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The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnaping Prevention Act

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INTRODUCTION

The Uniform Child Custody Jurisdiction Act (UCCJA)[1] was developed in consultation with leading scholars, and, from its inception, has been hailed as the solution to one of this century's celebrated dilemmas of federalism, the so-called "problem of the interstate child."[2] This is the conundrum presented by those formally adjudicated child custody disputes in which the child or the contestants have contacts with more than one state: Which, if any, custody decisions will be enforced outside the state where they were made?

The UCCJA's drafters believed that the existing patchwork of state jurisdictional rules, by their very multiplicity, encouraged contestants to relocate in order to relitigate child custody cases. Through the UCCJA, the drafters intended to substitute a single enforceable and orderly regime; they believed such a regime would "remedy th[e] intolerable state of affairs where self-help and the rule of 'seize-and-run' prevail rather than the orderly processes of the law,"[3] and ensure that custody decisions were heard "in the most convenient and proper place from the point of view of gathering evidence."[4] Early scholarly writing about the Act reflected the drafters' optimism, which most later assessments of the Act's operation have maintained.[5] Nevertheless, as frus-

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[1] 9 U.L.A. pt. 1, at 115-331 (1988). The National Commissioners on Uniform State Laws originally promulgated the Uniform Child Custody Jurisdiction Act (UCCJA) in 1968.

[2] Albert Ehrenzweig coined the phrase "interstate child." *See* Albert A. Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings*, 64 MICH. L. REV. 1, 1 (1965) [hereafter Ehrenzweig, *Uniform Legislation*]. For a full exposition of the problem, see generally Albert A. Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953) [hereafter Ehrenzweig, *Interstate Recognition*]; Leonard G. Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795 (1964) [hereafter Ratner, *Federal System*].

[3] UCCJA Prefatory Note, 9 U.L.A. pt. 1, at 117.

[4] Proceedings [of the National Conference of Commissioners on Uniform State Laws] in Committee of the Whole, Uniform Child Custody Act 17 (Aug. 3, 1966) (statement of W.J. Brockelbank, Chairman, Special Committee on Uniform Child Custody Jurisdiction Act).

[5] *See, e.g.*, LEA BRILMAYER, CONFLICT OF LAWS 163-67, 178 (1991); Edward E. Bates, Jr. & James E. Holmes, *The Uniform Child Custody Jurisdiction Act: Progress and Pitfalls*, 17 GA. ST. B.J. 72 (1981); Brigitte M. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203 (1980) [hereafter Bodenheimer, *Interstate Custody*]; Brigitte M. Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and*

trated practitioners and judges by now suspect,[6] the UCCJA has not provided a consistently reliable solution to the problem of the interstate child.

Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications, 65 CAL. L. REV. 978 (1977) [hereafter Bodenheimer, *Progress Under the UCCJA*]; Brigitte M. 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 (1975) [hereafter Bodenheimer, *Rights of Children*]; Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969) [hereafter Bodenheimer, *Legislative Remedy*]; Brigitte M. Bodenheimer & Janet Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C. DAVIS L. REV. 229 (1979); William V. Dorsaneo III, *Due Process, Full Faith and Credit and Family Law Litigation*, 36 SW. L.J. 1085 (1983); Henry H. Foster & Doris J. Freed, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act*, 28 HASTINGS L.J. 1011 (1977); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553 (1989); Barry Kuten & Roberta Fox, *Closing the Custody Floodgate: Florida Adopts the Uniform Child Custody Jurisdiction Act*, 6 FLA. ST. U. L. REV. 409 (1978); Lucy S. McGough & Anne R. Hughes, *Charted Territory: The Louisiana Experience with the UCCJA*, 44 LA. L. REV. 19 (1983); John J. Sampson & Harry L. Tindall, *The Uniform Child Custody Jurisdiction Act Comes to Texas—As Amended, Integrated and Improved*, 46 TEX. B.J. 1096 (1983); Eric Stein, *Uniformity and Diversity in a Divided-Power System: The United States' Experience*, 61 WASH. L. REV. 1081 (1986); Kathleen M. Duncan, Note, *Children: Child Custody: The Case for Enactment of the Uniform Child Custody Jurisdiction Act in Oklahoma*, 33 OKLA. L. REV. 107 (1980); Evelyn L. Kosicki, Note, *Child Custody Jurisdiction in Ohio—Implementing the Uniform Child Custody Jurisdiction Act*, 12 AKRON L. REV. 121 (1978); Gail F. Moulds, Note, *The Uniform Child Custody Jurisdiction Act: Is It Working in Florida?*, 13 STETSON L. REV. 431 (1984); Elizabeth C. Shuff, Comment, *The Uniform Child Custody Jurisdiction Act in Virginia*, 14 U. RICH. L. REV. 435 (1980).

But see Russell M. Coombs, *Interstate Child Custody: Jurisdiction, Recognition and Enforcement*, 66 MINN. L. REV. 711 (1982) (criticizing parts of UCCJA as ineffective and unconstitutional); Leonard G. Ratner, *Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective-Litigation Values vs. the Territorial Imperative (b) The Uniform Child Custody Jurisdiction Act*, 75 NW. U. L. REV. 363 (1980) [hereafter Ratner, *Procedural Due Process*] (suggesting, in the alternative, amending or reinterpreting certain provisions of UCCJA); *Family Law: Court's Adoption of the Uniform Child Custody Jurisdiction Act Offers Little Hope of Resolving Child Custody Conflicts*, 60 MINN. L. REV. 820 (1976) (noting that most important issues are committed to courts' discretion).

[6] *See, e.g.*, Emanuel A. Bertin, *Relocation: No Common Ground; All States Agree That What's Good for the Child Is What Counts—but That's All They Agree On*, FAM. ADVOC., Winter 1989, at 6; Dennis J. Jacobsen, *A Judge Looks at Relocation: What Works in Court?*, FAM. ADVOC., Winter 1989, at 30; Peter M. Walzer, *Jurisdiction: Maneuvering Through Complex Rules*, FAM. ADVOC., Winter 1990, at 16.

The UCCJA is a success in the sense that every state has adopted it without substantial alteration.[7] It now applies to all child custody litigation with interstate features. In too many

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[7] *See* ALA. CODE §§ 30-3-20 to -44 (1989 & Supp. 1991); ALASKA STAT. §§ 25.30.010 to .910 (1991); ARIZ. REV. STAT. ANN. §§ 8-401 to -424 (1989 & Supp. 1991); ARK. CODE ANN. §§ 9-13-201 to -228 (Michie 1991); CAL. CIV. CODE §§ 5150-5174 (West 1983 & Supp. 1991); COLO. REV. STAT. ANN. §§ 14-13-101 to -126 (West 1989 & Supp. 1991); CONN. GEN. STAT. ANN. §§ 46b-90 to -114 (West 1986 & Supp. 1991); DEL. CODE ANN. tit. 13, §§ 1901-1925 (1981 & Supp. 1991); D.C. CODE ANN. §§ 16-4501 to -4524 (1989 & Supp. 1991); FLA. STAT. ANN. §§ 61.1302 to .1348 (West 1985 & Supp. 1992); GA. CODE ANN. §§ 74-501 to -525 (Harrison 1981 & Supp. 1989); HAW. REV. STAT. §§ 583-1 to -26 (1985); IDAHO CODE §§ 32-1101 to -1126 (1983 & Supp. 1991); ILL. ANN. STAT. ch. 40, ¶¶ 2101-2126 (Smith-Hurd 1980 & Supp. 1991); IND. CODE ANN. §§ 31-1-11.6-1 to -24 (West 1979 & Supp. 1991); IOWA CODE ANN. §§ 598A.1 to .25 (West 1981 & Supp. 1991); KAN. STAT. ANN. §§ 38-1301 to -1326 (1986); KY. REV. STAT. ANN. §§ 403.400 to .620 (Michie/Bobbs-Merrill 1984 & Supp. 1990); LA. REV. STAT. ANN. §§ 13:1700 to :1724 (West 1983 & Supp. 1991); ME. REV. STAT. ANN. tit. 19, §§ 801-825 (West 1981 & Supp. 1991); MD. FAM. LAW CODE ANN. §§ 9-201 to -224 (1984 & Supp. 1991); MASS. GEN. LAWS ANN. ch. 209B, §§ 1-14 (West 1987 & Supp. 1991); MICH. STAT. ANN. §§ 27A.651 to .673 (Callaghan 1986 & Supp. 1991); MINN. STAT. ANN. §§ 518A.01 to .25 (West 1990 & Supp. 1991); MISS. CODE ANN. §§ 93-23-1 to -47 (1972 & Supp. 1991); MO. ANN. STAT. §§ 452.440 to .550 (Vernon 1986 & Supp. 1992); MONT. CODE ANN. §§ 40-7-101 to -125 (1991); NEB. REV. STAT. §§ 43-1201 to -1225 (1988); NEV. REV. STAT. §§ 125A.010 to .250 (1979); N.H. REV. STAT. ANN. §§ 458-A:1 to :25 (1983 & Supp. 1991); N.J. STAT. ANN. §§ 2A:34-28 to -52 (West 1987 & Supp. 1991); N.M. STAT. ANN. §§ 40-10-1 to -24 (Michie 1978 & Supp. 1991); N.Y. DOM. REL. LAW §§ 75-a to -z (McKinney 1988 & Supp. 1992); N.C. GEN. STAT. §§ 50A-1 to -25 (1989); N.D. CENT. CODE §§ 14-14-01 to -26 (1981); OHIO REV. CODE ANN. §§ 3109.21 to .37 (Anderson 1989 & Supp. 1991); OKLA. STAT. ANN. tit. 43, §§ 501-527 (West 1987 & Supp. 1992); OR. REV. STAT. §§ 109.700 to .930 (1989); 42 PA. CONS. STAT. ANN. §§ 5341-5366 (1981 & Supp. 1991); R.I. GEN. LAWS §§ 15-14-1 to -26 (1988 & Supp. 1991); S.C. CODE ANN. §§ 20-7-782 to -830 (Law. Co-op. 1985 & Supp. 1991); S.D. CODIFIED LAWS ANN. §§ 26-5A-1 to -26 (1984 & Supp. 1991); TENN. CODE ANN. §§ 36-6-201 to -225 (1991); TEX. FAM. CODE ANN. §§ 11.51 to .75 (1986 & Supp. 1991); UTAH CODE ANN. §§ 78-45c-1 to -26 (1987 & Supp. 1991); VT. STAT. ANN. tit. 15, §§ 1031-1051 (1989); VA. CODE ANN. §§ 20-125 to -146 (Michie 1990); WASH. REV. CODE ANN. §§ 26.27.010 to .910 (West 1986 & Supp. 1991); W. VA. CODE §§ 48-10-1 to -26 (1986 & Supp. 1991); WIS. STAT. ANN. §§ 822.01 to .25 (West 1977 & Supp. 1991); WYO. STAT. §§ 20-5-101 to -125 (1987 & Supp. 1991).

For a partial catalog of state variations from the text of the UCCJA, see Christopher L. Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291, 316-25 (1986).

cases, however, it has merely added a layer of formal complexity (and, consequently, of uncertainty and expense) to interstate custody disputes, without producing either predictability or repose.[8] It has neither standardized state jurisdictional decisions nor discouraged (and penalized) self-help. Litigants not subject to direct coercion by the court that rendered a custody decision can still evade an unwelcome decision with judicial assistance from another state's courts.

Any assessment of the UCCJA is complicated by the Parental Kidnaping Prevention Act of 1980 (PKPA),[9] a federal statute that addresses precisely the same problem. Notwithstanding its popular name, the PKPA's most important provisions implement the Full Faith and Credit Clause. The PKPA requires states to defer to one another's custody decrees when specific criteria (derived from the UCCJA in most respects) are met.[10] At least forty-three states had adopted the UCCJA by the time the PKPA became effective.[11] The PKPA's sponsors hoped the legislation would force states that had not yet adopted the UCCJA to reach the same results as states that had, and would plug what they per-

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[8] In this article, I use the term "repose" to refer to a forum's refusal even to consider a request to modify a custody decision, whether the decision is made by the forum or a foreign court. In the intrastate context, repose is often considered important to the best interests of the child. In the interstate context, repose is thought to discourage parents from moving from state to state with their children in search of more favorable custody decisions.

[9] Pub. L. No. 96-611 §§ 6-10, 94 Stat. 3568 (1980) (codified in scattered sections of 28 and 42 U.S.C. (1988 & Supp. I 1989)).

[10] *See* Parental Kidnaping Prevention Act of 1980 (PKPA) § 8(a), 94 Stat. 3569-71 (codified at 28 U.S.C. § 1738A (1988)). In addition to these provisions and a general statement of purposes in § 7, 94 Stat. 3568, the PKPA amends 42 U.S.C. § 663 to make the Parent Locator Service available for tracing an absent parent or child in connection with state or federal parental kidnaping prosecutions and with the making or enforcing of custody orders. *See* PKPA § 9, 94 Stat. 3571 (codified as amended at 42 U.S.C. § 663). It also "interprets" 18 U.S.C. § 1073, the crime of Interstate Flight to Avoid Prosecution, to apply to parents subject to state felony prosecution for kidnaping their children. *See* PKPA § 10, 94 Stat. 3573.

[11] The latest date that the PKPA could have become effective was July 1, 1981, the effective date specified in Pub. L. No. 96-611 § 2, 94 Stat. 3567. Because Pub. L. No. 96-611 also contains technical amendments to the Social Security Act entirely unrelated to the PKPA, *see* Pub. L. No. 96-611 §§ 1-5, 11, 94 Stat. 3566-68, 3573-74 (codified in scattered sections of 26 and 42 U.S.C.), however, some courts have concluded that the PKPA became effective on December 28, 1980, its enactment date. *See, e.g.*,

ceived as loopholes in the UCCJA.[12] Unfortunately, the sponsors' critique of the UCCJA was inadequate. The PKPA replicates some of the UCCJA's defects, and its attempts to improve on the UCCJA create additional problems.[13] Although the PKPA raises new issues of statutory interpretation and interstate deference (adding further to the complexity and expense of multistate custody litigation), it has not solved the problem of the interstate child any more than the UCCJA did.

This article's thesis is that the UCCJA and PKPA have not eliminated jurisdictional competition because a federal system such as ours cannot achieve both of the Acts' two main instrumental goals—preventing or punishing "child-snatching" and promoting well-informed decisions. Our system commits custody decisions to sovereign states, which make and modify the decisions according to indeterminate precepts. Such a system will inevitably create some version of the problem of the interstate child; so long as these features of our system persist, legislation cannot solve the problem. Therefore, although this article proposes amendments to the UCCJA designed to increase its effectiveness, in the alternative, it urges legislatures to repeal both the UCCJA and the PKPA, in order to eliminate the superfluous delays and transaction costs that impede the courts' search for justice in individual child custody cases.

This article begins by examining the fundamental nature of the problem that these statutes were intended to remedy.[14] It then reviews the history of our understanding of the problem[15] and traces the development of reforming legislation, paying particular attention to the courts' interpretations of the statutes.[16] The arti-

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Thompson v. Thompson, 798 F.2d 1547, 1550-51 (9th Cir. 1986), *aff'd*, 484 U.S. 174 (1988).

Forty-three states had adopted the UCCJA by 1980. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 523 (1980). By 1981, all United States jurisdictions had adopted the UCCJA except Massachusetts, Mississippi, Texas, the District of Columbia, Puerto Rico, and the Virgin Islands. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 470 (1981).

12 *See* Henry H. Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L. SCH. L. REV. 297, 300-04 (1981).

13 *See infra* part IV.

14 *See infra* part IA.

15 *See infra* part IB.

16 *See infra* parts II-IV.

cle concludes with proposals for further reform.[17]

I. THE "PROBLEM OF THE INTERSTATE CHILD"

The "problem of the interstate child" is the jurisdictional conundrum presented by formally adjudicated child custody[18] disputes in which the child or the contestants have contact with more than one state: When, if at all, will a custody decision made in one state be enforced in another? This question arises when more than one forum seeks to adjudicate a dispute concerning the same child, and it raises four distinct jurisdictional issues. Two of these issues, "initial" and "continuing" jurisdiction, concern the jurisdiction of the first state to consider the case. The other two, "enforcement" and "modification" jurisdiction, concern the jurisdiction of another, subsequent, state.

The first time a parent[19] seeks judicial resolution of his or her child's custody, the issues raised by this implicit assertion that the chosen forum has "initial jurisdiction" are relatively simple. In broad terms, the court must decide whether the forum has sufficient connection with the parents and the child to render a decision. After the initial custody decree has been made, the decree court may adjudicate any subsequent custody disputes only if it has "continuing jurisdiction."[20] If a court in another state is asked to enforce the first state's decree, this raises both the issue

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17 *See infra* part V.

18 "Custody" encompasses the entire bundle of non-economic parental rights: living with the child, visiting with the child, and making decisions about the child's education, medical care, discipline, associations, religious training, and so forth. Custody rights are commonly allocated between a child's parents when they divorce; these rights may also be altered by guardianship proceedings, abuse and neglect proceedings, adoption proceedings, *see* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, and juvenile delinquency proceedings. *See In re* Gault, 387 U.S. 1, 17 (1966).

19 This discussion assumes that the only possible child custody litigants are the child's parents, though solely for rhetorical ease. In fact, the child custody contest may be waged between a parent and some other natural person, between two non-parents, or between the state and one or more natural persons. The jurisdictional issues remain the same whether or not the contestants are parents. Both the UCCJA and the PKPA apply to all child custody litigation. *See* PKPA § 8(a), 94 Stat. 3471 (codified at 28 U.S.C. § 1738A(b)); UCCJA § 2 & cmt., 9 U.L.A. pt. 1, at 133.

20 *See* Dale F. Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROBS. 819, 825 (1944).

of the first state's jurisdiction to make the disputed order and the issue of the second state's "enforcement jurisdiction."[21] Finally, if a second state is asked to modify, rather than enforce, a custody decree made in another state, this raises the issue of the second state's "modification jurisdiction."[22] All of these jurisdictional issues may be litigated in the court whose jurisdiction is challenged, or collaterally in some other court.

The most troublesome aspect of the problem is that, because courts sitting in different states may resolve the question of their own, or another state's, jurisdiction in each of these situations differently, parties who are unsuccessful in one forum may be rewarded for relitigating in another; worse still, to the extent that a litigant's chance of success is improved if she brings the child with her when she moves, the law tends to undermine the stability of families as well as of judicial decisions. The problem was first named and studied in the middle years of this century (as soon as custody litigation became common in the United States).[23] Although this was not explicitly recognized then, the problem arises from fundamental features of our legal system rather than from particular laws. The next section describes this core of the problem.

A. The Core of the Problem

1. The Limits of Federalism

Although the problem is usually analyzed as if it were produced by particular laws, in fact the problem is imbedded in the very structure of our legal system. When the problem is stripped of technical details, it is easy to understand why it has been so intractable. Some form of the problem is inherent in a federal system like ours, which allocates child custody adjudication to autonomous state tribunals,[24] so long as custody litigants, like other citi-

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[21] A court has enforcement jurisdiction if it may enforce a custody order. This question is now governed by the UCCJA.

[22] A court has modification jurisdiction if it may modify a custody order. This question is also now governed by the UCCJA.

[23] Ehrenzweig, *Uniform Legislation*, *supra* note 2, at 1. Perhaps not coincidentally, the automobile began to make interstate migration cheaper and easier beginning in the 1920s. *See* FRANK DONOVAN, WHEELS FOR A NATION 162-63 (1965). For an early scholarly description of the problem of the interstate child, see generally Herbert F. Goodrich, *Custody of Children in Divorce Suits: The Conflict of Laws Problem*, 7 CORNELL L. REV. 1 (1921).

[24] This would be true whether the tribunal were a court, a master, a

zens, may move freely from state to state, and our courts continue to use the best interests of the child—or any other indeterminate test—to reach custody decisions that are modifiable during the child's minority.

In such a system, whenever one parent moves away from the other, with or without the children, the move itself may be seen as changing circumstances sufficiently to justify a modification. The move also ensures that more than one forum will have at least a colorable interest in resolving any ensuing dispute over custody or visitation. With each interstate move, a new state becomes interested in the child's welfare or in the parent's custodial rights, yet the interests of states already concerned with the dispute, the child, or the litigants, do not necessarily diminish.

Before the UCCJA and PKPA, the states subscribed to a variety of jurisdictional theories, in effect giving any forum with an interest in an interstate custody dispute a rationale for seeking to resolve it.[25] Moreover, under applicable Supreme Court precedents, no state was bound to enforce another state's prior custody decision.[26] Leonard Ratner, who first proposed a uniform law to reform the problem of the interstate child, believed that this radical jurisdictional indeterminacy, and the litigants' consequent uncertainty about the proper forum, caused litigants and their children to move in search of a more favorable forum.[27] He concluded, therefore, that if all the states adopted uniform jurisdictional rules and cooperated in requiring their courts to defer to custody determinations made in states with proper jurisdiction under such uniform rules, both the uncertainty and the jockeying for a better forum would end.[28]

Both the UCCJA and the PKPA follow Ratner's model. The accumulating decisions under these statutes demonstrate, however, that the problem of the interstate child has not been solved. States following these statutes' commands still render custody decisions to which other states, also relying on these statutes,

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family service agency, a court clinic, or an individual expert in children's needs, so long as each state's tribunal were independent of tribunals in other states.

25 *See infra* part IB1.

26 *See infra* part IB2.

27 *See* Leonard G. Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and A Proposed Uniform Act*, 38 S. CAL. L. REV. 183, 196-205 (1965) [hereafter Ratner, *Legislative Resolution*].

28 *Id.* at 183.

refuse to defer. Courts continue to review custody decisions' merits before deciding whether to enforce or modify the decisions. Litigants may therefore still improve their positions by moving away from a state of adverse decision. Most distressingly, competent attorneys (even after thorough research) remain unable either to predict whether a court will deem itself jurisdictionally empowered to decide a custody matter, or to advise their clients whether a custody decision will be binding in states other than the one where it was made. Although faulty design and poor drafting contribute to these statutes' failure, such flaws are not the fundamental cause of their ineffectiveness. The problem of the interstate child was never resolvable by Ratner's model.

There are two paramount constraints on any solution to the problem of the interstate child. First, each state's courts are sovereign within state boundaries and powerless outside them. Therefore, any state's judgment will have extraterritorial effect only if another independent sovereign gives it that effect. That is, another state's courts must subordinate the local interests in the dispute to the interests of a foreign state.[29] Second, any solution must balance two important and incompatible objectives derived from modern substantive custody law: flexibility, and certainty in the dual senses of predictability and repose.

The incompatibility of flexibility with certainty is an important tension in the internal law of the several states, but so long as a custody dispute is before a single sovereign the two objectives can be balanced and the tension resolved in each particular case. When a party's interstate move brings a custody case before the courts of a second sovereign, however, the competing needs of each jurisdiction may preclude a solution. The next section shows how this works. First, it shows how substantive custody law tends to subvert predictability and repose even in intrastate cases; second, it shows how this tendency is magnified to unmanageable proportions in interstate cases.

2. Substantive Custody Law

a. Single-State Custody Cases

In the middle years of this century, when scholars first noticed

[29] Although a forum's own interest in federalism, as expressed by the Full Faith and Credit Clause, might have been interpreted to mandate such cooperation, the law developed otherwise. *See infra* note 68 and accompanying text.

the problem of the interstate child, some states had substantive custody rules that favored one party over the other.[30] With a few notable exceptions, this is no longer the case.[31] We have by now evolved what is in effect a uniform substantive child custody law:

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[30] During this period the courts were shifting from paternal preference to the tender years doctrine to the search for the best interests of the child. *See infra* note 32. Nevertheless, in 1944 Professor Stansbury asserted that "the applicable internal laws of the several states . . . do not differ enough to create problems of choice of law." Stansbury, *supra* note 20, at 819.

[31] The most striking exceptions concern the effect on custody of a parent's extra-marital sexual encounters. In some states, a custodial parent who has a lover may lose custody solely on that basis. *See, e.g.*, Jarrett v. Jarrett, 400 N.E.2d 421, 423-426 (Ill. 1979) (mother's open cohabitation with man makes award of custody to her improper), *cert. denied*, 449 U.S. 927 (1980); Beck v. Beck, 341 So. 2d 580, 582 (La. Ct. App. 1977) (mother's "open and public adultery with her paramour" renders her unfit for custody); Parker v. Parker, 158 A.2d 607, 610 (Md. 1960) (mother's adultery raises strong presumption against her fitness for custody); Boykin v. Boykin, 370 S.E.2d 884, 886 (S.C. Ct. App. 1988) (citing mother's "flagrant" promiscuity as reason to award custody to father); *cf.* Primm v. Primm, 409 So. 2d 1288, 1290 (La. Ct. App. 1982) (court may require mother to keep her lover and her children apart as condition of custody); *In re* G.B.S. & A.L.S., 641 S.W.2d 776, 777-78 (Mo. Ct. App. 1982) (not error to condition custody on father's not cohabiting with woman); Hanson v. Hanson, 187 N.W.2d 647, 648-49 (Neb. 1971) (court may give legal custody to state, physical custody to mother, to ensure mother desists from post-divorce affairs). *But see* Helgenberger v. Helgenberger, 306 N.W.2d 867, 869 (Neb. 1981) (sexual conduct determinative only when it affects children's welfare); Whaley v. Whaley, 399 N.E.2d 1270, 1275 (Ohio Ct. App. 1978) (requiring proof of causal connection between parent's sexual conduct and harm to child); *In re* Walter, 557 P.2d 57, 57 (Or. Ct. App. 1976) (improper to condition custody on mother's not cohabiting with a man); J.B. v. A.B., 242 S.E.2d 248, 256 (W. Va. 1978) (if sexual misconduct is not "outrageous," it is not relevant).

Similarly, although some states will never give custody to a homosexual parent, *see, e.g.*, Jacobson v. Jacobson, 314 N.W.2d 78 (N.D. 1981) (custody changed because mother is lesbian); Roe v. Roe, 324 S.E.2d 691 (Va. 1985) (award of custody to actively homosexual father error of law), others have held that a parent's sexual orientation is relevant to a custody determination only if it is adversely affecting the child. *See, e.g.*, Birdsall v. Birdsall, 243 Cal. Rptr. 287 (Ct. App. 1988) (parental homosexuality no bar to visitation); Bezio v. Patenaude, 410 N.E.2d 1207 (Mass. 1980) (mother's lesbianism alone insufficient to deny her return of custody); *In re* Cabalquinto, 669 P.2d 886 (Wash. 1983) (en banc) (parental homosexuality no bar to visitation); Schuster v. Schuster, 585 P.2d 130 (Wash. 1978) (en banc) (lesbian cohabitation in violation of prior custody decrees insufficient to warrant change of custody). *See generally Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1630-40 (1989) (examining factors,

the courts must try to achieve the best interests of the child. Litigants do not travel from state to state in search of more favorable substantive law. Formally, the law is the same everywhere. Why, then, do litigants continue moving to other states to avoid adverse custody decisions? Because substantive custody law does not decide cases, and all custody decisions are modifiable. Litigants move to get yet another day in court, lured by the indeterminacy of substantive custody law's best interests ideal into believing that a different tribunal will reach a more favorable result.

Modern child custody law is characterized by a tension between certainty and flexibility. The tension is clearly evident in the modern goal of making custody decisions "in the best interests of the child." That phrase heralded the nineteenth-century shift from the feudal rule, which required courts to place a child in her father's custody, to our present child-centered inquiry.[32] The feudal rule exalted certainty over flexibility. It was, if nothing else, easy to understand and apply. "The best interests of the child" is neither. There is no consensus—legal, scientific, or societal—as to either the "best" outcome for children or even as to

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including sexual orientation, that influence courts in resolving custody disputes).

[32] Early American cases echoed their English models in treating the father as the natural guardian of his child who had an alienable property right in the child's custody as well as in any income from the child's work. *See, e.g.*, Bermudez v. Bermudez, 2 Mart. 180 (La. 1812) (awarding custody to father after mother left); State v. Barney, 14 R.I. 62 (1883) (holding that father may assign infant's custody to paternal grandmother over mother's objections). *But cf.* State *ex rel.* Neider v. Reuff, 2 S.E. 801, 803 (W. Va. 1887) (noting father's unalienable right to custody and control of minor child). Beginning in the mid-1800s, however, some courts conditioned the father's rights on the child's well-being. *See, e.g.*, State *ex rel.* Paine v. Paine, 23 Tenn. (4 Hum.) 523 (1843) (denying custody to morally unfit father). *But see, e.g.*, Ely v. Gammel, 52 Ala. 584 (1875) (granting custody to adulterous father). At approximately the same time, concern for very young children's welfare led some courts to place them with their mothers. *See, e.g.*, State v. Stigall, 22 N.J.L. 286 (1849) (awarding custody of one- and three-year-old children to mother, but custody of five-year-old to father). These doctrines gradually evolved into a more general concern for the child's "best interests." *See, e.g.*, State *ex rel.* Neider v. Reuff, 2 S.E. 801, 802-06 (W. Va. 1887) (noting general rule that father is entitled to custody of minor children, but awarding custody to mother under developing best interests standard). *See generally* MICHAEL GROSSBERG, GOVERNING THE HEARTH 234-42 (1985) (discussing shift from father-oriented, property-based custody standards to standards that emphasize child's best interest).

the conditions most likely to produce any desired result. Rather, in our pluralistic society many different, conflicting, strongly-held opinions exist on both those questions.

Given this plurality of opinion, the litigants in every case may dispute both what outcome would be "best" for a particular child and what means are most likely to achieve any desired outcome.[33] Using whatever facts and arguments seem appropriate in a particular case, judges must develop a case-specific standard for each custody decision, and then must apply this standard to the very facts that were used to generate it.[34] The "best interests of the child" is therefore, at best, an ideal rather than either "a rule"[35] or "a standard."[36] A court can neither reach nor rationally approach "the best interests of the child." In virtually any case, another equally diligent tribunal might reach a different decision.[37]

Moreover, in most states custody decisions are freely modifiable whenever a judge determines that the child's welfare requires a change of custody. Evaluating whether a second judge has made a wiser decision than the first is at least as difficult as evaluating the result in the first instance. Modern custody litigation is therefore characterized by great discretion for judges and correspondingly great uncertainty for litigants. It exalts flexibility over predictability to an extreme degree on the assumption that superficially similar cases need not be decided alike because no two cases can be *meaningfully* similar.

Reformers dissatisfied with this system have often focused on making the flexibility of the best interests ideal fulfill its promise of individual justice. This motivation underlies attempts to increase the sophistication of case-specific standards by educating and supporting the decision-makers. Many states now give

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[33] *See* Mnookin, *supra* note 18, at 232-37.

[34] *Id.* at 231.

[35] *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-88 (1976) (defining rule as "a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way"); Mnookin, *supra* note 18, at 231 n.21 (stating that the "best interests of the child" is neither a rule nor determinative of a rule).

[36] *See* Kennedy, *supra* note 35, at 1688 ("A standard refers directly to one of the substantive objectives of the legal order.").

[37] Because of the standard's indeterminacy, this would be true whether the tribunal were a court, a master, a family service agency, a court clinic, or an individual expert in children's needs.

judges who make custody decisions institutionalized access to advice from professionals staffing court clinics and probation departments.[38] Some also give judges ample opportunity to develop wisdom in specialized family courts.[39]

Unfortunately, even wise and sophisticated flexibility can be systemically destabilizing. However well the best interests ideal's flexibility may serve the goal of justice in the individual case, it endangers the entire system's legitimacy. Every custody decision based on a case-specific standard is vulnerable to the charge that it represents merely one judge's personal predilections rather than the rule of law.[40] Litigants and counsel are chronically dissatisfied with such flexibility. This dissatisfaction is reflected in the latter's perennial attempts to identify common patterns in custody decisions,[41] in settlements based on the parties' risk-taking preferences rather than on "the law,"[42] and in the increasing use of nonjudicial decision-making processes.[43]

The system's need for legitimacy in the face of the substantive standard's radical indeterminacy therefore creates a countervailing need for certainty—for predictability or, at a minimum, for repose. Because the best interests ideal renders custody results unavoidably unpredictable, the system's need for legitimacy has become focused on the goal of repose. Explicit pleas for repose are made by those who advocate limiting the courts' power to modify existing custody orders.[44] Some child psychologists agree

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38 *See* Robert J. Levy, *Custody Investigations in Divorce Cases*, 1985 AM. B. FOUND. RES. J. 713, 714.

39 *Id.*

40 Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 3 (1984).

41 *See generally, e.g., id.* (identifying common patterns in 241 reported 1982 appellate custody decisions nationwide).

42 *See* Mnookin, *supra* note 18, at 230-37. *But see* Sally B. Sharp, *Modification of Agreement Based Custody Decrees: Unitary or Dual Standard*, 68 VA. L. REV. 1263 (1982) (arguing that custodial arrangements reached by parental agreement are wiser and better-informed than judicial determinations or expert opinions).

43 *See* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 728 (1988).

44 Although the modern trend is toward requiring a "substantial" or "material" change of circumstances for modification, *see* Uniform Marriage and Divorce Act § 409, 9A U.L.A. 628 (1987); Atkinson, *supra* note 40, at 5, some states require much less, *see, e.g.*, Parten v. Parten, 351 So. 2d 613, 615 (Ala. Civ. App. 1977) (modifying custody order on basis of facts unknown to judge at first trial); *accord* Hill v. Hill, 620 P.2d 1114, 1119 (Kan. 1980);

with the often-heard argument that, because stability is in children's best interest, modifications should be difficult to obtain.[45] Nevertheless, the best interests ideal undermines the goal of repose by requiring that, to protect the child from unforseen and unforeseeable dangers, custodial decrees must remain perpetually modifiable.[46] Thus, the ordinary tendency of custody law, even when litigation takes place entirely within one state, is towards flexibility even at the cost of systemic legitimacy. This tendency is greatly magnified in multistate litigation.

b. Special Characteristics of Multistate Custody Cases

Multistate child custody cases are very often true conflicts,[47] in which two or more states have a genuine interest in resolving matters, each in its own way. All true conflicts are notoriously and inherently difficult, but child custody conflicts are especially so. A court must decide not which state's law to apply but whether to hear the case at all. In this context, flexibility means holding another hearing; certainty means enforcing an existing order or deferring to a proceeding that is pending elsewhere.

In principle, every state court has an interest both in flexibility (to respond to the forum's interest in the dispute by doing justice in the particular case) and in certainty (to protect the legitimacy of the court and of the system of justice generally). In any particular multistate case, however, the need for flexibility will seem most urgent to the court with a local child before it exhibiting all

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Dailey v. Dailey, 635 S.W.2d 391, 393 (Tenn. Ct. App. 1981); *In re* Potts, 699 P.2d 799, 800 (Wash. Ct. App. 1985).

45 Indeed, perpetual uncertainty in custodial arrangements may be more dangerous for children than judicial inflexibility is, because " 'poor parental models are easier to adapt to than ever shifting ones.' " Bodenheimer, *Legislative Remedy*, *supra* note 5, at 1209 (quoting ANDREW S. WATSON, PSYCHIATRY FOR LAWYERS 197 (1968)); *accord* May v. Anderson, 345 U.S. 528, 541-42 (1953) (stating that children need to be free of "incessant tug of war between squabbling parents"); JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 31-39 (1973).

46 *See, e.g.*, Kovacs v. Brewer, 356 U.S. 604, 612 (1958) (Frankfurter, J., dissenting).

47 A state is "interested" in having its law applied if doing so would advance the state's policy. If more than one state has an interest, there is a "true conflict." *See generally* BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 183-84 (1963); John H. Ely, *Choice of Law and the State's Interest In Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Joseph Singer, *Real Conflicts*, 69 B.U. L. REV. 1 (1989).

the compelling particularity of its needs and vulnerabilities. That court will want to make a new inquiry (and perhaps a new order) instead of blindly enforcing a foreign decree. Indeed, the interstate move itself may seem a "change of circumstances" sufficient to warrant at least a new hearing and perhaps a change of custody as well.

Conversely, the need for certainty will seem most urgent to the court that lacks the power to enforce its own orders and that must rely on another state's court to do so. Such a court will not want to allow a litigant to evade an unfavorable ruling merely by crossing a state border. In multistate, as in single-state, custody cases, the legal system's need for legitimacy in the face of apparent indeterminacy translates into a need for certainty. In the context of a request to modify a custody order, certainty would mean repose, that is, refusing even to consider the request.

In a single-state case, a single tribunal must balance the interest in certainty with the interest in flexibility inherent in the best interests ideal.[48] In a multistate case, however, no one court can comprehend the competing forces. "The legal system" becomes a term with uncertain meaning. Meeting the system's need for legitimacy in multistate cases would require cooperation of a kind that the situation itself undermines.

Although motivated by concern for children, a court's willingness to retry custody in multistate cases can be especially troublesome both to the litigants and to the system of justice. Most child custody disputes reach negotiated, not litigated, solutions.[49] Only the most recalcitrant disputes are fully litigated. The legal system's ability to impose a resolution on such disputes depends heavily on the litigants' perceptions of its legitimacy. A child custody decision will seem legitimate only to the extent that it seems to be the product of serious and thoughtful attention to the particular children's needs and to the parents' competing claims of ability to meet those needs. The best interests ideal's inherent flexibility presents some risk to the law's legitimacy even when a child custody dispute is conducted entirely in the courts of one

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[48] *See* Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2288-97 (1991) (defending best interests ideal for enabling judicial discretion where it is needed).

[49] *Cf.* Mnookin, *supra* note 18, at 288 ("Divorcing parents often negotiate and agree about child custody while simultaneously settling other issues such as visitation, child support, and marital property division.").

state, but the risk is greatly magnified in multistate cases. If a decision seems to reflect only the personal values of the new judge—or the parochial values of the new forum—it will not be respected.

When a litigant doubts a custody decision's legitimacy and believes she can improve her position by taking the dispute to another forum, she may be strongly tempted to do just that.[50] If this tactic proves successful, and particularly if the mere change of forum seems to have contributed to the change in result, the other party will, in turn, be tempted to continue the cycle by taking the child somewhere else. If large numbers of litigants "seize and run,"[51] the legal system as a whole will be perceived as powerless to decide custody questions without the parties' consent; this, in turn, will likely encourage further self-help.

That some custody litigants will respond to an unfavorable custody order not by complying but by moving away with the child and relitigating in a new forum should come as no surprise. Indeed, the wonder is that so many parents acquiesce in adverse custody decisions. Parents are likely to have deeply-held beliefs about their children's needs. An unsuccessful custody litigant may fervently believe that the trial court wrongly assessed the child's needs, the parents' respective fitness to meet those needs, or both. The litigant may conclude that the court's erroneous decision puts the child in grave danger, from which the original state's legal system provides no protection. If another jurisdiction seems likely to take a fresh look at the custody question, the losing litigant will thus be strongly tempted to go there. Our culture's high valuation of a parent's willingness to make sacrifices and take risks for his or her child will, in such circumstances, support any parental inclination toward self-help. Even a parent who customarily is a Good Citizen (obeying the law because it is a source of moral guidance) may therefore become a Bad Man (or Woman) when he or she loses a custody dispute (merely asking what consequences will follow disobedience).[52]

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50 At one time, counsel may have even advised her to follow this course. *See* Geoffrey C. Hazard, Jr., *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379, 393 (1959).

51 May v. Anderson, 345 U.S. 528, 542 (1953) (Jackson, J., dissenting).

52 *See* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (stating that to know law, one must "look at it as a bad man, who cares only for the material consequences which such knowledge enable him to predict"); William Twining, *The Bad Man Revisited*, 58 CORNELL L. REV.

The radical indeterminacy of the best interests ideal, and the advantages that a local litigant has over a party who lives far from the tribunal, also combine to encourage such a step. Courts handling custody matters are typically local courts. The judge may know local witnesses in person or by reputation; their lifestyles, values, and even their accents will be familiar. A local litigant seeking to evade a foreign custody order will likely be supported by such local witnesses: the opposing party will be trying to prevent those witnesses from being heard in the local court. Understandably, courts are reluctant to close their doors to custody disputes in which their state has some interest, or to accept any other state's custody determination as final whenever a local petitioner can make a colorable claim that custody should be reexamined.[53] Courts appear particularly reluctant to defer to an out-of-state tribunal when the dispute involves a local family or there is an abundance of local evidence.

Moreover, a foreign decision may well reflect unfamiliar—perhaps even actively disliked—cultural values. The evidence on which the foreign tribunal relied will probably be represented, at best, by a relatively unpersuasive cold transcript.[54] The foreign expert witnesses were likely affiliated with unfamiliar institutions. The foreign fact witnesses may well have displayed unfamiliar values and life experiences. Such evidence is harder for a court to assess (and therefore perhaps inevitably less persuasive) than evidence from local witnesses.

The distant party relying on a foreign decree has additional disadvantages. She must somehow find and communicate with forum counsel. She must contend with regional chauvinism. If the forum orders a hearing, she must bear the costs of transporting and housing witnesses or forgo their testimony. The party seeking a modification need only convince a court that a local

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275, 279 (1973) ("[W]hile the Good Citizen asks 'How should I behave?,' the Bad Man inquires 'What will happen to me if I embark on this course of action?' ").

53 Before the UCCJA, most courts disregarded other states' custody decisions, at least in reported cases. Ehrenzweig, *Interstate Recognition*, *supra* note 2, at 347; Stansbury, *supra* note 20, at 828-29. Although both the UCCJA and the PKPA were designed to alleviate the problem, it persists nonetheless.

54 In Massachusetts, for example, there may be no transcript at all. *See* MASS. GEN. R. PROB. CT. 18 (party wishing stenographic record must request it 48 hours before hearing).

child's welfare should be determined locally, and that the local parent is fit. Taken together, these factors account for the local party's "home court advantage." The prospect of enjoying such an advantage, in turn, furnishes yet another incentive for a disappointed custody litigant to seize and run.

In short, multistate custody cases have a structural tendency toward flexibility that permits them to be relitigated virtually indefinitely, until the parties' energies flag or the child reaches majority. This tendency made the problem of the interstate child notorious in the middle years of the century. It continues to undermine the legislative "solutions" of the UCCJA and the PKPA.

B. The Traditional Understanding of the Problem

The scholars who identified the problem of the interstate child analyzed it on a different level. They agreed generally on its causes. A given interstate custody dispute could be brought in the courts of more than one state. The states frequently ignored one another's custody decisions. Thus, custody litigants, by moving from state to state, could avoid unfavorable orders. The traditional understanding was that this problem resulted because there were too many interested forums and they granted too little interstate deference.

1. Too Many Interested Forums

Before the UCCJA, interstate custody disputes were clothed in judicially-developed doctrines of jurisdiction, comity, and full faith and credit. Courts and commentators used these traditional doctrines to express the interests at play in child custody disputes. Because many legitimate interests compete in such disputes, these traditional doctrines generated many potentially inconsistent bases for jurisdiction.

Litigation about child custody, like other family litigation, ordinarily takes place in state court because the underlying values are thought to be peculiarly suited to local determination and control.[55] Children's welfare, if endangered, is of the same *parens*

[55] *See In re* Burrus, 136 U.S. 586, 593-94 (1890) (dictum) (stating that domestic relations exception applies to custody); Barber v. Barber, 62 U.S. (21 How.) 582 (1859) (creating domestic relations exception to federal jurisdiction). *But cf.* Spindel v. Spindel, 283 F. Supp. 797 (E.D.N.Y. 1968) (criticizing domestic relations exception); Sharon E. Rush, *Domestic Relations*

patriae interest to the state where the children are found,[56] as it is of urgent practical interest to their parents. Even if a child is not in danger, a state has at least the same interest in the family connections of a child domiciled[57] or resident[58] there, perhaps magnified by the child's youthful vulnerability, as it has in those of any citizen. Traditionally, these interests were described, by analogy to the state's interest in its citizens' marriages and divorces, as jurisdiction over the child's "status."[59]

Unless the child is also physically present there, however, the state of the child's domicile or residence may be unable to enforce its custody decision because the child is not within its power. In contrast, no matter how tenuous its interest in the child, the state in which the child is physically present has the power to enforce its custody order. Thus, a court's jurisdiction might be premised on the child's mere presence within the state. Courts articulated this by saying that the child was the *res* in dispute.[60]

Finally, a plurality of the Supreme Court gave jurisdictional recognition to the parents' strong interest in their child's custody in *May v. Anderson*.[61] In *May*, the court that made the custody order had personal jurisdiction over one parent and in rem jurisdiction over the children.[62] The Court held that the absent parent could relitigate custody in another state because the decree court lacked

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Law: Federal Jurisdiction and State Sovereignty in Perspective, 60 NOTRE DAME L. REV. 1, 30 (1984) (arguing that federal courts should narrow domestic relations exception by entertaining domestic relations cases "unless abstention . . . principles warrant judicial restraint").

56 *See* 43 C.J.S. *Infants* § 5 (1978 & Supp. 1991).

57 Because a child cannot establish her own domicile, determining a child's domicile is even more difficult than determining an adult's. *See* Stansbury, *supra* note 20, at 821-22.

58 The difficulties of determining a child's domicile, and practical concerns for the child's welfare, led many courts to substitute residence, overtly or covertly, for domicile. *See* Ehrenzweig, *Interstate Recognition*, *supra* note 2, at 351.

59 *See* May v. Anderson, 345 U.S. 528, 536-42 (1953) (Jackson, J., dissenting); RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 144-155 (1934); Goodrich, *supra* note 23, at 2-3; Stansbury, *supra* note 20, at 820-24.

60 *See* Ehrenzweig, *Interstate Recognition*, *supra* note 2, at 347; Ratner, *Federal System*, *supra* note 2, at 797.

61 345 U.S. 528 (1953).

62 *Id.* at 530; *see id.* at 534 & n.7. The court appeared to exercise in rem jurisdiction over the children based on their status as domiciliaries of the state, rather than based on their physical presence in the state. *See id.*

personal jurisdiction over her.[63]

Unless both parents and all of the children were domiciled and physically present in the state of the children's birth, interests in the children and parents were likely to be scattered among several states. Believing that a search for the one state with the best claim to jurisdiction would be futile except when those interests coalesced in a single state, some authorities recognized concurrent jurisdiction in several states over the same custody dispute.[64] However, even if it had "concurrent jurisdiction" under this analysis, a state court with power over neither the child nor the losing party remained unable to enforce its custody decisions.[65] In other civil matters, if the court deciding a case lacked direct control over both the losing party and the *res*, the winner could still enforce her judgment in some other appropriate state, provided that she could show that the first court had jurisdiction, because the Full Faith and Credit Clause required the states to respect and enforce one another's decisions.[66] Unfortunately, in custody litigation, a winning litigant was often unable to enforce a judgment rendered by a court with power over neither the loser nor the child.

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[63] *Id.* at 534. The plurality opinion seems to be based on the parent's due process interest in the custody of her child, a right "far more precious . . . than property rights." *Id.* at 533. Justice Frankfurter's concurring view was that although custody determinations are never entitled to full faith and credit because they are modifiable, the parents nevertheless have no due process rights that would prevent a state from enforcing a foreign custody decision through comity. *See id.* at 535-36 (Frankfurter, J., concurring). Frankfurter's rationale has been influential. *See infra* notes 165-72 and accompanying text (discussing UCCJA's drafters' reliance on Frankfurter's concurrence in *May*).

[64] *See* Sampsell v. Superior Court, 197 P.2d 739 (Cal. 1948) (Traynor, J.); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971); Ehrenzweig, *Uniform Legislation*, *supra* note 2, at 3; Ratner, *Legislative Resolution*, *supra* note 27, at 195; Stansbury, *supra* note 20, at 831-32.

[65] *See Sampsell*, 197 P.2d at 756 (Schauer, J., dissenting).

[66] *See* U.S. CONST. art. IV, § 1. The Full Faith and Credit Clause requires the states to enforce one another's judgments in most, but not all, cases. Full faith and credit is not required if the state rendering the decision lacked personal jurisdiction, *see, e.g.*, Hanson v. Denckla, 357 U.S. 235 (1957) (holding that Delaware had no obligation to grant full faith and credit to Florida judgment where Florida court lacked personal jurisdiction), or subject matter jurisdiction, *see, e.g.*, Fall v. Eastin, 215 U.S. 1 (1909) (holding direct order to transfer land located in another state not entitled to full faith and credit).

2. Too Little Interstate Deference

Before the UCCJA and the PKPA, two special features of custody law made enforcing in one state a custody order that had been made in another an often insurmountable obstacle for a custody litigant. First, because of the unsettled and varying theories about custody jurisdiction, a second state's court could refuse to enforce a custody decree on the ground that the first court's jurisdiction was inadequate.[67] Second, the Supreme Court had held that if the court that rendered a custody decision may modify it, other courts may also modify it because they need give the decision no greater deference.[68] Therefore, a second state's court might refuse to enforce even a jurisdictionally unassailable decision because it could have been modified where made and, due to changed circumstances, it had become unwise on the merits.[69] Moreover, some states held custody decisions to be inherently modifiable, even if circumstances remained unchanged.[70] Those states' custody decisions were never entitled to full faith and credit elsewhere.

Because of these doctrines, jurisdiction to make a custody decision was often the subject of dispute, and no custody decision was clearly entitled to enforcement outside the state in which it was made. Hence, disappointed litigants sometimes perceived that they had nothing to lose by taking the child, and the dispute, to a new forum for further litigation.[71] Because the states only deferred to one another's custody decisions as a matter of comity—that is, after a hearing had convinced the local judge that she would have reached the same result anyway—before the UCCJA

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67 *See, e.g.*, *May*, 345 U.S. at 534 (holding that Ohio need not give full faith and credit to custody order made by a Wisconsin court that lacked personal jurisdiction over one parent).

68 *See, e.g.*, Kovacs v. Brewer, 356 U.S. 604 (1958); New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947).

69 Ehrenzweig, *Interstate Recognition*, *supra* note 2, at 352.

70 *See, e.g.*, *In re* Bort, 25 Kan. 215 (1881); *see also* Ehrenzweig, *Interstate Recognition*, *supra* note 2, at 352-55 (discussing Kansas rule); *cf. Kovacs*, 356 U.S. at 609-16 (Frankfurter, J., dissenting) (arguing that child's welfare is paramount consideration and adherence to Full Faith and Credit Clause must yield if enforcing another state's order would adversely affect child's welfare); *May*, 345 U.S. at 535-36 (Frankfurter, J., concurring) (stating that a prior decree "reflecting another state's discharge of its responsibility at another time" did not affect forum state's responsibility for child's welfare).

71 Justice Jackson named this third feature "a rule of seize-and-run." *May*, 345 U.S. at 542 (Jackson, J., dissenting).

and the PKPA, only extrajudicial logistics would deter a Bad Man (or Woman) who had just lost a custody dispute from seizing the child and running to a new forum.

This, then, was the traditional understanding of the problem of the interstate child. Parents, having many reasons to be dissatisfied with and disrespectful of adverse custody decisions, could move freely from state to state with their children; state courts were able, and usually willing, to consider custody anew regardless of the determination made by a different state's court. This way of understanding the problem was fairly generally established by mid-century. The next sections trace the development of the idea that reform was possible and desirable, and sketch the evolution of the reforming legislation, the Uniform Child Custody Jurisdiction Act and the Parental Kidnaping Prevention Act.

II. THE IDEA OF REFORM

The scholars who studied the problem of the interstate child agreed generally on its characteristics. They disagreed, however, about whether reform was desirable. The most important scholars studying the problem were Albert Ehrenzweig, Brainerd Currie, and Leonard Ratner. Of those three, only Professor Ratner found comprehensive reform attractive.

When Professor Ehrenzweig studied interstate custody decisions in the early 1950s,[72] he was primarily concerned with correctly describing what courts actually were doing. He identified two principles, which, he claimed, correctly predicted court behavior in such cases.[73] First, Ehrenzweig said that courts seldom enforced foreign custody awards[74] for three reasons: (1) they believed that the court making the award had lacked jurisdiction to do so;[75] (2) they found that there had been an intervening change of circumstances;[76] or (3) they felt a duty to make an independent inquiry into the welfare and needs of any child brought before them.[77] Second, he said that when courts did respect foreign custody awards they usually did so because, after

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[72] *See generally* Ehrenzweig, *Interstate Recognition*, *supra* note 2.

[73] *See id.* at 349-57. These differed from the result required by the 1934 Restatement of Conflict of Laws. *See* RESTATEMENT OF CONFLICT OF LAWS §§ 144-47 (1934).

[74] *See* Ehrenzweig, *Interstate Recognition*, *supra* note 2, at 348.

[75] *Id.* at 349-52.

[76] *Id.* at 352.

[77] *Id.* at 352-55.

inquiring into the facts, they found no material change of circumstances.[78]

Ehrenzweig found only one exception to the pattern of disregarding prior foreign custody decrees.[79] He found that courts usually did enforce foreign orders against a party who had brought a minor child into the jurisdiction either " 'in defiance of a decree of a court of competent jurisdiction of a sister state,' "[80] or " 'wrongfully . . . for the purpose of avoiding and circumventing' "[81] a foreign order. He called this the "clean hands doctrine."[82] According to Ehrenzweig, courts failed to apply the clean hands doctrine in only two situations: when the opposing party "had not claimed his rights for a period and had himself violated the prior decree,"[83] and when the foreign decree seemed punitive because it deprived the now-local party of previously-granted custody "on the mere ground of his disobedience."[84] Although Ehrenzweig was principally interested in description rather than prescription, he did suggest that a "fully satisfactory solution" might be possible if the states decided child custody "without regard to the cooperation or resistance of the feuding parties," that is, if a system of public regulation were substituted for private litigation over child custody.[85]

In contrast, Professor Ratner deplored the existing law, and made the first systematic proposal for improving interstate child custody jurisdiction.[86] After studying state decisions and the Supreme Court's evolving constitutional doctrines,[87] Ratner selected four goals for reform: (1) to hold the trial at a place fair to the parties; (2) to have the decision made by a court with maximal access to the evidence; (3) to discourage multiple litigation; and (4) to discourage "abduction, removal, retention, or conceal-

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78 *See id.* at 356-57.

79 *See id.* at 357-60.

80 *Id.* at 362 (quoting *Ex parte* Memmi, 181 P.2d 885, 888 (Cal. Dist. Ct. App. 1947)).

81 *Id.* (quoting Koebrich v. Simpson, 197 P.2d 820, 821 (Cal. Dist. Ct. App. 1948)).

82 *Id.* at 360.

83 *Id.* at 369 (citing Cook v. Cook, 135 F.2d 945 (D.C. Cir. 1943)).

84 *Id.* at 370.

85 *Id.* at 372.

86 *See* Ratner, *Federal System*, *supra* note 2, at 815.

87 *See id.* at 798 (discussing Supreme Court decisions involving full faith and credit in custody cases).

ment of a child in disregard of the reasonable claims of others."[88] He found the existing law seriously deficient in meeting these goals because the "amorphous concepts of comity and concurrent jurisdiction" depended heavily on the state courts' "unpredictable discretion" and therefore promoted "continuing uncertainty in the resolution of custody disputes, continuing insecurity in the relationship of the child to its parents, and continuing expense to the individuals and the community."[89]

Ratner proposed that the states adopt the goals he identified, and he suggested first judicial[90] and then legislative[91] methods by which they could do so. He believed the states could accomplish all four goals by abolishing concurrent jurisdiction over child custody disputes and instead reposing exclusive jurisdiction in a single forum, the state of the child's "established home."[92] If the child had no established home, the appropriate forum would be the "state of the last non-transient family abode,"[93] or the "forum selected by one parent and accepted by the other without objection."[94] After the initial decree had been made, Ratner would

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88 Ratner, *Legislative Resolution*, *supra* note 27, at 183. Professor Ratner had initially identified eleven objectives. *See* Ratner, *Federal System*, *supra* note 2, at 808-10. He later boiled these down to four. *See* Ratner, *Legislative Resolution*, *supra* note 27, at 183.

89 Ratner, *Federal System*, *supra* note 2, at 815.

90 *See id.* at 815-16.

91 *See* Ratner, *Legislative Resolution*, *supra* note 27, at 196-205.

92 *See* Ratner, *Federal System*, *supra* note 2, at 815-16; Ratner, *Legislative Resolution*, *supra* note 27, at 200 (§ 4(1) of Proposed Uniform Child Custody Jurisdiction Act). Somewhat arbitrarily, Professor Ratner defined the child's established home as the community where a child had been living for at least six months. Ratner, *Federal System*, *supra* note 2, at 818. He believed that the states could adopt this standard through uniform legislation or court decisions, or Congress could impose it by implementing the Due Process or Full Faith and Credit Clauses. *Id.* at 827 & n.153. When Professor Ratner developed a proposed act implementing his ideas, however, he did not give the "established home" exclusive jurisdiction to decide custody. *See generally* Ratner, *Legislative Resolution*, *supra* note 27.

93 Ratner, *Federal System*, *supra* note 2, at 818; *see* Ratner, *Legislative Resolution*, *supra* note 27, at 200 (§ 4(1)(b) of proposed uniform act).

94 Ratner, *Federal System*, *supra* note 2, at 819; *see* Ratner, *Legislative Resolution*, *supra* note 27, at 200 (§ 4(1)(c) of proposed uniform act). Similarly, Ratner's proposed act permitted a state where the child was "a resident" to exercise jurisdiction if "the child resides with a defendant whose interest is substantially adverse to a parent petitioner." *Id.* (§ 4(2)(b) of proposed uniform act).

have limited other states to enforcing (rather than modifying) it,[95] so long as the state of initial decree remained the child's established home.[96] If the child acquired a new "established home,"[97] a court there would have jurisdiction to modify custody;[98] if not, the proper forum would be the last established home if a contestant continued to reside there,[99] or otherwise the child's new residence.[100]

Underlying the doctrine of concurrent jurisdiction had been a recognition that several states may have legitimate interests in a child's welfare. Ratner shared that recognition, but for him state interests derived from the parties' interests; he thought states permitted relitigation because a local party had not received a fair opportunity to be heard elsewhere.[101] This perspective led him to respond in a new way.

Rather than permitting serial proceedings, each with a claim to legitimacy based on local interests, Ratner's statute attempted to involve all potentially interested persons in one action. To give everyone with a claim to the child's custody an opportunity to be heard, and to bind each one personally,[102] Ratner's statute

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95 *See* Ratner, *Federal System*, *supra* note 2, at 832-33. Ratner codified this idea, with some difficulty, in §§ 5 and 9(2) of his proposed act. *See* Ratner, *Legislative Resolution*, *supra* note 27, at 201-03.

96 *See* Ratner, *Federal System*, *supra* note 2, at 822; Ratner, *Legislative Resolution*, *supra* note 27, at 203 (§ 9(2) of proposed uniform act).

97 Although Ratner initially said this could only occur with court approval or by parental consent, *see* Ratner, *Federal System*, *supra* note 2, at 820, his proposed act permitted either parent to create a new established home unilaterally simply by moving with the child and waiting, *see* Ratner, *Legislative Resolution*, *supra* note 27, at 199 (§ 2(20) of proposed uniform act).

98 *See* Ratner, *Federal System*, *supra* note 2, at 820-21. However, Ratner's proposed act permitted a state where the child had acquired a new established home to dismiss a petition to modify "without prejudice" if jurisdiction had been obtained in violation of another state's decree. *See* Ratner, *Legislative Resolution*, *supra* note 27, at 202 (§ 7(2) of proposed uniform act).

99 Ratner, *Federal System*, *supra* note 2, at 820-22; Ratner, *Legislative Resolution*, *supra* note 27, at 201 (§ 5(2) of proposed uniform act).

100 Ratner, *Federal System*, *supra* note 27, at 821; Ratner, *Legislative Resolution*, *supra* note 27, at 201 (§ 5(3) of proposed uniform act).

101 *See* Ratner, *Legislative Resolution*, *supra* note 27, at 184-88.

102 Under the plurality opinion in May v. Anderson, 345 U.S. 528 (1953), the forum court could bind only those contestants within its personal jurisdiction to its child custody determination. *See id.* at 533-34.

required custody pleadings to identify all interested persons,[103] made all interested persons necessary parties to the custody action,[104] and permitted long-arm notice.[105] To enhance the legitimacy and accuracy of this one action, the statute also tried to give the court access to reliable and current information about the child[106] by ordinarily making the child's "established home" the forum,[107] by permitting a court to dismiss custody proceedings if it determined that another state would be a more appropriate forum,[108] and by providing that all custody orders should be modifiable if circumstances changed.[109] Finally, Ratner tried to promote cooperation among courts by encouraging interstate investigations[110] and by permitting a court to take jurisdiction of a custody dispute solely to enforce another state's order.[111] Ratner's act also codified Ehrenzweig's "clean hands doctrine" by prohibiting the forum from modifying another state's custody order if the forum's jurisdiction derived from an interstate move that violated the other state's order.[112]

Professor Ratner's proposed act rejected the doctrine of concurrent jurisdiction in order to achieve stability, which he envisioned in terms of the twin goals of discouraging multiple litigation and deterring the abduction, removal, retention, or concealment of a child in disregard of the reasonable claims of others. To achieve this stability, Ratner's act reposed initial juris-

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103 *See* Ratner, *Legislative Resolution*, *supra* note 27, at 203-04 (§ 10 of proposed uniform act).

104 *See id.* at 199-200 (§ 3 of proposed uniform act).

105 *See id.* at 204-05 (§ 13 of proposed uniform act).

106 Note Ratner's aspirational statement in § 1(2) of his proposed act. *See id.* at 197 (setting forth objective to "[p]ermit the determination of a child's custody by the court most likely to decide correctly, that is, by the court having maximum access to the relevant evidence").

107 Ratner, *Federal System*, *supra* note 2, at 815-17. Although Ratner thought that where a child's established home was would ordinarily be obvious, he said that in doubtful cases it should be where the child had resided for at least six months, because "[m]ost American children are integrated into an American community after living there six months." *Id.* at 818. He implemented this in §§ 4 and 5 of his proposed uniform act. *See* Ratner, *Legislative Resolution*, *supra* note 27, at 200-02.

108 Ratner, *Legislative Resolution*, *supra* note 27, at 202 (§ 7(1) of proposed uniform act).

109 *Id.* at 202-03 (§§ 6, 8 of proposed uniform act).

110 *Id.* at 204 (§ 12 of proposed uniform act).

111 *Id.* at 203 (§ 9(1) of proposed uniform act).

112 *Id.* at 202 (§ 7(2) of proposed uniform act).

diction in a single forum and forbade simultaneous proceedings.[113] Moreover, Ratner's act gave the forum with initial jurisdiction—the "decree state"—continuing jurisdiction over any subsequent custody disputes, at least while the child remained in that state.[114] So long as the decree state had continuing jurisdiction, other states were required to enforce, and forbidden to modify, its decrees.[115]

Brainerd Currie and Albert Ehrenzweig both wrote in response to Ratner's proposal. While agreeing with Ratner generally about how the existing law functioned, both scholars disagreed with him about the desirability of reform. Professor Currie rejected Ratner's suggestion that jurisdiction be limited to the child's "established home," because he considered the child's physical presence necessary both to a determination of the child's best interests[116] and to the enforcement of any custody order.[117] Moreover, his own examination of four contemporary decisions[118] led Currie to conclude that the Supreme Court would never hold that custody decrees were entitled to full faith and credit.[119] Consistent with these preferences and predictions, Currie proposed that Congress implement the Full Faith and Credit Clause in accord with the Court's apparent preference that "no judgment shall preclude the courts of a state having a legitimate interest in the matter from making whatever custodial decree is required, in their judgment and discretion, for the welfare of the child."[120] Currie proposed, in effect, to clarify and reinforce existing law.

Like Currie, Ehrenzweig believed that the Full Faith and Credit

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[113] *Id.* at 201-02 (§§ 4 and 5 of proposed uniform act) ("if . . . no custody proceeding is pending in a court of another state having jurisdiction substantially in accordance with this Act").

[114] *Id.* at 201 (§ 5(1) of proposed uniform act). Even afterwards, if the child had departed the decree state without express court authorization, the decree state retained continuing jurisdiction as long as another party continued to live there. *Id.*

[115] *Id.* at 203 (§ 9(2) of proposed uniform act).

[116] *See* Brainerd Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89, 117.

[117] *Id.* at 117-18.

[118] *See id.* at 109-18 (discussing Ford v. Ford, 371 U.S. 187 (1962); Kovacs v. Brewer, 356 U.S. 604 (1958); May v. Anderson, 345 U.S. 528 (1953); New York *ex rel* Halvey v. Halvey, 330 U.S. 610 (1947)).

[119] *Id.* at 115.

[120] *Id.*

Clause did not, and should not, apply to custody decisions.[121] However, he agreed with Ratner that Currie's proposed legislation would encourage unilateral removal of the child, resolution of custody by a forum unfairly inconvenient to one party, and relitigation.[122] To combat these tendencies, he proposed a uniform state act much simpler than Ratner's, providing for "permanent jurisdiction" in a "guardianship court" situated in the state where the child "has his permanent abode and has been present for at least six months."[123] By itself, this proposal might have accomplished Ratner's third and fourth goals of discouraging multiple litigation and the abduction of children, if in draconian fashion, by reducing the plethora of possible forums to one. However, Ehrenzweig's act also responded to Ratner's other two goals, that the forum be fair to all parties and have maximal access to evidence, by providing for "temporary jurisdiction" in any state where the child was present, or where proceedings for her parents' divorce, annulment or separation had been commenced.[124] Because Ehrenzweig's act permitted any court with either temporary or permanent jurisdiction to "rescind or modify"[125] any previous custody order, his proposal, like Currie's, essentially codified existing law. Its main innovation was a requirement that no court modify a previous order until the court had "secured such records, transcripts and other information as may be available in the court which has made such decree or elsewhere."[126]

Thus, although these three scholars all agreed that existing law encouraged abductions by permitting relitigation, two of them also believed this to be the unfortunate but inevitable consequence of the parties' due process right to a fair forum and the overridingly important goal of protecting children's welfare. Ehrenzweig's proposal would have permitted successive modifications in courts of different states while improving the information available to each court; Currie's proposal would have merely clarified existing law. Only Ratner proposed comprehensive reform aimed at changing both parental and judicial behavior.

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121 *See* Ehrenzweig, *Uniform Legislation*, *supra* note 2, at 4.

122 *See id.* at 3-4 (citing Ratner, *Procedural Due Process*, *supra* note 5, at 193).

123 *Id.* at 10-11 (Article 1 of Counter-Proposal for a Uniform Interstate Custody Act).

124 *Id.* at 11 (Article 2 of counter-proposal).

125 *Id.* (Article 3 of counter-proposal).

126 *Id.* (Article 3 of counter-proposal).

It was at this juncture, with three distinct and competing visions of law reform in recently-published law review articles, that the discussion shifted from scholarly to practical venues. The next section sketches the process of drafting and compromise that eventually produced the UCCJA, and examines interpretations of the statute that undermine the reformers' goals.

III. THE UNIFORM CHILD CUSTODY JURISDICTION ACT

A. The Development of the UCCJA

The problem of the interstate child was of considerable concern to practitioners as well as scholars in the mid-1960s. Ratner had drafted his statute at the request of the Committee on Child Custody of the American Bar Association's Family Law Section.[127] At its midyear meeting in February, 1965, the National Conference of Commissioners on Uniform State Laws (NCCUSL) voted to appoint a Special Committee to draft a Child Custody Jurisdiction Act.[128] Shortly thereafter, in March, 1965, Professor Henry Foster circulated a revision of the jurisdictional sections of Ratner's act.[129] During that summer's ABA meeting, the various proposals were discussed, and at least one other proposal was generated and shared with the Chairman of the NCCUSL Special Committee. Professor John Bradway proposed interstate cooper-

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127 Ratner, *Legislative Resolution*, *supra* note 27, at 196 n.51.

128 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 80-81 (1965).

129 *See* Memorandum from Henry H. Foster, Jr., Professor of Law, New York University, to American Bar Association Family Law Section, Committee on Child Custody (March 25, 1965) (on file with the *U.C. Davis Law Review*). Ratner's jurisdictional scheme had required a forum state to have at least six months' recent contact with the child and to be the residence of either the child or a parent, and required notice to all nonresident interested parties. *See* Ratner, *Legislative Resolution*, *supra* note 27, at 200-01 (§ 4 of proposed uniform act). Foster rejected this. Instead, for initial jurisdiction, Foster would have relied on personal jurisdiction over the child combined with what he hoped would be constitutionally adequate contacts with the parents. *See* Foster, *supra*, § 1. To bolster the adequacy of these contacts, Foster's draft provided that a court might order the petitioner to "pay necessary travel expenses for the respondent to appear and defend." *Id.* § 1(5); *see id.* § 2(3). Foster would have permitted any court to modify a custody order, provided the petitioner was in substantial compliance with the original order and had either served the respondent in the forum state or paid his or her travel expenses; if the child was "found to be dependent or neglected," even these requirements were waived. *Id.* § 2.

ation among all interested states in both information-gathering and decision-making, culminating in a "joint decree which can be entered on the record in both states."[130] All of these proposals shared Ratner's overall aspiration of requiring the states to enforce foreign custody decisions.

A year later, the Special Committee presented a "First Tentative Draft of the Uniform Child Custody Act" to the NCCUSL.[131] Although the Ehrenzweig and Foster proposals influenced this draft,[132] it differed significantly from them and indeed from all other previous proposals. Instead of focusing exclusively on the jurisdictional conundrum, it contained hortatory provisions relating to substantive custody law;[133] moreover, its jurisdictional scheme would have encouraged courts to issue custody decrees that other states would have been unlikely to enforce.[134]

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130 Letter from John S. Bradway to W.J. Brockelbank, Chairman of NCCUSL Special Committee on Uniform Child Custody Jurisdiction Act 3 (Aug. 18, 1965) (from the papers of John Wade, Vanderbilt University) (copy on file with the *U.C. Davis Law Review*). Professor Bodenheimer listed this memo as one of the UCCJA's sources. *See* Bodenheimer, *Legislative Remedy*, *supra* note 5, at 1217.

131 Uniform Child Custody Act (Tentative Draft No. 1, July 1, 1966) (from the papers of John Wade, Vanderbilt University) (copy on file with the *U.C. Davis Law Review*) [hereafter First Tentative Draft].

132 Like Ehrenzweig's proposal, this draft suggested the compilation of a dossier to be used by all interested courts throughout a child's minority, *id.* §§ 4.3, 4.5-.7, and recommended that the same judge continue to handle the case if possible, *id.* § 4.12. The jurisdictional section, *id.* § 2.1, derives from Foster's § 1. *See* Foster, *supra* note 129, § 1.

133 These provisions included a statement that "[c]ustody shall be awarded according to the best interests of the child," First Tentative Draft, *supra* note 131, § 4.8; a list of factors to be considered, *id.* § 4.9; and presumptions in favor of stability, *id.* § 4.11, and visitation, *id.* § 4.13. All of these substantive standards, however, were undercut by a provision stating that they were "meant to be guidelines to be adapted by the circumstances of the particular case. The failure of the trial court to observe them, may be ground for reversal on appeal only if there has been a substantial failure of justice." *Id.* § 4.15.

134 The central provision permitted a court to make a custody decree if it has jurisdiction of the persons of the parties named in the suit, and the custody decree is effective only as to such persons, subject to limitations on simultaneous and geographically inconvenient proceedings. *See id.* §§ 2.2(a), 3.1, 7. However, the draft also permitted a court lacking personal jurisdiction over the defendant to make a custody decree ancillary to a decree of divorce, annulment, legal separation or termination of parental rights, *id.* § 6.1, although such a decree was to be "effective only as to the party over whom the court has jurisdiction of the person," *id.* § 6.2, and

The First Tentative Draft and the Ratner, Foster, and Bradbury proposals all took an activist stance to the problem of the interstate child. They attempted to solve the problem by changing the law in order to motivate or coerce courts to respect one another's custody decisions. An activist stance naturally appealed to practitioners eager to respond to their clients' distress. In contrast, Ehrenzweig's and Currie's belief that the existing law should be accepted and codified must have seemed at best irrelevant, the product of ivory tower isolation from the pain and strife of actual practice.

The activist proposals used four main strategies, each based on a different analysis of the problem's underlying dynamics. The first strategy was based on an assumption that courts permitted the parties to relitigate custody in a new forum because they were unsure that the first forum had reached a wise result. Two proposals therefore attempted to assure courts that foreign decrees would be made carefully, in order to make enforcement of foreign decrees more acceptable. Ratner designed his jurisdictional scheme to give decision-making power to the single court with the best access to current information about the child. Similarly, the custody law reforms of the First Tentative Draft responded to a concern that decrees based solely on lay testimony might reasonably be denied recognition in states where courts habitually relied on professional home studies and other sorts of expert evidence. The First Tentative Draft therefore required courts to appoint a guardian ad litem for the child, and to compile, maintain and use a complete "dossier"[135] before rendering a decree that addressed the child's "physical, mental, spiritual, economic, social and familial welfare."[136] Ratner's act and the First Tentative Draft differed, however, on whether merely *motivating* courts to enforce foreign custody orders would be sufficient. Ratner's act required courts to enforce properly-made foreign custody decrees; the First Tentative Draft did not.[137]

"subordinate to any prior custody decree," *id.* § 6.3. These provisions invited courts to issue decrees of dubious extraterritorial validity or usefulness.

135 The dossier would include investigative reports and stenographic transcripts of all hearings. *Id.* § 4.3.

136 *Id.* § 4.9.

137 *See* Brigitte Bodenheimer, Prefatory Note, Uniform Child Custody Jurisdiction Act 2 (Tentative Draft No. 2, April 25, 1968). Professor Bodenheimer stated:

The second activist strategy was based on an assumption that the second forum permitted relitigation out of concern for a party whose due process rights had been violated in the first forum. That is, this strategy focused on the possibility that courts might be constitutionally precluded from respecting one another's decisions, even if they would prefer to do so. Ratner's proposed act, according to this view, could not always produce enforceable orders. To preclude collateral challenges to a custody decree, Ratner's act gave the forum power to bind every person known to be likely to assert a custodial claim, whether or not that person had any contact with the forum.[138] Foster feared, however, that asserting jurisdiction over persons with no connection to the forum might be so unfair as to be unconstitutional. Foster's solution was to underwrite these litigants' access to the decisionmaker. He thought that any forum would be fair enough if local litigants could be ordered to pay their distant opponents' travel expenses, and he proposed that provisions to that effect be added to Ratner's act.[139]

The third activist strategy was based on an assumption that autonomous state courts that were presented with custody questions serially would each inevitably find it necessary to re-examine the evidence in order to fulfill a duty to protect the now-local child. Thus, two proposals attempted to transcend the problem of getting a local court to defer to a previously-made foreign child custody decision by radically restructuring the decision making process. Ehrenzweig's suggestion was utopian. He would have substituted a system of public regulation for the adversary system,

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> In view of these wide discrepancies in the caliber of custody decrees it is understandable that the draftsmen of the First Tentative Draft felt compelled to add provisions as to the standards for custody determinations, the preparation of social studies, and so forth, and that they ended up with a Child Custody Act rather than a Child Custody Jurisdiction Act.

Id.

138 *See* Ratner, *Legislative Resolution*, *supra* note 27, at 199-202, 204-05 (§§ 3, 4, 5, and 13 of proposed uniform act). Professor Ratner based these provisions on his "effective litigation" conception of due process, which valued optimal access to evidence and avoidance of multiple trials over adherence to the traditional "territorial" requirements that a state have personal jurisdiction over each claimant (based upon residence, domicile, or personal service) in order to adjudicate his or her rights to custody of a child. *See* Ratner, *Procedural Due Process*, *supra* note 5, at 366-88.

139 *See* Foster, *supra* note 129, at 2; *supra* note 129 (comparing Ratner's proposed uniform act with Foster's proposed revisions).

with one "guardianship court" maintaining jurisdiction over a custody dispute during the child's entire minority. This court would lose control of the case only when the court itself decided that transfer of jurisdiction to another forum would serve the child's welfare.[140] Bradway's proposal shared a similar impulse, but relied on combining existing structures in new ways rather than on creating entirely new systems, with all interested states cooperating in reaching and enforcing a single decision.[141]

Finally, the fourth activist strategy was based on an assumption that if courts had the appropriate goals clearly stated for them and were reminded of their prudential power to refuse to provide a forum on the grounds of forum non conveniens or Ehrenzweig's "clean hands doctrine," they would do the right thing.[142] Ratner's proposed act thus contained a lengthy list of purposes,[143] and expressly permitted dismissal if "another state is the fairest place for the trial."[144] To emphasize a court's duty not to reward a party for flouting a foreign decree, Ratner's act also required dismissal of an otherwise proper modification if the petitioner was holding the child in violation of a foreign decree, provided that the opposing party had exercised reasonable diligence and another fair forum was available.[145]

At their 1966 Annual Meeting, the NCCUSL Commissioners discussed several sections of the First Tentative Draft and sent the project back to committee.[146] When the Uniform Child Custody Jurisdiction Act next emerged, in 1968, it was in substantially final

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140 Ehrenzweig, *Uniform Legislation*, *supra* note 2, at 6.

141 *See* Bradway, *supra* note 130, at 2-3 ("The facts in the case may be collected separately in [state] A and in [state] B as in interstate support cases; and then each jurisdiction will have a full story. Then the court in the state in which [the child] is present may draft a tentative decree and refer it to the corresponding court in A where [the wife] remains. The court in A in all probability will reach a conclusion similar to that reached by the B court. If so, then we have a joint decree which can be entered on the record in both states . . . . But suppose [the courts disagree. The solution] has already been worked out in Congress. . . . [A] conference committee resolves the dispute in many instances.").

142 Ratner, *Legislative Resolution*, *supra* note 27, at 202 (§ 7 of proposed uniform act).

143 *See id.* at 196-97 (§ 1 of proposed uniform act).

144 *See id.* at 202 (§ 7(1)(a) of proposed uniform act).

145 *See id.* (§ 7(2) of proposed uniform act).

146 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 94 (1966).

form, and the NCCUSL approved it.[147] The intervening two years contained a great deal of hard work, much of it by the Special Committee's Reporter, Professor Brigitte M. Bodenheimer, who was undoubtedly responsible both for the UCCJA's specific form and for its adoption by state after state.[148] Due to her drafting and lobbying skills, the Uniform Act that emerged from this process was greeted with widespread support and enthusiasm.

Bodenheimer used a method that has been called "interest group liberalism." Optimistic about the potential of law to do good and to solve any problem presented, she incorporated ideas from all of the existing proposals.[149] On the level of goals, the UCCJA, like the proposals on which it was based, sought to achieve both stability and flexibility. On the level of method, because the UCCJA adopted and elaborated on all four of the activist strategies that had been proposed for dealing with courts' reluctance to enforce foreign custody decisions, it approached every problem both with rules constraining court discretion and with principles inviting free exercise of discretion. This openness to all the previous drafters' principal ideas undoubtedly helped secure support for the Act. Unfortunately, some of these ideas are mutually incompatible.

First, the UCCJA attempted to make custody decisions more acceptable to foreign courts by giving jurisdiction to the forum most likely to have access to current and complete information about the child and the family.[150] To further this project, the UCCJA sets out two main grounds for jurisdiction, "home state"

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147 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 112, 198 (1968).

148 *See UCCJA: A Monument to Brigitte Bodenheimer*, UNIFORM L. MEMO, Winter 1981-1982, at 8-9.

149 *See* THEODORE J. LOWI, THE END OF LIBERALISM 51 (2d ed. 1979) (discussing "interest-group liberalism," which "defines the public interest as a result of the amalgamation of various claims"). For Bodenheimer's acknowledgment of her debt to these various sources, see Bodenheimer, *Legislative Remedy*, *supra* note 5, at 1217-18.

150 Section 3 governs all assertions of "jurisdiction to make a custody determination by initial or modification decree." 9 U.L.A. pt. 1, at 143-44. Bodenheimer hoped that decisions "rendered in states in which as much as possible of the essential information about the child and his potential custodians is available will be considered trustworthy enough to command respect and recognition in other states." Bodenheimer, *Legislative Remedy*, *supra* note 5, at 1221 (footnote omitted).

and "significant connection,"[151] whereas Ratner's act had only one, "established home."[152] Under the UCCJA, a forum may exercise jurisdiction when it is the child's "home state"[153] at the time the custody proceeding is commenced.[154] Or, to protect the home state's jurisdiction when one parent has recently absconded with the child,[155] a forum may exercise jurisdiction when it has been the child's home state within six months of the proceedings' commencement and "the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent[156] continues to live in this State."[157] In addition, a forum to which the child and at least one parent[158] have a "significant connection" and where "substantial evidence concerning the child's present or future care, protection, training, and personal relationships" is located may also take jurisdiction provided that "it is in the best interests of the child" to do so.[159] The drafters added this "significant connection" provision because of their concern that the

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151 UCCJA § 3, 9 U.L.A. pt. 1, at 143.

152 *See* Ratner, *Legislative Resolution*, *supra* note 27, at 199-201 (§§ 2(20), 4-5 of proposed uniform act).

153 This concept is defined in UCCJA § 2(5) as follows:

> "[H]ome state" means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as a parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period.

9 U.L.A. pt. 1, at 133. This concept derives from Ratner's "established home" concept. *See* Ratner, *Legislative Resolution*, *supra* note 27, at 199 (§ 2(20) of proposed uniform act); *supra* notes 92-100 and accompanying text.

154 UCCJA § 3(a)(1)(i), 9 U.L.A. pt. 1, at 143; *cf.* Ratner, *Legislative Resolution*, *supra* note 27, at 200 (§ 4(1)(a) of proposed uniform act).

155 *See* Bodenheimer, *Legislative Remedy*, *supra* note 5, at 1225.

156 This ungainly phrase identifies non-parents who either have or seek custody of a child. UCCJA § 2(9), 9 U.L.A. pt. 1, at 134.

157 UCCJA § 3(a)(1)(ii), 9 U.L.A. pt. 1, at 143 (footnote added); *cf.* Ratner, *Legislative Resolution*, *supra* note 27, at 200 (§ 4(a)(b) of proposed uniform act).

158 The statute also applies when the child and one "contestant" have a significant connection with the jurisdiction. UCCJA § 3(a)(2)(i), 9 U.L.A. pt. 1, at 143. A "contestant" is a person, including a parent, who claims a right to custody or visitation of a child. UCCJA § 2(1), 9 U.L.A. pt. 1, at 133.

159 UCCJA § 3(a)(2), 9 U.L.A. pt. 1, at 143.

home state might not always have the best access to relevant information.[160] Like Ratner's act, the UCCJA requires enforcement,[161] and limits modification,[162] of properly-made foreign custody decrees. Further, the UCCJA also has two minor jurisdictional provisions with roots in Ratner's proposed act: emergency jurisdiction,[163] and vacuum jurisdiction.[164]

Second, the UCCJA implemented Ratner's strategy of protecting the parties' due process interests. It did so by borrowing Ratner's broad assertion of power to bind every interested person whether or not she has had any connection with the forum.[165] As

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160 *See* Bodenheimer, *Legislative Remedy*, *supra* note 5, at 1227. In that article, written shortly after the UCCJA was promulgated, she hypothesized a case in which a married couple who had lived in state *A* for some years left their children with friends in state *B* while they obtained a divorce, and then moved separately to different cities in state *C*. *See id.* at 1221. There, although state *A* might arguably be the home state, or have been the home state within six months, state *C* would seem to be a more appropriate forum. She also referred to the notorious case *Painter v. Bannister*, implying that under the UCCJA, the father would have had an easier time getting his son back because the child had significant connections with the father's home state. *Id.* at 1227 (citing Painter v. Bannister, 140 N.W.2d 152 (Iowa) (awarding custody to deceased mother's parents after father had asked them to care for child), *cert. denied*, 385 U.S. 949 (1966)).

161 UCCJA §§ 13, 15, 9 U.L.A. pt. 1, at 276, 311.

162 UCCJA § 14, 9 U.L.A. pt. 1, at 292.

163 Emergency jurisdiction is available to a state exercising *parens patriae* jurisdiction to protect a child if she is present in the state and either abandoned or in need of emergency protection because she "has been subjected to or threatened with mistreatment or abuse or is otherwise neglected." UCCJA § 3(a)(3)(ii) & cmt., 9 U.L.A. pt. 1, at 144-45. This provision was consistent with Ratner's proposal. *See* Ratner, *Legislative Resolution*, *supra* note 27, at 203 (§ 9(3) of proposed uniform act).

164 Vacuum jurisdiction is available when "it appears that no other state would have jurisdiction under prerequisites substantially in accordance with [the UCCJA]," or when another state has declined jurisdiction because it viewed the present forum as more appropriate. UCCJA § 3(a)(4), 9 U.L.A. pt. 1, at 144. The suggestion that another state might decline jurisdiction in favor of the forum derives from Ratner's § 4(3). *See* Ratner, *Legislative Resolution*, *supra* note 27, at 200.

165 Notice and an opportunity to be heard must be given to "the contestants, any person whose parental rights have not been previously terminated, and any person who has physical custody of the child." UCCJA § 4, 9 U.L.A. pt. 1, at 208. In addition, any other person who "claims to have custody or visitation rights with respect to the child" must be made a party. UCCJA § 10, 9 U.L.A. pt. 1, at 269-70.

Bodenheimer explicitly acknowledged,[166] this choice was based on the assumption that Frankfurter's concurrence, rather than the plurality opinion, states the rule of *May v. Anderson*.[167] Frankfurter thought no litigant—not even a parent—has a due process right to insist that the forum deciding a child's custody have personal jurisdiction over the adult litigants.[168] Under this reading of *May*, properly notified parties may be bound even if they have no contact with the forum.[169] Nevertheless, the UCCJA also adopted a version of Foster's solution to any resulting constitutional defect. Under the UCCJA, a decision binds "all parties who have been served in this state or *notified in accordance with section 5* or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard."[170] Section 5 permits notice by "any form of mail . . . requesting a receipt."[171]

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166 *See* Bodenheimer, *Legislative Remedy*, *supra* note 5, at 1232; *accord* UCCJA § 13 cmt., 9 U.L.A. pt. 1, at 277.

167 345 U.S. 528 (1953); *see supra* notes 61-63 and accompanying text (discussing *May*).

168 *See* 345 U.S. at 535-36 (Frankfurter, J., concurring). Justice Frankfurter stated that a court may recognize a custody decree made by a sister state lacking personal jurisdiction over a parent without offending the Due Process Clause of the Fourteenth Amendment, but no prior custody decree is entitled to full faith and credit because "the child's welfare . . . has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication." *Id.*

169 State courts interpreting the UCCJA are split on whether they really possess this statutorily-asserted power to bind a party with no connection to the forum. *Compare In re* Leonard, 175 Cal. Rptr. 903 (Ct. App. 1981) (relying on *May* and distinguishing Kulko v. Superior Court, 436 U.S. 84 (1978) (holding presence of children insufficient to give state power to order non-resident parent to pay child support)) *and* Hudson v. Hudson, 670 P.2d 287 (Wash. Ct. App. 1983) (relying on Frankfurter's concurrence in *May*) *with Ex parte* Dean, 447 So. 2d 733 (Ala. 1984) (relying on *May* plurality and holding that Florida custody judgment was not entitled to full faith and credit although it complied with the UCCJA and the PKPA, because, in the absence of long-arm statute, Florida lacked personal jurisdiction over defendant mother) *and* Mitchell v. Mitchell, 458 N.Y.S.2d 807 (Sup. Ct. 1982) (holding that state with minimal contact with one party defers to parties' former home state).

Professor Coombs has suggested that some "extreme applications" of the UCCJA would unconstitutionally deprive defendants of due process. *See* Coombs, *supra* note 5, at 762-65. A full discussion of this issue is beyond the scope of this article.

170 UCCJA § 12, 9 U.L.A. pt. 1, at 274 (emphasis added).

171 UCCJA § 5, 9 U.L.A. pt. 1, at 212-13. According to the Comment, the mail need not reach the addressee for service to be accomplished: "If at

Persons who have physical custody of the child outside the forum state may be ordered to appear, and, whether they appear voluntarily or not, their expenses may be shifted to another party or otherwise provided for.[172]

Third, although the UCCJA neither created federal guardianship courts nor permitted two states to enter joint orders, it adopted a number of provisions inspired by Ehrenzweig's proposed act and Bradway's letter that require or encourage interstate cooperation.[173] The UCCJA requires each state to preserve its child custody records until the child's majority and to certify the records, upon request, to another state's court.[174] Each state can request court records from other states,[175] and must have a place to file certified copies of decrees and other materials relating to foreign custody proceedings.[176] The UCCJA also permits courts to authorize out-of-state depositions,[177] to request assistance from another state's courts,[178] and to conduct hearings and studies to assist another state's court,[179] and it encourages local judges to speak with judges in other possible forums before deciding whether to exercise jurisdiction.[180]

Finally, the UCCJA adopted the hortatory strategy: like Ratner's act, the UCCJA contains a long list of purposes embodying both stability and flexibility goals[181] and codifies both forum

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all possible, actual notice should be received by the affected persons; but efforts to impart notice in a manner reasonably calculated to give actual notice are sufficient when a person who may perhaps conceal his whereabouts, cannot be reached." UCCJA § 5 cmt., 9 U.L.A. pt. 1, at 213 (citations omitted).

172 UCCJA §§ 19(b), 20(c), 9 U.L.A. pt. 1, at 319, 322.

173 UCCJA §§ 18-20, 9 U.L.A. pt. 1, at 318-22, seem closest to Bradway's suggestions, but all probably derive from his vision of interstate cooperation. *See* Bradway, *supra* note 130, at 3 (proposing that courts cooperate in issuing custody decrees—even to the point of issuing joint decrees). Article 3 of Ehrenzweig's proposed act, providing that before a court could modify a foreign custody order it should be required to obtain information from the foreign court, was probably also influential. *See* Ehrenzweig, *Uniform Legislation*, *supra* note 2, at 11.

174 UCCJA § 21, 9 U.L.A. pt. 1, at 324.

175 UCCJA § 22, 9 U.L.A. pt. 1, at 325-26.

176 UCCJA § 16, 9 U.L.A. pt. 1, at 316.

177 UCCJA § 18, 9 U.L.A. pt. 1, at 318.

178 UCCJA § 19, 9 U.L.A. pt. 1, at 319.

179 UCCJA § 20, 9 U.L.A. pt. 1, at 322.

180 UCCJA § 7(d), 9 U.L.A. pt. 1, at 233.

181 *See* UCCJA § 1, 9 U.L.A. pt. 1, at 123-24.

non conveniens[182] and Ehrenzweig's "clean hands doctrine."[183] The latter two provisions rely heavily on the local judge's discretion. The UCCJA mandates dismissal of an otherwise proper custody proceeding in only one circumstance: if the modification petitioner "has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody."[184] Even then, a court may still exercise jurisdiction if to do so is "required in the interest of the child."[185] In addition, the UCCJA permits dismissal of a custody proceeding in three circumstances: first, if the forum is "inconvenient . . . and . . . a court of another state is a more appropriate forum";[186] second, if a modification petitioner "has violated any . . . provision of a custody decree of another state";[187] and third, if a petitioner in an initial proceeding "has wrongfully taken the child from another state or has engaged in similar reprehensible conduct."[188]

The UCCJA thus employs some version of all four of the activist strategies that had been proposed, without attempting to reconcile their inconsistencies. Faced with an incoherent statute, the courts have had predictable difficulty with the cases coming before them. Often, although the UCCJA seems to have dictated a case's rationale, its result seems better explained by Ehrenzweig's two principles.[189] The next section illustrates this observation by examining state courts' interpretations of the UCCJA's most crucial provisions, showing how they expose the Act's incoherence and its consequent failure to resolve the problem of the interstate child.

B. The Crucial Indeterminacies of the UCCJA

Beginning in the late 1940s, some courts and commentators embraced the doctrine of "concurrent jurisdiction" in response to the jurisdictional tangle enmeshing interstate custody cases. Under this doctrine, several states' courts might legitimately

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182 *See* UCCJA § 7, 9 U.L.A. pt. 1, at 233-34.
183 *See* UCCJA § 8, 9 U.L.A. pt. 1, at 251.
184 UCCJA § 8(b), 9 U.L.A. pt. 1, at 251.
185 *Id.*
186 UCCJA § 7(a), 9 U.L.A. pt. 1, at 233.
187 UCCJA § 8(b), 9 U.L.A. pt. 1, at 251.
188 UCCJA § 8(a), 9 U.L.A. pt. 1, at 251.
189 *See supra* notes 72-85 and accompanying text.

assert jurisdiction over the same custody dispute at approximately the same time, and none of their decisions was entitled to enforcement in another forum.[190] To achieve Ratner's goals of discouraging multiple litigation and deterring the abduction, retention, or concealment of a child in disregard of the reasonable claims of others, Ratner's proposed act had sharply limited concurrent jurisdiction.[191] The drafters of the UCCJA embraced Ratner's stability goals,[192] but, apparently disagreeing amongst themselves over whether to authorize continuing and concurrent jurisdiction, employed ambiguous language to implement them.[193] This drafting strategy reified the disagreement: it has consequently been reenacted in case after case as the courts struggle to understand and apply the UCCJA's compromise language.

The central question for interpreting the UCCJA is, "When may a court make a custody order?" The Act's concurrent jurisdiction compromises frequently deny this question either a single or a certain answer. For expository purposes, the central question may usefully be broken down into four subsidiary questions: (1) When may a court make an initial custody order?; (2) When must a court enforce a foreign custody order instead of making an independent inquiry into the situation?; (3) When may a court, after an independent inquiry, modify a foreign custody order?; and (4) When should a court refuse to inquire into the merits of a custody matter because its order would not be respected by a foreign court, or for other reasons? This section examines the state courts' interpretations of the UCCJA's answers to these four questions. As the courts' interpretations reveal, the UCCJA's answers do not advance the reformers' stability goals.

Courts interpreting the UCCJA have often permitted a litigant to evade an adverse decision in one state by recourse to the courts of another state. They have done so, in most instances, because of their concern for justice in the particular case—a concern Ratner shared, and one embodied in the UCCJA both as principle

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190 *See* Sampsell v. Superior Court, 197 P.2d 739 (Cal. 1948); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971); Ehrenzweig, *Uniform Litigation*, *supra* note 2, at 3, Ratner, *Legislative Resolution*, *supra* note 27, at 195; Stansbury, *supra* note 20, at 831-32.

191 *See supra* notes 86-115 and accompanying text.

192 *See* UCCJA § 1(a)(1), (4)-(7), 9 U.L.A. pt. 1, at 123-24.

193 *See* Foster, *supra* note 12, at 303-04, 307-08.

and as rule.[194] As will become clear, whatever their doctrinal rhetoric, state courts have not abandoned the practice of concurrent jurisdiction.

1. When May a Court Make an Initial Custody Order? (Sections 3 and 6)

The UCCJA provides an apparently straightforward standard for determining when a court may make an initial custody order. Section 3 establishes four alternate grounds for taking jurisdiction: (1) the forum is the child's "home state" (or has been within the last six months); (2) the child and at least one contestant have a "significant connection" to the forum; (3) the child is physically present in the jurisdiction and an emergency necessitates resolving the child's custody; and (4) no other state has jurisdiction under the Act.[195] Courts most often use the first two of these grounds to resolve jurisdiction between competing parents; the other two grounds are not much used in this context.[196]

The existence of four alternate jurisdictional grounds suggests that the UCCJA did adopt the doctrine of concurrent jurisdiction, and that therefore two or even more states might potentially have jurisdiction over the same matter at the same time—one as the "home state" and others as "significant connection" states. The UCCJA does, however, have a mechanism explicitly designed to

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194 *See* UCCJA §§ 1(a)(2)-(3), 3(a)(2), 7(c)(2)-(3), 8, 14(a), 9 U.L.A. pt. 1, at 123, 143, 233, 251, 292.

195 UCCJA § 3, 9 U.L.A. pt. 1, at 143-44; *see supra* notes 150-64 and accompanying text (discussing UCCJA's jurisdictional provisions in greater detail).

196 With the exception of child protection actions filed by a public entity and alleging abuse and neglect, emergency jurisdiction is primarily used in actions for modification rather than for initial custody. *See, e.g.*, Stuart v. Stuart, 516 So. 2d 1277 (La. Ct. App. 1987) (affirming emergency transfer of custody of child in Louisiana for visit on basis of allegations that custodial mother became intoxicated daily and was unable to care for child, although Washington had become home state); Marcrum v. Marcrum, 437 A.2d 725 (N.J. Super. Ct. App. Div. 1981) (ordering hearing where abducting father alleged that custodial mother was an alcoholic). Even in this context, courts are reluctant to exercise emergency jurisdiction if the emergency can adequately be dealt with in the child's home state. *See, e.g.*, Nelson v. Nelson, 433 So. 2d 1015 (Fla. Dist. Ct. App. 1983) (refusing to exercise emergency jurisdiction when emergency was not in Florida); *cf.* Dillon v. Medellin, 409 So. 2d 570 (La. 1982) (refusing to enforce another state's emergency modification because to do so would encourage an abduction). Vacuum jurisdiction is rarely used in any context.

prevent this. Like Ratner's act, and adopting its exact language,[197] the UCCJA forbids simultaneous proceedings. Section 6 prohibits courts from exercising jurisdiction while another proceeding concerning the same child is "pending" in a forum that is "exercising jurisdiction substantially in conformity with this Act."[198]

In practice, however, although courts sometimes defer to other states' pending proceedings,[199] when they consider it appropriate they have easily been able to find statutory grounds for asserting jurisdiction and resolving a custody matter that another court is currently considering.[200] The courts do this in two main ways: by

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197 *Compare* UCCJA § 6(a), 9 U.L.A. pt. 1, at 219-20 *with* Ratner, *Legislative Resolution*, *supra* note 27, at 200-01 (§§ 4-5 of proposed uniform act).

198 UCCJA § 6, 9 U.L.A. pt. 1, at 219-20. Section 9 requires the parties, in their first pleadings, to disclose all interested persons and all other litigation concerning the child. 9 U.L.A. pt. 1, at 266. Some courts have treated this requirement as jurisdictional, *see, e.g.*, Brewington v. Serrato, 336 S.E.2d 444 (N.C. Ct. App. 1985); others have held that any defect is curable by amendment, *see, e.g.*, Gambrell v. Gambrell, 272 S.E.2d 70 (Ga. 1980).

199 *See, e.g.*, Rector v. Rector, 565 P.2d 950 (Colo. Ct. App. 1977) (holding court lacked subject matter jurisdiction because another proceeding was pending in Kansas); Mainster v. Mainster, 466 So. 2d 1228, 1229 (Fla. Dist. Ct. App. 1985) (holding Florida should have declined to exercise jurisdiction "because the Virginia proceeding was pending at the time the mother filed her Florida action"); Steele v. Steele, 296 S.E.2d 570 (Ga. 1982) (reversing trial court to require deference to former home state's pending proceeding); Cunningham v. Cunningham, 719 S.W.2d 224 (Tex. Ct. App. 1986) (requiring enforcement of North Carolina custody decree rendered in case pending when Texas began proceedings).

200 In so doing, courts are sometimes aided by the statute's amorphous policy pronouncements. For example, the statute's general purposes, set out in § 1, include "discourag[ing] continuing controversies," "deter[ring] abductions" and "avoid[ing] re-litigation of custody decisions," but also ensuring that "a custody decree is rendered in that state which can best decide the case in the interest of the child," and 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." UCCJA § 1, 9 U.L.A. pt. 1, at 124. The official Comment to § 3 emphasizes the act's purpose "to limit jurisdiction rather than proliferate it . . . . [J]urisdiction exists only if it is in the *child's* interest, not merely the interest or convenience of the feuding parties . . . . There must be maximum rather than minimum contact with the state." UCCJA § 3 cmt., 9 U.L.A. pt. 1, at 145 (emphasis in original).

determining that the case is not "pending" in the other state, and by determining that the other state did not exercise jurisdiction in "substantial conformity" with the UCCJA.

The Rhode Island case *Houtchens v. Houtchens*[201] is a good example of the first interpretive strategy for evading section 6.[202] The parties married in Rhode Island and then moved to Texas. Their two children were born in Texas, and the family lived together there for some years. Then, one day, the father moved back to Rhode Island with the children. The mother immediately commenced a proceeding in Texas seeking divorce and custody.[203] Two weeks after arriving in Rhode Island, the father also sought custody of the children, in a Rhode Island court.

In response, the mother objected that UCCJA section 6 precluded Rhode Island from taking jurisdiction of the case because Texas custody proceedings were already pending when the father filed his action in Rhode Island. Nevertheless, the Rhode Island trial court held a hearing and granted the father temporary custody of the children. Meanwhile, the earlier-begun Texas action continued, and, about two months after the Rhode Island temporary order was entered, the Texas court granted the mother a divorce and custody of the children. She accordingly removed the children from Rhode Island and returned with them to Texas.

The Rhode Island court decided that, by taking her children to Texas, the mother had acted in contempt of its temporary custody order; it ordered her to return the children to their father. On the strength of this Rhode Island order, the father went to Texas, got the children, and brought them back to Rhode Island.

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201 488 A.2d 726 (R.I. 1985).

202 *See id.*; *see also* Fuge v. Uiterwyk, 542 So. 2d 726, 728-29 (La. Ct. App. 1989) (holding that rule for contempt, filed in Florida to enforce Florida custody order, is not a pending "proceeding to determine custody" and therefore § 6 does not require Louisiana to defer to it); *In re* Brandon L.E., 551 N.E.2d 506, 510 (Mass. 1990) (holding that although Mississippi is attempting to enforce its prior custody order by finding the mother in contempt, this does not mean that a custody proceeding is still "pending" in Mississippi, and therefore does not preclude Massachusetts from assuming jurisdiction).

203 Under UCCJA § 3(a)(1)(ii), Texas would seem to have had jurisdiction: the children had lived with their parents in Texas "within 6 months before the commencement of the proceeding," the children were only absent from Texas because of their "removal or retention by a person claiming [their] custody," and their mother continued to live in Texas. *See* 9 U.L.A. pt. 1, at 143.

The mother followed her children back to Rhode Island and appealed the temporary custody order and the judgment of contempt to the Rhode Island Supreme Court, renewing her argument that section 6 required Rhode Island to defer to Texas. The Rhode Island Supreme Court affirmed the trial court's exercise of jurisdiction. Although acknowledging that Texas had been the children's home state within six months of the time the mother initiated her claim for custody there, and thus that Texas had jurisdiction under the UCCJA,[204] the supreme court held that section 6 did not require the trial court to defer to the pending Texas custody proceeding.

The court reasoned that because the father had not received actual notice of the Texas proceeding at the time he filed his Rhode Island action, the Texas proceeding was not yet really "pending," and therefore Rhode Island should not be precluded from exercising its "significant connection" jurisdiction.[205] The Rhode Island court made no inquiry as to when a custody proceeding is "pending" under Texas law. The question was instead seen as one of Rhode Island law, to be decided with reference to the children's best interests. The children's best interests, in turn, were seen through the lens of the Rhode Island trial court's factual determinations: that exercising jurisdiction[206] and awarding custody to their father[207] would be in their best interests.

The North Carolina case *Davis v. Davis*[208] is a good example of the second interpretive strategy for evading section 6, that is, determining that the foreign state did not exercise jurisdiction in "substantial conformity" with the UCCJA.[209] In *Davis*, the par-

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204 488 A.2d at 730.

205 *Id.* at 731-32; *cf.* Lopez v. District Court, 606 P.2d 853 (Colo. 1980) (en banc) (holding that under California law, a custody action is "pending" as soon as filed).

206 Assumption of jurisdiction under UCCJA § 3(a)(2) requires a determination that this is in the child's best interests. 9 U.L.A. pt. 1, at 143.

207 The determination that awarding custody to the father was in the children's best interests is implicit in the award.

208 281 S.E.2d 411 (N.C. Ct. App. 1981).

209 At least four other states' courts have used this mechanism to avoid deferring to an ongoing, earlier-begun, custody proceeding in another state. *See* Norsworthy v. Norsworthy, 713 S.W.2d 451 (Ark. 1986) (holding that Arkansas need not defer to Texas custody proceeding begun two weeks earlier because Texas's exercise of jurisdiction seems to conflict with purposes of UCCJA as set out in § 1); Bull v. Bull, 311 N.W.2d 768 (Mich. Ct. App. 1981) (holding that Michigan need not defer to pending Georgia

ties' North Carolina marriage was punctuated by several separations during which the mother took the children to California. Eventually, the father filed an action in North Carolina seeking "permanent and exclusive" custody of the children.[210] In response, the mother pled that a custody proceeding that antedated the father's North Carolina action was pending in California, and that a California court had granted her temporary custody of the children. Both California and North Carolina had adopted the UCCJA.[211] Following the procedure mandated by UCCJA section 6(c),[212] the North Carolina trial judge telephoned the California judge, was told that California would not relinquish its jurisdiction, and accordingly dismissed the father's action.[213]

On the father's appeal, the North Carolina Court of Appeals reversed. It is clear from the opinion that the Court of Appeals thought the mother should not have custody.[214] (The court's recital of the facts paints the mother as impulsive and unreliable, repeatedly leaving the father for no apparent reason and then begging him to take her and the children back. The court also

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proceeding because Georgia did not consider best interests of child in changing custody and thus did not act in conformity with the UCCJA); Swire v. Swire, 494 A.2d 1035 (N.J. Super. Ct. App. Div. 1985) (holding that New Jersey need not defer to proceeding pending in former home state where father still resided because the "vast preponderance" of evidence was in New Jersey, where children had been living for six years); *In re* Fenn, 664 P.2d 1143 (Or. Ct. App. 1983) (holding that Oregon was not required to defer to Texas proceeding begun two weeks earlier because Oregon had better access to evidence about children and family); *see also* Mainster v. Mainster, 466 So. 2d 1228 (Fla. Dist. Ct. App. 1985) (interpreting section 6 to permit or require an inquiry into correctness of other state's determination of its own jurisdiction, but agreeing that other state had jurisdiction); Bowden v. Bowden, 440 A.2d 1160 (N.J. Super. Ct. App. Div. 1982) (remanding for factual hearing to decide if Nebraska's pending proceedings were "substantially in conformity" with UCCJA).

210 281 S.E.2d at 412.

211 *Id.* at 413, 416.

212 Section 6(c) reads:

> If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum . . . .

9 U.L.A. pt. 1, at 220.

213 281 S.E.2d at 412.

214 *Id.* at 411-12.

recounts several occasions when the mother allegedly deceived the father so she could leave North Carolina with the children.[215]) It accordingly read UCCJA section 6 as permitting North Carolina to determine for itself whether California was "exercising jurisdiction substantially in conformity with this Act."[216]

The children appear to have been in California from approximately March, 1978, to January, 1979, and again from February, 1979 to June, 1979, both times probably living with their mother and maternal grandmother.[217] While in California, the mother and children received public assistance.[218] Although the California court might well have determined, therefore, that during their visits to California the mother and children established "significant connections" with the state, supporting California jurisdiction under UCCJA section 3(a)(2), the North Carolina court redetermined the facts and disagreed. That court focused on the brevity of the mother's most recent stay in California before she filed her custody action: "We do not believe that, by this brief interlude (one month) in California, California obtained jurisdiction in conformity with [N.C. Gen. Stat. section] 50A-3."[219]

These two strategies for interpreting section 6, that is, determining that a case is not "pending" or that an exercise of jurisdiction is not in "substantial conformity with this Act," have a common thread. In both, the second forum, motivated by concerns for a child's welfare to disregard an earlier-begun foreign proceeding, exploits the statutory direction to evaluate foreign jurisdiction under forum law in order to justify taking jurisdiction over the case. Section 6 directs the second court to test both pendency and substantial conformity with respect to "*this* Act,"[220] that is, the law of the state making the inquiry, rather than the law of the state where the other proceeding was begun. Even when both states have adopted the UCCJA without change, so that the language of the two state laws is identical, directing a court to look at its own, rather than foreign, law seems to increase the latitude of its interpretations. The UCCJA does not direct the second court to consider the decisional law that guided the first court

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215 *See id.* at 411-12, 417.

216 *Id.* at 416.

217 *See id.*

218 *See id.* at 412.

219 *Id.* at 416.

220 9 U.L.A. pt. 1, at 219 (emphasis added).

in its own interpretation of the UCCJA.[221] As a result, even when the first court's proceeding is both pending and proper under its own interpretation of the UCCJA, the present forum is able to construe the foreign proceeding as not "pending" under local law, or as not in "substantial conformity" with the requirements of local law, and to take jurisdiction.

State courts do not always exploit these opportunities; in many cases they instead dismiss in deference to a pending foreign proceeding. But whenever the now-local child seems to have needs that the forum fears a foreign proceeding will disregard, section 6 provides the means for a concerned court to take jurisdiction over the dispute. In such cases, however, the forum's eventual child custody order will be particularly vulnerable to attack in other states, and especially so in the state whose pending proceeding was disregarded.[222]

2. When Must a Court Enforce a Foreign Order Instead of Making an Independent Inquiry Into the Situation? (Sections 12, 13, and 15)

Section 6 requires courts to defer only to pending cases, not to final decisions. Similarly, the provisions requiring deference to foreign decrees are couched in terms that make it possible to interpret the UCCJA as requiring the forum to defer to a foreign proceeding only as long as the case is actually pending in a foreign court.[223] Under this interpretation, once the foreign custody

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[221] This was a deliberate drafting choice, the result of Bodenheimer's decision to make the act "uniform" but not "reciprocal." Bodenheimer wanted every state that adopted the UCCJA to be bound by its provisions whether or not other interested states had also adopted it. *See* UCCJA Prefatory Note, 9 U:L.A. pt. 1, at 118.

[222] *See infra* notes 233-38 and accompanying text (discussing *In re* Hopson, 168 Cal. Rptr. 345 (Ct. App. 1980)).

[223] *See* UCCJA §§ 12, 13, 15, 9 U.L.A. pt. 1, at 274, 276, 311. Several years after the UCCJA was promulgated, when it became apparent that courts were sometimes interpreting the act in this way, Professor Bodenheimer wrote that the UCCJA both forbade concurrent jurisdiction and implicitly required other states to defer to the decree state's jurisdiction even after the child has left the decree state:

> When a child stays in a state for six months or more as a visitor or a victim of abduction, the question arises whether the new state has power to modify the custody decree. The answer is that the Act does not permit the second state to take jurisdiction because the paramount jurisdiction of the prior state continues. Section 3 of the Act, the basic provision on subject matter

case reaches final judgment, another forum may immediately exercise its own jurisdiction by re-determining custody.[224]

The UCCJA does contain two provisions that seemingly require courts to enforce foreign decrees. Both of them, however, direct the forum to inquire into the foreign court's jurisdiction before enforcing its order. Because the foreign court's jurisdiction is to be tested according to the law of the forum rather than the law of the court rendering the decision, both provisions permit the same sorts of interpretive strategies as are sometimes used under section 6.

One of the two provisions requiring deference to foreign decrees is in UCCJA section 13. Section 13 requires the forum to "recognize and enforce" foreign custody decrees made by a court that had "assumed jurisdiction under statutory provisions substantially in accordance with this Act or [if the decree] was made under factual circumstances meeting the jurisdictional standards of the Act."[225] The most common way for a court to honor section 13's strictures without enforcing the foreign decision is to

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> jurisdiction, must be read in conjunction with section 14, which does not permit modifications by another state as long as the prior state's exclusive jurisdiction continues. This is true whether or not another state has technically become the child's home state.

Bodenheimer, *Progress Under the UCCJA*, *supra* note 5, at 988 (footnotes omitted). As authority for this assertion, Bodenheimer relied on the Commissioner's Note to Section 14 rather than on the text of the statute itself. *See id.* at 988 n.67; *see also* Bodenheimer, *Interstate Custody*, *supra* note 5, at 204-05.

In response, Professor Foster made a textual analysis of the UCCJA that supports his conclusion that the decree state does not retain continuing jurisdiction for more than six months after the child has left it. *See* Foster, *supra* note 12, at 303-10.

224 *See, e.g.*, Gordon v. Gordon, 363 S.E.2d 353 (Ga. Ct. App. 1987) (reversing trial court's order because entered while custody proceeding was pending in another state, but remanding for a hearing on whether the other state has jurisdiction "now," and for possible modification of the order if it does not).

225 9 U.L.A. pt. 1, at 276. Section 13 also conditions its requirement of enforcement on the foreign decree not having been modified "in accordance with jurisdictional standards substantially similar to those of this Act." So far as I am aware, no court has based a decision on a distinction between the slightly different standards applied to the foreign state's assumption of jurisdiction ("substantially in accordance with this Act") and its exercise of jurisdiction by modification ("substantially similar to those of this Act").

determine that the foreign court did not assume jurisdiction "substantially in accordance with this Act."[226]

Courts have applied fairly technical local rules to foreign decisions under this rubric, as in *Brewington v. Serrato*.[227] In *Brewington*, the North Carolina Court of Appeals held that a Texas court's jurisdiction was defective because its (final and unappealed) decision had not complied with North Carolina's requirement that custody decisions contain explicit and specific findings of jurisdictional facts.[228] Both Texas and North Carolina had adopted the UCCJA. Although the North Carolina court did not acknowledge it, Texas certainly had "significant contacts" jurisdiction, and may have been the "home state" as well.[229] When the Texas court gave the mother custody, the father neither appealed nor obeyed the order; instead, he filed for custody in North Carolina. The North Carolina court's determination that Texas lacked jurisdiction seems to have been driven by its view of the merits, based at least in part on evidence of post-abduction father-son fishing trips.[230]

The other provision governing deference to foreign decrees is found in UCCJA section 15 when it is read together with section

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226 The other possibility, a determination that the factual circumstances do not meet the Act's jurisdictional standards, seems mostly to have been used in reviewing the work of courts not subject to the UCCJA. *See, e.g.*, Mace v. Mace, 341 N.W.2d 307 (Neb. 1983) (determining that Mississippi, which had not yet adopted UCCJA, lacked significant contacts with child who had regularly visited father there).

227 336 S.E.2d 444 (N.C. Ct. App. 1985); *see also* Dillon v. Medelin, 409 So. 2d 570 (La. 1982) (refusing to defer to Texas's § 3(a)(4) "emergency" jurisdiction, which was based on allegations that custodial mother and stepfather sexually abused child and used drugs, because alleged actions occurred in Louisiana rather than in Texas).

228 *See* 336 S.E.2d at 447; *cf.* Walt v. Walt, 574 So. 2d 205 (Fla. Dist. Ct. App. 1991) (reversing trial court's enforcement of Mississippi custody decree because of Mississippi's procedural lapses, as assessed under Florida's verbatim enactment of UCCJA § 9).

229 *See* UCCJA § 3(a)(1)(i), (2), 9 U.L.A. pt. 1, at 143. The child was born in Texas and lived there with his parents for a year, until the family moved to North Carolina. About six months after the move, however, the mother returned to Texas with the child, first saying that she was visiting a sick relative and then that she did not want to go on living with her husband. Approximately six months after the mother and child returned to Texas, the father fetched the child back to North Carolina over the mother's protest. She immediately filed a custody action in Texas; the father was served, and he filed responsive pleadings. 336 S.E.2d at 446.

230 *See* 336 S.E.2d at 448.

12. Section 15 permits a party to file a foreign custody decree with a forum court, and requires the forum to enforce such a decree "in like manner as a custody decree rendered by a court of this State."[231] By itself, this provision seems simple and automatic; it apparently gives the forum no opportunity to inquire into the bona fides of a facially-valid foreign custody order. Such an opportunity, however, is latent in the direction to treat the foreign decree "in like manner" to a local decree. Section 12 defines a local custody decree's effect. According to section 12, a local decree is binding as to "all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law," provided that the court that rendered it has "jurisdiction under section 3," that is, under forum law.[232]

The California case *In re Hopson*[233] provides a striking example of the sort of interpretation a court that does not wish to enforce a recent foreign decree can give section 15. In *Hopson*, both parties presented the California court with facially-valid foreign custody decrees. The Arizona decree gave custody to the mother. She asked the California court to enforce the Arizona decree under California's enactment of UCCJA section 15. Arizona had been the children's home state at the time the action was originally filed there. The later Tennessee decree transferred custody to the father. Arguably, Tennessee had jurisdiction at the time it made its decision.[234] Rather than enforcing either foreign

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231 9 U.L.A. pt. 1, at 311.

232 UCCJA § 12, 9 U.L.A. pt. 1, at 274. Section 12 also specifies that the decree is binding only on all properly-served parties "who have been given an opportunity to be heard."

233 168 Cal. Rptr. 345 (Ct. App. 1980).

234 The parties had lived in Arizona for two years when they divorced; an Arizona decree gave the mother custody. Although the Arizona decree prohibited both parents from removing the children from the state without court permission, the mother moved with them to California shortly after the father moved, alone, to Tennessee. Thereafter, the father sought a change of custody in the Arizona court; while his request was pending, he took the children from California to his home in Tennessee and filed for custody there. After a hearing, Arizona continued the mother's custody and gave her permission to take the children to California or anywhere else. *Id.* at 349-50.

Shortly thereafter, a Tennessee court took jurisdiction of the father's action for custody, over the mother's objection. After a contested hearing, the Tennessee court gave the father custody because it considered the children's best interests more important than punishing the father for child-

decree, the California court assumed jurisdiction over the dispute itself, reasoning that California had jurisdiction because it had been the children's home state at the time the father abducted them to Tennessee, more than two years previously.[235] The California Court of Appeal reviewed the Tennessee decision as if an inferior local court had made it, and found it to be in "error."[236] According to the California court, Tennessee should have deferred to the then-pending Arizona proceeding, should have weighed the father's misconduct more heavily, and should have applied a different substantive standard to the question of modification.[237] Had the case been in fact appealed from Tennessee to California, a remand to the Tennessee courts would have been proper; under the circumstances, committing the question to a California trial court approximated this result as closely as possible. Of course, since Tennessee is in fact an independent sovereign state, California's determination of the custody issue in *Hopson* was not respected in the one place it could have been enforced—Tennessee, where the children stayed during the California litigation, and where they remained afterwards.[238]

3. When May a Court, After an Independent Inquiry, Modify a Foreign Custody Order? (Sections 3 and 14)

Under the UCCJA, deciding that a foreign child custody decree is not entitled to be "recognized and enforced" is only one way for a court to avoid enforcing it. Even a concededly valid decree may often be modified. Sections 3 and 14 govern such modifications.

By prohibiting simultaneous proceedings, section 6 implicitly prohibits a forum from modifying foreign orders in pending cases. However, the UCCJA treats final decrees differently; sections 12, 13, and 15 all contemplate modification of final foreign

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snatching. *Id.* at 350. The children had been living in Tennessee for seventeen months at the time of this decision. *Id.* at 353.

235 *Id.* at 359.

236 *Id.* at 356.

237 *Id.* at 353-56.

238 The mother was unable to enforce California's decision in Tennessee. Interestingly, about four years after the *Hopson* decision, when the children were approximately 14 and 17, both ran away from their father to live with their mother. The parties were then able to agree on visitation. Telephone Interview with William Hinton (Aug. 21, 1991) (attorney for mother).

custody decrees under certain circumstances. Section 14 specifies these circumstances. The forum may modify a foreign decree if "(1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction."[239] There are three important points to note about this language.

First, while sections 12, 13 and 15 tested foreign jurisdiction at the time the decree court assumed it, section 14 tests it "now." Second, even if the forum concludes that the decree court both assumed jurisdiction legitimately and still has jurisdiction "now," the forum may nevertheless modify the decree if it determines that the decree court has "declined to assume" its jurisdiction. Third, these assessments, like the forum's evaluation of its own jurisdiction, are to be made on the basis of the forum's view of both facts[240] and law.[241] The first two of these points merit extended discussion.

a. Does the Decree Court Have Jurisdiction "Now"?

Even the decree of a court that, under section 13, concededly "assumed jurisdiction under statutory provisions substantially in accordance with this Act"—a decree that the forum court must therefore "recognize and enforce"[242]—may nevertheless be modified by a forum that decides that the decree state does not have jurisdiction "now," if the forum also believes that it itself does have jurisdiction. The new state's assessment of the situation may well differ from the decree state's assessment. Indeed, decree states often think they may retain "significant contact" jurisdiction long after the child has left the state.[243] The statute can, with

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239 UCCJA § 14, 9 U.L.A. pt. 1, at 292.

240 *Id.* ("it appears to the court of this State").

241 *Id.* ("under jurisdictional prerequisites substantially in accordance with *this* Act" (emphasis added)).

242 UCCJA § 13, 9 U.L.A. pt. 1, at 276.

243 *See, e.g.*, Smith v. Superior Court, 137 Cal. Rptr. 348 (Ct. App. 1977) (holding it proper to exercise "significant contacts" jurisdiction nine years after child's departure); Barden v. Blau, 712 P.2d 481 (Colo. 1986) (en banc) (remanding to determine whether, seven years after leaving state, the children still have "significant contacts" that would support Colorado jurisdiction); Kioukis v. Kioukis, 440 A.2d 894 (Conn. 1981) (remanding to determine if Connecticut has "significant contacts" jurisdiction three years after child's departure from state); Yurgel v. Yurgel, 572 So. 2d 1327 (Fla.

some difficulty, be read to support this position.[244] Usually it is

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1990) (holding that Florida retains jurisdiction four years after children moved away); Harris v. Melnick, 552 A.2d 38 (Md. 1989) (holding it proper to exercise "significant contacts" jurisdiction seven years after children moved away); Range v. Range, 440 N.W.2d 691 (Neb. 1989) (holding it proper to exercise "significant contacts" jurisdiction three years after children moved away); People *ex rel.* Throneberg v. Butcher, 479 N.Y.S.2d 762 (App. Div. 1984) (holding that New York has "significant contacts" jurisdiction seventeen months after child left state because child was wrongfully retained in Oklahoma after a visit there); G.S. v. Ewing, 786 P.2d 65 (Okla. 1990) (holding it proper to exercise "significant contacts" jurisdiction four years after children's departure); *see also* Dennis v. Dennis, 387 N.W.2d 234 (N.D. 1986) (holding that trial court did not abuse discretion by dismissing for forum non conveniens reasons a case that had been remanded for determination of whether, three years after child left North Dakota, there was still "significant contacts" jurisdiction); *cf.* Schlumpf v. Superior Court, 145 Cal. Rptr. 190 (Ct. App. 1978) (holding that although California retained "significant contacts" jurisdiction nine years after child's departure, UCCJA § 7, forum non conveniens, required court to stay proceedings in favor of those in child's present home state).

[244] UCCJA § 3(c) makes it clear that the "[p]hysical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody." 9 U.L.A. pt. 1, at 144. That being the case, it is possible to interpret § 3(a)(2)'s requirement that "the child and his parents, or the child and at least one contestant, have a significant connection with this State," *id.* at 143, as being satisfied long after the child has departed with one parent for a new home, so long as the child visits the local parent occasionally.

Section 3(a)(2)'s other requirement, that "there [be] available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships," *id.* at 143, is either ignored, *e.g.*, Kendall v. Whalen, 526 A.2d 588, 590 (Me. 1987) (relying entirely on Bodenheimer's writings and "the purpose of the UCCJA" to affirm decree state's continuing jurisdiction to modify custody twenty-one months after child left Maine with custodial parent), or considered to be satisfied by regular visitation, *e.g.*, Yurgel v. Yurgel, 572 So. 2d 1327, 1331 (Fla. 1990) (finding that children's annual visits establish significant contacts; holding that UCCJA does not divest decree court of continuing jurisdiction "unless virtually all contacts [with decree state] have been lost"), or even by the possibility that a change in custody would make evidence about the decree state relevant to the child's *future* care, protection, training, and personal relationships, *e.g.*, Biggers v. Biggers, 650 P.2d 692, 696 (Idaho 1982) (permitting decree state to modify custody although children live in new state with custodial parent because evidence of children's pre-move contacts in Idaho bears on their "present and future care").

In some states, courts may also rely on a statutory preference for continuing jurisdiction. *See, e.g.*, Levy v. Levy, 434 N.E.2d 400, 404 (Ill. App. Ct. 1982) (relying, in part, on Illinois amendment to UCCJA § 3 specifying that "a court, once having obtained jurisdiction over a child, shall

only when an appellate court in the decree state wishes to punish parental wrongdoing that it concludes that time must have vitiated the child's connections with the decree state.[245] In contrast, when the question of "significant contact" jurisdiction arises in the new (or "asylum") state, the forum often concludes that the decree state lost jurisdiction almost as soon as the new state became the "home state"—potentially little more than six months after the move.[246]

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retain such jurisdiction"); Larsen v. Larsen, 615 P.2d 806 (Kan. Ct. App. 1980) (relying, in part, on KAN. STAT. ANN. § 60-1610(a) (1979) (amended repeatedly through 1988) to find continuing jurisdiction to modify custody five years after child and custodial parent moved away from Kansas).

[245] *See, e.g.*, Hafer v. Superior Court, 179 Cal. Rptr. 132 (Ct. App. 1981) (finding error to assert continuing jurisdiction over custody matter three years after child left California for Idaho; mother's abduction of children influenced court); Hegler v. Hegler, 383 So. 2d 1134 (Fla. Dist. Ct. App. 1980) (holding that Florida lacked "significant contacts" jurisdiction over children who left state four years before, although one was abducted back to Florida two years later and thus had been in Florida for two years, and remanding to determine if emergency jurisdiction existed); State *ex rel.* Murphy v. Boudreau, 653 P.2d 531 (Okla. 1982) (affirming trial court's finding that Oklahoma lost jurisdiction over children five years after their move, in part because father abducted child); *cf. In re* Lance, 690 P.2d 979 (Mont. 1984) (per curiam) (affirming dismissal of modification filed seven months after child left state with custodial mother because petitioning father was *pro se*, incarcerated, and had attempted to bribe Wyoming trial judge). *But see* L.F. v. G.W.F., 443 A.2d 751 (N.J. Super. App. Div. 1982) (finding New Jersey's jurisdiction vitiated 4½ years after child's departure).

[246] *See, e.g.*, *In re* Leonard, 175 Cal. Rptr. 903 (Ct. App. 1981) (fourteen months; held-over visit); Fuge v. Uiterwyk, 542 So. 2d 726 (La. Ct. App. 1989) (twelve months); Olson v. Olson, 494 A.2d 737 (Md. Ct. Spec. App. 1985) (five years); Mace v. Mace, 341 N.W.2d 307 (Neb. 1983) (eighteen months); *In re* Reynolds, 441 N.E.2d 1141 (Ohio Ct. App. 1982) (two years); Ellis v. Nickerson, 604 P.2d 518 (Wash. Ct. App. 1979) (five years).

Even when doing so permits an abduction to mature into the basis for home state jurisdiction in six months, many asylum courts test the decree state's jurisdiction not at the time the proceeding was commenced or even at the time the decision was rendered, but at the time the modification proceeding was filed in the new state, or even later. *See, e.g.*, Pierce v. Pierce, 287 N.W.2d 879 (Iowa 1980) (testing decree state's jurisdiction at time of filing in Iowa); Bull v. Bull, 311 N.W.2d 768 (Mich. Ct. App. 1981) (testing Georgia's jurisdiction at time abducting mother filed pleadings in Michigan in response to father's attempt to enforce Georgia decree there); Ellis v. Nickerson, 604 P.2d 518 (Wash. Ct. App. 1979) (refusing to enforce Missouri decree issued in 1977, two years after mother left state, because by 1979 Missouri lacked "significant contacts" with the children; forum, children's home since 1977, asserts jurisdiction); *In re* Brandon L.E., 394

When the decree and asylum states' assessments of jurisdiction differ in this way, each forum usually follows its own determination.[247] It is important to understand that, because any given forum may be an asylum state in one case and a decree state in another, jurisdiction is typically analyzed as a question "of fact" that may be resolved differently in superficially similar cases on the basis of assertedly important factual distinctions.[248]

Occasionally a court will address the underlying policy questions rather than the technical details of a modification issue. The Oregon Supreme Court's epic struggles with the proper interpretation of section 14 are particularly illuminating. The court confronted the problem in two cases, each of which arose when a party took a child into Oregon from the state of initial jurisdiction before an initial order had been made. As the court recognized, the policy question was whether an abduction should ever mature into such settled residency as would support an exercise of child

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S.E.2d 515 (W. Va. 1990) (testing Florida's jurisdiction at time of appeal from West Virginia's custody decision); Rosics v. Heath, 746 P.2d 1284 (Wyo. 1987) (testing Texas's jurisdiction at time of initial modification hearing in Wyoming).

Slidell v. Valentine, 298 N.W.2d 599 (Iowa 1980), is a similar case. There, the Iowa Supreme Court refused to enforce a Florida custody order in favor of the father by applying its own law to the question of when a Florida custody proceeding had been commenced. The Iowa court held that custody proceedings the father had commenced in Florida shortly before the mother left the state (in defiance of an order to produce the child in court) were abandoned by him because he did not search for her vigorously enough, although Florida itself later consolidated the earlier proceedings with those the father brought when he finally located the mother in Iowa, three years later. *Id.* at 602.

[247] *See, e.g.*, McCarron v. District Court, 671 P.2d 953 (Colo. 1983) (en banc) (issuing mandamus to require Colorado court to exercise jurisdiction over custody dispute although decree state had asserted its continuing jurisdiction).

[248] *Compare* Harris v. Melnick, 552 A.2d 38 (Md. 1989) (Maryland, as decree state, asserts exclusive continuing jurisdiction although child has lived in Colorado for seven years) *with* Olson v. Olson, 494 A.2d 737 (Md. Ct. Spec. App. 1985) (Maryland, as asylum state, asserts home state jurisdiction five years after child's arrival from Rhode Island) *and* Howard v. Gish, 373 A.2d 1280 (Md. Ct. Spec. App. 1977) (Maryland, as asylum state, asserts jurisdiction after eleven months); *also compare* Mace v. Mace, 341 N.W.2d 307 (Neb. 1983) (Nebraska, as asylum state, decides that decree state lost jurisdiction after children were absent for eighteen months) *with* Range v. Range, 440 N.W.2d 691 (Neb. 1989) (Nebraska, as decree state, asserts jurisdiction over children absent for three years and distinguishes *Mace* on basis of children's ages).

custody jurisdiction by the asylum state. Answering this question "no" subordinates the UCCJA's goals of flexibility and of having the custody decision made by a court with maximum access to current information; answering it "yes" subordinates the UCCJA's goals of preventing and deterring abductions. The question therefore exposes the heart of the UCCJA's indeterminacy.

The first such case to command the Oregon Supreme Court's attention was *In re Settle*.[249] In *Settle*, the mother fled with the children to Oregon in order to evade the father's custodial claims while the case was pending in an Indiana court with personal jurisdiction over both parents and the children.[250] In the mother's absence, Indiana granted the father custody. When the father located the children in Oregon and attempted to enforce the Indiana custody order, however, the Oregon trial court consolidated the father's habeas corpus action with the mother's petition for modification, heard testimony on the merits, and granted custody to the mother.[251] The Oregon Court of Appeals reversed, holding that the mother was not entitled to an Oregon forum because she had violated an Indiana court order by leaving the state with the children,[252] but on further appeal the Oregon Supreme Court vindicated both the trial court's assertion of jurisdiction and its award of custody. By the time of the Oregon hearing, the children had been away from both Indiana and their father for twenty months.[253] The supreme court reasoned that UCCJA section 14 permitted Oregon to modify the Indiana decree because Indiana was neither the home state nor a state with "significant connection" to the children at the time the Oregon action was filed,[254] and because Oregon had by then become the children's "home state."[255]

From the first, the Oregon Supreme Court recognized that the

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249 556 P.2d 962 (Or. 1976) (in banc), *overruled by In re* Ross, 630 P.2d 353 (Or. 1981) (in banc).

250 The Oregon Supreme Court explicitly acknowledged the mother's scofflaw motivations. *See id.* at 963-64.

251 The court thought the children's welfare would be best served by stability—continued custody with the mother—in the absence of "affirmative reasons to award custody to either parent." *Id.* at 965.

252 *In re* Settle, 550 P.2d 445 (Or. Ct. App.), *rev'd*, 556 P.2d 962 (Or. 1976) (in banc), *overruled by In re* Ross, 630 P.2d 353 (Or. 1981) (in banc).

253 556 P.2d at 964.

254 *Id.* at 966.

255 *Id.* at 965.

UCCJA attempts to achieve both of two incompatible goals, flexibility and repose. In *Settle*, after carefully considering the UCCJA's language and official Comments, the Oregon Supreme Court chose flexibility. It read the statute itself as choosing flexibility over repose, in order to achieve the best interests of the child, whenever the two "schizophrenic" goals presented "an irreconcilable conflict."[256]

A few years later, in *In re Ross*,[257] the Oregon Supreme Court overruled *Settle*. The facts of *Ross* were similar to those of *Settle*. Two days after parents who had married and lived together in Montana separated, the father took their child to Oregon. In his absence, and on the basis of service by publication, the Montana court awarded the mother both a divorce and custody of the child. It took the mother twenty months to locate the father and child in Oregon. Relying on *Settle*, the lower Oregon courts took jurisdiction over the father's modification petition, held a hearing, and awarded him custody.[258] On further appeal, the Supreme Court of Oregon reversed, holding that because the child retained "significant connections" with Montana, Oregon could not take jurisdiction.[259]

The factual basis for this holding was not strong. The trial court had found that the only " 'significant connection' the child now has with [Montana] is the October, 1977, decree."[260] To conclude that the child still had a significant connection with Montana at the time the father sought modification in Oregon, the Oregon Supreme Court had to transform the mother's connections with Montana into the child's:

> The mother still lived [in Montana], and the relationship between mother and child is itself a significant one. Beyond that, although the child was forcibly removed at [age nineteen months], the child had other significant connections with the state. Her older sister continued to reside in the family home with the mother, and other friends and neighbors, who had also been involved in the child's upbringing also continued to live

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256 *Id.* at 968 ("A close reading of the Act discloses a schizophrenic attempt to bring about an orderly system of decision and at the same time to protect the best interests of the children who may be immediately before the court.").

257 630 P.2d 353 (Or. 1981) (in banc).

258 *In re* Ross, 614 P.2d 1225 (Or. Ct. App. 1980), *rev'd*, 630 P.2d 353 (Or. 1981) (in banc).

259 630 P.2d at 360-61.

260 *Id.* at 359 (quoting trial court).

nearby.[261]

As the court forthrightly acknowledged, its decision in *Ross* was based on a deliberate change in policy, in an attempt to deter "abductions."[262] The court abandoned the policy it had chosen in *Settle*, although it still thought that "the purpose which pervades the Act is to provide that child custody determinations will be made in the state where there is optimum access to evidence,"[263] and it still read sections 3 and 14 as giving a new state jurisdiction after "successful long-term concealment following an abduction."[264] Contrary to its own careful analysis of the specifically-applicable sections,[265] the Oregon Supreme Court in *Ross* relied on the UCCJA's stated general purpose of "deterring abductions and other unilateral removals of children undertaken to obtain custody awards."[266]

Why? The most influential factor seems to have been Professor Bodenheimer's published criticism of the *Settle* decision.[267] Bodenheimer had left no doubt that she viewed *Settle* as based on "an interpretation [of the UCCJA] which would encourage the very evils the Commissioners on Uniform State Laws intended to eradicate."[268] In response, the Oregon court held that, at least on *Ross*'s facts, "[a]n abduction and concealment of but 21 months does not divest the decree state of jurisdiction."[269]

A close reading of the two cases could support the conclusion that the Oregon Supreme Court was wrong in both *Settle* and *Ross*. To shift custody to a parent who had deliberately flouted the authority of a foreign court, in *Settle* the supreme court ignored

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261 *Id.* at 361. In evaluating this recital, it must be remembered that the child had been taken from the mother, and remained concealed from her, from August 28, 1977, when the child was nineteen months old, until at least May 15, 1979, when the child was three years and four months old. *Id.* at 354-55.

262 *Id.* at 361. One problem with this policy is distinguishing "abductions," or wrongful interstate moves with a child, from their non-wrongful cousins.

263 *Id.* at 357.

264 *Id.* at 358.

265 *See In re* Settle, 556 P.2d 962 (Or. 1976) (in banc), *overruled by In re* Ross, 630 P.2d 353 (Or. 1981) (in banc).

266 UCCJA § 1(5), 9 U.L.A. pt. 1, at 124; *see Ross*, 630 P.2d at 357, 361.

267 *See* 630 P.2d at 362-63 (quoting Bodenheimer, *Progress Under the UCCJA*, *supra* note 5, at 988-89).

268 Bodenheimer, *Progress Under the UCCJA*, *supra* note 5, at 988.

269 630 P.2d at 363.

strong arguments for deferring to the decree state: both language in section 8 that would have supported dismissing the modification,[270] and Oregon's own pre-UCCJA cases, which, ironically, had helped Ehrenzweig to formulate the "clean hands doctrine."[271] In *Ross*, however, the Oregon court took his child from a father who had never violated any order of which he had actual notice. His departure with the child in the company of his eighteen-year-old girlfriend may well have startled and enraged the mother, but it was not legally "wrongful," because prior to a custody order both parents are the natural guardians of their child.[272] But such criticism would entirely miss a much more important point. Oregon's high court twice grappled with the problem sections 3 and 14 pose, both times taking serious and careful note of the statute's language and the scholarly commentary. It reached two contradictory, but equally well-documented and well-thought-out conclusions, because the UCCJA supports them both. Tellingly, other jurisdictions continued to cite *Settle* approvingly even after Oregon overruled it.[273]

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[270] Section 8(b) permits dismissal of a modification "[i]f the petitioner has violated any . . . provision of a custody decree of another state" and dismissal is "just and proper under the circumstances." 9 U.L.A. pt. 1, at 251. The mother had violated a court order by leaving Indiana.

Dismissal was not mandated in *Settle*, however, because the UCCJA only requires a court to dismiss a modification when the modification petitioner "has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody." UCCJA § 8(b), 9 U.L.A. pt. 1, at 251. At the time she removed the children from Indiana, the mother had temporary custody of the children by court order and agreement of the parties. *See In re* Settle, 556 P.2d 962, 963 (Or. 1976) (in banc), *overruled by In re* Ross, 630 P.2d 353 (Or. 1981) (in banc).

[271] *See* Ehrenzweig, *Interstate Recognition*, *supra* note 2, at 367 n.142 (citing *In re* Lorenz, 241 P.2d 142, 146 (Or. 1952); *Ex parte* Quinn, 233 P.2d 767, 772 (Or. 1951) (dictum); Lingel v. Maudlin, 212 P.2d 751 (Or. 1949)).

[272] The Oregon Supreme Court implicitly acknowledged this awkward fact when it said that "[e]ven though father removed the child prior to the time mother filed her suit, there is no dispute that the child was improperly retained." *Ross*, 630 P.2d at 360. If there was no dispute, there should have been: the father apparently had no notice of the Montana decree giving custody to his ex-wife until he was arrested nearly two years later and charged with "custodial interference" for violating it. *See id.* at 354-55.

[273] *See, e.g.* Speights v. Rockwood, 451 So. 2d 1275 (La. Ct. App. 1984) (refusing to enforce Texas custody order and exercising home state jurisdiction although custodial mother entered Louisiana with child in violation of a Texas restraining order); Pierce v. Pierce, 640 P.2d 899, 905

b. Has the Foreign Court "Declined to Exercise Jurisdiction"?

Even if the decree court both assumed jurisdiction legitimately and still has jurisdiction "now," under UCCJA section 14 the forum may nevertheless modify the decree if it determines that the decree court "declined to exercise" its jurisdiction. Although perhaps intended to apply to cases that remain "open" while not under active consideration, this phrase can be interpreted to allow a forum to modify any foreign decision of which it disapproves. It need only see the foreign method of decision (perhaps as revealed by its result) as a declination of jurisdiction.

E.E.B. v. D.A.[274] is a particularly egregious example of this interpretive strategy. Although *E.E.B.* is a New Jersey case, the story begins in Ohio, where twenty-one-year-old Doris Angle gave birth to her daughter out of wedlock, in October, 1978. Three days after the child's birth, Doris and the child's father surrendered the child for adoption to the county welfare department, and three days after that the child was placed with "preadoptive parents," Edwin E. Bowen and his wife.[275] Four days later—one week after signing the surrender form, ten days after the child's birth—Doris went to the county welfare department with her mother and asked for her baby back.[276] The welfare worker refused, and, on the next day, someone in the department asked the Juvenile Court to approve the surrender. That court, unaware that Doris had changed her mind, did so.[277]

The subsequent Ohio proceedings went as swiftly as these things ever do. Only two months elapsed before Doris Angle found a lawyer and filed a habeas corpus petition, seeking custody of her daughter. The Juvenile Court took three more months to deny the writ.[278] Doris Angle's unsuccessful appeal to the Ohio

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(Mont. 1982) (ordering hearing on home state of child retained in Montana after end of visit; citation shows court's awareness that *Settle* was overruled "in part"); L.F. v. G.W.F., 443 A.2d 751, 756 (N.J. Super. Ct. App. Div. 1982) (declining to exercise continuing jurisdiction, citing *Settle*, and stating, "We think that each case must be decided on its own facts."); Gooch v. Gooch, 321 N.W.2d 354 (Wis. 1982) (exercising home state jurisdiction fourteen months after custodial parent left decree state in violation of court order).

274 446 A.2d 871 (N.J. 1982), *cert. denied*, 459 U.S. 1210, *reh'g denied*, 460 U.S. 1104 (1983).

275 *Id.* at 873.

276 Angle v. Children's Servs. Div., 407 N.E.2d 524, 525 (Ohio 1980).

277 *Id.* at 525.

278 *See id.*

Court of Appeals took another four months.[279] Her further appeal to the Ohio Supreme Court was decided about a year later, in July, 1980. Although the court treated the question as solely one of statutory interpretation, it was perhaps motivated also by a desire to curb the lawlessness of Ohio county welfare offices. The Ohio Supreme Court reversed the lower courts, holding that Doris was "entitled to custody of her child."[280] It remanded the case to the Juvenile Court for "proceedings consistent with this opinion."[281] Although the Bowens urged the Ohio Supreme Court to order, and the Juvenile Court to schedule, a best interests hearing, both refused. The Juvenile Court issued the writ of habeas corpus.[282]

Had the prospective adoptive parents still been in Ohio, that would have been the end of the matter: her daughter, then aged twenty-one months, would have been returned to Doris Angle. However, in October, 1979, the Bowens moved to New Jersey with the child so that Edwin could become pastor of a church there.[283] Rather than complying with the writ of habeas corpus, the Bowens filed an action for custody in New Jersey six days after the Ohio Juvenile Court had issued the writ.[284]

Doris Angle's challenge to New Jersey's jurisdiction reached the New Jersey Supreme Court in January, 1981. That court simultaneously sent the jurisdictional question to New Jersey's intermediate appellate court while remanding for an expedited best interests hearing in the Court of Chancery.[285] This unusual procedure ensured that the New Jersey Supreme Court would give plenary consideration to the jurisdiction question only after a New Jersey trial court had decided the merits of the case.

Not surprisingly, the Court of Chancery found it in the child's best interests to remain with the Bowens, the only parents she had ever known. Doris Angle neither participated in the hearing nor challenged the finding.[286] She did, however, vigorously chal-

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279 *See E.E.B.*, 446 A.2d at 873.

280 *Angle*, 407 N.E.2d at 527.

281 *Id.*

282 *E.E.B.*, 446 A.2d at 874.

283 The New Jersey decision mentions that the Bowens notified the welfare department, raising the inference that they may not have notified the Ohio courts. *See id.*

284 *Id.*

285 Bowen v. Angle, 427 A.2d 589 (N.J. 1981).

286 *E.E.B.*, 446 A.2d at 872.

lenge New Jersey's right to reach the merits of the case rather than merely enforce the Ohio decision.

Ohio was clearly the child's home state when Doris Angle filed her habeas corpus petition.[287] The case proceeded expeditiously. Nevertheless, driven by its concern for the child's best interests as the Court of Chancery determined them, the New Jersey Supreme Court affirmed the modification of Ohio's decree. It reasoned that by refusing to hold a best interests hearing, the Juvenile Court had "declined to exercise" its jurisdiction.[288] The New Jersey decision relied on Ohio precedents—which it asserted the Ohio courts had misapplied—allegedly entitling the Bowens to such a hearing.[289] It ignored the clear meaning of the Ohio Supreme Court's mandate and of its denial of the Bowens' request for a hearing: that the juvenile court was required to issue the writ forthwith. Although couched in politer terms, in effect the New Jersey court reviewed the decision of another state's highest court and found it in error, just as the California Court of Appeal had done in *Hopson*.[290]

E.E.B. is a striking case because the New Jersey Supreme Court used the UCCJA to disregard a very recent, unquestionably valid, judgment of a sister state. Section 14's best justification is the need to respond to changed circumstances, yet New Jersey used it instead to review, and reverse, another state's determination of the best way to respond to unchanged, if tragic, facts. Once the welfare worker sent Doris Angle away without her baby, once the Juvenile Court denied her the speedy relief of habeas corpus, this case could only end sadly. No court could do better than choose between bad outcomes. The child was growing up with the Bowens although her mother had neither surrendered her for adoption nor been found to be unfit.[291] Neither Doris Angle nor the Bowens had done anything wrong; the child was even more

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287 At that time, her child had lived from birth with a "person acting as a parent" in Ohio; since the child was under six months of age, this sufficed to make Ohio the child's home state. *See* UCCJA § 2(5), (8)-(9), 9 U.L.A. pt. 1, at 133-34.

288 *E.E.B.*, 446 A.2d at 877.

289 *Id.*

290 *See In re* Hopson, 168 Cal. Rptr. 345 (Ct. App. 1980); *supra* notes 233-38 and accompanying text (discussing *Hopson*).

291 Indeed, the Bowens apparently never contended that Doris Angle was unfit; they relied instead on establishing the more lenient "best interests of the child" standard. *See E.E.B.*, 446 A.2d at 873-74.

blameless. Certainly returning the child to her mother, as the Ohio Supreme Court ordered, would have been painful for the Bowens and devastating to the child, but perhaps the court saw no other way to bring Ohio's county welfare offices in line, to protect other mothers and their babies from what amounts to little more than kidnaping.

Whether or not one agrees with the Ohio court's balancing of the harms, the choice was clearly committed to it. Yet the Bowens were able to evade this choice by moving to another jurisdiction. In New Jersey, Ohio's institutional concerns were, necessarily, attenuated: only the child was in New Jersey; her mother and the rogue welfare bureaucrats were not. Because of the Bowens' move and the delays of litigation, the child had spent most of her short life in New Jersey.[292] Principles of comity, naturally enough, seemed much less important to the New Jersey courts than the compelling needs of this particular New Jersey child.

4. When Should This Court Refuse to Inquire Into a Custody Matter? (Sections 7 and 8)

The UCCJA contains no guidance for a forum seeking to ascertain whether its order is likely to be respected by a foreign court. To the extent it assumes that another state's interpretations of the Act are likely to conform to its own, the forum may be deluded. In practice, as we have seen, states often interpret the statute as authorizing decisions that other states then judge to be improper and disregard.[293] The difficulty is deep within the marrow of the UCCJA: because its drafters did not recognize the inevitable inconsistency of pursuing both flexibility and repose, the UCCJA embraces both Ratner's stability and his flexibility goals, and so provides no single answer in hard cases.

The UCCJA does contain, in sections 7 and 8, two provisions that seek to guide the forum in deciding whether to decline to exercise jurisdiction that seems otherwise proper. Section 7 reminds a court that it may dismiss a proceeding at any time upon finding that it is an "inconvenient" forum and that another forum is "more appropriate."[294] Although courts use this provision, in practice dismissal on these grounds is entirely discretionary;

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[292] The child was 3½ years old (and had been in New Jersey for two years and eight months) by the time Supreme Court made its decision.

[293] *See supra* notes 195-292 and accompanying text.

[294] UCCJA § 7, 9 U.L.A. pt. 1, at 233-34.

appellate courts seldom reverse trial courts that conclude the forum is not "inconvenient."[295]

Section 8 attempts to codify Ehrenzweig's "clean hands doctrine." Although Ehrenzweig found that courts usually refused to modify foreign orders when the petitioning party had brought the child into the jurisdiction either " 'in defiance of a decree of a court of competent jurisdiction of a sister state,' "[296] or " 'wrongfully . . . for the purpose of avoiding and circumventing' " a foreign order,[297] section 8 is much narrower. It *requires* dismissal only if "the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody."[298] Further, it *permits* dismissal in only two other circumstances: "[if] the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct,"[299] and "[i]f the petitioner has violated any other provision of a custody decree of another state."[300]

Section 8's codification of the "clean hands doctrine" has given rise to a very interesting phenomenon. Section 8 is almost never cited, except by courts that are either explaining why the provision does not apply to the forum, or suggesting that it does apply to a foreign court.[301] Nevertheless, the doctrine itself is alive and

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295 *See, e.g.*, Harris v. Melnick, 552 A.2d 38 (Md. 1989) (finding no abuse of discretion in trial court's refusal to dismiss in favor of Colorado, where children had lived for seven years). *But see* Schlumpf v. Superior Court, 145 Cal. Rptr. 190 (Ct. App. 1978) (reversing trial court's exercise of jurisdiction over child who moved away nine years before, and requiring it to decline jurisdiction in favor of child's new home, Wyoming).

296 Ehrenzweig, *Interstate Recognition*, *supra* note 2, at 362 (quoting *Ex parte* Memmi, 181 P.2d 885, 888 (Cal. Ct. App. 1947)).

297 *Id.* at 362 (quoting Koebrich v. Simpson, 197 P.2d 820, 821 (Cal. Dist. Ct. App. 1948)).

298 UCCJA § 8(b), 9 U.L.A. pt. 1, at 251. Even then, the forum may exercise jurisdiction if it considers that to do so would be "required in the interest of the child." *Id.*

299 *Id.* § 8(a).

300 *Id.* § 8(b).

301 *See, e.g.*, Flannery v. Stephenson, 416 So. 2d 1034, 1039 (Ala. Civ. App. 1982) (stating that § 8 did not apply because father abducted child from custodial mother's relatives rather than from mother herself); *In re* Leonard, 175 Cal. Rptr. 903, 917 (Ct. App. 1981) (stating that § 8(b) did not apply, apparently because both parents engaged in wrongful conduct);

well. Courts often refuse jurisdiction to a party who has acted badly; they just fail to cite section 8 when they do so.[302] Instead, they cite section 7,[303] section 14,[304] scholarly articles,[305] or the

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Baird v. Baird, 374 So. 2d 60, 63 (Fla. Dist. Ct. App. 1979) (stating that § 8 did not prohibit Florida from considering mother's request for modification, although Arizona decree court found her in contempt when she refused to return there with the child, because her original Arizona decree did not explicitly prohibit departure from Arizona); Bullard v. Bullard, 647 P.2d 294, 301 (Haw. Ct. App. 1982) (stating that § 8(b) did not apply although mother wrongfully retained child after end of visit because Hawaii was decree state and § 8(b) prohibited modification of decree "of another state"); Dobyns v. Dobyns, 650 S.W.2d 701, 707 (Mo. Ct. App. 1983) (stating that § 8(a) did not apply because the wronged parent brought a cross-petition for custody); People *ex rel.* Throneberg v. Butcher, 479 N.Y.S.2d 762, 764 (App. Div. 1984) (suggesting that Oklahoma, where child had been for seventeen months, "might well" decline jurisdiction under § 8); *cf.* Schoeberlein v. Rohlfing, 383 N.W.2d 386, 390-91 (Minn. Ct. App. 1986) (refusing, on other grounds, to modify Florida's decree on petition of parent who held child in Minnesota after visit was to have ended; citing § 8(b) as additional support for this discretionary refusal to exercise jurisdiction); Winkelman v. Moses, 279 N.W.2d 897, 901 (S.D. 1979) (refusing to modify court's own decree on petition of parent who removed child from her home in California without prior notice to her mother or her school on grounds that California has a closer connection to the evidence, mentioning but not relying on § 8(b)).

302 *See, e.g.*, Kumar v. Superior Court, 652 P.2d 1003, 1011-12 (Cal. 1982) (refusing to modify New York decree in asylum state, in part because petitioning mother moved to California without prior notice to father; explicitly "does not reach" § 8 issue); Hafer v. Superior Court, 179 Cal. Rptr. 132, 139 (Ct. App. 1981) (reversing assumption of "significant contact" jurisdiction three years after child's departure, in part, to deter abductions); Zuccaro v. Zuccaro, 407 So. 2d 389, 390 (Fla. Dist. Ct. App. 1981) (affirming trial court's refusal to exercise jurisdiction when father took child from mother in New York, without prior notice to her, solely to prevent New York from becoming the "home state"); State *ex rel.* Laws v. Higgins, 734 S.W.2d 274, 279 (Mo. Ct. App. 1987) (prohibiting trial court from modifying Wyoming custody order because children's presence in Missouri resulted from father's keeping them after their visit should have ended); State *ex rel.* Murphy v. Boudreau, 653 P.2d 531, 533 (Okla. 1982) (declining to exercise decree state's own continuing jurisdiction in part because Oklahoma parent "abducted" the child from New Mexico and was holding the child in violation of custody orders in both states); Ryan v. Ryan, 301 N.W.2d 675, 678 (S.D. 1981) (reversing trial court's refusal to exercise jurisdiction because father forcibly took child from mother to Arizona before mother filed custody action in South Dakota).

303 *See, e.g.*, Zuccaro v. Zuccaro, 407 So. 2d 389, 391 (Fla. Dist. Ct. App. 1981).

304 *See, e.g.*, Kumar v. Superior Court, 652 P.2d 1003, 1007 (Cal. 1982).

"general principles" behind the Act.[306] In addition, many states refuse to consider periods of time during which a child was "wrongfully" in a party's actual custody when they assess their own jurisdiction under sections 3 and 14.[307]

According to Ehrenzweig, courts appeared to ignore the "clean hands doctrine" in two situations: when the opposing party "had not claimed his rights for a period and had himself violated the prior decree,"[308] and when the foreign decree deprived a now-local party of previously-granted custody "on mere ground of his disobedience."[309] Courts interpreting the UCCJA appear to have

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305 *See, e.g., id.* at 1007 (citing Bodenheimer, *Interstate Custody, supra* note 5); State *ex rel.* Laws v. Higgins, 734 S.W.2d 274 (Mo. Ct. App. 1987) (citing Joan M. Krauskopf, *Child Custody Jurisdiction Under the UCCJA*, 34 J. Mo. B. 383 (1978)).

306 *See, e.g.*, Hafer v. Superior Court, 179 Cal. Rptr. 132, 138 (Ct. App. 1981); Ryan v. Ryan, 301 N.W.2d 675, 677 (S.D. 1981).

307 *See, e.g.*, Freeman v. Freeman, 547 S.W.2d 437, 441 (Ky. 1977) (stating that time during which child is wrongfully hidden in a state does not count towards satisfying home state time-in-residence requirement); Curtis v. Curtis, 574 So. 2d 24 (Miss. 1990) (ignoring twenty months' residence in Mississippi under color of invalid temporary order); *In re* Nehra, 372 N.E.2d 4, 8 (N.Y. 1977) (ignoring four and one-half years); Winkelman v. Moses, 279 N.W.2d 897, 899 (S.D. 1989) (dictum) (stating that abducting parent may not acquire home state status even after six months in state); Sams v. Boston, 384 S.E.2d 151, 157-58 (W. Va. 1989) (ignoring three and one-half years); *cf. In re* B.B.R., 566 A.2d 1032, 1042 (D.C. 1989) (Schwelb, J., concurring) (stating that parents should not be allowed to create jurisdictional facts by wrongful conduct); *In re* Ross, 630 P.2d 353, 361 (Or. 1981) (in banc) ("It could not have been intended that unilateral removal of the child results in the deprivation of decree state jurisdiction upon the expiration of six months . . . .").

Contra Pierce v. Pierce, 640 P.2d 899, 905 (Mont. 1982) (wrongful conduct does not affect threshold issue of whether court has jurisdiction); Nehra v. Uhlar, 402 A.2d 264, 267-69 (N.J. Super. Ct. App. Div.) (six years adequate to divest decree state of jurisdiction), *cert. denied*, 408 A.2d 807 (N.J. 1979).

308 Ehrenzweig, *Interstate Recognition, supra* note 2, at 369. Ehrenzweig noted that

> there are a number of cases in which courts have refused to recognize or did recognize custody decrees of sister states without apparent regard to the "clean hands" of the benefiting parent. Close analysis, disregarding inconclusive reasoning in the traditional terms of jurisdiction and changes of circumstances, permits, however, classification of a large majority of such cases under other, more realistic, equitable considerations.

Id.

309 *Id.* at 370.

re-created these two exceptions, exercising jurisdiction when both parties have acted badly,[310] and when the foreign decree seems "punitive."[311] Neither of these elaborations on the clean hands doctrine has any basis in the text of section 8.[312]

It appears that the courts are continuing to follow the spirit of

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310 *See, e.g.*, *In re* Leonard, 175 Cal. Rptr. 903, 917 (Ct. App. 1981) (exercising jurisdiction although California parent had snatched child, apparently because Georgia parent "had committed the identical act three days before"); Houtchens v. Houtchens, 488 A.2d 726, 731 (R.I. 1985) (exercising jurisdiction although father had twice unilaterally removed children from Texas, apparently because mother had also abducted them and father's "conduct stemmed from the sincere belief that [it was] necessary to protect . . . the children).

311 *See, e.g.*, *In re* Lemond, 395 N.E.2d 1287, 1291 (Ind. Ct. App. 1974) (dicta) (stating that a foreign decree designed to punish should not be given total deference); Slidell v. Valentine, 298 N.W.2d 599, 605 (Iowa 1980) (noting that punitive decrees are disfavored unless "just and proper under the circumstances"); Spaulding v. Spaulding, 460 A.2d 1360, 1366-67 (Me. 1983) (defining punitive decrees as those of "a sister state [that] changes or awards custody, without regard to the best interest of the child, solely to punish one parent for disregarding its authority"); Holt v. District Court, 626 P.2d 1336, 1343-44 (Okla. 1981) (noting that punitive foreign orders need not be enforced but finding order before it not punitive); Brooks v. Brooks, 530 P.2d 547, 551 (Or. Ct. App. 1975) (deeming order granting custody to father due to mother's interference with father's visitation rights punitive and therefore subject to modification).

Although the text of the UCCJA contains no provision regarding punitive decrees, the concept is discussed in the official Comment to § 13, 9 U.L.A. pt. 1, at 277, and in two of Professor Bodenheimer's articles. *See* Bodenheimer, *Progress Under the UCCJA*, *supra* note 5, at 1003-04; Bodenheimer, *Rights of Children*, *supra* note 5, at 503-04.

312 Section 8(b) allows courts to ignore unclean hands when a child's best interests require it, although many courts have recognized this exception without referring to § 8. *See, e.g.*, Kudler v. Smith, 643 P.2d 783, 785-86 (Colo. Ct. App. 1981) (modifying New York order requiring grandparental visitation, on ground of children's best interests, although New York order authorizing custodial father to depart with children contemplated six-week visit rather than permanent move), *cert. denied*, 459 U.S. 837 (1982); Marcrum v. Marcrum, 437 A.2d 725, 727 (N.J. Super. Ct. App. Div. 1981) (exercising "emergency" jurisdiction and ordering a hearing on abducting father's allegations although Texas had given mother custody and earlier asylum state, Indiana, had ordered Texas order enforced), *appeal dismissed*, 460 A.2d 645 (N.J. 1982); Nehra v. Uhlar, 402 A.2d 264, 268-69 (N.J. Super. Ct. App. Div.) (requiring best interests hearing because children had been with mother for most of their lives, although she abducted the children in 1973 from custodial father in Michigan, and father was seeking enforcement of Michigan and New York custody decrees in his favor), *cert. denied*, 408 A.2d 807 (N.J. 1979).

the "clean hands doctrine" while ignoring the letter of section 8. Perhaps they prefer the freedom of an equitable principle to the confines of precedent-bound statutory interpretation. Perhaps section 8 feels to courts like a forfeiture provision. The section is complicated and technical, and its terms often seem to conflict with the courts' own sense of when they should, or should not, exercise jurisdiction. When they do not ignore it entirely, courts read section 8 narrowly, just as they tend to interpret statutes of limitation narrowly. At the same time, they are developing flexible, discretionary methods for punishing those "abductions" that either seem unjustifiable or have become too permanent to undo.

As this review of the courts' interpretations of the UCCJA's key provisions, sections 3, 6, 7, 8, 12, 13, 14, and 15, has demonstrated, the practice of concurrent jurisdiction continues to flourish. Thus, even after the UCCJA was widely adopted, in every contested custody case the possibility that a new forum would both take jurisdiction and reach a more favorable result remained clearly present. This possibility continued to encourage parents to "seize and run." Early studies of the Act's operation recognized this, although they tended to attribute the problem to errors in interpretation caused by unfamiliarity with the Act.[313]

Professor Bodenheimer's published exegeses of the UCCJA,[314] which have been influential with courts, exemplify rather than remedy the statute's indeterminacy. In reviewing early cases under the statute, she decried two errors that she claimed the courts were making: taking jurisdiction after an "abduction," and enforcing "punitive decrees." She completely failed to recognize that these are two ways of looking at the same situation.

Bodenheimer's first concern was to deter unauthorized extensions of visits and "abductions," a term she used loosely to include removals before any custody decree had been made,[315] and, sometimes, extended even to moves by a custodial parent that were merely unauthorized by the decree court. In aid of that goal, she said that the UCCJA gave the child's old home exclusive continuing jurisdiction that persists so long as one of the parents lives in the old state—even after a child "stays in a [new] state for

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313 *See, e.g.*, Bates & Holmes, *supra* note 5, at 77; Bodenheimer, *Progress Under the UCCJA*, *supra* note 5, at 985.

314 *See* Bodenheimer, *Interstate Custody*, *supra* note 5; Bodenheimer, *Progress Under the UCCJA*, *supra* note 5.

315 *See* Bodenheimer, *Progress Under the UCCJA*, *supra* note 5, at 989-90.

six months or more as a visitor or victim of abduction," and even if the new state has "technically" become the home state.[316] However, she was also, and equally, concerned that no other state enforce a "punitive" decree. She defined a "punitive" decree as one made to punish a parent for leaving the decree state with the child, or to redress a wrongful removal.[317] Taken together, Bodenheimer's interpretations of the UCCJA encourage the decree state to vindicate its "continuing jurisdiction" by entering a custody order that the asylum state is then encouraged to disregard as "punitive."

While the UCCJA's sponsors continued to press for more states to adopt it,[318] and while Professor Bodenheimer continued to explain her ideas about its proper interpretation, Congress began to study the problem. The next section describes the process that led Congress to enact federal law covering approximately the same ground as the UCCJA—the Parental Kidnaping Prevention Act (PKPA).[319]

IV. The Parental Kidnaping Prevention Act

A. The Development of the PKPA

In the late 1970s, in connection with its study of comprehensive federal criminal code reform,[320] Congress began to consider leg-

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316 *See id.* at 988. This was the pronouncement that influenced the Oregon court in *Ross*. *See supra* notes 257-73 and accompanying text (discussing *Ross*). In a later article, Bodenheimer attributed this rule of exclusive continuing jurisdiction to "state law" that, she said, both preexisted and survived the UCCJA's enactment. *See* Bodenheimer, *Interstate Custody*, *supra* note 5, at 213.

317 Bodenheimer, *Progress Under the UCCJA*, *supra* note 5, at 1003-04.

318 *See, e.g.*, *Parental Kidnaping: Hearing on H.R. 1290 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 101 (1980) [hereafter *Hearing on H.R. 1290*] (American Bar Association House of Delegates, Resolution I, App. A (Aug. 1978)) (encouraging state legislatures to adopt the UCCJA "at the earliest opportunity").

319 Pub. L. No. 96-611 § 6-10, 94 Stat. 3568 (codified in scattered sections of 28 and 42 U.S.C.).

320 *See* Peter E. Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 Duke L.J. 1, 59 (discussing Nixon administration bills that would have criminalized disclosure of certain classified government information); Louis B. Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics, and Prospects*, Law & Contemp. Probs., Winter 1977, at 1, 2 (describing "awesome scope and complexity" of controversial federal criminal law reform proposal). The original criminal code reform bill was S. 1400, 93d Cong., 1st Sess. (1973). Succeeding bills included S. 1,

islation to deter a parent from taking her children across state lines in defiance of a court's order or the other parent's wishes.[321] In early 1977, Senator Moss introduced a bill that would have required states to accord full faith and credit to custody decrees.[322] In 1978, at Senator Wallop's suggestion, similar language was added to S. 1437, the criminal code reform bill passed by the Senate (but not the House) in 1978.[323] For the next two years, Congress studied many bills that dealt with the "parental kidnaping" problem. The provisions of these bills fell generally into four categories.

One category of proposals would have made "parental kidnaping" a federal crime.[324] Professor Bodenheimer,[325] the American

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94th Cong., 1st Sess. (1975); H.R. 6869, 95th Cong., 1st Sess. (1977); S. 1437, 95th Cong., 2d Sess. (1978); S. 1722, 96th Cong., 2d Sess. (1979); S. 1630, 97th Cong., 1st Sess. (1981).

321 H.R. 762, 95th Cong., 1st Sess. (1977) (would make parental kidnaping a crime). A number of similar legislative proposals were introduced in that same legislative session and studied in connection with omnibus criminal code reform. *See, e.g., Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary* (pts. 1-3), 95th Cong., 1st & 2d Sess. 720, 727 (1977-1978) [hereafter *Hearings on H.R. 6869*] (statement of Children's Rights, Inc.).

322 H.R. 988, 95th Cong., 1st Sess. (1977).

323 *See* Russell M. Coombs, *The "Snatched" Child is Halfway Home in Congress*, 11 FAM. L.Q. 407 (1978), *reprinted in Hearings on H.R. 6869*, *supra* note 321, at 1002-18.

324 The proper definition of "parental kidnaping" was hotly contested. Parents and their advocates wanted Congress to treat any taking that surprised or angered the other parent as a federal crime. *See, e.g., Parental Kidnaping Prevention Act of 1979, S. 105: Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 70, 71 (1980) [hereafter *Joint Hearing on S. 105*] (statement of Arnold I. Miller, President, Children's Rights, Inc.) (defining "child-snatching" as "a concealment of a child from another person" and estimating that 70% take place before any custody order is issued). In contrast, the Justice Department wanted to limit federal involvement to cases in which a parent both violated a court's custody decree and posed a serious risk of physical harm to the child. *See Hearing on H.R. 1290*, *supra* note 318, at 81-84 (statement of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division).

325 *See Parental Kidnaping, 1979: Hearing on Examination of the Problem of "Child Snatching" Before the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 47, 47, 53-55 (1979) [hereafter *Hearing on Child Snatching*] (statement of Brigitte M.

Bar Association,[326] a non-profit organization called Children's Rights, Inc.,[327] and individual parents[328] supported these proposals. Strongly opposed by Professor Russell Coombs,[329] the Justice Department,[330] and the Federal Bureau of Investigation (F.B.I.)[331] as unduly harsh and a misuse of scarce resources, however, they never became law. Nonetheless, they left their mark on the PKPA. The PKPA "interprets" the federal crime of Interstate Flight to Avoid Prosecution to apply to parents subject to state felony prosecution for kidnaping their children.[332] Congress

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Bodenheimer, Professor of Law, University of California, Davis); *Hearings on H.R. 6869*, *supra* note 321, at 2561, 2563 (statement of Brigitte M. Bodenheimer, Professor of Law, University of California, Davis).

326 *See Hearing on H.R. 1290*, *supra* note 318, at 99-107 (statement of Doris J. Freed, Chairperson, Comm. on Custody, and Council Member, Family Law Section, American Bar Association, on Behalf of American Bar Association); *Joint Hearing on S. 105*, *supra* note 324, at 52-68 (statement of Doris J. Freed, Chairperson, Comm. on Custody, American Bar Association).

327 *See, e.g.*, *Hearing on H.R. 1290*, *supra* note 318, at 39-80 (testimony of Children's Rights, Inc.); *Hearings on H.R. 6869*, *supra* note 321, at 720-31 (statement of Children's Rights, Inc.).

328 *See, e.g.*, *Parental Kidnaping Prevention Act of 1979, S. 105: Addendum to Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 309-12, 319, 323-25 (1980) [hereafter *Addendum to Joint Hearing on S. 105*] (letter to Elizabeth Nichols; letters from Gerald F. Klejnot, Sr., Margaret & David Strickland); *Hearing on H.R. 1290*, *supra* note 318, at 35-38 (prepared statement of Marilyn W. Armstrong).

329 *See Joint Hearing on S. 105*, *supra* note 324, at 143, 154 (prepared statement of Russell M. Coombs); Coombs, *supra* note 323, at 415-17.

330 *See Hearing on H.R. 1290*, *supra* note 318, at 81-84 (statement of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division); *Joint Hearing on S. 105*, *supra* note 324, at 21-24, 47-50 (statements of Paul R. Michel, Acting Deputy Attorney General, Department of Justice); *see also Addendum to Joint Hearing on S. 105*, *supra* note 328, at 101 (additional submission of Russell M. Coombs: letter from Assistant Attorney General Patricia M. Wald to Representative Peter W. Rodino and attachments (n.d.)).

331 *See Hearing on H.R. 1290*, *supra* note 318, at 84-86 (statement of Executive Assistant Director Francis M. Mullen, Jr.); *Joint Hearing on S. 105*, *supra* note 324, at 24-27 (statement of Lee Colwell, Executive Assistant Director, Federal Bureau of Investigation).

332 *See supra* note 10. This approach was suggested by Children's Rights, Inc. *See Joint Hearing on S. 105*, *supra* note 324, at 77, 79 (prepared statement of Children's Rights, Inc., presented by Arnold I. Miller, President, and Rae Gummell, Vice President).

intended to enlist the F.B.I.'s assistance in locating abducting parents, contrary to pre-PKPA practice, but to stop short of federally prosecuting the parents.[333] The provision therefore met many of the objections of the opponents of criminal sanctions while giving the proponents some of what they had hoped to gain.

The second category of proposals would have required the Parent Locator Service to assist both official and private searches for abducting parents.[334] The Service, a joint federal-state effort, was originally established to assist state welfare departments in forcing absent parents to support their children. The Department of Health and Human Services opposed its use to locate abducting parents because to do so would be expensive and make parents' tax records, the primary source of location information, too widely available.[335] Nevertheless, the PKPA made the Service available for official searches.[336]

The third category consisted of bills that would have amended the diversity jurisdiction statute[337] to give United States District

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333 *See Hearing on H.R. 1290*, *supra* note 318, at 86, 95-99 (testimony of Francis Mullen, Jr., Executive Assistant Director, Federal Bureau of Investigation, U.S. Department of Justice).

334 *See, e.g.*, S. 105, 96th Cong., 1st Sess. (1979), *quoted in Hearing on Child Snatching*, *supra* note 325, at 3, 12-13. Senate Bill 105 would have required assistance to "an agent or attorney of any state," "any court having jurisdiction to make or enforce a child custody determination, or any agent of such court," "any parent, legal guardian, attorney, or agent of a child sought to be located," and "any agent or attorney of the United States," for the purpose of enforcing federal criminal provisions or of "making or enforcing a child custody determination." S. 105, 96th Cong., 1st Sess. § 4 (1979).

These proposals were pressed by Children's Rights, Inc. *See, e.g.*, *Joint Hearing on S. 105*, *supra* note 324, at 77, 79 (prepared statement of Children's Rights, Inc., presented by Professor Arnold I. Miller, President, and Rae Gummell, Vice President); *Hearings on H.R. 6869*, *supra* note 321, at 720, 725 (statement Children's Rights, Inc.). Professor Bodenheimer also supported these proposals. *See Hearings on H.R. 6869*, *supra* note 321, at 2561, 2563 (statement of Brigitte M. Bodenheimer, Professor of Law, University of California, Davis).

335 *See Hearing on H.R. 1290*, *supra* note 318, at 86, 89-91 (testimony of Louis B. Hays, Deputy Director, Office of Child Support Enforcement, Department of Health and Human Resources) (expressing concerns about added cost of additional searches and about privacy implications of giving searchers access to federal tax returns, the primary source of location information).

336 *See supra* note 10.

337 28 U.S.C. § 1332(a).

Courts the power to enforce valid state custody orders.[338] It was opposed by the Justice Department because it would have "increase[d] the workload of the federal courts" and for other, technical, reasons,[339] and it did not become law.

The final category consisted of several bills developing the proposals of Senators Moss and Wallop to implement the Full Faith and Credit Clause by requiring states to enforce one another's custody decrees. This approach was endorsed by the American Bar Association[340] and Children's Rights, Inc.,[341] and it had many academic supporters. Professor Bodenheimer thought it would ensure that other states would enforce the properly-made decrees of every state that had adopted the UCCJA.[342] In addition, without recognizing the inherent inconsistency, she thought a federal statute could be used to close "loopholes" in the UCCJA that permitted parents to evade its strictures,[343] although the PKPA could only close those loopholes by commanding courts to refuse full faith and credit to some custody decrees authorized by the UCCJA. Professor Coombs thought that placing the UCCJA's provisions on jurisdiction and interstate recognition of custody

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338 *See* H.R. 9913, 95th Cong., 1st Sess. (1977); H.R. 11273, 95th Cong., 2d Sess. (1978); H.R. 11722, 95th Cong., 2d Sess. (1978); H.R. 325, 96th Cong., 1st Sess. (1979); *see also Hearing on H.R. 1290*, *supra* note 318, at 9-16 (testimony of Hon. Hamilton Fish, Jr., Representative in Congress from the 25th Congressional District of the State of New York) (advocating Senate adoption of H.R. 325).

339 *See Reform of the Federal Criminal Laws: Hearings on S. 1722 and S. 1723 Before the Senate Comm. on the Judiciary* (pt. XIV), 96th Cong., 1st Sess. 10628, 10629-30 (1979) [hereafter *Hearings on S. 1722 and 1723*] (letter from Assistant Attorney General Patricia M. Wald to Hon. Peter W. Rodino, Chairman, Committee on the Judiciary (Sept. 20, 1978); submitted by Professor Russell Coombs).

340 *See Hearing on H.R. 1290*, *supra* note 318, at 101 (American Bar Association House of Delegates, Resolution II, app. A (Aug. 1978)).

341 Children's Rights, Inc. believed that requiring courts to give full faith and credit to custody decrees would produce "consistency and uniformity in the enforcement of custody decrees." *Hearings on H.R. 6869*, *supra* note 321, at 720, 725 (statement of Children's Rights, Inc.).

342 *See Hearing on Child Snatching*, *supra* note 325, at 50-51 (statement of Brigitte M. Bodenheimer, Professor of Law, University of California, Davis). Similarly, it was argued that such federal legislation would oblige all the states to follow the provisions of the UCCJA, whether or not they had actually adopted it. *See, e.g.*, *Joint Hearing on S. 105*, *supra* note 324, at 55-56 (prepared statement of Doris J. Freed).

343 *See Hearing on Child Snatching*, *supra* note 325, at 51-52 (statement of Brigitte M. Bodenheimer, Professor of Law, University of California, Davis).

decrees within federal law would "ensure that they are interpreted and applied by the states with . . . uniformity."[344] In addition, Professor Coombs, Professor Bodenheimer, and Dr. Doris Jonas Freed all thought that the Moss/Wallop approach would empower the victims of pre-decree abductions. If a parent took a child away before any custody order had been made, they believed that the remaining parent could completely protect her custody rights by immediately obtaining a custody order; they thought full faith and credit would require all other states to enforce such an order.[345] Congress enacted the Moss/Wallop approach as the main part of the PKPA.[346]

Early versions of the Moss/Wallop proposals contained two interesting variations, both ultimately rejected because they seemed to invite relitigation rather than enforcement. The first variation relieved states of the duty to enforce those custody decrees found to be "inconsistent with [the enforcing state's] strong public policy." This language was strongly opposed by both the Justice Department[347] and Professor Bodenheimer;[348]

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[344] *Hearings on S. 1722 and 1723*, *supra* note 339, at 10669, 10670 (statement of Associate Professor Russell M. Coombs, School of Law, Rutgers University, Camden, New Jersey); *see also Joint Hearing on S. 105*, *supra* note 318, at 143, 145 (prepared statement of Russell M. Coombs).

[345] *See Addendum to Joint Hearing on S. 105*, *supra* note 328, at 267, 272 (questions of Senator Mathias and Responses of Russell M. Coombs); *Hearing on H.R. 1290*, *supra* note 318, at 102, 103-04 (testimony of Doris J. Freed, Chairperson, Comm. on Custody and Council Member, Family Law Section, American Bar Association, on behalf of American Bar Association); *Hearing on Child Snatching*, *supra* note 325, at 60, 63-64 (answers by Brigitte M. Bodenheimer, Professor of Law, University of California, Davis to questions by Senator Cranston following hearing in Los Angeles). The UCCJA by itself could not always ensure such a result. *See, e.g.*, Houtchens v. Houtchens, 488 A.2d 726 (R.I. 1985) (awarding custody to parent who took children without consent, prior to any custody decree, even though UCCJA governed in both states); *supra* notes 201-07 and accompanying text (discussing *Houtchens*).

[346] *See supra* note 10. The PKPA was attached as a rider to a bill providing for Medicaid coverage of pneumococcal vaccine. *See* Pub. L. No. 96-611, 94 Stat. 3568.

[347] *See, e.g.*, *Hearings on S. 1722 and 1723*, *supra* note 339, at 10628-35 (letter from Assistant Attorney General Patricia M. Wald to Hon. Peter W. Rodino, Chairman, Committee on the Judiciary (Sept. 20, 1978)) (stating that provision might be unconstitutional, would extend federal control into state law of child custody, and would make criminal enforcement turn on a subjective civil standard).

[348] *See Hearings on H.R. 6869*, *supra* note 321, at 2561, 2562 (statement of

they successfully argued that the exception would swallow the rule. The second rejected variation relieved states of the duty to enforce "punitive" custody decrees. Professor Bodenheimer initially supported a narrow formulation of this rule,[349] but reluctantly withdrew her support in the face of the Justice Department's strenuous objections.[350] Professor Coombs also opposed this exception.[351]

The PKPA was developed from the same set of beliefs and understandings that produced the UCCJA, and by means of a similar process of "interest group liberalism."[352] Intended to supplement rather than supersede the UCCJA, its provisions are similar although not identical. It became effective on July 1,

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Brigitte M. Bodenheimer, Professor of Law, University of California, Davis) (noting that public policy "exception" would "annihilate the principle of full faith and credit").

349 H.R. 6869, 95th Cong., 1st Sess. (1977) would have relieved a state from enforcing a foreign custody decision when "the primary basis for the child custody determination was punishment of a contestant and not the best interests of the child." Professor Bodenheimer thought that inviting the second court to reexamine the best interests of the child "would open a large loophole that could undermine the rule of full faith and credit to a considerable extent." She suggested the following language as a safe substitute: "the primary basis for a court's modification of its own prior custody determination was the imposition of a disciplinary measure upon a contestant." *Hearings on H.R. 6869*, *supra* note 321, at 2561, 2562-63 (statement of Brigitte M. Bodenheimer, Professor of Law, University of California, Davis); *see also Hearing on Child Snatching*, *supra* note 325, at 47, 48 (statement of Brigitte M. Bodenheimer, Professor of Law, University of California, Davis) (suggesting that definition of "custody determination" specify "modifications *other than punitive modifications*" (emphasis added)).

350 *See Hearings on S. 1722 and 1723*, *supra* note 339, at 10628, 10630, 10632 n.1 (letter from Assistant Attorney General Patricia M. Wald to Hon. Peter W. Rodino, Chairman, Committee on the Judiciary (Sept. 20, 1978)) (stating that provision would encourage second state to re-determine child's best interests, would create substantive federal standard in area of traditionally exclusive state concern, and would make criminal enforcement turn on subjective civil standard); *Hearing on Child Snatching*, *supra* note 325, at 60, 61 (answers of Brigitte M. Bodenheimer, University of California, Davis to questions by Senator Cranston following hearing in Los Angeles).

351 *See Hearings on S. 1722 and S. 1723*, *supra* note 339, at 10669, 10671 (statement of Professor Russell M. Coombs, School of Law, Rutgers University, Camden, New Jersey) (stating that exception would be a "federal encroachment on the right of each state to determine what specific factors would be given what weight in awarding or changing custody").

352 *See supra* note 149 and accompanying text.

1981.[353] Although many courts considering interstate custody problems since the PKPA's enactment have simply ignored the Act,[354] many others have struggled to reconcile its commands with those of the UCCJA. The next section examines these courts' interpretations of the PKPA, illustrating the Act's crucial indeterminacies.

B. The Crucial Indeterminacies of the PKPA

If the central question for understanding the UCCJA was, "When may a court make a custody order?," the analogous question for understanding the PKPA is, "When must a court give full faith and credit to a custody order?" For expository purposes, this question may usefully be broken down into two subsidiary questions: (1) When must a court enforce a foreign custody order?; and (2) When may a court, after an independent inquiry, modify a foreign custody order? This section examines the state courts' interpretations of the PKPA's answers to these two questions, and the PKPA's consequent failure to "close loopholes" and achieve the reformers' stability goals.

1. When Must a Court Enforce a Foreign Custody Order?

Like the UCCJA, the PKPA applies to both custody and visita-

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353 Pub. L. No. 96-611 § 2, 94 Stat. 3567.

354 *See, e.g.*, Waller v. Richardson, 757 P.2d 1036 (Alaska 1988); Szmyd v. Szmyd, 641 P.2d 14 (Alaska 1982); Bell v. Bell, 705 S.W.2d 891 (Ark. 1986); Davis v. Davis, 687 S.W.2d 843 (Ark. 1985); Bakke v. District Court, 719 P.2d 313 (Colo. 1986) (en banc); E.P. v. District Court, 696 P.2d 254 (Colo. 1985) (en banc); McCarron v. District Court, 671 P.2d 953 (Colo. 1983) (en banc); Mondy v. Mondy, 428 So. 2d 235 (Fla. 1983); Biggers v. Biggers, 650 P.2d 692 (Idaho 1982); *In re* Hubbard, 315 N.W.2d 75 (Iowa 1982); Bills v. Murdock, 654 P.2d 406 (Kan. 1982); Perry v. Perry, 639 S.W.2d 780 (Ky. 1982); Wood v. Graham, 633 S.W.2d 404 (Ky. 1982); Harris v. Melnick, 552 A.2d 38 (Md. 1989); Stowers v. Humphrey, 576 So. 2d 138 (Miss. 1991); Castleberry v. Castleberry, 541 So. 2d 457 (Miss. 1989); Roberts v. Fuhr, 523 So. 2d 20 (Miss. 1987); Walker v. Luckey, 474 So. 2d 608 (Miss. 1985); Clarke v. Clarke, 496 A.2d 361 (N.H. 1985); Mattleman v. Bandler, 461 A.2d 561 (N.H. 1983); State *ex rel.* Aycock v. Mowrey, 544 N.E.2d 657 (Ohio 1989); Walling v. Walling 727 P.2d 586 (Okla. 1986); Kretzer v. Kretzer, 506 A.2d 81 (R.I. 1986); Knoth v. Knoth, 377 S.E.2d 340 (S.C. 1989); Coppedge v. Harding, 714 P.2d 1121 (Utah 1985); Angell v. Sixth Judicial Dist., 656 P.2d 405 (Utah 1982); Duval v. Duval, 546 A.2d 1357 (Vt. 1988); Carr v. Carr, 375 S.E.2d 190 (W. Va. 1988); Brockman v. Hegner, 317 S.E.2d 516 (W. Va. 1984); Rosics v. Heath, 746 P.2d 1284 (Wyo. 1987).

tion orders.[355] Unlike the UCCJA, the PKPA does not distinguish between final decrees and orders in pending cases. Because it defines a "custody determination" to include "permanent and temporary orders, and initial orders and modifications,"[356] the PKPA requires courts to enforce both temporary and final orders, provided only that they are "made consistently with the provisions of [the PKPA] by a court of another State."[357]

To be consistent with the PKPA, a custody determination must have been made by a court with jurisdiction under its own law.[358] In this, the PKPA differs from the UCCJA, which assesses the decree state's jurisdiction under the forum's law.[359] In actual practice, however, the difference may be more formal than real. Although an asylum court interpreting the PKPA may sometimes defer to the decree state's own jurisdictional assessment,[360] more often it will make an independent evaluation.[361] Indeed, under the PKPA the asylum court may well decide that the decree court's assessment of its own jurisdiction was erroneous.[362] Thus, even under the PKPA, asylum courts remain able to avoid enforcing foreign decisions when they so choose.

To be consistent with the PKPA, a foreign decree must also be made in one of five sets of factual situations.[363] These are based

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355 *Compare* PKPA § 8(a), 94 Stat. 3569 (codified at 28 U.S.C. § 1738A(b)(2)) *with* UCCJA § 2(1), 9 U.L.A. pt. 1, at 133.

356 PKPA § 8(a), 94 Stat. 3569 (codified at 28 U.S.C. § 1738A(b)(3)).

357 PKPA § 8(a), 94 Stat. 3569 (codified at 28 U.S.C. § 1738A(a)).

358 *See* PKPA § 8(a), 94 Stat. 3570 (codified at 28 U.S.C. § 1738A(c)(1)) ("has jurisdiction under the law of such State").

359 *See supra* notes 220-21 and accompanying text.

360 *See, e.g.*, Bahr v. Bahr, 439 N.Y.S.2d 265 (Fam. Ct. 1981) (deferring to Connecticut's assessment of its own jurisdiction), *aff'd*, 458 N.Y.S.2d 247 (App. Div.), *appeal denied*, 454 N.E.2d 1310 (N.Y. 1983).

361 *See, e.g.*, Murphy v. Woerner, 748 P.2d 749 (Alaska 1988) (assessing Kansas's jurisdiction under Kansas statute and cases); Barndt v. Barndt, 580 A.2d 320 (Pa. Super. Ct. 1990) (assessing North Dakota's jurisdiction under North Dakota law); Arbogast v. Arbogast, 327 S.E.2d 675 (W. Va. 1984) (assessing Kansas's jurisdiction under Kansas statute and cases).

362 *See, e.g.*, Pierce v. Pierce, 640 P.2d 899, 904-05 (Mont. 1982) (holding trial court erred in telephoning Kentucky court to find out if it asserted jurisdiction, and remanding for full hearing on whether Kentucky court has jurisdiction under Kentucky law); Serna v. Salazar, 651 P.2d 1292, 1295 (N.M. 1982) (determining that California did not have jurisdiction under its own law); Debra S. v. Roger S., 455 N.Y.S.2d 723, 725 (Fam. Ct. 1982) (same).

363 *See* PKPA § 8(a), 94 Stat. 3570 (codified at 29 U.S.C. § 1738A(c)(2)); *infra* note 366.

on UCCJA section 3 but differ from it in two ways. First, the PKPA requires the forum to enforce custody determinations made by courts with "significant contacts" jurisdiction only if the child had no home state. Second, the PKPA adopted Bodenheimer's concept of "continuing jurisdiction." These deserve separate discussion.

a. The PKPA Favors Home State Jurisdiction

In early versions of the Moss/Wallop proposal, the problem of identifying those decrees that deserved enforcement had been solved by adopting the language of UCCJA section 3. A custody decree was entitled to full faith and credit if it had been made by a court with "jurisdiction under the law of such state," and if one of the jurisdictional requirements of UCCJA section 3 were met.[364] At Professor Bodenheimer's suggestion, however, this language was altered to close a "loophole" used by "persons who remove a child from the home state prior to custody litigation."[365] As enacted, the PKPA favors home state jurisdiction by requiring courts to grant full faith and credit to custody decrees that were made pursuant to "significant contact" jurisdiction, only if the child had no home state.[366]

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364 *See, e.g.*, S. 105, 96th Cong., 1st Sess. § 3(a) (1979).

365 *Hearing on Child Snatching*, *supra* note 325, at 50, 51-2 (statement of Brigitte M. Bodenheimer, Professor of Law, University of California, Davis). Professor Coombs agreed with Professor Bodenheimer's suggestion and proposed the language that was eventually enacted into law. *See Addendum to Joint Hearing on S. 105*, *supra* note 328, at 267, 270 (questions of Senator Mathias and responses of Russell M. Coombs); *Joint Hearing on S. 105*, *supra* note 324, at 143, 145 n.16 (prepared statement of Russell M. Coombs).

366 The PKPA requires that "[t]he appropriate authorities of every State . . . enforce according to its terms, and . . . not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State." PKPA § 8(a), 94 Stat. 3569 (codified at 28 U.S.C. § 1738A(a)). It defines as "consistent with the provisions of this section" only those determinations made by a court with jurisdiction "under the law of such state," PKPA § 8(a), 94 Stat. 3570 (codified at 28 U.S.C. § 1738A(c)(1)), and where

> (2) one of the following conditions is met:
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> . . .
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> (B)(i) *it appears that no other State would have jurisdiction under subparagraph (A), and* (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State *other*

This provision is often explained by saying that the PKPA gives the home state exclusive jurisdiction. While that is a much simpler and clearer explanation than the one I have just given, it is also inaccurate. The PKPA is federal law and therefore can neither grant nor withhold state jurisdiction; that is a matter for state law. All the PKPA can do, and all that it does, is specify which state decrees are entitled to enforcement under the Full Faith and Credit Clause. The PKPA neither requires a state to exercize jurisdiction only when its orders would be entitled to full faith and credit[367] nor prohibits a state from enforcing (as a matter of comity) a custody decree not entitled to full faith and credit. It is in this limited sense alone that the PKPA prefers home state over significant contacts jurisdiction.

Although courts routinely enforce initial decrees made by courts with home state jurisdiction,[368] they occasionally refuse to do so. The most commonly cited statutory ground is failure to give proper notice. The PKPA requires that "reasonable notice and opportunity to be heard" be afforded any parent, contestant, or person with actual physical custody of a child, before a custody order is entered.[369] If one parent disappears with the child before any custody action has been filed, the remaining parent is often advised to seek custody immediately.[370] Frequently, however, he or she finds it difficult to serve process on, or even give actual notice to, the absent parent. Although courts sometimes

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> *than mere physical presence in such State*, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships
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> . . . .

PKPA § 8(a), 94 Stat. 3570 (codified at 28 U.S.C. § 1738A(c)(2)) (emphasis added).

367 *See, e.g.*, Pazder v. Pazder, 556 N.Y.2d 427 (App. Div. 1990) (mem.) (permitting father to institute action for, *inter alia*, custody of children who have been living in Florida with their mother for eleven months over mother's objection that PKPA prohibits this).

368 *See, e.g.*, Michell v. Michell, 437 So. 2d 122 (Ala. Civ. App. 1982) (enforcing Texas custody order because Texas had been child's home state within six months of commencement of action although father had taken him to Alabama eleven days before mother filed Texas proceeding).

369 PKPA § 8(a), 94 Stat. 3570 (codified at 28 U.S.C. § 1738A(c)); *cf.* UCCJA § 5, 9 U.L.A. pt. 1, at 212-13 ("Notice required for the exercise of jurisdiction over a person outside this State shall be given in a manner reasonably calculated to give actual notice . . . .").

370 *See supra* note 345 and accompanying text.

enforce foreign custody orders entered *ex parte* in such circumstances on the ground that the absent parent was not reasonably entitled to any notice,[371] some courts balk, especially when the remaining parent did not act quickly.[372]

b. The PKPA Recognizes "Continuing Jurisdiction"

The UCCJA requires that a court wishing to modify its own decree apply the same jurisdictional tests it needed to apply to enter an initial decree.[373] In contrast, the PKPA explicitly adopted Bodenheimer's concept of "continuing jurisdiction."[374] Once a state court has made an initial custody decree that is "consistent" with the PKPA's standards, only that court's orders are entitled to full faith and credit—provided that the decree court continues to have jurisdiction under its own law and remains the residence of either the child or any contestant.[375]

Decree courts have not been reluctant to interpret the PKPA's

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[371] *See, e.g.*, Siler v. Storey, 677 S.W.2d 504 (Tex. 1984) (requiring enforcement of Pennsylvania custody decree made without service on father because he had abducted child and was hiding from process server; no explicit PKPA analysis); *cf.* Elder v. Park, 717 P.2d 1132 (N.M. 1986) (deferring to New Hampshire's jurisdiction because mother filed post-abduction action there, even though New Hampshire's *ex parte* temporary order was unenforceable and New Mexico court could properly modify it to give father summer visit with child).

[372] *See, e.g.*, Sherry Ann F. v. Bennett S., 502 N.Y.S.2d 383 (Fam. Ct. 1986) (refusing to enforce order entered without notice to father; mother filed California action 11 months after father's departure with child); Virginia E.E. v. Alberto S.P., 440 N.Y.S.2d 979 (Fam. Ct. 1981) (refusing to enforce *ex parte* California custody decree dated August 8, 1977; father disappeared with child in 1975).

[373] UCCJA § 3(a), 9 U.L.A. pt. 1, at 143.

[374] Professor Bodenheimer's articles had urged a similar interpretation of the UCCJA. *See, e.g.*, Bodenheimer, *Progress Under the UCCJA*, *supra* note 5, at 984. According to Professor Foster, she was influential in persuading Congress to enact the concept into federal law. *See* Foster, *supra* note 12, at 303 n.33.

[375] Subsection (c)(2)(E) refers to "continuing jurisdiction," which subsection (d) defines as follows: "The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant." PKPA § 8(a), 94 Stat. 3570-71 (codified at 28 U.S.C. § 1738A(d)). Subsection (c)(1) merely requires that the state have jurisdiction "under the law of such State," i.e., under its own law. PKPA § 8(a), 94 Stat. 3570 (codified at 28 U.S.C. § 1738A(c)(1)).

language as authorizing them, long after the child has moved away, to make custody orders that they expect to be exclusively entitled to full faith and credit.[376] After all, many courts asserted continuing jurisdiction on the strength of the UCCJA alone.[377] Under the UCCJA, however, asylum courts were much less likely to recognize a decree court's continuing jurisdiction than a decree court was to assert it.[378] The PKPA seems at first glance to have made a difference here. Asylum courts using the PKPA to analyze the continuing jurisdiction issue usually recognize the decree state's continuing jurisdiction.[379] However, asylum courts

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376 *See, e.g.*, Russo v. Myers, 588 So. 2d 887 (Ala. Civ. App. 1990) (decree state exercising jurisdiction to modify nearly two years after custodial mother and child moved to Florida, and enforcing modification by contempt three years after); Robertson v. Robertson, 532 So. 2d 1014 (Ala. Civ. App. 1988) (decree state asserting continuing jurisdiction four years after children left state); O'Daniel v. Walker, 686 S.W.2d 805 (Ark. Ct. App. 1985) (decree state exercising jurisdiction to modify three years after custodial mother and children left state, and punishing noncompliance with contempt four years after); Jesus A. v. Lizette A., 546 N.Y.S.2d 284 (Fam. Ct. 1989) (asserting jurisdiction to modify its custody order seven months after custodial mother and children moved to Puerto Rico); Hall v. Hall, No. 1401, 1991 WL 46676 (Tenn. Ct. App. Apr. 8, 1991) (decree state asserting jurisdiction to modify 2½ years after custodial mother and child moved to Georgia); Escudero v. Henry, 395 S.E.2d 793 (W. Va. 1990) (denying writ of prohibition to custodial mother to prevent exercise of modification jurisdiction nearly two years after she and the children moved to Kentucky).

But see, e.g., Ziegler v. Ziegler, 691 P.2d 773 (Idaho Ct. App. 1985) (holding that decree state may decline to exercise continuing jurisdiction when remaining parent has voluntarily litigated custody in child's new home); Nielsen v. Nielsen, 472 So. 2d 133 (La. Ct. App. 1985) (holding that decree state may decline to exercise continuing jurisdiction when child, who has been living in Texas for two years, has closer connections there); Patricia R. v. Andrew W., 467 N.Y.S.2d 322 (Fam. Ct. 1983) (holding that decree state may decline to exercise continuing jurisdiction when children spend the greater portion of their time in New Jersey).

377 *See supra* note 243 and accompanying text. Decree courts continue to decline to exercise continuing jurisdiction to punish the remaining parent's wrongdoing. *See supra* note 245. In Hafer v. Superior Court, 179 Cal. Rptr. 132 (Ct. App. 1981), for example, the mother abducted the child to Florida in violation of a California court order. The father obtained a California order awarding him custody, which the mother subsequently petitioned the California court to modify. *Id.* at 133. The California Court of Appeal viewed the mother's wrongful abduction as an "adequate basis to deny [her] the California forum for unclean hands . . . ." *Id.* at 136.

378 *See supra* note 243-46 and accompanying text.

379 *See, e.g.*, Murphy v. Woerner, 748 P.2d 749 (Alaska 1988) (holding that asylum state may not modify Kansas decree three years after custodial

sometimes deferred to decree courts under the UCCJA; perhaps courts already inclined to defer now also cite the PKPA.

Certainly, asylum courts continue to take jurisdiction when they deem it appropriate to do so, even if the case is still under active consideration in the decree court. Some of the opinions in such cases simply do not address the PKPA,[380] deal with it cursorily,[381] or conclude that it does not apply.[382] However, some of these

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mother and children moved there); Via v. Johnston, 521 So. 2d 1324 (Ala. Civ. App. 1987) (holding that asylum state must enforce Indiana modification made over a year after custodial parent and child left state); Souza v. Superior Court, 238 Cal. Rptr. 892 (Ct. App. 1987) (holding that asylum state must enforce Hawaii modification made more than three years after custodial parent and child left state); Bahr v. Bahr, 439 N.Y.S.2d 265 (Fam. Ct. 1981) (holding that asylum state must defer to Connecticut exercise of continuing jurisdiction although child and custodial parent had been living in New York for more than six months); State *ex rel.* Cooper v. Hamilton, 688 S.W.2d 821 (Tenn. 1985) (holding that asylum state must enforce 1980 Indiana modification made after custodial parent and child moved to Tennessee); Rush v. Stansbury, 668 S.W.2d 690 (Tex. 1984) (holding that asylum state must enforce Tennessee modification made seven months after custodial father brought children to live with him in Texas); *In re* S.A.V., 798 S.W.2d 293 (Tex. Ct. App. 1990) (holding that asylum state may not modify decree six months after custodial parent left decree state); Lundell v. Clawson, 697 S.W.2d 836 (Tex. Ct. App. 1985) (holding that asylum state must enforce Minnesota modification made after custodial mother and child had moved to Texas with Minnesota court's permission); Arbogast v. Arbogast, 327 S.E.2d 675 (W. Va. 1984) (holding that asylum state must enforce Kansas modification made eight months after custodial parent and child left state).

380 *See, e.g.*, Mace v. Mace, 341 N.W.2d 307 (Neb. 1983) (asylum state refusing to enforce decree state's modification without analyzing effect of PKPA); Rosics v. Heath, 746 P.2d 1284 (Wyo. 1987) (same).

381 *See, e.g.*, Perez v. Perez, 561 A.2d 907, 911 & n.6 (Conn. 1989) (relying principally on UCCJA and noting that PKPA was modeled on UCCJA and contains similar language); Quenzer v. Quenzer, 653 P.2d 295, 301 (Wyo. 1982) (concluding, without analysis, that continuing jurisdiction was "not applicable" to a Texas custodial modification entered three years after custodial mother left Texas with child, although father had continuously remained a Texas resident), *cert. denied*, 460 U.S. 1041 (1983).

382 *See, e.g.*, State *ex rel.* Department of Human Services v. Avinger, 720 P.2d 290, 292 (N.M. 1986) (holding that New Mexico may conduct abuse and neglect hearing although custodial mother still resides in Texas because PKPA does not apply to such proceedings); Williams v. Knott, 690 S.W.2d 605, 608-09 (Tex. Ct. App. 1985) (holding that Texas may consider mother's petition to terminate father's parental rights although custody dispute between them is pending in Oklahoma because PKPA and UCCJA do not apply). *But see* State *ex rel.* Kasper v. Kasper, 792 P.2d 118, 118 (Utah

cases do rely on interpretations of the PKPA's language.[383] The PKPA sets forth three prerequisites for continuing jurisdiction: (1) the initial decree must have been made "consistently with the provisions of this section"; (2) the decree state's own jurisdictional requirements must "continue[ ] to be met"; and (3) the decree state must "remain the residence of the child or of any contestant."[384] Courts using the PKPA to repudiate another state's continuing jurisdiction usually employ interpretive strategies that find defects in the first two of these.

In re Thorensen[385] is a good example of the first interpretive strategy, that is, deciding that the foreign decree was not made "consistently with the provisions of this section." The Thorsensens lived in Florida and their child was born there. About two years later, the mother filed for a divorce in Florida; in December, 1979, a Florida court gave her permanent custody of the child. The parents later filed countercharges against one another in the Florida court; while that matter was pending, the mother moved out of state in violation of an order requiring her to obtain court permission. In response, the Florida court transferred the child's custody to a state agency. Nearly five years later, in 1985, the father located the mother and child in Washington. To assist him in bringing the child back to Florida, the Florida court gave the father custody. This order was entered without prior notice to the mother, although her whereabouts were known.

The Washington court not only refused to enforce the change of custody, it decided that any subsequent Florida orders, even if

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Ct. App. 1990) (holding that PKPA applies to neglect hearings and that Utah must defer to decree state's continuing jurisdiction).

383 *See, e.g., Ex parte* Blanton, 463 So. 2d 162 (Ala. 1985) (refusing to enforce Louisiana modification entered after custodial mother left state with children); Snow v. Snow, 369 N.W.2d 581 (Minn. Ct. App. 1985) (refusing to enforce South Dakota modification entered on father's petition filed after custodial mother left state with children); Serna v. Salazar, 651 P.2d 1292 (N.M. 1982) (refusing to enforce California modification entered on father's motion filed two years after custodial mother moved to New Mexico with children); Debra S. v. Roger S., 455 N.Y.S.2d 723 (Fam. Ct. 1982) (refusing to enforce California modification entered on mother's default, three years after custodial mother moved to New York with child); *In re* Thorensen, 730 P.2d 1380 (Wash. Ct. App. 1987) (refusing to enforce Florida modification entered after custodial mother left state with children).

384 PKPA § 8(a), 94 Stat. 3570 (codified at 28 U.S.C. § 1738A(d)).

385 730 P.2d 1380 (Wash. Ct. App. 1987).

properly-noticed, would not be entitled to full faith and credit.[386] Although Florida had continuously been the father's residence, the Washington court concluded that Florida's continuing jurisdiction had ended because its latest order was not "consistent" with the PKPA.[387] The court was apparently motivated to reach this result by its fear that Florida might not give proper weight to the mother's allegations of abuse, which the Washington court had found to be substantiated.[388]

Serna v. Salazar[389] is a good example of the second interpretive strategy, that is, determining that the decree state's jurisdictional requirements have not "continue[d] to be met."[390] Shortly after the couple's 1977 California divorce gave the mother custody, she moved with the child to New Mexico. In October, 1980, the father asked the California court to give him a month's summer visit with the child, which it did. In May, 1981, however, before the first such visit could take place, the mother asked a New Mexico court to modify the California order. She alleged that the father was a drug addict and an alcoholic. The New Mexico trial court dismissed the action in deference to California's continuing jurisdiction, but the New Mexico Supreme Court reversed. Relying on a California case, it held that California no longer had jurisdiction under its own law. Therefore, the supreme court reasoned, New Mexico could exercise jurisdiction as the child's new home state.[391] The fact that a California court had, seven months before, entered an order intended to take effect in the summer of 1981 was deemed of "no relevance."[392]

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386 *See id.* at 1385; *cf. supra* notes 371-72 and accompanying text (noting courts' tendency to refuse to enforce *ex parte* orders of which absent parent had inadequate notice).

387 *See* 730 P.2d at 1383-84.

388 *See id.* at 1382; *cf.* Snow v. Snow, 369 N.W.2d 581 (Minn. Ct. App. 1985) (deciding that decree state lost jurisdiction because its entry of *ex parte* change of custody violated both UCCJA and PKPA).

389 651 P.2d 1292 (N.M. 1982).

390 *See id.* at 1295 (quoting PKPA § 8(a), 94 Stat. 357 (codified at 28 U.S.C. § 1738A(d))); *see also* Pierce v. Pierce, 640 P.2d 899 (Mont. 1982) (remanding for factual inquiry into Kentucky's continuing jurisdiction although Kentucky had asserted, and was exercising, jurisdiction to modify); Debra S. v. Roger S., 455 N.Y.S.2d 723 (Fam. Ct. 1982) (refusing to enforce modification very recently entered in decree state).

391 651 P.2d at 1294-95.

392 *Id.* at 1295.

2. When May a Court, After an Independent Inquiry, Modify a Foreign Custody Order?

Like the UCCJA, the PKPA permits courts to modify even concededly valid foreign custody orders in two situations: (1) if "the other state no longer has jurisdiction,"[393] and (2) if the decree court has "declined to exercise" its jurisdiction.[394] The first provision, which has already been discussed,[395] gives rise to continual uncertainty over whether a decree court's modification will be enforced elsewhere. Moreover, even when a litigant persuades an asylum state to recognize the decree state's order, her victory may be pyrrhic.

Gordon v. Gordon[396] is a good example of this. After the Ohio divorce court gave custody to the mother, she moved with the child to Georgia. Later, when the Ohio court modified its order to give the father custody, he tried to enforce the modification in Georgia. He was successful on appeal—but the case was remanded for a hearing to determine whether Ohio still had jurisdiction.[397] If it did not, the appellate court indicated that Georgia might properly exercise jurisdiction over the case to restore custody to the mother.[398]

E.E.B. v. D.A.[399] is a good example of one strategy for interpreting away the "declined to exercise its jurisdiction" provision. In *E.E.B.*, the PKPA was no barrier to New Jersey's modification of a very recent Ohio decision. The court's conclusion that Ohio had declined to exercise its jurisdiction when it failed to hold a best interests hearing served to authorize modification under the PKPA precisely as it did under the UCCJA.[400]

This tendency of asylum courts to exercise jurisdiction when

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393 PKPA § 8(a), 94 Stat. 3571 (codified at 28 U.S.C. § 1738A(f)(2)); *cf.* UCCJA § 14(a), 9 U.L.A. pt. 1, at 292 ("it appears to a court of this State that the court which rendered the decree does not now have jurisdiction").

394 PKPA § 8(a), 94 Stat. 3571 (codified at 28 U.S.C. § 1738A(f)(2)); *cf.* UCCJA § 14(a)(1), 9 U.L.A. pt. 1, at 292.

395 *See supra* notes 373-92 and accompanying text (discussing "continuing jurisdiction" under PKPA).

396 363 S.E.2d 353 (Ga. Ct. App. 1987).

397 *Id.* at 355.

398 The Georgia court was critical of the Ohio modification, calling it "home cooking." *See id.*

399 446 A.2d 871 (N.J. 1982), *cert. denied*, 459 U.S. 1210, *reh'g denied*, 460 U.S. 1104 (1983).

400 *See supra* notes 274-92 and accompanying text (discussing holdings that decree court declined to exercise jurisdiction under UCCJA).

they fear the decree court may reach the wrong result seems not to have gone unnoticed by the state courts. Anticipating such intervention, decree courts have experimented with ways to retain power over departing or absent litigants. They sometimes issue orders explicitly "retaining jurisdiction" over a party who is or may be moving to another state. Asylum courts routinely disregard these orders,[401] as they do agreements between the parties providing for continuing jurisdiction in the decree court.[402] Decree courts also sometimes craft orders intended to coerce an out-of-state party into obeying their custody orders, with mixed results.[403]

Because the PKPA has not significantly reduced the UCCJA's indeterminacy, parents and their lawyers have searched for other ways to settle the jurisdictional question. Two relatively recent Supreme Court opinions arose in that context. They concern two strategies for coping with the inadequacies of the statutory

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401 *See, e.g.*, Snow v. Snow, 369 N.W.2d 581 (Minn. Ct. App. 1985) (disregarding South Dakota retention of jurisdiction by refusing to enforce its modification); *cf.* Rumbolo v. Phelps, 759 S.W.2d 894, 896 (Mo. Ct. App. 1988) (holding that if trial court order claiming "continuing jurisdiction" was meant to retain jurisdiction regardless of future events, it was error, but if it was meant only to assert a determination to exercise jurisdiction to extent allowed by law, order's correctness is not justiciable because it turns on future facts).

402 *See, e.g.* Olson v. Olson, 494 A.2d 737 (Md. Ct. App. 1985) (asylum court refusing to abide by parties' settlement agreement stipulation that custody would be determined by Rhode Island courts). Of course, a decree court's decision to *decline* to exercise continuing jurisdiction is always accepted. *See, e.g.*, Berry v. Berry, 466 So. 2d 138, 140 (Ala. Civ. App. 1985) (accepting decree state of North Carolina's determination that it lacked continuing jurisdiction). So, too, may be a party's admission that continuing jurisdiction has been lost. *See* Quenzer v. Quenzer, 653 P.2d 295 (Wyo. 1982) (asylum court relying in part on party's concession, in earlier Oregon custody action, that decree state of Texas had lost jurisdiction to modify when custodial mother and child moved away), *cert. denied*, 460 U.S. 1041 (1983).

403 *See, e.g.*, Kioukis v. Kioukis, 440 A.2d 894, 895, 899 (Conn. 1981) (error to require escrow of all further child support payments until mother complied with modified visitation order); Bullard v. Bullard, 647 P.2d 294 (Haw. Ct. App. 1982) (requiring father who had frustrated mother's visitation when he had custody to post $2,500 bond before being permitted visitation); Roberts v. Fuhr, 523 So. 2d 20, 23-24 (Miss. 1987) (*ne exeat* bond used to secure compliance with custody and visitation orders; bond forfeited when father retained child in Illinois instead of returning him to Mississippi for visit).

schemes—self-help and invoking the jurisdiction of the federal courts. The next section examines those cases.

V. The Supreme Court Cases

Two recent Supreme Court cases poignantly typify many other casualties of the PKPA's and UCCJA's indeterminacies.[404] Taken together, these cases also cut off any reasonable hope that the federal courts will try to impose uniform interpretations on either the UCCJA or the PKPA.[405]

A. Automatic Interstate Rendition for Parental "Kidnaping": California v. Superior Court (Smolin)

For the Supreme Court, *California v. Superior Court (Smolin)*[406] was an extradition case, plain and simple. Richard Smolin and his father, Gerard Smolin, had done something in Louisiana that Louisiana claimed was a crime. Let them, therefore, be tried in Louisiana. The Smolins argued that they had merely been enforcing a valid California custody judgment when they took Richard's children from a school bus stop in Louisiana and brought them back to California; as legal custodians, they argued, they could not be guilty of kidnaping. Fine, responded the Supreme Court: tell that story in Louisiana. Whether or not the Smolins' arguments were correct—and the Court was willing to grant that they were—"under the Extradition Act, it [was] for the Louisiana courts to do justice in this case, not the California courts."[407]

The Smolins had argued in the Supreme Court that there was only one way to resolve whether Richard had legal custody of his children when he took them back to California: their way. Richard's 1981 California custody order was valid because California clearly had "continuing jurisdiction" under the UCCJA and the

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404 *See* Thompson v. Thompson, 484 U.S. 174 (1988); California v. Superior Court (Smolin), 482 U.S. 400 (1987); *infra* text accompanying notes 405-29.

405 Certiorari remains a theoretical possibility for litigants claiming that either the PKPA or the UCCJA is "repugnant to the Constitution, treaties, or laws of the United States . . . ." 28 U.S.C. § 1257. The Court has shown no disposition to get into such matters, however.

406 482 U.S. 400 (1987).

407 *Id.* at 412 (citing Extradition Act, 18 U.S.C. § 3182).

PKPA.[408] The prosecution's contention that the 1981 Texas judgment giving the children's mother custody was valid was "quite simply, dead wrong."[409] The Smolins had wanted to convince the Supreme Court, as they had convinced the California court,[410] that their custody claim was so strong that, in effect, Louisiana had not charged them "substantially" with a crime at all.

The Smolins' strategy thus required them to obscure what was, perhaps, their most compelling ground for relief. In truth, their California judgment was plainly valid—in California. Elsewhere, it was open to question. There is some evidence that the Smolins themselves understood this: they used self-help, after all, instead of attempting to litigate the issues in Louisiana. But on another level, they seem to have been lured by the UCCJA's and the PKPA's appearance of uniformity into assuming that a validly rendered California judgment would be enforced elsewhere if only the statutes were "properly applied." This assumption plainly underlay their claim, in the Supreme Court, that the father was "really" the legal custodian of his children.

As we have seen, however, under the PKPA and the UCCJA, each state has the opportunity, perhaps even the duty, to reassess the decree state's jurisdiction before enforcing a foreign decree. Louisiana might well prefer the mother's 1981 Texas custody decree over the father's 1981 California decree. To see how this might happen, we must examine the facts carefully.

When Richard and Judith Smolin were divorced in 1978, California was indisputably the children's home state.[411] The California court gave Judith custody of their two small children subject to Richard's rights of "reasonable visitation." Judith married James Pope in August, 1979. In November, 1979, the Popes moved to Oregon, taking the children with them, and neglecting

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408 Brief of Real Parties in Interest at 34-35, California v. Superior Court (Smolin), 482 U.S. 400 (1987) (No. 86-381).

409 *Id.* at 34 n.16.

410 *See* People v. Superior Court (Smolin), 716 P.2d 991 (Cal. 1986) (en banc), *rev'd sub nom.* California v. Superior Court (Smolin), 482 U.S. 400 (1987).

411 They had married, lived together, and had their children, in California. Joint Appendix at 61, California v. Superior Court (Smolin), 482 U.S. 400 (1987) (No. 86-381) (Smolin v. Smolin, No. E 001135 (unpublished) (Cal. Ct. App. Feb. 25, 1986)) [hereafter Joint Appendix]; *see* UCCJA § 3(a)(1), 9 U.L.A. pt. 1, at 143.

first to tell Richard that they were going. Two months later, in January, 1980, the Popes moved with the children to Texas.[412]

In September, 1980, after she and the children had been in Texas for eight months, Judith began a proceeding in Texas seeking recognition and enforcement of the California judgment granting her sole custody. Richard was served, but did not appear. Instead, in October, 1980, he filed an action in California seeking joint custody by modification of the 1978 order. Judith was served, but she did not appear. Apparently, neither Judith nor Richard informed either the California or the Texas court about the proceedings pending in the other state.[413]

The California case proceeded more expeditiously: Richard was made the children's joint custodian on October 27, 1980. Judith did nothing to comply with the new California order, apparently on the advice of counsel.[414] In January, 1981, Richard therefore asked the California court to find her in contempt and grant him sole custody. On February 27, 1981, to punish Judith for disobeying its earlier visitation orders, the California court gave Richard sole custody of his children, and terminated his duty to pay child support.[415]

Meanwhile, on February 13, 1981, the Texas court issued a decree recognizing and enforcing the 1978 California decree that had given Judith sole custody of the children. Relying on the Texas decree, Judith did not comply with the most recent California decree. Nor did Richard seek to enforce it; instead, he merely stopped paying child support.[416]

In March, 1981, the Popes moved to Louisiana with the children, again without telling Richard. He did not learn their exact whereabouts until October, 1982. After that, Richard spoke with his children by telephone and sent them gifts, but he did not make any serious effort to enforce the 1981 California decree giving him sole custody until after February, 1984. That February, the Popes served Richard with notice of their Louisiana proceeding to have the children adopted by James Pope. In response, Richard and his father went to Louisiana, took the children from a

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412 Joint Appendix, *supra* note 411, at 62.

413 *Id.* at 63-64.

414 Her Texas attorney told Richard's attorney that, in his opinion, the 1980 California joint custody order was not enforceable in Texas because California lacked jurisdiction to make such an order. *Id.*

415 *Id.* at 64-65, 96-98.

416 *Id.* at 64-65.

school bus stop, and brought them back to California.[417]

Richard Smolin's claim to be the legal custodian of his children when he removed them from Louisiana depended on the validity of the October, 1980, California order giving him joint custody.[418] From the California courts' perspective, California could change custody because it still had "continuing jurisdiction." A Louisiana court, however, might well have taken a different view. It could have determined that California should have dismissed Richard's October, 1980, petition for modification under UCCJA section 6 because Judith's request to enforce the original California custody decree was already pending in Texas.[419] If California's exercise of modification jurisdiction was therefore not "substantially in accordance with this Act," under UCCJA section 13, no state need recognize and enforce the modified order.[420] Nor would the modification be entitled to full faith and credit under the PKPA, because California had lacked jurisdiction under its own law.[421] Thus, the Smolins' guilt or innocence might well turn on whether California's view of its own order would be accepted or not.

As we have seen, decree states often assert continuing jurisdiction although the children are living in an asylum state that believes it has thereby gained home state jurisdiction. The Supreme Court's decision in *Smolin* means that self-help is never safe, even for a parent armed with a facially valid custody decree. Whether or not any state's assertion of child custody jurisdiction is likely to be respected elsewhere, this case makes it determinative of rights within that state, and a possible basis for criminal charges.

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417 *Id.* at 65-66.

418 After Richard brought his children back to California, the February, 1981, order giving him sole custody was held to have been punitive and unenforceable, because the court had entered it solely to punish Judith Pope and without hearing any evidence about the children's needs. *Id.* at 64-65, 96-98.

419 *See* UCCJA § 6, 9 U.L.A. pt. 1, at 219-20. Arguably, a proceeding for recognition and enforcement of a foreign order under § 13 is a "proceeding concerning the custody of the child[ren]" under § 6. *See* UCCJA § 13, 9 U.L.A. pt. 1, at 276.

420 9 U.L.A. pt. 1, at 276; *see supra* text accompanying notes 223-30.

421 *See* PKPA § 8(a), 94 Stat. 3570-71 (codified at 28 U.S.C. § 1738A(c)(1), (d)); *supra* text accompanying notes 389-92.

B. Federal Courts' Lack of Jurisdiction to Enforce the PKPA: Thompson v. Thompson

The facts of *Thompson v. Thompson*[422] were relatively uncomplicated. In December, 1980, a California divorce court awarded Susan Thompson custody of her son pending a full investigation and hearing, to facilitate her move to Louisiana. Three months after the move, she asked the Louisiana court to enforce this order, and it did so in April, 1981. Susan had alleged that David Thompson had frightened and endangered their child with his hostile and erratic behavior; the Louisiana court was apparently exercising emergency jurisdiction.[423] Meanwhile, in California the investigation continued. In June, 1981, the California court awarded David full custody of the child. According to David, the California investigation covered the same allegations made in Louisiana and found them "meritless."[424]

Faced with two recent, and conflicting, custody decisions, David could have asked the Louisiana court either to enforce California's decision or to reassess its own jurisdiction and dismiss its case. But he thought this would waste time and money, because the California judge had already, unsuccessfully, made the same arguments and requests by telephone.[425] He therefore promptly asked the local federal district court to enjoin enforcement of the Louisiana decree.[426] The district court's refusal was affirmed on appeal.[427] The Supreme Court granted certiorari and closed the doors of the federal courts to these cases.

In *Thompson*, the Supreme Court held that the PKPA does not imply a private right of action in federal court to determine the validity of conflicting state custody decrees. The Court rejected the pleas of the petitioner and amici that, unless state court decisions could be appealed to federal court, the state courts would not give the PKPA either consistent interpretation or unbiased

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422 484 U.S. 174 (1988).

423 *See* PKPA § 8(a), 94 Stat. 3570 (codified at 28 U.S.C. § 1738A(c)(2)(C)(ii)) (emergency jurisdiction); UCCJA § 3(a)(3)(ii), 9 U.L.A. pt. 1, at 144 (same); Joint Appendix, *supra* note 411, at 24-28 (Louisiana pleadings).

424 Brief for Petitioner at 18, Thompson v. Thompson, 484 U.S. 174 (1988) (No. 86-964).

425 *Id.* at 18-19.

426 484 U.S. at 178.

427 Thompson v. Thompson, 798 F.2d 1547 (9th Cir. 1986), *aff'd*, 484 U.S. 174 (1988).

application.[428] Relying on Congress's refusal to amend the diversity statute and other legislative history,[429] the Court concluded that Congress had not intended to institute such extraordinary federal supervision of state courts.[430]

The parties in both *Thompson* and *Smolin* seemed to share with the Court an unspoken assumption that there are "correct" statutory answers for child custody jurisdiction disputes; they differed only as to which court should impose the answer. Yet, as we have seen, the statutes are indeterminate at almost every pressure point, susceptible of many equally valid interpretations. At least since its decision in *May v. Anderson*,[431] the Supreme Court has been blamed for creating or exacerbating the problem of the interstate child, although in fact its role there was merely to clarify a dilemma inherent in our federalism. Perhaps these two decisions should be seen in that light as well. They can only be accused of making things worse if "correct" interpretations of the UCCJA and the PKPA are possible. Given the actual state of affairs, perhaps all they have done is to clarify our view of a disaster the Court had no part in creating and no power to remedy.

VI. Critique of the Reforms and Two Proposals for Further Reform

A. Critique

Although the UCCJA and the PKPA were developed after careful study and wide consultation, and were adopted with great optimism, they have not succeeded in abolishing jurisdictional competition in interstate custody cases. Indeed, they have been

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428 *Compare* Petition for Writ of Certiorari at 9-11, Thompson v. Thompson, 484 U.S. 174 (1988) (No. 86-964); Brief for the People of the States of California, Hawaii, Nevada, and Texas, et al. as Amici Curiae at 14, Thompson v. Thompson, 484 U.S. 174 (1988) (No. 86-964); Motion for Leave to File Brief Amici Curiae and Brief of Amici Curiae Sacramento County, California, et al., In Support of Petitioner at 7-10, Thompson v. Thompson, 484 U.S. 174 (1988) (No. 86-964); *and* Motion for Leave to File Brief Amici Curiae and Brief of Women's Legal Defense Fund, et al., In Support of the Petitioner at 8-11, Thompson v. Thompson, 484 U.S. 174 (1988) (No. 86-964) *with Thompson*, 484 U.S. at 187 (declining to indulge a "presumption" that "the States are either unable or unwilling to enforce the provisions of the [PKPA]").

429 *See* 484 U.S. at 183-87; *supra* notes 337-39.

430 484 U.S. at 186.

431 345 U.S. 528 (1953).

spectacularly unsuccessful, and have exacerbated the problem of the interstate child instead of resolving it. These statutes are so complicated that litigating any jurisdictional question takes an inordinate amount of time. In the worst cases, a recalcitrant party in possession of the children can use the delay to find yet another forum; in such a case, the passage of time alone will have strengthened her case and weakened her opponent's.[432] Even in the best cases the delay prolongs the uncertainty, and increases the expense, of litigation.[433] Before these reforms, at least, courts were able to resolve jurisdictional issues in custody cases with relative promptness.

These delays might be seen as the deplorable but necessary cost of instituting a new system. According to this view, once the appellate courts had settled a few disputed issues, we could expect the delays to diminish sharply. While this might be a valid way of looking at the situation if the statutes produced predictable and certain answers to jurisdictional issues, sadly they do not.

Putting aside their rationales for the moment, and looking only at the pattern made by their results, the cases under the UCCJA and the PKPA are remarkably similar to the cases that preceded the Acts. They display the same patterns Professor Ehrenzweig found in the 1950s.[434] Courts today seldom enforce foreign custody orders unless, after independently inquiring into the facts, they find no material change of circumstances. Courts still modify foreign orders if they think that the court that made the award lacked sufficient connection with the child to do so or that there has been an intervening change of circumstances. Courts still enforce foreign orders against a party who has acted "wrong-

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[432] *Compare* Nehra v. Uhlar, 372 N.E.2d 4, 8 (N.Y. 1977) (enforcing Michigan order granting custody to father although mother and children had been away for 4½ years, because she had abducted them) *with* Nehra v. Uhlar, 402 A.2d 264 (N.J. Super. Ct. App. Div.) (requiring best interests hearing because children had been with mother for most of their lives, although both Michigan and New York had awarded father custody and mother had not complied with either decree), *cert. denied*, 408 A.2d 807 (N.J. 1979).

[433] *See, e.g.*, Davis v. Davis, 687 S.W.2d 843 (Ark. 1985) (eighteen months spent on jurisdiction without reaching merits); *In re* B.B.R., 566 A.2d 1032 (D.C. 1989) (four years of litigation); Archambault v. Archambault, 555 N.E.2d 201 (Mass. 1990) (eight years of litigation).

[434] *See supra* notes 72-85 and accompanying text (discussing Ehrenzweig's observations).

fully" (as they define wrongfulness, rather than as UCCJA section 8 defines it), unless to do so would harm the child. Even then, in order to decide whether or not the child would be harmed, they inquire into the merits of the case. Instead of transforming the courts' practice, these statutes have transformed only the discourse used to conduct and explain the practice, leaving the underlying dynamics substantially unchanged.

Many courts use the interpretive strategies discussed above;[435] many others (perhaps baffled by the UCCJA's complexity) achieve like results with less attention to the niceties of statutory interpretation.[436] Certainly, not every interstate case is characterized by such use of the UCCJA. In many instances, courts use the UCCJA as its proponents hoped they would use it: to assure that the court that has the best access to relevant evidence resolves custody matters, and to discourage parties from using the courts of one state to trump the courts of another. Even in such cases, however, courts generally defer to foreign decrees only after inquiring into the case's merits. For this reason, the interpretive strategies discussed above are not aberrations; it would be a mistake to discount them as "errors" in interpreting the UCCJA. The statute lends itself to such interpretation, as the Oregon Supreme Court explained,[437] because it balances the rules and principles constraining jurisdiction with others expanding it if "necessary" to the "best interests" of a child.

If the reforms have not succeeded, it is worth asking why not. One possible answer is that the statutes defectively execute a basically sound plan. There is some evidence for this view. The UCCJA embeds the highly indeterminate, fact-intensive, "best interests of the child" standard in every jurisdictional determination and in the rules governing forum non conveniens and clean hands.[438] This virtually ensures that in every interstate custody

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435 *See supra* part IIIB.

436 *See, e.g.*, Peery v. Peery, 453 So. 2d 635 (La. 1984) (refusing to enforce California order in case that was pending when Louisiana proceeding commenced, but not discussing §§ 6 or 13, and remanding for new factual hearing but requiring consideration of California record).

437 *See In re* Ross, 630 P.2d 353 (Or. 1981) (in banc); *In re* Settle, 556 P.2d 962 (Or. 1976), *overruled by In re* Ross, 630 P.2d 353 (Or. 1981) (in banc).

438 UCCJA §§ 3(a)(2) ("A court of this State . . . has jurisdiction to make a child custody determination . . . if (2) it is in the best interest of the child that a court of this State assume jurisdiction . . . ."), 6 (inquiry as to whether the court of another state was "exercising jurisdiction substantially in conformity with this Act" can, by considering § 3(a)(2), become a best

matter each court will consider the children's best interests—that is, the merits of the case—in deciding whether to exercise jurisdiction or to defer to another court's decision-making. Whenever the forum, after examining the merits, comes to a conclusion that differs from the decree court's decision, it is bound to be strongly tempted to remedy what it perceives as a wrong, by asserting and exercising jurisdiction.

The PKPA's differences from the UCCJA—its privileging of home state jurisdiction and its adoption of continuing jurisdiction—might seem to limit the forum's threshold inquiry. In practice, however, the PKPA makes little difference. It requires the forum to assess the decree state's jurisdiction in order to decide whether a child custody decree is entitled to enforcement.[439] Moreover, it requires the forum to determine both its own jurisdiction and the decree state's jurisdiction in order to decide whether it may modify the decree.[440] Each of these inquiries sends the forum to the UCCJA and thereby requires one or more best-interests determinations.

If the UCCJA and the PKPA are failing because of drafting mistakes, it should be possible to write a statute that would succeed. If, however, these statutes are failing because the problem is insoluble, the only sensible response is radical simplification, to eliminate unproductive delays and transaction costs. The following two sections explore these possibilities.

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interests inquiry), 7(c) ("In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction."); 8(b) ("Unless required in the interest of the child, the court shall not exercise its jurisdiction . . . ."), 12 (inquiry as to whether a decree was "rendered by a court . . . which had jurisdiction under section 3" can, by considering § 3(a)(2), become a best interests inquiry), 13 (inquiry as to whether the court of another state "had assumed jurisdiction under statutory provisions substantially in accordance with this Act" or "was made under factual circumstances meeting the jurisdictional standards of the Act" can, by considering § 3(a)(2), become a best interests inquiry), 14(a) (inquiry as to whether the court of another state "does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act" can, by considering § 3(a)(2), become a best interests inquiry), 9 U.L.A. pt. 1, at 143, 219-20, 233, 251, 274, 276, 292.

439 *See* PKPA § 8(a), 94 Stat. 3570-71 (codified at 28 U.S.C. § 1738A(c)(1), (d)).

440 *See* PKPA § 8(a), 94 Stat. 3571 (codified at 28 U.S.C. § 1738A(f)).

B. First Reform Proposal

To be effective, any legislative solution must control the core of the problem of the interstate child. To do so, it must centralize decision-making, limit the free movement of parents and children, substitute a rule for the best interests ideal, or use some combination of these strategies. My preference is for centralizing decision-making, because of the genuine risks to civil liberties inherent in other approaches.

While it would certainly be easier to persuade Congress to amend the PKPA than to convince fifty state legislatures to adopt uniform revisions of the UCCJA, the dynamics of the problem and our experience under the existing statutes together suggest that the easier course could not possibly be effective. Congress lacks the power to limit state jurisdiction directly; all it can do is require that full faith and credit be given to specified judgments. Any federal statute that refers to state law to specify which judgments were entitled to full faith and credit would import the UCCJA's weaknesses, just as the present PKPA does. Moreover, even a new statute establishing entirely independent criteria for full faith and credit would not solve the problem. At present, the states are enforcing too few foreign custody decrees, not too many. Tightening the criteria for enforcement could only exacerbate the problem. Meanwhile, the UCCJA would continue to empower the states to enter nonconforming custody orders that would be valid where made and that perhaps would receive comity elsewhere. Revising the PKPA might alter the results in individual cases, but it could not change the overall pattern described by Ehrenzweig.[441]

My proposal is therefore that every state enact a Revised Uniform Child Custody Jurisdiction Act (RUCCJA).[442] This proposal adapts Ehrenzweig's guardianship court idea, because I believe it is more important to be able to tell unambiguously which court has jurisdiction than to search for the "best" court. Nearly twenty years' experience under the UCCJA has taught that no matter how good a decree court's access to evidence, an asylum court that disagrees with the result will still relitigate the dispositive issues. To counter this tendency, jurisdiction to make a custody

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441 *See* Ehrenzweig, *Interstate Recognition*, *supra* note 2, at 349-57; *supra* notes 72-85 and accompanying text.

442 The complete text of the proposed RUCCJA appears in the Appendix.

decision must not be in dispute and custody decisions must be clearly entitled to enforcement outside the state in which they were made. Because a state without power over either the child or the losing party is unable directly to enforce its own custody decision, enforcement of the decision by other courts must not appear discretionary.

Let one court, in the child's home state, have the exclusive power to make an initial decree. Let the decree court then retain exclusive power to modify its decision for any period it chooses, but no longer than five years. After that time, the decree court may modify its earlier decision only if it remains the child's home state. Otherwise, the new home state gains exclusive power to modify the custody determination. In genuine emergencies, any court where the child is found may enter a temporary order, to stabilize the situation. However, to prevent the exercise of such emergency jurisdiction from expanding into an exercise of broader jurisdiction, a temporary order should expire swiftly and not be renewable. The goal is for the temporary order to remain in effect no longer than is necessary for the child's home state or the state with continuing jurisdiction to grant supervening relief.

This proposal could be implemented by repealing the UCCJA's statements of principle supporting flexibility,[443] its definitions,[444] its jurisdictional provisions,[445] and its provisions codifying forum non conveniens[446] and clean hands.[447] The other sections of the statute should be retained. For clarity and consistency, the PKPA's definitions[448] should be substituted for the UCCJA defini-

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443 UCCJA § 1(a)(2)-(3), (6), 9 U.L.A. pt. 1, at 124.

444 UCCJA § 2, 9 U.L.A. pt. 1, at 133.

445 UCCJA §§ 3, 6, 13, 14, 9 U.L.A. pt. 1, at 143-44, 219-20, 276, 292.

446 UCCJA § 7, 9 U.L.A. pt. 1, at 233-34.

447 UCCJA § 8, 9 U.L.A. pt. 1, at 251.

448 PKPA § 8(a) provides:

> As used in this section, the term—
>
> (1) "child" means a person under the age of eighteen;
>
> (2) "contestant" means a person, including a parent, who claims a right to custody or visitation of a child;
>
> (3) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;
>
> (4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the

tions, and a definition of "initial custody determination" should be added.[449] New jurisdictional provisions giving exclusive jurisdiction to one single state at a time, and commanding enforcement of that state's decisions, should be added.[450] The repealed statements of principle should not be revised, because to do so would undermine the revised statute's new bias toward certainty.

State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child; and

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

94 Stat. 3569-70 (codified at 28 U.S.C. § 1738A(b)).

[449] The following provision should be added to the end of 28 U.S.C. § 1738A(b) and enacted as part of the RUCCJA: "(9) 'initial custody determination' means the first custody determination made with respect to this child by any state."

[450] The following provision should be substituted for UCCJA § 3:

§ 3. [Jurisdiction]

(a) An initial child custody determination may be made by a court in this state only if this state is the home state of the child on the date of the commencement of the proceeding or had been the child's home state within six months before that date.

(b) Every custody determination shall specify how long the court's jurisdiction over the child shall last. A court may specify any period of time up to and including five years. Except as provided in section 3(e), if a custody determination of this or any state fails to specify how long the court's jurisdiction over the child shall last, the court's jurisdiction shall be deemed to expire one year after the date the child custody determination was entered.

(c) (1) During the period specified in section 3(b), a court in this state may modify any custody determination made in this state.

(2) A court in this state may modify any other custody determination if this state is the child's home state on the date of the commencement of the modification proceeding or had been the child's home state within six months before the

Nor should sections 7 and 8 be rewritten rather than repealed; courts are fully capable of assessing and implementing equitable principles without legislative guidance. This proposal could be implemented without revising the PKPA, or that statute could be amended to conform.[451]

If it were to be enacted in every state, this proposed RUCCJA would diminish jurisdictional competition sharply, because it unambiguously selects one court at a time as the exclusive forum for each custody dispute. Because it achieves this by elevating Ratner's certainty goals over his flexibility goals, however, I fear not even a single state will enact it. Moreover, even if it were adopted, I predict that sometimes courts would evade it.

The UCCJA took its concern for justice in the individual case from existing custody law, where the concern is a fundamental precept. Neither courts nor legislatures seem at all disposed to give it up. In this they may reflect society's values. Many professionals have been convinced by Goldstein, Freud, and Solnit that since decision-makers can make at best rough judgments about what individual children need and how to provide it, the better part of wisdom is to make custody decisions swiftly and then stick by them.[452] Yet even those who agree in principle find it hard to

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commencement of the modification proceeding, provided that the period specified in section 3(b) has expired.

(d) Except as provided in section 3(c), a court in this state shall enforce, and may not modify, any custody determination that was made by a court of this or any state during the period that court retained jurisdiction according to the provisions of section 3(b).

(e) Notwithstanding the foregoing, a court of this state may make a temporary custody order with respect to a child who is physically present within this state and either has been abandoned or needs emergency protection from actual mistreatment or abuse. Such a temporary order may remain in effect for no more than six weeks and may not be renewed under any circumstances. A court's jurisdiction to make or modify such a temporary custody order expires with the order.

[451] A conforming amendment would repeal PKPA § 8(a), 94 Stat. 3570 (codified at 28 U.S.C. § 1738A(c)(2)(B)-(D)), and revise PKPA § 8(a), 94 Stat. 3570-71 (codified at 28 U.S.C. § 1738A(d)) to read as follows (revision in italics): "The jurisdiction of a court of a state that has made a child custody determination consistently with the provisions of this section continues *for one year after entry of such determination, or for such longer period (up to and including five years) as the determination itself specifies.*"

[452] GOLDSTEIN, FREUD & SOLNIT, *supra* note 45, at 99-101.

put these precepts into practice when they believe an earlier custody decision was wrong. Ordinary parents and citizens find the advice even harder to accept. Although this proposed RUCCJA does not close the doors of the courthouse entirely—it merely limits custody litigants to one forum at a time—its enactment would sometimes require a local child to be returned to a foreign custodian against the advice of all local experts. I wonder if we can reasonably expect our state legislatures to command this result. Even if they were to do so, I wonder if we could reasonably expect our courts to obey.

C. Second Reform Proposal

To say that we cannot expect our courts and legislatures to accept my proposal, or any proposal that similarly chooses jurisdictional certainty over flexibility, is to admit that we cannot solve the problem of the interstate child without sacrificing values equally important to us. If that is so, criticizing the UCCJA and the PKPA for preserving the very difficulties they were intended to cure would be foolish. Such criticism would lose sight of the dynamic underlying both the courts' interpretations of these statutes and their pre-reform jurisprudence. Any federal system that commits custody decisions to sovereign states, that permits parents and children to move freely among the states, and that decides custody according to indeterminate precepts and then permits modification of initial decisions according to equally indeterminate standards, will inevitably produce some version of the problem of the interstate child.[453] The problem of the interstate child is not resolvable by the UCCJA, the PKPA, the proposed RUCCJA, or by any other measures, unless our society is willing to choose certainty over flexibility, and to absorb the attendant costs.

If it is not, we would do well to repeal both the UCCJA and the PKPA. Repeal would permit the courts to go directly to their search for justice in the individual case without wasting time interpreting these complicated statutes. If it feels unseemly to have no statutory rule at all, we could ask Congress to enact Brainerd Currie's proposal that "no judgment shall preclude the courts of a state having legitimate interest in the matter from making whatever custodial decree is required, in their judgment

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[453] *See supra* part IA.

and discretion, for the welfare of the child."[454] That would at least give the parties fair warning of the shoals ahead.

CONCLUSION

With hindsight it seems clear that the UCCJA should never have been expected to guide courts to predictable and consistent solutions of interstate custody disputes. Contrary to its proponents' claims, the UCCJA did not choose certainty over flexibility; indeed, by embracing both it ensured that flexibility would prevail. Choosing certainty would require courts to close their doors to custody disputes concerning some children with substantial connections to the forums' own locale, and to do so regularly, systematically, and in the face of allegations that the children's well-being was thereby endangered. The high value we place on protecting children ensures that our courts have never voluntarily done this, and that they might not even if they were unambiguously commanded to do so. If our society lacks the resolve to make this command, or to carry it out, then the "problem of the interstate child" was misnamed. It should have been called "the tragedy[455] of the interstate child." If we can understand a problem but cannot solve it without making matters worse, all that is left is pity and terror.

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454 Currie, *supra* note 116, at 115.

455 *See* MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS 25 (1986).

APPENDIX

PROPOSED REVISED UNIFORM CHILD CUSTODY JURISDICTION ACT
(Proposed Revisions in Italics)

§ 1. [Purposes of Act; Construction of Provisions]

(a) The general purposes of this Act 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) [*repealed*];

(3) [*repealed*];

(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;

(6) [*repealed*];

(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.

(b) This Act shall be construed to promote the general purposes stated in this section.

§ 2. [Definitions]

As used in this Act:

(a) "child" means a person under the age of eighteen;

(b) "contestant" means a person, including a parent, who claims a right to custody or visitation of a child;

(c) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

(d) "home state" means the state in which, immediately preceding the time involved, the child lived with his or her parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the state in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(e) "modification" and "modify" refer to a custody determination which

modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

(f) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(g) "physical custody" means actual possession and control of a child;

(h) "state" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and

(i) "initial custody determination" means the first custody determination made with respect to this child by any state.

§ 3. [Jurisdiction]

(a) An initial child custody determination may be made by a court in this state only if this state is the home state of the child on the date of the commencement of the proceeding or had been the child's home state within six months before that date.

(b) Every custody determination shall specify how long the court's jurisdiction over the child shall last. A court may specify any period of time up to and including five years. Except as provided in section 3(e), if a custody determination of this or any state fails to specify how long the court's jurisdiction over the child shall last, the court's jurisdiction shall be deemed to expire one year after the date the child custody determination was entered.

(c) (1) During the period specified in section 3(b), a court in this state may modify any custody determination made in this state.

(2) A court in this state may modify any other custody determination if this state is the child's home state on the date of the commencement of the modification proceeding or had been the child's home state within six months before the commencement of the modification proceeding, provided that the period specified in section 3(b) has expired.

(d) Except as provided in section 3(c), a court in this state shall enforce, and may not modify, any custody determination that was made by a court of this or any state during the period that court retained jurisdiction according to the provisions of section 3(b).

(e) Notwithstanding the foregoing, a court of this state may make a temporary custody order with respect to a child who is physically present within this state and either has been abandoned or needs emergency protection from actual mistreatment or abuse. Such a temporary order may remain in effect for no more than six weeks and may not be renewed under any circumstances. A court's jurisdiction to make or modify such a temporary custody order expires with the order.

§ 4. [Notice and Opportunity to be Heard]

Before making a decree under this Act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this state, notice and opportunity to be heard shall be given pursuant to section 5.

§ 5. [Notice to Persons Outside this State; Submission to Jurisdiction]

(a) Notice required for the exercise of jurisdiction over a person outside this state shall be given in a manner reasonably calculated to give actual notice, and may be:

(1) by personal delivery outside this state in the manner prescribed for service of process within this state;

(2) in the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;

(3) by any form of mail addressed to the person to be served and requesting a receipt; or

(4) as directed by the court [including publication, if other means of notification are ineffective];

(b) Notice under this section shall be served, mailed, or delivered, [or last published] at least [10, 20] days before any hearing in this state.

(c) Proof of service outside this state may be made by affidavit of the individual who made the service, or in the manner prescribed by the law of this state, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.

(d) Notice is not required if a person submits to the jurisdiction of the court.

§ 6. [Simultaneous Proceedings in Other States] [*Repealed; see section 3.*]

§ 7. [Inconvenient Forum] [*Repealed.*]

§ 8. [Jurisdiction Declined by Reason of Conduct] [*Repealed.*]

§ 9. [Information under Oath to be Submitted to the Court]

(a) Every party in a custody proceeding in his *or her* first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last 5 years, and the names and pres-

ent addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath whether:

(1) he *or she* has participated (as a party, witness, or in any other capacity) in any other litigation concerning the custody of the same child in this or any other state;

(2) he *or she* has information of any custody proceeding concerning the child pending in a court of this or any other state; and

(3) he *or she* knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

(b) If the declaration as to any of the above items is in the affirmative the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case.

(c) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in this or any other state of which he *or she* obtained information during this proceeding.

§ 10. [Additional Parties]

If the court learns from information furnished by the parties pursuant to section 9 or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order that person to be joined as a party and to be duly notified of the pendency of the proceeding and of his *or her* joinder as a party. If the person joined as a party is outside this state he *or she* shall be served with process or otherwise notified in accordance with section 5.

§ 11. [Appearance of Parties and the Child]

[(a) The court may order any party to the proceeding who is in this state to appear personally before the court. If that party has physical custody of the child the court may order that he *or she* appear personally with the child.]

(b) If a party to the proceeding whose presence is desired by the court is outside this state with or without the child the court may order that the notice given under section 5 include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party.

(c) If a party to the proceeding who is outside this state is directed to appear under subsection (b) or desires to appear personally before the court with or without the child, the court may require another party to pay to the clerk of the court travel and other necessary expenses of the party so appearing and of the child if this is just and proper under the circumstances.

§ 12. [Binding Force and Res Judicata Effect of Custody Decree]

A custody decree rendered by a court of this state which had jurisdiction under section 3 binds all parties who have been served in this state or notified in accordance with section 5 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this Act.

§ 13. [Recognition of Out-of-State Custody Decrees] [*Repealed; see section 3.*]

§ 14. [Modification of Custody Decree of Another State] [*Repealed; see section 3.*]

§ 15. [Filing and Enforcement of Custody Decree of Another State]

(a) A certified copy of a custody decree of another state may be filed in the office of the clerk of any [District Court, Family Court] of this state. The clerk shall treat the decree in the same manner as a custody decree of the [District Court, Family Court] of this state. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this state.

(b) A person violating a custody decree of another state which makes it necessary to enforce the decree in this state may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or his *or her* witnesses.

§ 16. [Registry of Out-of-State Custody Decrees and Proceedings]

The clerk of each [District Court, Family Court] shall maintain a registry in which he *or she* shall enter the following:

(1) certified copies of custody decrees of other states received for filing;

(2) communications as to the pendency of custody proceedings in other states;

(3) communications concerning a finding of inconvenient forum by a court of another state; and

(4) other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this state or the disposition to be made by it in a custody proceeding.

§ 17. [Certified Copies of Custody Decree]

The Clerk of the [District Court, Family Court] of this state, at the request of the court of another state or at the request of any person who is affected by or has a legitimate interest in a custody decree, shall certify and forward a copy of the decree to that court or person.

§ 18. [Taking Testimony in Another State]

In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses, including parties and the child, by deposition or otherwise, in another state. The court on its own motion may direct that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony shall be taken.

§ 19. [Hearings and Studies in Another State; Orders to Appear]

(a) A court of this state may request the appropriate court of another state to hold a hearing to adduce evidence, to order a party to produce or give evidence under other procedures of that state, or to have social studies made with respect to the custody of a child involved in proceedings pending in the court of this state; and to forward to the court of this state certified copies of the transcript of the record of the hearing, the evidence otherwise adduced, or any social studies prepared in compliance with the request. The cost of the services may be assessed against the parties or, if necessary, ordered paid by the [county, state].

(b) A court of this state may request the appropriate court of another state to order a party to custody proceedings pending in the court of this state to appear in the proceedings, and if that party has physical custody of the child, to appear with the child. The request may state that travel and other necessary expenses of the party and of the child whose appearance is desired will be assessed against another party or will otherwise be paid.

§ 20. [Assistance to Courts of Other States]

(a) Upon request of the court of another state the courts of this state which are competent to hear custody matters may order a person in this state to appear at a hearing to adduce evidence or to produce or give evidence under other procedures available in this state [or may order social studies to be made for use in a custody proceeding in another state]. A certified copy of the transcript of the record of the hearing or the evidence otherwise adduced [and any social studies prepared] shall be forwarded by the clerk of the court to the requesting court.

(b) A person within this state may voluntarily give his *or her* testimony or statement in this state for use in a custody proceeding outside this state.

(c) Upon request of the court of another state a competent court of this state may order a person in this state to appear alone or with the child in a custody proceeding in another state. The court may condition compliance with the request upon assurance by the other state that state travel and other necessary expenses will be advanced or reimbursed.

§ 21. [Preservation of Documents for Use in Other States]

In any custody proceeding in this state the court shall preserve the pleadings, orders and decrees, any record that has been made of its hearings, social studies, and other pertinent documents until the child reaches [18, 21] years of age. Upon appropriate request of the court of another state the court shall forward to the other court certified copies of any or all of such documents.

§ 22. [Request for Court Records of Another State]

If a custody decree has been rendered in another state concerning a child involved in a custody proceeding pending in a court of this state, the court of this state upon taking jurisdiction of the case shall request of the court of the other state a certified copy of the transcript of any court record and other documents mentioned in section 21.

§ 23. [International Application]

The general policies of this Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

[§ 24. [Priority]

Upon the request of a party to a custody proceeding which raises a question of existence or exercise of jurisdiction under this Act the case shall be given calendar priority and handled expeditiously.]

§ 25. [Severability]

If any provision of this Act or the application thereof to any person or circumstance is held invalid, its invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

§ 26. [Short Title]

This Act may be cited as the *Revised Uniform Child Custody Jurisdiction Act.*