jurisdiction over the custody matter and Colorado could not modify the Mis-

126. 544 P.2d at 406.

127. *Id.* at 408.

128. Similar reasoning was employed by the Michigan Court of Appeals in *In re* McDonald, 74 Mich. App. 119, 253 N.W.2d 678 (1977). There, while recognizing that Michigan did not have jurisdiction to decide the custody of the McDonald child, the court refused to enforce a Washington order granting temporary custody to the father. The court reasoned that since the mother currently possessed the child, and that a final order might grant custody to the mother, requiring a transfer of the child to the father could create instability in the child's life.

129. 557 P.2d 384 (Colo. 1976).

130. The facts of *Brown* were as follows: the Browns were divorced in Missouri in March, 1975, and custody of their three children was awarded to the mother. In July, 1975 the mother and children moved to Colorado. In September, 1975 the mother filed an action, in Colorado, for a change in the custody decree to terminate the father's visitation rights. The father moved to dismiss the action for lack of jurisdiction. The trial court denied the father's motion; on appeal the Colorado Supreme Court reversed.

souri decree.[131] The court did not state whether Missouri's jurisdiction was based on the home state or significant connection test, but since the children involved had only lived in Colorado for two months at the time of the mother's petition, Missouri was still their home state. Here, the home state rule provides an appropriate rationale to deny jurisdiction to the Colorado courts.

Subsequent to *Brown*, the Colorado Court of Appeals decided *In re Custody of Rector*.[132] In that case the Rectors were divorced in Kansas in 1974 and custody of their son was awarded to the father. In 1975, the Kansas court modified the decree and awarded custody to the mother. The father then appealed that decree. However, after the custody modification, the mother had removed the child to Colorado. Six months later, while the child and mother were residing in Colorado, and while the Kansas appeal was still pending, the father petitioned the Colorado courts for modification of the Kansas decree. The trial court dismissed the petition for lack of jurisdiction and the Court of Appeals affirmed. Pointing out that the Act prohibits a court from exercising jurisdiction when a proceeding concerning custody of the child is pending in another state, the court ruled that the pending Kansas appeal precluded Colorado jurisdiction.[133]

The Colorado opinions seem to indicate a reluctance to fully implement the UCCJA. Tending to consider the location of the parents more important than the domicile of the child, the Colorado courts have interpreted the Act as providing two co-equal bases for jurisdiction. This interpretation has expanded the possibilities for jurisdiction under the Act. Moreover, as *Nelson* demonstrates, the Colorado courts have shown a hesitancy to apply the clean hands doctrine as a sanction for parental wrongdoing. At the same time, those courts have indicated some tendency to defer to the jurisdiction of another state if contacts with Colorado are minimal and the child's home state has previously assumed jurisdiction over custody, and/or if a custody adjudication is pending in another state.

While some courts in other states have followed the trend in Colorado,[134] other courts have applied the Act in somewhat varied manners. In *Marriage of Settle*,[135] the Oregon Supreme Court failed to enforce

131. 557 P.2d at 385-86.
132. 565 P.2d 950 (Colo. App. 1977).
133. *Id.* at 952.
134. *See* text and authorities accompanying notes 112, 119, & 128 *supra*.
135. 556 P.2d 962 (Or. 1976).

an Indiana decree.[136] Indicating that since the children involved had lived with a parent in Oregon for more than six months prior to the institution of the Oregon proceedings, the Oregon Supreme Court concluded that Oregon had jurisdiction as the children's home state.[137] The court characterized as a "more troublesome issue" the question of whether Oregon "*should exercise* its jurisdiction."[138] Since Indiana was no longer the children's home state, the children lacked a significant connection with Indiana,[139] and Indiana did not have a substantial quantity of evidence about the children's welfare, the Oregon Supreme Court concluded that Oregon could modify the Indiana decree.[140] Mindful of the Act's incorporation of the clean hands doctrine, the court concluded that the mother had wrongfully removed the children from Indiana to avoid a custody proceeding.[141] However, noting that the Act has dual purposes, discouraging forum-shopping and protecting the best interests of the child, the court decided that the best interests of the children were paramount and so Oregon could entertain the suit—despite the mother's wrongdoing.[142] Finally, the Oregon Supreme Court ruled that the trial court had properly found changed circumstances justifying the custody decree modification.[143]

136. The facts of *Settle* were as follows: in August of 1973 Ms. Settle left the marital domicile of Indiana with the Settles' two children and moved to Oregon. In November, 1973 she returned to Indiana and there remained. In December, 1973 she filed suit for divorce. Pursuant to an agreement of the parties, the mother was granted temporary custody (pending the outcome of the hearing). In the hearing, the father's answer, filed in March, 1974, requested that he be given custody of the children. In the latter part of March, without notifying the court or the father, the mother returned to Oregon with the children. In May of 1974, without hearing testimony from the mother, the Indiana court awarded custody to the father. The father then attempted to locate the children and eventually found them in Oregon. Subsequently, he instituted a habeas corpus proceeding in Oregon to regain custody of the children pursuant to the Indiana decree. (The court's opinion does not indicate on what date this action was filed.) Prior to the institution of that proceeding, the mother had registered the Indiana decree in Oregon and instituted a proceeding for modification, requesting that she be granted custody. The two actions were consolidated and the trial court denied the father's petition and awarded custody to the mother. The Court of Appeals reversed and the Supreme Court remanded the case for reinstitution of the trial court's award.

137. 556 P.2d at 965.

138. *Id.*

139. The court indicated that there was no significant connection with Indiana because the children had been away from Indiana for eighteen months and they had not seen their father in twenty months. *Id.* at 966.

140. *Id.*

141. *Id.*

142. *Id.* at 968.

143. *Id.* at 969.

Settle illustrates the ineffectiveness of the clean hands doctrine in discouraging parental abductions. The court failed to deny the suit by the abducting mother because to do so would not have been "in the best interests of the child." Since a court might reach this conclusion in any case, the clean hands doctrine, even under the UCCJA, offers little hope of deterring parental abductions.

North Dakota considered another aspect of the UCCJA in *Giddings v. Giddings*.[144] In that case, shortly after an Iowa divorce was granted and custody awarded to the mother, the father took the child on a permitted visit to North Dakota. The father did not return the child promptly and the mother obtained a contempt order in Iowa. The mother then traveled to North Dakota and filed an ex parte motion to enforce the contempt order. An enforcement order was granted by the trial court but reversed by the North Dakota Supreme Court. Indicating that the trial court could proceed so long as the due process requirements of the Act were met, the Supreme Court ruled that the ex parte order violated the Act's notice and opportunity to be heard provisions.[145] This result is not required by the plain language of the UCCJA since the due process provisions apply only to the issuance or modification of custody decrees, but not to enforcement proceedings. Still, the result does not seem inconsistent with the emphasis within the Act on ensuring procedural due process.

The California Court of Appeal considered the applicability of the UCCJA for the first time in *McDowell v. Orsini*.[146] In *McDowell*,[147] the court of appeal ruled that California could not consider a father's visitation rights in a support enforcement action because California had no basis for jurisdiction in a custody matter under the UCCJA.[148] Since the child resided in Pennsylvania, California was not his home state for jurisdictional purposes. The court also concluded that none

144. 228 N.W.2d 915 (N.D. 1975).

145. *Id.* at 919.

146. 54 Cal. App. 3d 951, 127 Cal. Rptr. 285 (1976).

147. In *McDowell*, a New York divorce was granted in 1972, and, while no formal custody decree was rendered, the child remained with his mother. Subsequently, the father moved to California and the mother and child moved to Pennsylvania. In 1974, a hearing was held in California to enforce a support order issued by an earlier California decision. The court allowed a de novo consideration of the support order and, upon the father's request, a consideration of the issue of the father's right to visitation. The trial court's order purported to make a determination with respect to both visitation rights and support duties.

148. The court of appeal also ruled that the visitation determination was improper because it was made without written application to the court. Thus, under the provisions of the UCCJA, the mother was denied reasonable notice and an opportunity to be heard. 54 Cal. App. 3d at 961-62, 127 Cal. Rptr. at 291-92.

of the other possible bases for jurisdiction were applicable.[149] In this decision, the court correctly declined jurisdiction because a home state determination could properly be made in Pennsylvania where the child resided.

A review of the decisions leads to several conclusions regarding current judicial interpretation of the UCCJA. The cases indicate that: (1) ex parte proceedings are to be discouraged;[150] (2) the notice and opportunity to be heard sections of the Act will be strictly construed;[151] (3) a state will defer to the jurisdiction of another state when a custody proceeding is pending in that state;[152] (4) the home state and significant connection tests are construed as co-equal alternative bases for jurisdiction and a state may assume jurisdiction when either test is met;[153] (5) the clean hands provision is rarely applied and has little effect on parental conduct;[154] (6) if a state has made a custody determination under the provisions of the Act, or in substantial conformity with the Act, and both parties appeared before the court, another state is more likely to defer to the jurisdiction of the former state;[155] and (7) even when a state has deferred to the jurisdiction of a sister state, the deferring state is unlikely to enforce a decree by the sister state granting temporary custody to a party not currently in possession of the child.[156]

The courts of other states may not follow the trends reviewed here. If, however, other states do follow these trends, the UCCJA alone will clearly be insufficient to prevent child stealing.[157] Although the Act was designed to restrict the number of jurisdictions that could hear child custody suits, current judicial interpretations have expanded the situations in which more than one state may have jurisdiction to hear a custody suit. The result is an incentive to remove the child from an area in which an unfavorable determination might be (or has been) made and to sue for custody in another jurisdiction. Since courts are unwilling to bar such suits on the basis of the clean hands doctrine, the abducting parent has little to fear. This situation could be substantially improved by clarifying the provisions of the Act.

149. *Id.* at 962-63, 127 Cal. Rptr. at 292.
150. *See* text accompanying notes 119 & 144-45 *supra.*
151. *See* text accompanying notes 144-48 *supra.*
152. *See* text accompanying notes 132-33 *supra.*
153. *See* text accompanying notes 108-17 *supra.*
154. *See* text accompanying notes 118-19 & 141-42 *supra.*
155. *See* text accompanying notes 120-26, 129-31, & 146-49 *supra.*
156. *See* text accompanying notes 127-28 *supra.*
157. *See* Trescott, *Child-Snatching: A Legal 'Crime'*, Wash. Post, Dec. 27, 1976, § B, at 3, cols. 1-2.

3. The UCCJA: Suggested Revisions

Since current judicial interpretation of the UCCJA has not ensured single-state jurisdiction in custody cases, jurisdictional standards should be clarified to reflect the priority of the home state.[158] Several revisions should be considered. First, the Act contains no clear definition of what constitutes the "best interests of the child."[159] If specific unambiguous criteria for this standard were provided, jurisdiction could be effectively restricted. Such criteria could make it clear that jurisdiction will normally reside in the home state and *only in highly unusual circumstances* would another state have jurisdiction in a custody case. This addition would be consistent with the drafters' intentions.[160] When coupled with a presumption that no jurisdiction exists in a state to which an abducted child has been taken, specific "best interests" criteria would make it clear that only in highly exceptional circumstances (such as danger to the child's health) would the clean hands doctrine fail to bar a suit by a wrongful parent.

Restriction of jurisdiction will effectively deter custody modifications only if courts enforce the decrees of their sister states. Although recognition and enforcement of the decrees of a sister state are mandatory under section 13 of the Act, courts have treated recognition and enforcement of temporary awards as permissive. This position is contrary to the language and purposes of the Act. To effectuate the purposes of the Act, courts must accept the judgments of their sister states (including determinations of the issue of the child's stability) and recognize and enforce decrees rendered under the provisions of the Act. This change requires not a statutory alteration, but rather a modification of judicial attitudes. While such a change of attitudes is not always easy to accomplish, if judges are made aware of the instability created by the failure to recognize and enforce temporary custody decrees, judicial compliance with the purposes of the Act should increase.

While the suggested reforms would help make the UCCJA more effective, the Act would still be insufficient to fully cope with the problem of parental kidnapping because it offers no means to search for and locate the abducting parent.[161] Even if a state renders a contempt de-

158. The drafters intended that the Act would provide for single-state jurisdiction. *See* Commissioners' Note to Section 3, UCCJA, *supra* note 86, at 107.

159. *See* Comment, *Family Law: Court's Adoption of Uniform Child Custody Jurisdiction Act Offers Little Hope of Resolving Child Custody Conflicts*, 60 MINN. L. REV. 820, 834-35 (1976).

160. *See* Commissioners' Note to Section 3, UCCJA, *supra* note 86, at 107-09.

161. Even if the Act deters some parental abductions, others will undoubtedly occur.

cree against an abducting parent, there is no way for sister states to enforce the contempt order if the offender cannot be found.

California has amended its version of the UCCJA with provisions that would help to discourage abductions and to locate the offending parent. Under those amendments, a court declining jurisdiction for an initial custody decree must notify the parent or guardian and the prosecuting attorney in the appropriate state. On motion, the California court may order the petitioner to appear with the child in a custody proceeding in another state and/or may place the child in the care of the court for return to the legal custodian.[162] These provisions supplement the Act by ensuring notice to relevant persons of the location of the child even when a new custody action cannot be heard. The lawful custodian would thus be more likely to recover the child. In addition, these provisions, if added to the UCCJA and universally adopted, would discourage an abducting parent from initiating new custody proceedings in an attempt to gain judicial authorization for possession of the child, and would aid in locating a parent who had already done so.

The UCCJA is the primary, but not the only, reform which has been proposed to deal with the problem of child stealing. Additional changes in custody adjudication procedures and new criminal penalties have also been suggested.

B. Other Legislative Reforms

Suggested legislative revisions to curb child snatching (other than the UCCJA) have centered on two principal areas, full faith and credit and new criminal penalties for parental abductions. Proposals in both areas merit consideration.

Since Congress may enact legislation to implement the full faith and credit clause,[163] Congress could enact legislation requiring states to grant full faith and credit to child custody decrees. Some authorities have recommended such an action,[164] and bills have been introduced in both the House[165] and Senate[166] to effectuate this recommendation.

Some provision for locating the kidnapped children must be made to ensure that the children are returned to their lawful custodians.

162. CAL. CIV. CODE § 5157 (West Supp. 1977). *See also* Foster & Freed, *supra* note 14, at 1024-25.

163. *See, e.g.*, 28 U.S.C. § 1738 (1973) which provides that a court shall give the same full faith to a decree of a sister state as would the rendering court.

164. *See, e.g.*, Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89; 123 CONG. REC. S2982 (daily ed. Feb. 24, 1977) (remarks of Sen. McGovern).

165. H.R. 10977, 94th Cong., 1st Sess. (1975).

166. S. 797, 95th Cong., 1st Sess. (1977).

However, no action has been taken on any of these bills.

Even if congressional action were taken, federal legislation to mandate full faith and credit for custody decrees would be insufficient to solve the problem of parental kidnapping. First, full faith and credit would apply only to final decrees. Thus, a parent might still abduct his or her child before a final decree is rendered and file a custody petition in another state.[167] Second, a state might grant full faith and credit to a sister state's decree and still proceed to modify that decree on the basis of changed circumstances. As a result, a parent would still be encouraged to flee with the child to another jurisdiction.[168] Third, this suggestion provides no method for locating the abducting parent and the child. While granting full faith and credit is probably a necessary step to help deter child stealing, this proposal alone is inadequate to achieve that goal.[169]

Reform of criminal laws is the other primary means suggested as an answer to parental kidnapping.[170] The state of California has passed legislation against child stealing which makes the act a felony with penalties of up to four years in prison and up to a $10,000 fine.[171] The law mandates that "the district attorney shall take all actions necessary" to locate violators.[172] Since the crime is a felony, the law ensures the availability of extradition[173] and gives prosecutors wide latitude to try to find violators.

The Department of Health, Education and Welfare has established a parent locator service in connection with child support enforcement.[174] This agency has the power to search police, Internal Revenue Service,

167. *See* Molinoff, *supra* note 5, at 11. One organization claims that as many as sixty-eight percent of all snatchings occur before custody hearings begin. Daniloff, *Parents Lose Faith in the Law as Child-Snatchings Increase*, L.A. Times, Feb. 13, 1978, § 2, at 5, col. 4.

168. *See* Ratner, *supra* note 23, at 832.

169. It would probably be less circuitous to have the Supreme Court rule definitively as to what constitutes a final decree in child custody litigation and, thus, what kind of decree is entitled to full faith and credit. Unfortunately, such an event seems unlikely. *See* text accompanying notes 32-50 *supra*. In addition, such a procedure would do nothing to protect children where a "final" decree had not yet been rendered and, thus, would not prevent child stealing.

170. *See Amendments to the Federal Kidnapping Statute: Hearings on H.R. 4191 and H.R. 8722 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 93d Cong., 2d (1974).

171. CAL. PENAL CODE §§ 278-278.5 (West Supp. 1978). The prosecutor retains discretion to file only misdemeanor charges in less serious cases.

172. CAL. CIV. CODE § 4604(b) (West Supp. 1978).

173. Of course, another state may still refuse to extradite an abducting parent.

174. Van de Kamp, *supra* note 74, at 19-20.

and Social Security records to locate missing parents. Under the new California law, prosecutors may request information from this agency. Unfortunately, prosecutors' offices and police agencies have not yet been given access to this service in connection with child stealing cases.[175] If access were granted, this service would undoubtedly be an aid in locating stolen children and their abducting parents.

Although California's legislation is a step forward, legislation on a state-by-state basis is unlikely to be effective in alleviating the problem of child stealing. Individual states lack the mechanisms to locate offending parents who flee their jurisdictions. The new federal service will be helpful, but it does not provide a means to positively search for the abductor. Since the office relies on records gathered for other purposes, the time lag in finding an abducting parent could be considerable.[176] What is really needed is the FBI's assistance in locating offending parents.[177]

Legislation to make child stealing a federal crime has been introduced in both the House[178] and the Senate.[179] Under the House bill, which was first proposed in 1973, child stealing would be a misdemeanor with penalties of up to one year in prison and/or a $1,000 fine. Congressman Bennett has been trying to have such legislation passed for five years, but to no avail. The Senate bill would make child stealing a misdemeanor with penalties of up to six months in jail and up to a $10,000 fine. This bill also mandates full faith and credit for child custody decrees. Recently, the Senate bill was appended as an amendment to the Senate's Criminal Code Reform Act (S. 1437) and the Reform Act was passed by the Senate on January 30, 1978.[180] The Senate version is the better of the two bills. The House bill would apply only if a final custody determination were rendered while the Senate bill would apply "where neither a valid court decree or express agreement exist [sic] [but one parent abducts and secrets the child] in violation of

175. *Id.* at 20.

176. The Los Angeles District Attorney's Office noted: "it takes four to six months to obtain information which, upon receipt, usually proves to be stale." *Id.*

177. Los Angeles District Attorney Van de Kamp has said that "[s]o many of these children are taken into other states that the assistance of the FBI is crucial . . . Because the FBI operates in all states, it is uniquely qualified to perform this task." Farr, *Van de Kamp Hits FBI on 'Stolen Children' Policy*, L.A. Times, Sept. 5, 1977, § 2, at 1, col. 4.

178. This bill has been introduced many times, most recently as H.R. 4001, 95th Cong., 1st Sess., 123 CONG. REC. H1479 (daily ed. Feb. 24, 1977).

179. An amendment to S. 1437, 95th Cong., 2d Sess., 124 CONG. REC. S498 (daily ed. Jan. 25, 1978).

180. S. 1437, 95th Cong., 2d Sess., 124 CONG. REC. D56 (daily ed. Jan. 30, 1978).

the natural custodial rights of [the other parent]."[181]

Both bills have the advantage of giving the FBI clear authority to investigate child stealing cases. Thus, locating the offending parent would be facilitated. However, the penalties provided for in the bills are so small that it is unlikely that they would have any deterrent effect.[182] To provide a serious deterrent, stronger penalties are necessary.

Use of the criminal law to cope with child stealing has been criticized for several reasons. First, providing criminal sanctions does not remove the parent's motive for abducting the child. A parent may decide to abduct the child and hope for a custody modification in another state. If a modification is granted, a criminal conviction is unlikely.[183] This argument would lose effect, however, with uniform adoption of the UCCJA (along with the amendments to the Act recommended herein[184]) since an abducting parent would be denied access to the courts in another jurisdiction.[185] In addition, the fear of punishment would be likely to deter some parents from kidnapping their children.

The second criticism, aimed at federal criminal penalties, is that the FBI lacks the motivation and the resources to chase child snatchers.[186] However, if the FBI were given clear statutory authority to pursue kidnapping parents, the agency would be more inclined to do so.[187] Moreover, even if it is true that the FBI lacks the resources to handle this problem, the answer lies in increasing the FBI's resources rather than continuing to ignore the problem.[188]

A third criticism of criminal sanctions is that they might result in the anamolous situation of a parent's being awarded custody and also being found guilty of criminal child stealing.[189] This could only occur if a parent abducted the child and later obtained a custody modification

181. 124 CONG. REC. S501 (daily ed. Jan. 25, 1978).

182. Molinoff, *supra* note 5, at 11.

183. As with contempt, it seems improbable that a court which has found a parent fit for custody would participate in a criminal conviction. *See* text accompanying notes 63-67 & 79 *supra*.

184. *See* text accompanying notes 159-62 *supra*.

185. The Senate bill, *supra* notes 179-81, also provides recognition and enforcement of foreign decrees.

186. Molinoff, *supra* note 5, at 10-11.

187. In California, despite the fact that before the adoption of the new criminal statute the police were reluctant to intervene, police cooperation has increased since the passage of the act. Police are more willing to take reports, investigate, and bring violations to the attention of prosecutors. Van de Kamp, *supra* note 74, at 16.

188. Molinoff, *supra* note 5, at 11.

189. *See* Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 U. COLO. L. REV. 495, 505-06 (1975).

in another state. With simultaneous adoption of the UCCJA, this paradoxical result would not occur.

The final major criticism aimed at the criminal law is that parents are well intentioned and should not be subjected to criminal sanctions. Moreover, it is argued that the child may be harmed by the jailing of his or her parent.[190] This argument fails to acknowledge the seriousness of child stealing. The instability created by being kidnapped by a parent may have serious and permanent consequences which psychologically scar the child.[191] Thus, the parent's "good intentions" are really irrelevant. If the parent were truly concerned with the child's interests, he or she would participate in a full hearing on the issue of custody—allowing the court to determine the issue on the basis of all available evidence. Additionally, the reasoning that the child might suffer harm and disadvantage by putting his or her parent in jail also misses the point. If our criminal policies were based on this notion we would not penalize parents for physical or sexual child abuse, or any other crime for that matter, because to do so might be harmful to the child. Being kidnapped by one's parent is certain to be harmful to the child. At best, this criticism is an argument for flexible criminal penalties. A law which would give the prosecutor discretion to charge an offender with either a felony or a misdemeanor and which would provide penalties similar to California's (a maximum of four years imprisonment and/or a $10,000 fine) would furnish this flexibility. In cases of a less serious nature the offending parent might be charged only with a misdemeanor. If a prison term would be unnecessarily harsh, a convicted child stealer might simply be fined. Such a law would provide penalties sufficiently severe to deter many would-be abductors and, if enacted on the federal level, to give the FBI the necessary jurisdiction to search for child stealers who flee and attempt to hide from authorities.

While current reform proposals contain many valuable ideas, attempts at reform have been largely piecemeal. To effectively discourage parental kidnapping, a uniform national policy must be designed which ensures that, generally, only one state will be responsible for a child's custody determination and that full faith and credit will be granted to custody decrees. Additionally, criminal penalties must be fashioned which are sufficiently severe to deter such conduct and

190. *See* Bodenheimer, *The International Kidnapping of Children: The United States Approach*, 11 FAM. L.Q. 83, 99 (1977); *Moving to Stop Child Snatching*, TIME, Feb. 27, 1978, at 85.

191. *See* text accompanying notes 7-12 *supra*.

which grant the FBI jurisdiction to search for offending parents. In essence, what is needed is a comprehensive national policy to cope with child stealing.

V. POLICY RECOMMENDATIONS

The analysis presented herein leads to the conclusion that a comprehensive national policy should be adopted to deal with the problem of child stealing. While many of the proposals which have been suggested are insufficient in isolation, if woven into a comprehensive policy, they would work together to help to reduce the incidence of child stealing. Specifically, the following recommendations are made:

(1) The UCCJA should be amended to:
   (a) provide clear criteria for the "child's best interest" standard;
   (b) ensure that the home state will normally be the only state with jurisdiction in a child custody matter and allow jurisdiction in other states only in extraordinary circumstances;
   (c) create a presumption that the state to which an abducting parent has fled does not have jurisdiction to adjudicate custody matters and ensure that only in highly unusual circumstances (such as threat of physical harm to the child) would such a state have custody jurisdiction;
   (d) provide that when a court declines jurisdiction in an initial or modifying custody proceeding, the parent or guardian in another state and the appropriate district attorney shall be notified; and to
   (e) provide that upon proper motion, a petitioner in a proceeding where custody jurisdiction has been declined may be ordered by the court to appear with the child in a custody proceeding in another state and/or that the court may take charge of the child who has been abducted and return him or her to the legal custodian.

(2) All states should enact such an amended version of the UCCJA.

(3) Congress should enact legislation providing that full faith and credit shall be granted to custody decrees.

(4) The states and the federal government should enact legislation making child stealing chargeable as either a misdemeanor or a felony, depending upon the seriousness of the offense, with penalties of up to four years imprisonment and/or a $10,000 fine;
   (a) child stealing should be defined to include situations where no formal custody adjudication has taken place but a person, abducting the child, has deprived another of en-

forceable custody rights;[192] and

(b) the federal legislation should give the FBI a clear mandate to investigate parental abductions and it should provide for any necessary expansion of the FBI's resources.

While this comprehensive policy will probably not eliminate child stealing, its occurrence would likely be reduced. By ensuring that only one state has jurisdiction for custody determinations and specifically denying the abducting parent access to the courts of states other than the one in which the child resides, the proposal would eliminate many of the incentives for child snatching: a parent, for example, will know that he or she cannot abduct the child and seek another custody adjudication elsewhere. Moreover, the requirement that full faith and credit be granted to custody decrees will prevent many modifications of foreign decrees and thus provide an added disincentive to parental kidnapping. While some parents, fearing loss of the children, may still abduct their children, the notification procedures combined with the FBI investigative provisions would make locating the offending parent and the child less difficult. Even in situations in which the abducting parent does not seek the aid of the courts and makes positive efforts to conceal his or her and the child's location, FBI investigative capabilities would make finding the abductor and the child possible in many cases. A parent contemplating an abduction will know that crossing state lines will no longer shield an abducting parent from police investigations. Additionally, severe, but flexible penalties for child stealing would help to deter the would-be abductor.

VI. CONCLUSION

Annually, thousands of children are kidnapped by one of their parents and taken to a foreign jurisdiction in search of a more favorable custody decree. Such abductions may cause serious psychological damage to the children involved and should, therefore, be prevented. However, under the laws of most states, abductions are facilitated because states often refuse to recognize and enforce the custody decrees of sister states, acting instead to modify them. Moreover, neither civil nor criminal liability as currently applied has proven effective to punish or deter such abductions. The UCCJA, with its goal of providing single-state jurisdiction in custody cases, is a promising alternative despite current judicial interpretation of the Act which has threatened its viability by expanding the bases of jurisdiction under the Act. Universal

192. Enforceable custody rights would be based on either a court decree or the natural custodial rights of a parent.

adoption of the UCCJA, with the amendments recommended herein to restrict child custody jurisdiction, in combination with the adoption of federal and state criminal penalties for child stealing, should greatly reduce the incidence of this problem. The policy proposed herein would reduce the incentive for child stealing by preventing a parent from obtaining a modification of a custody decree in a sister state. With criminal penalties for parental kidnapping, such behavior would be deterred. For those not deterred, the FBI could aid in locating the offending parent and the abducted child. The proportions of this problem are too great to ignore any longer. If child custody is to ensure that the best interests of the child are fulfilled, a comprehensive national child stealing policy must be enacted.

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