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Legalized Kidnapping of Children by Their Parents

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I. Introduction

The authority of parents over their children is fundamental to our society.[1] The bounds of parental authority are exceeded, however, when a parent abducts his child against the will of the child or of the other parent or guardian. This act interferes with the personal liberty of the child and the custody rights of the other parent. It thus qualifies as kidnapping.[2]

No effective sanction exists against parental kidnapping. Criminal statutes exempt parents explicitly or by judicial interpretation. Civil remedies are ineffective. Theories of tort recovery are weak and often barred by the doctrine of parental immunity. The civil contempt process is of limited applicability and may be circumvented by a contrary custody decree in another state.

Moreover, parental kidnapping is not only permitted by the courts; it is encouraged. A parent who removes his child from a state

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1. Child custody eludes consistent definition. At common law it was the right of the parent incident to his duty to care for his child. The father was entitled to the custody, earnings, and services of his children as a result of his obligation to maintain and educate them. A more modern definition is the relationship existing between parents and children in an ongoing family. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 17.2, at 573 (1968).

Family life has been held by the United States Supreme Court to be constitutionally protected. Griswold v. Connecticut, 381 U.S. 479, 496 (1961); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The Court also has held parental custody rights to be "far more precious . . . than property rights." May v. Anderson, 345 U.S. 528, 533 (1953). Custody rights are protected by the due process safeguards of the fourteenth amendment. Stanley v. Illinois, 405 U.S. 645 (1972); Newton v. Burgen, 363 F. Supp. 782 (W.D.N.C.), *aff'd*, 414 U.S. 1139 (1973). In Prince v. Massachusetts, 321 U.S. 158, 166 (1944), the Court held, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

2. At common law kidnapping was defined as the forcible abduction or stealing away of a man, woman, or child from his own country and sending him to another. 4 W. BLACKSTONE, COMMENTARIES *219. The fundamental elements of most modern kidnapping statutes are an unlawful detention and an unlawful asportation. R. PERKINS, PERKINS ON CRIMINAL LAW 177 (2d ed. 1969); *see, e.g.*, 18 PA. C.S. § 2901; MODEL PENAL CODE § 212.1 (Prop. Off. Draft 1962). The family unit receives special protection in some states through statutes prohibiting interference with custody. *E.g.*, 18 PA. C.S. § 2904; MODEL PENAL CODE § 212.4 (Prop. Off. Draft 1962).

customarily is granted a custody hearing in the destination state even though that parent has defied a custody decree of the origin state. Ironically the justification for granting a second custody hearing is said to be the state's concern for child welfare.[3] In cases of parental kidnapping, however, that concern is misplaced. States can promote child welfare most effectively by discouraging forum shopping and the parental kidnapping it entails.

The freedom of parents from criminal and civil sanctions when they abduct their children from the custody of the other parent or guardian is a subject of concern to many and forms the basis of this comment. The inconsistencies of custody jurisdiction and the resultant forum shopping also are discussed in detail. Finally, possible solutions are suggested.

II. Parental Rights as a Defense to Kidnapping Charges

Kidnapping legislation protects both parental custody rights and children's personal liberty against infringement by third parties. The legislation, however, does not protect children against actions of their parents. Parental status has become an almost complete defense to charges of kidnapping and related crimes.

The Federal Kidnapping Act[4] explicitly excludes parents from its sanctions. The original 1932 Lindbergh Act[5] imposed liability only for interstate kidnapping for ransom. The Act was later revised to include all cases of interstate kidnapping for the purpose of ransom, reward, or "other unlawful purpose."[6] When the House Judiciary Committee discussed the proposed revision, concern was expressed that this language would lead to the prosecution of parents who take their children across state lines in defiance of custody decrees or to avoid jurisdiction.[7] In response, Congress specifically exempted parents from the Act's operation.[8]

Furthermore, parental immunity has been implied when not explicit in state kidnapping statutes. *Burns v. Commonwealth*,[9] an early decision favoring parents, held that a Pennsylvania statute did not prohibit parental abductions.[10] Kidnapping was viewed as a

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3. *See* notes 89-91 and accompanying text *infra*.
4. 18 U.S.C. § 1201 (1971).
5. Act of June 22, 1932, ch. 271, §§ 1, 3, 47 Stat. 326.
6. Act of May 18, 1934, ch. 301, 48 Stat. 781, 782.
7. *Hearings on H.R. 5657 Before the Comm. on the Judiciary*, 72d Cong., 1st Sess. (1932); Note, *The Problem of Parental Kidnapping*, 10 Wyo. L.J. 225, 235 (1956).
8. 18 U.S.C. § 1201 (1971).
9. 129 Pa. 138, 18 A. 756 (1889).
10. Commonwealth v. Myers, 146 Pa. 24, 23 A. 164 (1892), also is frequently cited as an early Pennsylvania extension of immunity from kidnapping to parents.

threat to parental custody rights, but not to children's personal liberties. The court reasoned that the desires and claims of parents over their children spring from nature and are not subject to kidnapping legislation.[11] The decision's weakness is that it provided no protection against an abducting parent for the child or for the other parent. Other jurisdictions similarly have exempted parents from criminal kidnapping sanctions. Courts frequently refer to the natural desire of parents to exercise control and custody over their children.[12] Kidnapping charges are often dismissed under this reasoning for lack of unlawful intent.[13] Other courts find no harm in the parental action.[14] These courts view kidnapping as a crime against the parents and see the harm in the "malice and greed of the kidnapper"[15] and the "mental anguish"[16] of the parent. None of these decisions, however, expresses concern for the personal rights of the child. Another judicial analysis supporting parental immunity is the rights-duties approach to child custody.[17] Absent a court decree to the contrary, courts frequently hold both parents to have equal rights in their children.[18] Separated parents retain custody rights and can exercise them with impunity.[19] Even violation of temporary custody decrees will not result in criminal liability because these decrees do not

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11. Burns v. Commonwealth, 129 Pa. 138, 145, 18 A. 756, 757 (1889). The court held that the Pennsylvania statute was "enacted to protect parental and other lawful custody of children against the greed and malice of the kidnapper, not to punish their natural guardian for asserting his claim to the possession and control of them."

12. *E.g.*, Wilborn v. Superior Court, 51 Cal. 2d 828, 830, 337 P.2d 65, 66 (1959); State v. Elliott, 171 La. 306, 311, 131 So. 28, 30 (1930); People v. Nelson, 322 Mich. 262, 268, 33 N.W.2d 786, 788 (1948); State v. Switzer, 80 Ohio L. Abs. 12, 157 N.E.2d 466 (Findlay Mun. Ct. 1956).

13. *E.g.*, People v. Nelson, 322 Mich. 262, 33 N.W.2d 786 (1948); State v. Switzer, 80 Ohio L. Abs. 12, 157 N.E.2d 466 (Findlay Mun. Ct. 1956).

14. *E.g.*, Wilborn v. Superior Court, 51 Cal. 2d 828, 337 P.2d 65 (1959); State v. Brandenberg, 232 Mo. 531, 134 S.W. 529 (1911); State v. Switzer, 80 Ohio L. Abs. 12, 157 N.E.2d 466 (Findlay Mun. Ct. 1956).

15. *See, e.g.*, State v. Elliott, 171 La. 306, 311, 131 So. 28, 30 (1930); Commonwealth v. Myers, 146 Pa. 24, 30, 23 A. 164, 170 (1892).

16. *E.g.*, Wilborn v. Superior Court, 51 Cal. 2d 828, 830, 337 P.2d 65, 66 (1959); State v. Brandenberg, 232 Mo. 531, 537, 134 S.W. 529, 530 (1911).

17. *See* note 1 and accompanying text *supra* for a discussion of the rights and duties of custody.

18. State v. Dewey, 155 Iowa 469, 471, 136 N.W. 533, 534 (1912); State v. Angel, 42 Kan. 216, 222, 21 P. 1075, 1077 (1889); People v. Nelson, 322 Mich. 262, 268, 33 N.W.2d 786, 788 (1948); State v. Huhn, 346 Mo. 695, 698, 142 S.W.2d 1064, 1067 (1940); People v. Workman, 94 Misc. 374, 157 N.Y.S. 594 (Sup. Ct. 1916).

19. People v. Nelson, 322 Mich. 262, 33 N.W.2d 786 (1948); State v. Powe, 107 Miss. 770, 66 So. 207 (1914); State v. Hugn, 346 Mo. 695, 142 S.W.2d 1064 (1940); Commonwealth v. Myers, 146 Pa. 24, 23 A. 164 (1892).

terminate parental custody rights.[20]

A court decree conferring permanent custody generally will subject an abducting parent to kidnapping charges.[21] In a leading Colorado case the court held that a custody decree divests a parent of all rights and subjects him to the same liability as a third party.[22] A parent with a continuing duty of support, however, can claim immunity under the rights-duties reasoning accepted by most courts even when subject to an adverse decree of permanent custody.

However convincing the reasons for granting parental immunity to criminal charges may be, they cannot justify the treatment of agents of abducting parents. The agent generally is accorded the same immunity as his principal, the parent.[23] This delegation of parental custody rights is inappropriate because of their fundamental nature. These rights, described as essential to society and as antedating the legal process,[24] lose their unique character when delegated to an agent.[25] Criminal immunity for agents also is inconsistent with the reasoning that parents are immune because their actions do not cause the custodial parent anxiety about the child's welfare. When an agent or a third party abducts a child, the same degree of anxiety is aroused in the custodial parent.[26] This inconsistency was recognized in a California decision[27] that held nondelegable any right a parent may have to take or entice his children away because of the grief inflicted upon the custodial parent.[28] Michigan has adopted a slight-

20. Adams v. State, 218 Ga. 130, 126 S.E.2d 624 (1962); State v. Switzer, 80 Ohio L. Abs. 12, 157 N.E.2d 466 (Findlay Mun. Ct. 1956).

21. Parents were found guilty following an adverse decree in these decisions: Lee v. People, 53 Colo. 507, 127 P. 1023 (1912); State v. Crafton, 15 Ohio App. 2d 160, 239 N.E.2d 571 (1968). Parents were found not guilty in these cases because of a lack of a decree: State v. Dewey, 155 Iowa 469, 136 N.W. 533 (1912); State v. Elliott, 171 La. 306, 131 So. 28 (1930); People v. Nelson, 322 Mich. 262, 33 N.W.2d 786 (1948); State v. Huhn, 346 Mo. 695, 142 S.W.2d 1064 (1940); People v. Workman, 94 Misc. 374, 157 N.Y.S. 594 (Sup. Ct. 1916).

22. Lee v. People, 53 Colo. 507, 511, 127 P. 1023, 1024 (1912). The court also noted that criminal liability was necessary since contempt proceedings are futile when the abducting parent has fled the state. *See* notes 50-65 and accompanying text *infra*.

23. *E.g.*, State v. Dewey, 155 Iowa 469, 136 N.W. 533 (1912); State v. Angel, 42 Kan. 216, 21 P. 1075 (1889); State v. Elliott, 171 La. 306, 131 So. 28 (1930); People v. Nelson, 322 Mich. 262, 33 N.W.2d 786 (1948); People v. Workman, 94 Misc. 374, 157 N.Y.S. 594 (Sup. Ct. 1916); Commonwealth v. Myers, 146 Pa. 24, 23 A. 164 (1892).

24. *See* note 1 *supra*.

25. The court relied on this reasoning in State v. Brandenberg, 232 Mo. 531, 134 S.W. 529 (1911).

26. Note, *The Problem of Parental Kidnapping*, 10 WYO. L.J. 225, 229 (1956).

27. Wilborn v. Superior Court, 51 Cal. 2d 828, 337 P.2d 65 (1959); *accord*, State v. Brandenberg, 232 Mo. 531, 134 S.W. 529 (1911).

28. In that case the parent accompanied his agent in the taking of the child. The court reasoned that to hold otherwise would put parents at the mercy of strangers claiming to be agents and would jeopardize the interests of parents, children, and the public. Wilborn v. Superior Court, 51 Cal. 2d 828, 830, 337 P.2d 65, 66 (1959).

ly different rule: agents are immune if they act in the presence of the parent and the child is turned over promptly to the parent.[29] Application of agency theory to parental kidnappings emphasizes the courts' insensitivity to the interests of abducted children. The child experiences great fear and danger when his abductor is unknown to him. Following this reasoning, a Missouri court refused to delegate parental immunity to agents.[30] The court ruled that the "cloak of parental affection" that justifies parental immunity is absent from the activities of an agent. The agent has no natural obligation or inclination to care for the child properly.[31]

Kidnapping of children by their parents entails the same infringement of personal liberty and infliction of trauma upon the guardian as a kidnapping by a third party. It, therefore, should be subject to criminal sanctions. The special vulnerability of children to kidnapping and the gravity of the crime is often recognized in state prohibitions of child stealing and interference with custody. These states can better serve the interests of children and parents by eliminating the kidnapping immunities granted abducting parents.

III. Civil Liability for Parental Kidnapping

In most states parental immunity still exists and bars any suit by an unemancipated child against an abducting parent.[32] Parental immunity was unknown at common law, first appearing in the United States in 1891.[33] The conventional justifications for parental immunity are preservation of the family unit and maintenance of societal

29. People v. Nelson, 322 Mich. 262, 33 N.W.2d 786 (1948).
30. State v. Brandenberg, 232 Mo. 531, 134 S.W. 529 (1911).
31. *Id.* at 537, 134 S.W. at 530.
32. Parental immunity was abrogated in the following cases: Hebel v. Hebel, 435 P.2d 8 (Alas. 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Tamashiro v. DeGama, 51 Hawaii 74, 450 P.2d 998 (1969); Schenk v. Schenk, 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968); Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1970); Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); France v. APA Transp. Corp., 56 N.J. 500, 267 A.2d 490 (1970); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967); Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963); 7 CALIF. WEST L. REV. 466 (1971); 76 DICK. L. REV. 623 (1972).
33. Three cases, Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905), created the foundation for parental tort immunity in the United States.

peace.[34] The state as *parens patriae* is often said to have an interest in family preservation[35] because a secure family unit is in the best interest of the child.[36] Allowing interfamilial tort recoveries is thought to be a decaying influence upon family solidarity.[37]

Thirteen states have rejected this family harmony reasoning and have abolished parental immunity.[38] Disruption of the family unit is caused by the injury, not the recovery.[39] When the tort is a negligent one and the parent carries liability insurance, recovery promotes reconciliation. If a child has been intentionally harmed, on the other hand, there is no family solidarity to protect.[40] The occurrence of an intentional tort belies the image of a harmonious family and denial of recovery is purposeless.[41]

Thus, in those states in which parental immunity has been abrogated, a child conceivably can sue his abducting parent for false imprisonment and assault.[42] Recovery, however, is unlikely. Although the action is intentional, it is not intended to harm the child, but to end the custody of the other parent or to avoid the jurisdiction of a court. The action is taken to provide what the abducting parent believes to be the best environment for the child. Furthermore, a hesitancy still exists on the part of the judiciary to interfere with family solidarity.[43] Parents continue to be afforded wide discretion in the maintenance of family discipline and administration.[44] A

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34. *E.g.*, Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957) (the leading case upholding parental immunity in Pennsylvania before its abrogation); 19 U. PITT. L. REV. 681 (1958).

35. *See, e.g.*, Mesite v. Kirschstein, 109 Conn. 77, 145 A. 753 (1929); Mannion v. Mannion, 3 N.J. Misc. 68, 129 A. 431 (Cir. Ct. Hudson 1925).

36. *E.g.*, Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Tucker v. Tucker, 395 P.2d 67 (Okla. 1964).

37. Parks v. Parks, 390 Pa. 287, 135 A.2d 65 (1957).

An emancipated child is able to bring suit against his parents in states with parental immunity because there is no family unity to protect. Murphy v. Murphy, 206 Misc. 228, 133 N.Y.S.2d 796 (Sup. Ct. 1954); *see, e.g.*, Martens v. Martens, 11 N.J. Misc. 705, 167 A. 227 (Sup. Ct. 1933); Detwiler v. Detwiler, 162 Pa. Super. 383, 57 A.2d 426 (1948).

38. Cases cited note 32 *supra.*

39. Falco v. Pados, 444 Pa. 372, 379, 282 A.2d 351, 355 (1971).

40. *Id.; accord,* Parks v. Parks, 390 Pa. 287, 312, 135 A.2d 65, 79 (Musmanno, J., dissenting).

41. Falco v. Pados, 444 Pa. 372, 379, 282 A.2d 351, 355 (1971); *see* Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951); Brown v. Selby, 206 Tenn. 71, 332 S.W.2d 166 (1960) (allowing recovery for intentional torts on this theory).

42. Cases cited note 32 *supra* indicate the states in which parental immunity has been abolished.

43. *See* Falco v. Pados, 444 Pa. 372, 387, 282 A.2d 351, 357 (1971).

44. Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State,* 4 FAMILY L.Q. 410 (1970); *see* note 1 and accompanying text *supra* for a discussion of the deference accorded parental custody. Some states even aid parents in disciplining their children by statutes allowing judicial interference in cases of continued insubordination. *E.g.*, CAL. WELF. & INST'NS CODE § 601 (West 1972); MASS. GEN. LAWS ANN. ch. 272, § 53 (1970); PA. STAT. ANN. tit. 11, §§ 50-101 (Supp. 1975).

child's removal from the control of the other parent probably will be construed as within the realm of proper parental discretion. Recent evidence of such a lenient judicial policy is provided by the treatment of parents who abducted their children from religious colonies.[45]

Parental abductions also can give rise to civil liability between parents. Theoretically such actions might involve the tort of intentional infliction of mental distress and include recovery for loss of the minor's services. Even in a state maintaining interspousal immunity,[46] a cause of action may exist for wrongful abduction against a parent who has given up child custody by agreement or abandonment[47] or who has lost custody by a court decree.[48] This theory

45. National attention was focused on parental kidnapping recently because of several attempts by parents to regain custody of their teen-aged children after they had joined conservative religious societies. A particular agent was employed to effect "rescues" that usually were forcible and conducted in the parents' presence. The rescues were followed by confinement of the youths for several days during which time a program of reeducation was used to remove the religious indoctrination they had received. The few charges that were brought were dropped or grand juries refused to indict. In several cases police refused to register complaints because they considered the parents' actions to be "family squabbles." The agent was acquitted in the one case that reached Manhattan criminal court. He defended on an agency theory. Note, *Abduction, Religious Sects and the Free Exercise Guarantee*, 25 SYRACUSE L. REV. 623 (1974); Roiphe, *Struggle over Two Sisters*, N.Y. TIMES, June 3, 1973, § 6 (Magazine), at 16; *id.*, March 5, 1973, at 1, col. 2; *id.*, June 19, 1973, at 33, col. 1; *id.* Aug. 7, 1973, at 24, col. 5; TIME, March 12, 1973, at 83.

46. Twenty-two states have abrogated interspousal immunity: Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Cramer v. Cramer, 379 P.2d 95 (Alas. 1963); Katzenberg v. Katzenberg, 183 Ark. 626, 37 S.W.2d 696 (1931); Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Brown v. Brown, 88 Conn. 42, 89 A. 889 (1914); Lorang v. Hays, 69 Idaho 440, 209 P.2d 733 (1949); Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Hosko v. Hosko, 385 Mich. 39, 187 N.W.2d 236 (1971); Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969); Gilman v. Gilman, 78 N.H. 4, 95 A. 657 (1915); Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970); Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943) (also by statute in New York); Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965) (also by statute in North Carolina); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526 (1932); Catron v. First Nat'l Bank & Trust Co., 434 P.2d 263 (Okla. 1967); Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920); Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941); Juaire v. Juaire, 128 Vt. 142, 259 A.2d 786 (1969); Suratt v. Thompson, 212 Va. 191, 183 S.E.2d 200 (1971); Nelson v. American Employers' Ins. Co., 258 Wis. 252, 45 N.W.2d 681 (1951) (also by statute in Wisconsin).

Interspousal immunity was specifically upheld by the Supreme Court of Pennsylvania in Digirolamo v. Apanavage, 454 Pa. 557, 312 A.2d 382 (1973).

47. Howell v. Howell, 162 N.C. 283, 78 S.E. 222 (1913); Clark v. Bayer, 32 Ohio St. 299 (1877); Moritz v. Garnhart, 7 Watts 302 (Pa. 1838).

48. Rice v. Nickerson, 91 Mass. (9 Allen) 478 (1864); Pickle v. Page, 252 N.Y. 474, 169 N.E. 650 (1930); Note, *The Problem of Parental Kidnapping*, 10 WYO. L.J. 225, 237 (1956).

This theory has support in the Pennsylvania statute that provides that although parents have equal rights to child custody, a parent loses that right upon desertion

parallels criminal law in that following termination of custody rights, a parent has the same criminal liability as any third party.[49]

IV. Contempt Proceedings for Defiant Parents

Parents who have removed or detained their children in defiance of custody decrees have been held in civil contempt.[50] Civil contempt is used to compel compliance with a court decree, rather than to impose punishment.[51] A parent may be subject to a fine and imprisonment when charged with civil contempt, but these impositions must be conditioned upon continuing noncompliance with the decree.[52]

Unfortunately, civil contempt charges are unlikely to be an effective deterrent to parental kidnapping.[53] In most situations the child is removed from the state in search of a more favorable custody decree. A court cannot enforce its contempt order beyond the borders of the state; the extradition process is not available for civil contempt. A state court has no mechanism, therefore, to reach parents who have transported their children across state lines in

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or failure of parental duties. PA. STAT. ANN. tit. 48, § 91 (1965). Another supportive statute is the one providing that a deserted wife can sue her husband upon any cause of action. *Id.* § 114.

49. *See* notes 21-22 and accompanying text *supra.*

50. Bergen v. Bergen, 439 F.2d 1008 (3d Cir. 1971); *In re* Guardianship of Rodgers, 100 Ariz. 269, 413 P.2d 744 (1966); *Ex parte* Memmi, 80 Cal. App. 2d 295, 181 P.2d 885 (2d Dist. 1947); Smith v. Smith, 4 Terry 268, 45 A.2d 879 (Del. 1946); Kemp v. Kemp, 206 A.2d 731 (D.C. App. 1965); Coles v. Coles, 202 A.2d 394 (D.C. App. 1964); Winter v. Crowley, 245 Md. 313, 226 A.2d 304 (1967); Aufiero v. Aufiero, 332 Mass. 149, 123 N.E.2d 709 (1955); Sheehy v. Sheehy, 88 N.H. 223, 186 A. 1 (1936); Brocker v. Brocker, 429 Pa. 513, 241 A.2d 336 (1968); Commonwealth *ex rel.* Beghian v. Beghian, 408 Pa. 408, 184 A.2d 270 (1962); Cox v. Cox, 391 Pa. 572, 137 A.2d 779 (1958); Commonwealth *ex rel.* Sage v. Sage, 160 Pa. 399, 28 A. 863 (1894); Commonwealth *ex rel.* Lawry v. Reed, 59 Pa. 425 (1868); Commonwealth v. Weigley, 4 Pa. D. & C. 633 (C.P. Som. 1923), *appeal quashed,* Commonwealth *ex rel.* Wilhelm v. Weigley, 83 Pa. Super. 189 (1924); Wicks v. Cox, 146 Tex. 489, 208 S.W.2d 876 (1948); Brooks v. Brooks, 131 Vt. 86, 300 A.2d 531 (1973).

In one case criminal contempt was brought by the State. Kenimer v. State, 81 Ga. App. 437, 59 S.E.2d 296 (1950).

51. United States v. UMW, 330 U.S. 258, 303 (1947); United States *ex rel.* Carter v. Jennings, 333 F. Supp. 1392, 1395 (E.D. Pa. 1971); Knaus v. Knaus, 387 Pa. 370, 376, 127 A.2d 669, 672 (1956); Commonwealth *ex rel.* Lieberman v. Lewis, 253 Pa. 175, 181, 98 A. 31, 38 (1916). These cases set forth the distinction between criminal contempt, which is punitive, and civil contempt, which is remedial. Criminal contempt is lodged to vindicate the dignity and authority of the court and to protect the public interest. Civil contempt is aimed at enforcing compliance with a court decree. Any vindication of a court's authority through civil contempt is merely incidental.

52. Bergen v. Bergen, 439 F.2d 1008 (3d Cir. 1971); Kemp v. Kemp, 206 A.2d 731 (D.C. App. 1965); Coles v. Coles, 202 A.2d 394 (D.C. App. 1964); Commonwealth *ex rel.* Beghian v. Beghian, 408 Pa. 408, 184 A.2d 270 (1962).

53. Note, *The Problem of Parental Kidnapping,* 10 WYO. L.J. 225, 237-38 (1956).

violation of a custody decree.[54] In *Rosin v. Superior Court*[55] a California court found a parent in contempt, but noted that "jurisdiction is gone for all practical purposes when the children are living in another state, for no effective order can be made modifying the custody provisions of the decree."[56] The Supreme Court of Pennsylvania has faced this problem from the opposite perspective. In *Commonwealth ex rel. Sage v. Sage*[57] the court held that it could not compel a Pennsylvania resident who harbored her child in defiance of a New Jersey custody decree to return to New Jersey and submit herself to civil contempt proceedings.[58]

State courts disagree about the effect of a subsequent out-of-state custody decree on a contempt order of the original state. In *Brooks v. Brooks*[59] the Vermont Supreme Court declared that a Vermont contempt order remained valid even though superseded by a California custody decree. In contrast, *Brocker v. Brocker*,[60] a recent Supreme Court of Pennsylvania decision, held that a parent who detained his child in Ohio in defiance of a Pennsylvania decree could purge himself of contempt by proof of a subsequent Ohio decree in his favor.[61] In *Bergen v. Bergen*[62] a Virgin Islands court set aside a contempt order issued within that jurisdiction against a parent who defied a custody decree by taking his child to New York for a reopening of the custody issue. Deferring to interstate comity, the court recognized New York's jurisdiction and remanded the case for findings that would justify disregarding the parent's invocation of that

54. Rosin v. Superior Court, 181 Cal. App. 2d 486, 5 Cal. Rptr. 421 (2d Dist. 1960); People *ex rel.* Wagner v. Torrence, 94 Colo. 47, 51, 27 P.2d 1038, 1039 (1933); Winter v. Crowley, 245 Md. 313, 226 A.2d 304 (1967); Commonwealth *ex rel.* Beghian v. Beghian, 408 Pa. 408, 184 A.2d 270 (1962).

The Supreme Court of Colorado in People ex rel. Wagner v. Torrence, *supra* at 51, 27 P.2d at 1039, acknowledged the weakness of the civil contempt process in child custody matters. The contempt order itself reveals that the children are beyond the jurisdiction of the court that issued the custody decree.

55. 181 Cal. App. 2d 486, 5 Cal. Rptr. 421 (2d Dist. 1960).

56. *Id.* at 499, 5 Cal. Rptr. at 429. This holding recognized that the majority of state courts will reopen custody determinations on the mere physical presence of the child within the state. *See* notes 74-79 and accompanying text *infra.*

57. 160 Pa. 399, 28 A. 863 (1894).

58. *Id.* at 405-06, 28 A. at 864. The court did hold, however, that interstate comity required it to turn the child over to the New Jersey parent who sought a writ of habeas corpus in Pennsylvania. Nevertheless, in recent cases Pennsylvania courts have reopened custody disputes rather than defer to the principle of comity. *See* notes 104-08 and accompanying text *infra.*

59. 131 Vt. 86, 300 A.2d 531 (1973).

60. 429 Pa. 513, 241 A.2d 336 (1968).

61. *Id.* at 532, 241 A.2d at 345. (Roberts, J., concurring).

62. 439 F.2d 1008 (3d Cir. 1971).

jurisdiction.[63] This decision is consistent with the Pennsylvania view that contempt proceedings are inappropriate following a superseding custody decree in another jurisdiction in favor of the contemptuous parent.[64]

Civil contempt proceedings are an effective remedy to parental kidnapping only when the abducting parent remains within the state. Even if contempt orders are considered to survive a later custody decree of another state,[65] no mechanism exists by which defiant parents can be compelled to return.

V. Custody Jurisdiction: Encouragement of Parental Kidnapping

Parental kidnapping most often occurs when parents have separated and both desire custody of the child. Since states disagree on the basis for jurisdiction over custody disputes,[66] concurrent jurisdiction often exists and forum shopping becomes feasible. The states' failure to grant full faith and credit to custody decrees of other states also encourages parental kidnappings.[67]

A. Bases of Jurisdiction

States use one of three bases of original jurisdiction over custody disputes:[68] domicile of the child, residence of the child, or personal jurisdiction over both parents. Domicile is the strictest standard because it requires the greatest degree of permanence. Domicile is defined as the place with which one has the most settled connection and considers to be "home."[69] Children are deemed unable to choose a domicile until they are emancipated. By operation of law they take the domicile of their father at birth.[70] When parents separate, the children assume the domicile of the parent with whom they live or with whom the court places them.[71] Only a few states require that a child be domiciled within their borders before they will exercise jurisdiction in custody disputes.[72] Parents are least likely to

63. *Id.* at 1014.
64. Brocker v. Brocker, 429 Pa. 513, 241 A.2d 336 (1969).
65. Brooks v. Brooks, 131 Vt. 86, 300 A.2d 531 (1973).
66. Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948), is a frequently cited case that set down three bases of jurisdiction. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971); Comment, *The Full Faith and Credit Clause and Its Relation to Custody Decrees*, 11 ALA. L. REV. 139 (1958).
67. *See* notes 87-96 and accompanying text *infra.*
68. *See* note 66 *supra.*
69. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 4.1, at 144 (1968).
70. *Id.* § 4.3, at 151.
71. *Id.*
72. *E.g.*, Brown v. Brown, 105 Ariz. 273, 463 P.2d 71 (1969); Johnson v. Johnson, 105 Ariz. 233, 462 P.2d 782 (1969); Stallings v. Bass, 204 Ga. 3, 48 S.E.2d 822 (1948); Tureson v. Tureson, 281 Minn. 107, 160 N.W.2d 552 (1968); *Ex parte*

forum shop in these states because an intent to remain must be shown to establish a domicile. Forum shopping is especially discouraged after a decree has been issued elsewhere since removal of a child in violation of a custody decree does not change his domicile.[73]

The majority of states accept residence, a physical presence within the state, as an adequate basis for jurisdiction.[74] Willingness to accept such a meager basis is founded in the concept of *parens patriae*.[75] Once a child is present within the state, the state has a vital interest in that child's welfare.[76] Courts have held that the exercise of jurisdiction in cases of minors' welfare is an unavoidable duty stemming from *parens patriae*.[77] In the leading decision Judge (later Justice) Cardozo wrote,

> The jurisdiction of a state to regulate the custody of infants found within its territory does not depend upon the domicile of the parents. It has its origin in the protection that is due to the incompetent or helpless. [citations omitted] For this, the residence of the child suffices, though the domicile be elsewhere.[78]

This inclination to grant jurisdiction on mere physical presence, coupled with the tendency of courts to favor local petitioners, encourages forum shopping by abducting parents.[79]

Mullins, 26 Wash. 2d 419, 174 P.2d 790 (1946); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971).

73. Chamblee v. Rose, 249 S.W.2d 775 (Ky. 1952).

74. *E.g., In re* Guardianship of Smythe, 65 Ill. App. 2d 431, 213 N.E.2d 609 (1965); Batchelor v. Fulcher, 415 S.W.2d 828 (Ky. 1967); Neal v. Neal, 217 So. 2d 639 (Miss. 1969); Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925); *In re* Fore, 168 Ohio St. 363, 155 N.E.2d 194 (1958), *cert. denied*, 359 U.S. 313 (1959); Commonwealth *ex rel.* Scholtes v. Scholtes, 187 Pa. Super. 22, 142 A.2d 345 (1958); State *ex rel.* Van Loh v. Prosser, 78 S.D. 35, 98 N.W.2d 329 (1959); Wicks v. Cox, 146 Tex. 489, 208 S.W.2d 876 (1948); Falco v. Grills, 209 Va. 115, 161 S.E.2d 713 (1968); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971).

75. *See* notes 35-36 and accompanying text *supra*.

76. Commonwealth *ex rel.* Graham v. Graham, 367 Pa. 553, 80 A.2d 829 (1951); *In re* Wilkin's Estate, 146 Pa. 585, 23 A. 325 (1892); Coombs v. Coombs, 225 Pa. Super. 304, 303 A.2d 498 (1973); Commonwealth *ex rel.* Mason v. Mason, 213 Pa. Super. 433, 249 A.2d 922 (1968); Commonwealth *ex rel.* Scholtes v. Scholtes, 187 Pa. Super. 22, 142 A.2d 345 (1958); Commonwealth *ex rel.* Carson v. Carson, 20 Chest. 26 (Pa. C.P. 1971); Commonwealth *ex rel.* D'Ercole v. Barnes, 86 Pa. D. & C. 509 (C.P. Lawr. 1953).

77. Commonwealth *ex rel.* Scholtes v. Scholtes, 187 Pa. Super. 22, 142 A.2d 345 (1958).

78. Finlay v. Finlay, 240 N.Y. 429, 431, 148 N.E. 624, 625 (1925).

79. *E.g., In re* Irizarry's Custody, 195 Pa. Super. 104, 169 A.2d 307 (1961). In that case children awarded to their father in Puerto Rico were visiting their mother in Philadelphia. The Philadelphia county court exercised custody jurisdiction after only thirteen days. In Commonwealth *ex rel.* Rogers v. Daven, 298 Pa. 416, 148 A. 524 (1930), the Pennsylvania court exercised jurisdiction over children brought before it in violation of another state's court order. Foster, *Domestic Rela-*

The third basis for custody jurisdiction is in personam jurisdiction over the contesting parties, the parents.[80] States with this basis for jurisdiction will grant a custody hearing regardless of the residence or domicile of the child. This position is supported by the Supreme Court's decision that custody decrees issued without personal jurisdiction over both parents are invalid and may be reopened at a later time.[81] The natural parental right to custody was central in that decision. Since custody rights are personal rights, the Court held that a parent may not be deprived of them by a court without personal jurisdiction.[82] This jurisdictional basis discourages parents from subjecting themselves willingly to the jurisdiction of out-of-state courts, thus complicating the problems of nonfinality of decrees and insecurity for the child.

Some courts give token recognition to the continuing, concurrent jurisdiction of the state rendering the original custody decree.[83] This recognition becomes meaningless, however, when the second state reopens the case on the merits. Washington and Wisconsin have

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tions, 1960-1961 Survey of Pennsylvania Law, 23 U. PITT. L. REV. 465, 476 (1961); FOX, *Domestic Relations, 1963-1964 Survey of Pennsylvania Law*, 26 U. PITT. L. REV. 363, 377 (1964); Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 807 (1964).

80. Pope v. Pope, 239 Ark. 352, 389 S.W.2d 425 (1965); Sharpe v. Sharpe, 77 Ill. App. 2d 295, 222 N.E.2d 340 (1966); Batchelor v. Fulcher, 415 S.W.2d 828 (Ky. 1967); Green v. Green, 351 Mass. 466, 221 N.E.2d 857 (1966); Weiler v. Weiler, 331 S.W.2d 165 (Mo. App. 1960); Jackson v. Jackson, 241 S.C. 1, 126 S.E.2d 855 (1962); Gramelspacher v. Gramelspacher, 204 Va. 839, 134 S.E.2d 285 (1964); Brazy v. Brazy, 5 Wis. 2d 352, 92 N.W.2d 738 (1958); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971).

81. May v. Anderson, 345 U.S. 528 (1953). A custody decree that was part of a Wisconsin ex parte divorce was held subject to reopening by the absent parent in another state. The Court held that the decree was as severable from the divorce as an alimony award would be. *Id.* at 534.

82. *Id.* at 534. Justice Jackson in his dissenting opinion pointed out that the majority's approach amounted to treating children as chattels. He stressed that children also have a personal right at stake: the right to have their status determined with reasonable certainty. *Id.* at 542.

83. *E.g.*, Sharpe v. Sharpe, 77 Ill. App. 2d 295, 297, 222 N.E.2d 340, 342 (1966); Berlin v. Berlin, 239 Md. 52, 210 A.2d 380 (1965); Harris v. Harris, 50 Pa. D. & C.2d 728 (C.P. Bucks 1970); *Ex parte* Mullins, 26 Wash. 2d 419, 174 P.2d 790 (1946); Zillmer v. Zillmer, 8 Wis. 2d 657, 100 N.W.2d 564 (1960). In Sharpe v. Sharpe, *supra*, the court held that its continuing jurisdiction should be recognized even when a new domicile is established for the child in another state. In favoring single court jurisdiction the court chose continuity over propinquity to give stability to both children and the courts by the avoidance of forum shopping. *Id.* at 297, 222 N.E.2d at 342.

Pennsylvania, prominent among the states refusing to grant full faith and credit to decrees of other states, has recommended that other states recognize its continuing jurisdiction in custody determinations. In Harris v. Harris, *supra*, the court asserted continuing jurisdiction over children who had been removed to Georgia after the issuance of a Pennsylvania decree. The court reasoned that "[t]o reach a contrary result would put a premium upon 'legalized kidnapping' by one parent of his child or children when that parent does not wish to be scrutinized by the court and examined by counsel." *Id.* at 733-34. This is sound reasoning; Pennsylvania would do well to follow it.

been leaders in recognizing the continuing jurisdiction of the state that issued the original custody decree.[84] Courts in both states actively discourage parental abductions by refusing to exercise jurisdiction unless a new domicile has been established for the child within the state's borders.[85] Adoption of this policy by other states will limit interstate abductions.[86]

B. Full Faith and Credit

Article IV, section 1 of the United States Constitution mandates that full faith and credit shall be provided for the judicial determinations of each and every state.[87] Full faith and credit, however, is not generally accorded to child custody decrees. A commonly stated reason for this exception is that by their nature custody decrees are not res judicata.[88] Even permanent custody decrees are subject to modification. This flexibility stems from a recognition that child welfare is paramount and that the circumstances that contribute to it are not static. A custody determination will be reopened when there

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84. *Ex parte* Mullins, 26 Wash. 2d 419, 174 P.2d 790 (1946); Zillmer v. Zillmer, 8 Wis. 2d 657, 100 N.W.2d 564 (1960).

85. In *Ex parte* Mullins, 26 Wash. 2d 419, 426, 174 P.2d 790, 800 (1946), the court refused jurisdiction because the children were still domiciled in Ohio. The court defined domicile to include presence and an intent to remain permanently. *Id.* at 444, 174 P.2d at 804. *See* notes 69-73 and accompanying text *supra* for a discussion of domicile as a standard for jurisdiction. In Zillmer v. Zillmer, 8 Wis. 2d 657, 663, 100 N.W.2d 564, 567 (1960), the Wisconsin court similarly deferred to Kansas since most information regarding the children was available there, although the children had been living in Wisconsin with their grandparents.

86. *But see* A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 299 (1962), in which it is suggested that recognizing the decrees of other states disregards the immediate welfare of the child. Although Professor Ehrenzweig recognized that a flexible approach to comity causes interstate abductions, he proposed congressional action to standardize jurisdictional criteria.

87. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art. IV, § 1. Enabling legislation is found at § 1738 of the Judicial Code. 28 U.S.C. § 1738 (1971).

88. *E.g.*, Ford v. Ford, 371 U.S. 187 (1962); Langan v. Langan, 150 F.2d 979 (D.C. Cir. 1945); *In re* Guardianship of Rodgers, 100 Ariz. 269, 413 P.2d 744 (1966); Stout v. Pate, 120 Cal. App. 2d 699, 261 P.2d 788 (2d Dist. 1953); Smith v. Smith, 43 Del. 268, 45 A.2d 879 (Super. Ct. 1946); Commonwealth *ex rel.* Rogers v. Daven, 298 Pa. 416, 148 A. 524 (1930); Commonwealth *ex rel.* Hickey v. Hickey, 216 Pa. Super. 332, 264 A.2d 420 (1970); Proctor v. Proctor, 213 Pa. Super. 171, 245 A.2d 684 (1968); Commonwealth *ex rel.* Dinsmore v. Dinsmore, 198 Pa. Super. 480, 182 A.2d 66 (1962); Commonwealth *ex rel.* Schofield v. Schofield, 173 Pa. Super. 631, 98 A.2d 437 (1953); Anderson v. Anderson, 36 Wis. 2d 455, 153 N.W.2d 627 (1967).

has been a change of circumstances that may affect the welfare of the child.[89] Generally the burden of proving a change in circumstances is easily met.[90] Ironically this concern for child welfare encourages parental abductions. Since custody decrees may be modified in the issuing jurisdiction, courts in other states reason that they too may reopen the issue.[91]

Although child welfare is a noble goal, it is not so qualitatively unique to merit an exception to the full faith and credit clause.[92] States honor the policy of full faith and credit in other areas that involve fundamental rights of liberty and property.[93] If parental kidnapping is to be stopped, there must be recognition of interstate comity. This recognition is logical in child custody matters. Every state has the same fundamental concern in custody determinations—child welfare.[94] Every state uses approximately the same considerations to determine child welfare.[95] No reason exists, therefore, for failure to grant full faith and credit to custody determinations absent a significant change in circumstances subsequent to the initial decree. Even under changed circumstances comity would suggest application for modification in the court of the original decree. Recognition of foreign state custody decrees ultimately will best serve the interests of child welfare.[96]

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89. *E.g., In re* Guardianship of Rodgers, 100 Ariz. 269, 413 P.2d 744 (1966); *In re* Walker, 228 Cal. App. 2d 217, 39 Cal. Rptr. 243 (5th Dist. 1964); Boardman v. Boardman, 135 Conn. 124, 62 A.2d 521 (1948); Smith v. Smith, 43 Del. 268, 45 A.2d 879 (Super. Ct. 1946); Bachman v. Mejias, 1 N.Y.2d 575, 136 N.E.2d 866, 154 N.Y.S.2d 903 (1956); Friedman v. Friedman, 224 Pa. Super. 530, 307 A.2d 292 (1973); Proctor v. Proctor, 213 Pa. Super. 171, 245 A.2d 684 (1968); Commonwealth *ex rel.* Schofield v. Schofield, 173 Pa. Super. 631, 98 A.2d 437 (1953).

90. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 289-90 (1962).

91. Commonwealth *ex rel.* Rogers v. Daven, 298 Pa. 416, 148 A. 524 (1930); Commonwealth *ex rel.* Hickey v. Hickey, 216 Pa. Super. 332, 264 A.2d 420 (1970); Proctor v. Proctor, 213 Pa. Super. 171, 245 A.2d 684 (1968); Commonwealth *ex rel.* Dinsmore v. Dinsmore, 198 Pa. Super. 480, 182 A.2d 66 (1962); Commonwealth *ex rel.* Schofield v. Schofield, 173 Pa. Super. 631, 98 A.2d 437 (1953).

92. Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 798 (1964).

93. *E.g.*, Magnolia Petro. Co. v. Hunt, 320 U.S. 430 (1943) (workmen's compensation); Yarborough v. Yarborough, 290 U.S. 202 (1933) (child support).

94. *E.g.*, Casteel v. Casteel, 45 N.J. Super. 338, 353, 132 A.2d 529, 538 (1957). In this case the New Jersey court relied upon a statute that prohibited removal of minor domiciliaries from the state for reasons other than the child's best interests. The court held that full faith and credit still permitted a state to enforce its own policies. *Id.* at 354, 132 A.2d at 538.

95. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 17.4, at 584 (1968).

96. Fox, *Domestic Relations, 1963-1964 Survey of Pennsylvania Law*, 26 U. PITT. L. REV. 363, 377 (1964):

> Whereas kidnapping is a federal crime, the state courts' refusal to give full faith and credit to their sister states' custody decrees appears to encourage, and often to reward, the 'legalized abduction' of one's child, *i.e.*, a parent's taking of the child from one jurisdiction and obtaining 'lawful' custody of him in another.

Foster, *Domestic Relations, 1960-1961 Survey of Pennsylvania Law*, 23 U. PITT. L.

C. Clean Hands

Courts that reopen child custody decrees often do so even when the child has been brought before them through ruse, trick, violation of a decree, or other misconduct.[97] Although these courts draw their authority from equity, they fail to apply the essential equitable principle of "clean hands."[98] The principle declares that he who seeks equity must do so with clean hands; equity will not condone inequitable conduct by the petitioner.[99] Abducting parents seem to be immune, however, from this limitation in custody disputes.[100]

The typical justification for failure to apply the clean hands doctrine in custody determinations is that it would be improper to

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REV. 465, 476 (1961), also commented on the encouragement of legalized abduction by the current majority position on full faith and credit.

97. *E.g.*, Langan v. Langan, 150 F.2d 979 (D.C. Cir. 1945). In that case a child was detained in the District of Columbia in violation of a Maryland decree. The court reopened the case and emphasized its rejection of the clean hands principle by stating that the Maryland decree was improper because the Maryland court had invoked the doctrine in its decision. The court declared that any disciplinary action for the parent's misconduct was left to the "proper authorities." *Id.* at 983.

Other courts have reached similar decisions: *In re* Guardianship of Rodgers, 100 Ariz. 269, 413 P.2d 744 (1966) (mother took child from father's rightful custody in Texas); *In re* Walker, 228 Cal. App. 2d 217, 39 Cal. Rptr. 243 (5th Dist. 1964) (mother took child and was charged by Texas with kidnapping; California refused extradition); Smith v. Smith, 43 Del. 268, 45 A.2d 879 (Super. Ct. 1946); Helton v. Crawley, 241 Iowa 296, 41 N.W.2d 60 (1950); Aufiero v. Aufiero, 332 Mass. 149, 123 N.E.2d 709 (1955); Sheehy v. Sheehy, 88 N.H. 223, 186 A. 1 (1936); Commonwealth *ex rel.* Rogers v. Daven, 298 Pa. 416, 148 A. 524 (1930); Wicks v. Cox, 146 Tex. 489, 208 S.W.2d 876 (1948).

98. J. EATON, HANDBOOK OF EQUITY JURISPRUDENCE § 20, at 61 (2d ed. 1923).

99. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 293 (1962); Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 798 (1964).

100. Pennsylvania is prominent among the states whose courts ignore the clean hands principle in custody jurisdiction. Commonwealth *ex rel.* Rogers v. Daven, 298 Pa. 416, 148 A. 524 (1930); Commonwealth *ex rel.* Spriggs v. Carson, 229 Pa. Super. 9, 323 A.2d 273 (1974); Reilly v. Reilly, 219 Pa. Super. 85, 280 A.2d 639 (1971); Commonwealth *ex rel.* Thomas v. Gillard, 203 Pa. Super. 95, 198 A.2d 377 (1964); Commonwealth *ex rel.* Scholtes v. Scholtes, 187 Pa. Super. 22, 142 A.2d 345 (1958); Commonwealth *ex rel.* Schofield v. Schofield, 173 Pa. Super. 631, 98 A.2d 437 (1953); Commonwealth *ex rel.* Pukas v. Pukas, 164 Pa. Super. 488, 66 A.2d 315 (1949); Commonwealth *ex rel.* McTighe v. Lindsey, 156 Pa. Super. 560, 40 A.2d 881 (1945); Harris v. Harris, 50 Pa. D. & C.2d 728 (C.P. Bucks 1970); Commonwealth *ex rel.* D'Ercole v. Barnes, 86 Pa. D. & C. 509 (C.P. Lawr. 1953).

One Pennsylvania decision, Commonwealth *ex rel.* Beemer v. Beemer, 200 Pa. Super. 103, 188 A.2d 475 (1962), recognized the clean hands doctrine. The superior court denied an appeal to a mother for her "flagrant misconduct" in removing her children from the jurisdiction prior to the lower court decision and in keeping them after an adverse decision. *Id.* at 107, 188 A.2d at 477. The distinguishing circumstance in that case, however, was that the decree being defied was issued by a Pennsylvania court. Pennsylvania is not as responsive to violations of a sister state's decree.

punish the innocent child for parental misconduct.[101] Many courts realize that they may be encouraging interstate abductions and that ordinarily an individual should not be permitted to take advantage of his own misconduct, but they contend that these considerations should not bar a determination involving child welfare.[102] Misconduct is considered in these decisions only as an element in determining which parent should be awarded custody.[103]

Pennsylvania courts have excused abductions as instinctive parental behavior.[104] The superior court has said, "We do not feel that this act of a mother seeking her children . . . is of such serious consequences as to deprive her of her rights in them."[105] In a 1953 decision a parent brought her children to Pennsylvania in defiance of a Florida decree granting custody to the father. The court not only condoned her action as the natural consequence of motherhood, but ignored the Florida adjudication issued only five months before the inquiry of the Philadelphia county court.[106] Even more recently the superior court found abductions by both parents to be "reprehensible,"[107] but granted a hearing on the merits.

> [I]n this type of case where parents attempt to outwit each other in the possession and custody of their children, we will not place much weight on the frailties of human nature, nor subordinate more important factors, especially since those regrettable acts on the part of the parents are in the past.[108]

The sympathetic treatment often granted abducting parents is exemplified by a California decision[109] in which that state refused to extradite an abducting mother to Texas on a kidnapping charge. The

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101. In *In re* Guardianship of Rodgers, 100 Ariz. 269, 276, 413 P.2d 744, 749 (1966), the court addressed this point by stating, "Any other holding would punish innocent children for the wrongs committed by their parents and would prevent the inquiry to be made by the trial judge in determining where the best interests and welfare of the child lie."

102. *E.g.*, Smith v. Smith, 43 Del. 268, 274, 45 A.2d 879, 881 (Super. Ct. 1946):

> Ordinarily a man should not be permitted to take advantage of his own wrong-doing, but this principle must not be allowed to interfere with the basic rule that the child's welfare is the primary consideration in any case involving its custody.

103. *E.g., In re* Guardianship of Rodgers, 100 Ariz. 269, 413 P.2d 744 (1966); Smith v. Smith, 135 Cal. App. 2d 100, 286 P.2d 1009 (1st Dist. 1955); Commonwealth *ex rel.* Rogers v. Daven, 298 Pa. 416, 148 A. 524 (1930); Commonwealth *ex rel.* Scholtes v. Scholtes, 187 Pa. Super. 22, 142 A.2d 345 (1958); Commonwealth *ex rel.* Schofield v. Schofield, 173 Pa. Super. 631, 98 A.2d 437 (1953).

104. *E.g.*, Burns v. Commonwealth, 129 Pa. 138, 18 A. 756 (1889).

105. Commonwealth *ex rel.* Schofield v. Schofield, 173 Pa. Super. 631, 645, 98 A.2d 437, 443 (1953).

106. Commonwealth *ex rel.* Schofield v. Schofield, 173 Pa. Super. 631, 98 A.2d 437 (1953).

107. Commonwealth *ex rel.* Spriggs v. Carson, 229 Pa. Super. 9, 17, 323 A.2d 273, 276 (1974).

108. *Id.* at 14, 323 A.2d at 275.

109. *In re* Walker, 228 Cal. App. 2d 217, 39 Cal. Rptr. 243 (5th Dist. 1964).

court then granted custody to the mother, reasoning that if it awarded custody to the Texas father, the mother would be unable to visit her children without risking criminal liability for the kidnapping.[110] California refused to grant full faith and credit to the Texas decree, but also enabled the parent to sidestep criminal prosecution while enjoying her custody rights.

Some jurisdictions do apply the clean hands principle, however, and refuse to open custody determinations when the child is brought before the court in defiance of another court's decree.[111] Washington is a leader among these clean hands jurisdictions. In a landmark decision, *Ex parte Mullins*,[112] the Washington Supreme Court applied the principle, declaring that

> [t]o hold otherwise would be to put a premium upon wrongdoing by allowing a parent to gain an advantage by disobeying the orders of a court.
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> . . . .
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> . . . All reasoning and ideas of fair play and justice demand a holding that a parent acting in disobedience to an order of a court, cannot secure a new domicile for his or her child.[113]

D. Supreme Court Action

The efforts of individual states to limit forum shopping are necessarily ineffective. The child custody jurisdiction problems arising from interstate parental kidnapping are federal in nature and only a uniform, national policy can deal effectively with them.[114] The

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110. *Id.* at 225, 39 Cal. Rptr. at 248. The court also noted that invocation of the clean hands doctrine is discretionary with the court.

111. *E.g.*, Leathers v. Leathers, 162 Cal. App. 2d 768, 328 P.2d 853 (1958); Crocker v. Crocker, 122 Colo. 49, 219 P.2d 311 (1950); Rodney v. Adams, 268 S.W.2d 940 (Ky. 1954); *In re* Leete, 205 Mo. App. 225, 223 S.W. 962 (1920); Wilson v. Elliott, 96 Tex. 472, 75 S.W. 368 (1903); *Ex parte* Mullins, 26 Wash. 2d 419, 174 P.2d 790 (1946).

California is inconsistent on this point. *Compare* Leathers v. Leathers, *supra, with In re* Walker, 228 Cal. App. 2d 217, 39 Cal. Rptr. 243 (5th Dist. 1964) (clean hands doctrine recognized, but not invoked).

112. 26 Wash. 2d 419, 174 P.2d 790 (1946).

113. *Id.* at 431, 445, 174 P.2d at 797, 804.

114. For a discussion of the federal nature of the problem see Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795 (1964); Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROB. 819 (1944). For proposed federal solutions see Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 22 VAND. L. REV. 1207, 1216 (1969) (uniform state legislation); Currie, *Full Faith and Credit, Chiefly to Judgments*, 1964 SUP. CT. REV. 89, 115 (action by Congress); Ratner, *Legislative Resolution of the Interstate Child Custody Problem*, 38 S. CAL. L. REV. 183, 185 (1965) (uniform state legislation); Comment, *Conflicting Custody Decrees*, 7 DUQ. L. REV. 262, 272 (1968) (action by the United States Supreme Court).

United States Supreme Court has failed to create this policy, however, and has sidestepped the issue of legalized parental kidnapping.[115]

In *New York ex rel. Halvey v. Halvey*[116] the Court was presented with defiance of a Florida custody decree and a subsequent New York decree in favor of the defiant parent. The Court "in the exercise of judicial restraint decided to decide as little as possible."[117] Instead of directly examining the full faith and credit issue, the Court held that since the decree was modifiable in Florida, it also could be modified in New York.[118] In his concurring opinion Justice Rutledge admitted that this holding would encourage abductions, but stated that the Court had done its best.[119]

The problem again reached the Supreme Court in *May v. Anderson*.[120] The question was whether an Ohio court was bound to extend full faith and credit to a Wisconsin custody decree that was incident to a Wisconsin ex parte divorce. Again sidestepping the full faith and credit issue, the Court based its decision on the impropriety of Wisconsin's original jurisdiction since no personal jurisdiction had been obtained over one of the parents.[121] The majority opinion by Justice Burton held that parental custody was a personal right that could not be taken without in personam jurisdiction over the parent.[122] The effect of the decision, however, was to encourage parents to avoid service of process and later attack the jurisdiction of the court issuing a custody decree.[123]

In *Kovacs v. Brewer*[124] the Court espoused the changed circum-

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115. *See* Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 22 VAND. L. REV. 1207, 1216 (1969); Currie, *Full Faith and Credit, Chiefly to Judgments*, 1964 SUP. CT. REV. 89, 115. In the latter the author wrote, "the Court is not going to hold that custody decrees are entitled to full faith and credit." He further suggested that such action by the Court would be improper, amounting to judicial legislation. *Id.*; *see* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 79 (1971).

116. 330 U.S. 610 (1947).

117. Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 799 (1964).

118. 330 U.S. at 615.

119. *Id.* at 620-21.

120. 345 U.S. 528 (1953).

121. *Id.* at 533.

122. *Id.*

123. Justice Jackson in his dissent, *id.* at 536, noted that the majority provided no real solution because in this case neither state could bind both parents and the decree would never achieve finality.

> A state law such as this, where possession apparently is not merely nine points of the law but all of them and self-help is the ultimate authority, has little to commend it in legal logic or as a principle of order in a federal system.

Id. at 539. Using the majority's personal rights analysis Justice Jackson also argued that in addition to parents' personal custody rights, the child's personal right to have his status determined with reasonable certainty was at stake in these cases. *Id.* at 541-42.

124. 356 U.S. 604 (1958).

stances theory that had been adopted by a majority of states.[125] The Court found that the full faith and credit clause did not require a state to follow another state's decree when a change of circumstances had occurred.[126] Although the *Kovacs* majority refused to reject the full faith and credit clause in custody cases, they rendered it ineffective.[127] Low levels of proof are required to show a change in circumstances. These changes have included the mere passage of time.[128] As long as state courts make a token finding of changed circumstances, they have fulfilled the requirements of *Kovacs* and may ignore the custody decrees of other states.[129]

Ford v. Ford,[130] the High Court's most recent effort, again failed to address the constitutional question directly. A Virginia court had dismissed a custody case pursuant to a parental agreement. When one of the parents sought to modify the agreement in South Carolina, the custodial parent contended that the Virginia dismissal was binding and was upheld by the Supreme Court of South Carolina.[131] The Supreme Court ruled, however, that the state court had misinterpreted Virginia law in that dismissals in custody cases are not binding in Virginia.[132] Relying on *New York ex rel. Halvey v. Halvey*[133] the Court held the dismissal not binding in South Carolina.[134] The opinion did not indicate what the result would have been if the dismissal had been binding in Virginia. Thus, the applicability of the full faith and credit clause in custody determinations remains unclear.[135]

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125. *Id.* at 608.
126. *Id.*
127. Justice Frankfurter's dissent, *id.* at 609, went beyond the majority and suggested a complete rejection of full faith and credit in custody cases. He maintained that the goal of interstate comity was secondary to that of child welfare. Studies of custody determinations, however, have shown Justice Frankfurter's view of child welfare to be somewhat shortsighted. Child welfare has not been best served by ignoring sister state custody decrees. Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 U. VA. L. REV. 379, 380 (1959).
128. In the *Kovacs* case only fourteen months had passed since the initial custody decree. *See* Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROB. 819, 830 (1944).
129. *See* notes 89-91 and accompanying text *supra* for a more complete discussion of the changed circumstances reasoning.
130. 371 U.S. 187 (1962).
131. Ford v. Ford, 239 S.C. 305, 317, 123 S.E.2d 33, 39 (1961).
132. 371 U.S. at 192-93.
133. 330 U.S. 610 (1947).
134. 371 U.S. at 193-94.
135. Currie, *Full Faith and Credit, Chiefly to Judgments*, 1964 SUP. CT. REV. 89, 112; Comment, *Full Faith and Credit to Judgments*, 54 CALIF. L. REV. 282, 288 (1966). In Currie, *supra* at 112, the author wrote, "What is remarkable is that, at

Disagreement exists about the meaning of these Supreme Court decisions. The *Restatement (Second) of Conflict of Laws* interprets them to mean that full faith and credit is secondary to the national policy of promoting child welfare.[136] Close examination of the opinions' language, however, reveals that the *Restatement* view is not entirely accurate. Although vague references to child welfare appear in these decisions, the Justices did not carve an explicit exception to the full faith and credit clause.[137] The Court consistently avoided the constitutional question by finding qualifying facts that prevented direct application of the clause.[138] Indeed, Justice Frankfurter proposed the *Restatement* interpretation in his dissent to *Kovacs v. Brewer*,[139] but the position was not adopted by the majority.

E. An Alternative: Uniform Legislation

Despite the failure of the Supreme Court to create a national policy, an alternative exists in uniform legislation.[140] The Uniform Child Custody Jurisdiction Act,[141] adopted by the Commissioners on Uniform State Laws and approved by the American Bar Association in 1968, has been adopted by six states to date: California, Colorado, Hawaii, North Dakota, Oregon, and Wyoming.[142] The Act, which provides for reciprocal recognition of custody decrees, will discourage parental kidnapping when adopted by a majority of states. Under the Act only one court has full responsibility for any particular

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this late date, and despite the categorical language of the implementing act, the Court still shuns a holding that the Full Faith and Credit Clause applies to a custody decree."

136. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 434(c) (1971).

137. Comment, *Full Faith and Credit to Judgments*, 54 CALIF. L. REV. 282, 287 (1966). *But see* Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 22 VAND. L. REV. 1207, 1211 (1969).

138. Comment, *Full Faith and Credit to Judgments*, 54 CALIF. L. REV. 282, 288 (1966).

139. 356 U.S. 604, 609 (1958).

140. Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3 FAMILY L.Q. 304 (1969); Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 22 VAND. L. REV. 1207 (1969); Ratner, *Legislative Resolution of the Interstate Child Custody Problem*, 38 S. CAL. L. REV. 183 (1965); Walther, *The Uniform Child Custody Act*, 54 MARQ. L. REV. 161 (1971).

Although Congress can take action under the full faith and credit clause, 28 U.S.C. § 1738 (1971), it has chosen not to act, deferring instead to the Supreme Court's interpretation. Currie, *Full Faith and Credit, Chiefly to Judgments*, 1964 SUP. CT. REV. 89, 115; Comment, *Conflicting Custody Decrees*, 7 DUQ. L. REV. 262, 272 (1968). The latter commended congressional inaction because child custody is so inherently related to state policy. As an alternative, the author suggested that the Supreme Court establish standards. The Currie article, *supra* at 115, on the other hand, argued that action by the Court would be improper judicial legislation.

141. UNIFORM CHILD CUSTODY JURISDICTION ACT.

142. CAL. CIV. CODE §§ 5150-74 (West Supp. 1975); COLO. REV. STAT. ANN. §§ 46-6-1 to -26 (1973); HAWAII REV. STAT. §§ 583-1 to -26 (1973); N.D. CENT. CODE §§ 14-14-01 to -26 (1969); ORE. REV. STAT. §§ 109.700-.930 (1973); WYO. STAT. ANN. §§ 20-143 to -167 (1973).

child.[143] That court is one in the child's "home state."[144] The home state is the state in which the child lived with a parent or guardian for six months immediately preceding the custody determination. A home state's jurisdiction endures for six months after the child leaves that state.[145] This provision will greatly enhance the custodial parent's protection against an abducting parent. Currently the victimized parent is compelled to follow the abductor and file for habeas corpus in whatever state to which the child is taken. Under the Uniform Act, on the other hand, proceedings can be filed in the home state for up to six months after the child is gone. When no state qualifies as a home state, jurisdiction may be exercised by a state having "strong contacts"[146] with the child. Strong contacts exist under section 3(a)(3) when

> (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

Mere physical presence is insufficient as a jurisdictional basis, except in emergency situations when temporary measures may be taken by the state in its role as *parens patriae*. Emergencies include abandonment, neglect, and mistreatment.[147]

Once a court of jurisdiction is established under the Act, all petitions for modification of the original custody order must be addressed to that court.[148] This system provides for interstate comity without any direct reference to the full faith and credit clause. One of the most significant elements of the Uniform Child Custody Jurisdiction Act is adherence to the equitable principle of clean hands. Under the Act courts will decline jurisdiction when the child has been wrongfully taken from another state or wrongfully detained on a visit.[149] Inequitable activity extends beyond illegal activity to any conduct the court finds reprehensible. Furthermore, the clean hands principle applies even when no official custody decree has been rendered in any other state. Consistent with its equitable origins,

143. UNIFORM CHILD CUSTODY JURISDICTION ACT § 3.
144. *Id.* § 2(5).
145. *Id.* § 3(a)(1)(ii).
146. *Id.* § 2(a)(2).
147. *Id.* § 3(a)(3).
148. *Id.* § 14(a).
149. *Id.* § 8.

however, the principle will not be applied when there is a risk of harm to the child.[150]

VI. Conclusion

Few effective remedies exist for the child who is forcibly abducted by his parent. This parental act, nevertheless, constitutes kidnapping. There is a direct interference with the child's liberty, an interference with the custodial rights of the other parent, and often a defiance of a court-issued custody decree. Yet, parents are exempt from state kidnapping statutes and the Federal Kidnapping Act.[151] State courts have exempted parents by relying on concepts of parental instincts and a rights-duties analysis of parenthood. This leniency has been extended to agents of the abducting parent, although without logical foundation for the extension.

Civil remedies are available to the child, but are an inadequate deterrent to parental kidnapping. In a majority of states parental immunity persists. Even when immunity is abrogated, civil liability remains an unlikely remedy. If a child does bring suit, traditional parental defenses of good faith and concern for child welfare probably will bar recovery. Although a parent who willfully defies a custody decree is subject to civil contempt charges, this deterrent is similarly ineffective. Courts cannot enforce civil contempt citations beyond the limits of the state, the typical refuge of abducting parents.

For a number of reasons noncustodial parents will risk civil and criminal liability by abducting their children and transporting them across state lines. First, there is the general ineffectiveness of the remedies available. Second, the parent who removes his child to another state usually is rewarded with a favorable custody determination. Many states will grant a custody hearing on the mere physical presence of the child within its borders. A hearing often is granted despite the parent's defiance of another state's decree or a child custody agreement. Third, the local petitioner commonly is favored regardless of his lack of clean hands. Fourth, forum shopping has been encouraged by the failure of the United States Supreme Court to apply the full faith and credit clause to custody determinations. Last, although some relief is promised by the Uniform Child Custody Jurisdiction Act, to date it has been adopted by only six states.

Thus, a clear need has been demonstrated for effective sanctions against forcible abduction of children by their parents. These sanctions can be criminal or civil. Since most children are abducted in

150. *Id.* § 8(b).
151. 18 U.S.C. § 1201 (1971).

search of a favorable custody decree, the problem also can be remedied by uniform standards of custody jurisdiction. These standards should be established by strict application of the full faith and credit clause of the Constitution or by adoption of uniform legislation.

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