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Court-Sponsored Custody Mediation to Prevent Parental Kidnapping: A Disarmament Proposal Comment.

Sue T. Bentch

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Court-Sponsored Custody Mediation to Prevent Parental Kidnapping: A Disarmament Proposal

Sue T. Bentch

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I. INTRODUCTION

More than two hundred children are kidnapped each day in the United States,¹ not by the stereotypical evil-doer offering candy, but by one of the child's parents. These kidnapped children are the innocent victims² in an

1. See *Proposed Federal Parental Kidnapping Prevention Act: Hearings on S. 105 Before the Subcomm. on Child and Human Dev. of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 1 (1979) (statement of Senator Alan Cranston) (estimating 25,000 parental kidnappings each year); *id.* at 165 (statement of Senator Malcolm Wallop) (quoting estimate by Children's Rights, Inc., at 100,000 cases per year). More recent estimates place the figure at between 313,000 and 626,000 cases annually. See Coombs, *Curbing the Child Snatching Epidemic*, 6 FAM. ADVOC. 30, 30 (Spring 1984) (quoting 1981-82 survey by Dr. Richard Gelles at the University of Rhode Island).

2. See *Proposed Federal Parental Kidnapping Prevention Act: Hearings on S. 105 Before the Subcomm. on Child and Human Dev. of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 19 (1979) (statement of John D. Van De Kamp) (calling children "defenseless victims" of this crime). These self-help abductions result in tremendous emotional costs to both the child and the left-behind parent. See A. HARALAMBIE, *HANDLING CHILD CUSTODY CASES* 138 (1983) (parent left behind also bears costs of investigations and litigation). The emotional trauma to the abducted children includes both psychological and physical manifestations, such as eating and sleeping disorders. See J. GOLDSTEIN, A. FREUD,

escalating war between parents: one parent with custody and the other parent who has lost, or who fears losing, custody of the child.³ The magnitude of the parental kidnapping problem has forced both Congress and the legislatures of the various states to address its possible solution.⁴ Unfortunately, however, neither the Parental Kidnapping Prevention Act of 1980 (PKPA)⁵ nor the Uniform Child Custody Jurisdiction Act (UCCJA)⁶ has proven to be

& A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 32 (1973) (disorders caused by disruptions in continuity). Parental kidnappings may even include violence. *See Comment, Intentional Infliction of Emotional Distress: Recovery of Damages for Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 148 (in at least two cases, abducting parent and victimized child both killed). History's first recorded custody battle nearly had a violent ending. *See 1 Kings 3:16-28* (abductor would have allowed Solomon to cut child in two; mother would have given up custody rather than see child harmed).

3. *See Comment, Intentional Infliction of Emotional Distress: Recovery of Damages for Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 147 (although many parents kidnap child as result of unfavorable custody decree, over 70% of parental kidnappings occur before custody has been litigated).

4. *See Parental Kidnapping Prevention Act*, Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3568, 3569 (1980) (purpose to deter interstate abductions); *Uniform Child Custody Jurisdiction Act* § 1, 9 U.L.A. 111, 116-17 (1979) (purpose to deter abductions). The federal statute complements the state enactments of the uniform act. *See Berk & Walker, The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act*, 11 COLO. LAW. 1224, 1230 (1982) (purpose of UCCJA to deter parental abductions of children calculated to obtain favorable custody awards by forum shopping; purpose of PKPA to deter child snatching and forum shopping).

5. *Parental Kidnapping Prevention Act*, Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3568 (1980) (codified in scattered sections of titles 18, 28, & 42 of U.S.C.). The Act requires states to give full faith and credit to custody decisions of other states that conform with the Act. *See id.* § 8, 94 Stat. at 3569-71 (codified in 28 U.S.C. § 1738A (1982)) (every state shall give full faith and credit to custody determinations consistent with provisions of Act); *see also Comment, Parental Child-Snatching: Out of a No-Man's-Land of Law*, 13 ST. MARY'S L.J. 337, 348-49 (1981) (Act deters incentive to take child to more favorable forum); Note, *Child Snatching: The Federal Response*, 33 SYRACUSE L. REV. 1103, 1116 (1982) (Act based on Full Faith and Credit clause of United States Constitution).

6. *Uniform Child Custody Jurisdiction Act*, 9 U.L.A. 111 (1979). The Act specifies prerequisites for a state's exercise of custody jurisdiction. *See id.* § 3, 9 U.L.A. at 111, 122-25 (competence based on determination of child's "home state"). The UCCJA also lists criteria for *not* acquiring jurisdiction. *See id.* § 8, 9 U.L.A. at 142-43 (state may decline otherwise appropriate jurisdiction if petitioner has wrongfully taken child [the "clean hands" doctrine]); *see also Berk & Walker, The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act*, 11 COLO. LAW. 1224, 1230 (1982) (court not necessarily bound to exercise jurisdiction it has acquired). On September 1, 1983, Texas adopted the UCCJA, but with modifications to the Act as promulgated by the National Conference of Commissioners on Uniform Laws in 1968. *See TEX. FAM. CODE ANN.* §§ 11.51-.75 (Vernon Supp. 1986); *see also Sampson & Tindall, The UCCJA Comes to Texas—As Amended, Integrated, and Improved*, 46 TEX. B.J. 1096, 1104 n.3 (1983) (the Chairman of the Senate Jurisprudence Committee, the Chairman of the House Judiciary Comm., and the Democratic majority leader sponsored S.B. 439, which Governor Mark White signed on May 20, 1983). For a discussion of the Texas modifications to the UCCJA, *see generally id.* at 1096-1110.

the panacea its sponsors had hoped.⁷ Consequently, both commentators⁸ and aggrieved parents⁹ have sought remedies of criminal sanctions¹⁰ or civil liability¹¹ beyond those provided by the statutes. Even so, despite attacking this dilemma on several fronts, the tide of parental kidnapping has not yet

7. See S. KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 30-33 (1981) (UCCJA not mandatory and relies too much on judicial discretion); Coombs, *Curbing the Child Snatching Epidemic*, 6 FAM. ADVOC. 30, 32-33 (Spring 1984) (UCCJA's flexibility permits courts of different states to reach opposite conclusions); Coombs, *Custody Conflicts in the Courts: Judicial Resolution of the Old and New Questions Raised by Interstate Child Custody Cases*, 16 FAM. L.Q. 251, 252 (1982) (application of UCCJA and PKPA will depend on judicial resolution of questions of first impression); Sampson, *What's Wrong with the UCCJA?*, 3 FAM. ADVOC. 28, 30 (Spring 1981) (merely precatory mandates lead to "hometown" decisions); Comment, *Intentional Infliction of Emotional Distress: Recovery of Damages for Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 152 (PKPA provides no remedies for mental distress incurred by victimized parents and children); Note, *Tortious Interference with Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching*, 68 IOWA L. REV. 495, 508, 515 (1983) (UCCJA and PKPA apply only after custody adjudications).

8. See, e.g., Comment, *Intentional Infliction of Emotional Distress: Recovery of Damages for Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 162 (tort remedy affords relief to parent with joint custody, either before custody adjudicated or in court-awarded joint custody); Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 250 (tort of custodial interference is powerful remedy to combat parental kidnapping); Note, *The Search for a Solution to Child Snatching*, 11 HOFSTRA L. REV. 1073, 1117 (1983) (only hope for elimination of child snatching is threat of fines and imprisonment offered by stronger criminal laws).

9. See, e.g., *Fenslage v. Dawkins*, 629 F.2d 1107, 1108 (5th Cir. 1980) (mother sued father and in-laws for intentional infliction of mental anguish); *Cramlet v. Multimedia, Inc.*, 9 FAM. L. REP. (BNA) 2452, 2452 (D.C. Colo. May 11, 1983) (mother sued producers of Phil Donahue Show for failing to reveal whereabouts of father and abducted child); *Lloyd v. Loeffler*, 539 F. Supp. 998, 1005 (E.D. Wis.) (father sued mother and in-laws for tortious interference with custody), *aff'd*, 694 F.2d 489 (7th Cir. 1982).

10. See, e.g., *State v. Kracker*, 599 P.2d 250, 252 (Ariz. App. 1979) (mother convicted for violating custody order); *People v. Coyle*, 654 P.2d 815, 816 (Colo. 1982) (father convicted of violating custody order); *Roberts v. State*, 619 S.W.2d 161, 164 (Tex. Crim. App. 1981) (affirming conviction for criminal interference with custody). Most states that had exempted parents from kidnapping laws have amended them or passed child abduction statutes. See Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 237-38 (state criminal statutes only partially solve parental kidnapping problem). Only three states consider parental kidnapping neither a felony nor a misdemeanor. See *id.* at 237 n.66 (New Hampshire, West Virginia, and District of Columbia).

11. See, e.g., *Fenslage v. Dawkins*, 629 F.2d 1107, 1110 (5th Cir. 1980) (parent may recover damages for tortious act of taking and keeping children); *Lloyd v. Loeffler*, 539 F. Supp. 998, 1005 (E.D. Wis. 1982) (father entitled to damages from both ex-wife and her parents for interfering with lawful custody of his child), *aff'd*, 694 F.2d 489 (7th Cir. 1983); *Plante v. Engel*, 469 A.2d 1299, 1302 (N.H. 1983) (parent has cause of action for damages against third parties who aid and abet interference with custody).

been stemmed.¹²

This comment will examine the history of the parental kidnapping problem.¹³ It will then analyze each of the contemporary weapons in the anti-child-snatching arsenal and detail the benefits and shortcomings of each. Finally, this comment will propose an additional attack on the problem—one designed to disarm the animosities and frustrations that encourage a parent to resort to this crime which victimizes his or her own child.

II. HISTORY OF THE PARENTAL KIDNAPPING PROBLEM

Social and legal causes have both contributed to the dramatic rise in the number of parental kidnappings over the past two decades. First, the increasing divorce rate¹⁴ has combined with the great mobility of modern families¹⁵ to swell the numbers of children who are potential victims of parental kidnapping.¹⁶ Second, the children of divorce are too frequently the ammunition that an angry, hurt, or disgruntled parent can use to retaliate against his former spouse.¹⁷ Finally, the publicity afforded the parental kidnapping

12. See Coombs, *Curbing the Child Snatching Epidemic*, 6 FAM. ADVOC. 30, 30 (Spring 1984) (estimates range from 25,000 to 625,000 parental kidnappings per year); see also Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 249-50 (tort action not complete remedy for parental kidnapping); Note, *Tortious Interference with Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching*, 68 IOWA L. REV. 495, 508 (1983) (statutes inadequate to prevent parental kidnapping).

13. See Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 230 (defining parental kidnapping as abduction and/or concealment of child without consent of other parent). Child snatching, child stealing, and child abduction are synonymous with parental kidnapping. See *id.* at 229 n.1; Note, *Child Snatching: The Federal Response*, 33 SYRACUSE L. REV. 1103, 1103 n.4 (1982) (terms may be used interchangeably).

14. See 1985 STATISTICAL ABSTRACT OF THE UNITED STATES 82. The divorce rate increased from 2.5 per 1,000 population in 1965 to 3.5 in 1970, 4.8 in 1975, 5.2 in 1980, and 5.3 in 1981 [the last year for which figures are complete], for a total of 1,180,000 divorces in 1981. The Texas rate is even higher: 6.9 divorces per 1,000 population in 1981, a total of 101,600. See *id.*

15. See 1985 STATISTICAL ABSTRACT OF THE UNITED STATES 16 (between 1975 and 1980, nearly half of United States population change residence at least once).

16. See *Proposed Federal Parental Kidnapping Prevention Act: Addendum to Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the House Comm. of the Judiciary and the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 64 (1980) (submission of Michael W. Agopain) (statistics show one parental kidnapping for every twenty-two divorces); see also Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 233 (higher divorce rate plus greater mobility increases number of parental kidnappings).

17. See S. KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 11 (1981) (child becomes pawn in war between ex-spouses); Comment, *The Tort of*

problem may ironically encourage even more parents to consider this destructive form of self-help as a means to regain their children.¹⁸

From a legal perspective, in the past, once a parent kidnapped his child, he was generally immune from criminal sanctions.¹⁹ This parental immunity was established by both federal and state kidnapping laws which specifically excluded parents from liability.²⁰ Additionally, most law enforcement officials considered parental kidnapping merely a domestic squabble,²¹ and consequently either gave these kidnapping cases little attention or adopted a "hands off" policy.²²

Further, three judicial factors directly contributed to the escalation in the number of parental kidnappings. First, until recently, states have not been

Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings, 1983 U. ILL. L. REV. 229, 233 (many parental kidnappings motivated by revenge and retaliation).

18. See Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 233 (more parents will recognize possibility of abduction with increased public exposure of problem).

19. See *State v. Benner*, 385 A.2d 48, 49 (Me. 1978) (father cannot be prosecuted for taking own child); *Cline v. Superior Court*, 9 FAM. L. REP. (BNA) 2011, 2011 (Cal. Ct. App. Nov. 17, 1982) (father cannot be convicted of kidnapping unless mother has superior custody rights); see also S. KATZ, *CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN* 90-91 (1981) (parental immunity based on lack of unlawful intent, especially absent outstanding custody decree).

20. See, e.g., 18 U.S.C. § 1201 (1982) ("whoever unlawfully . . . kidnaps, abducts, or carries away . . . any person, except in the case of a minor by the parent thereof. . ."); ME. REV. STAT. ANN. tit. 17-A, § 301 (1983) (defense to kidnapping that person abducted is child of actor); TEX. PENAL CODE ANN. § 20.03 (b) (2) (Vernon 1974) (affirmative defense to kidnapping that actor related to person abducted). The federal statute, the Lindbergh Act, originally enacted in 1932, exemplifies the notion that parents do what they think best for the child. See S. KATZ, *CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN* 90 (1981) (parents act in child's best interests, even when acting wrongly). Even specific child snatching statutes may not hold parents liable. See *id.* (courts often uphold parental immunity, absent statutory language specifically including parental abductions). See generally *id.* at 90-98 (state by state analysis).

21. See Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 235 (parental kidnapping is simply domestic quarrel among family members). The lack of police concern frustrates many custodial parents while encouraging abducting parents. See *id.* (indifference provides further incentive to steal children); see also *id.* at 235 n.46 (recounting experience of victimized parent).

22. See Comment, *Intentional Infliction of Emotional Distress: Recovery of Damages for Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 149-50 (hands-off policy of state and federal agencies caused by perception of parental kidnapping as domestic relations problem); see also Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 235 (hands-off policy encourages increase in parental kidnappings). Additionally, federal courts have refused to exercise jurisdiction over child custody cases under the "domestic relations exception" to federal diversity jurisdiction. See *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859) (disclaiming jurisdiction over divorce or alimony); see also *In re Burriss*, 136 U.S. 586, 593-94 (1890) (extending domestic relations exception to child custody).

obliged to give full faith and credit²³ to the custody decrees of other states.²⁴ As a result, different states were empowered to enter conflicting decrees.²⁵ This inconsistency in custody determinations encouraged parental kidnapping by providing a forum for the kidnapping parent to relitigate an unfavorable custody decree.²⁶ Second, this lack of full faith and credit resulted from the courts' failure to consider custody decrees *res judicata*.²⁷ A court in one state can usually modify its own custody decree, if warranted in the child's

23. U. S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every State.").

24. See *May v. Anderson*, 345 U.S. 528, 534-35 (1953) (custody decree not entitled to full faith and credit where issued without personal jurisdiction over non-resident parent). Justice Jackson, in his dissent to *May v. Anderson*, asserted, "A state of the law such as this, where possession is not merely nine points of the law but all of them and self-help the ultimate authority, has little to commend it in legal logic or as a principle of order in a federal system." *Id.* at 539 (Jackson, J., dissenting). Justice Jackson added that although personal jurisdiction is "highly desirable, . . . the assumption that it overrides all other considerations and in its absence a state is constitutionally impotent to resolve questions of custody flies in the face of our own cases." *Id.* at 541 (Jackson, J., dissenting). Justice Jackson's dissent is the beginning of the "home state" concept adopted by the UCCJA. See S. KATZ, *CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN* 59 (1981) (Jackson urged balancing test to make only one state arbiter of custody); see also *Kovacs v. Brewer*, 356 U.S. 604, 612 (1958) (one court cannot be bound by prior decree of another).

25. See, e.g., *Stout v. Pate*, 261 P.2d 788, 790 (Cal. Ct. App. 1953) (California adjudicated custody despite prior decree in Georgia), *cert. denied*, 347 U.S. 968 (1954); *Webb v. Webb*, 266 S.E.2d 463, 464 (Ga. 1980) (Georgia awarded custody to father despite Florida's previous custody award to mother), *cert. dismissed*, 451 U.S. 493 (1981); *In re Custody of Ross*, 630 P.2d 353, 364 (Or. 1981) (reversing trial court's award of custody to abducting father despite Montana's previous custody award to mother).

26. See *Stout v. Pate*, 261 P.2d 788, 790 (Cal. Ct. App. 1953) (California court ignored earlier Georgia decree), *cert. denied*, 347 U.S. 968 (1954); *Stout v. Pate*, 69 S.E.2d 576, 577 (Ga. 1952) (Georgia court determined initial custody jurisdiction), *aff'd*, 75 S.E.2d 748 (Ga. 1953), *cert. denied*, 347 U.S. 968 (1954); see also Note, *The Search for a Solution to Child Snatching*, 11 HOFSTRA L. REV. 1073, 1078 (1983) (both courts and parents could determine for themselves which decree to follow). This revolving door litigation fulfilled the ominous prophesy of Justice Rutledge in *New York ex rel. Halvey v. Halvey*:

a continuing round of litigation over custody, perhaps also . . . abduction, between alienated parents . . . [can] hardly be thought conducive to the child's welfare. . . . [T]he controlling consideration should [therefore] be the best interests of the child, not only for disposing of such cases as a matter of local policy, . . . but also for formulating federal policies of full faith and credit as well as of jurisdiction and due process in relation to such dispositions.

New York ex rel. Halvey v. Halvey, 330 U.S. 610, 619-20 (1947) (Rutledge, J., concurring). Some states, however, have avoided relitigating custody based on concepts of comity or forum non conveniens. See S. KATZ, *CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN* 12 (1981).

27. See *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 615 (1947) (as custody is not *res judicata* in first forum, it is not *res judicata* elsewhere).

best interests by changing circumstances.²⁸ Judges of courts in other states, therefore, felt similarly free to modify the original custody determination without considering the earlier decree *res judicata*.²⁹ Finally, courts could easily obtain jurisdiction of a custody case based merely on the physical presence of the child within the state.³⁰ This over-simplified notion of personal jurisdiction encouraged the dissatisfied parent to take his child to another state where he could simply relitigate or modify the original adverse decree,³¹ or where he could obtain an initial decree in his favor.³²

These three factors were addressed by the Uniform Child Custody Jurisdiction Act (UCCJA),³³ which attempted to prevent abductions³⁴ by providing that only one state at a time was competent to litigate the custody of a particular child.³⁵ The UCCJA, however, was effective only in those states

28. See *id.* at 613 (altered conditions grounds to alter custody decree for welfare of child). In determining the child's best interests, the courts examine, *inter alia*, the child's wishes, his relation with his parent or parents, the parents' wishes, the child's relation with siblings or others who affect him, the child's adjustment to his home, his school, and his community, and the physical and mental health of all parties involved in the custody matter. See UNIFORM MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 197-98 (1979).

29. See, e.g., *Ford v. Ford*, 371 U.S. 187, 192-93 (1962) (Virginia's dismissal of custody case because of parents' agreement not *res judicata* barring South Carolina's custody determination); *Kovacs v. Brewer*, 356 U.S. 604, 608 (1958) (custody not *res judicata* if changed circumstances dictate modification in second state); *Stout v. Pate*, 261 P.2d 788, 790 (Cal. Ct. App. 1953) (Georgia's prior decree not *res judicata* in California). *But see* *McMillan v. McMillan*, 158 P.2d 444, 445-46 (Colo. 1945) (adjudication of custody by court having jurisdiction over all parties should be *res judicata* in other states); *Wilburn v. Wilburn*, 210 A.2d 832, 834 (D.C. 1965) (jurisdiction over all parties makes foreign judgment regarding custody *res judicata* in this forum).

30. See *May v. Anderson*, 345 U.S. 528, 542 (1953) (Jackson, J., dissenting) (criticizing this concept of jurisdiction for encouraging parents to "seize and run" to more sympathetic state); see also Note, *The Search for a Solution to Child Snatching*, 11 HOFSTRA L. REV. 1073, 1080 (1983) (physical possession of child tremendous tactical advantage to abducting parent).

31. See Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 233-34 (if parent resident in second state, merely bringing child to that state sufficient to give it custody jurisdiction).

32. See Note, *The Search for a Solution to Child Snatching*, 11 HOFSTRA L. REV. 1073, 1080 (1983) (mere physical presence of child enough to petition court for custody). See generally S. KATZ, *CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN* 34-35 (1981) (blaming exacerbation of parental kidnapping problem on lax jurisdictional standards).

33. Uniform Child Custody Jurisdiction Act, 9 U.L.A. 111 (1979).

34. See *id.* § 1, 9 U.L.A. at 117 ("deter abductions and other unilateral removals of children undertaken to obtain custody awards").

35. See *id.* § 3, 9 U.L.A. at 122-23 (jurisdiction determined by child's home state; mere physical presence insufficient); see also *id.* § 14, 9 U.L.A. at 153-54 (no jurisdiction to modify custody unless original state has lost jurisdiction and second state has acquired jurisdiction pursuant to section 3).

which had expressly adopted it.³⁶ By 1979, barely half the states had done so.³⁷ Congress was therefore persuaded to adopt the Parental Kidnapping Prevention Act (PKPA) of 1980.³⁸ This federal legislation mounted a four-pronged attack against parental kidnapping. First, the PKPA mandated that "home state" decrees receive full faith and credit in sister states.³⁹ Second, the Act provided for the custodial parent's recovery of expenses incurred in locating and regaining physical custody of the child.⁴⁰ Third, the PKPA added the assistance of the national "Parent Locator Service" to track down abducted children.⁴¹ Fourth, the Act made the Fugitive Felon Act apply to parents who stole children from a state that considered parental kidnapping a felony.⁴²

Concurrently, most of the remaining states were persuaded to adopt the UCCJA⁴³ while many amended their criminal kidnapping laws to include

36. See, e.g., *McDowell v. Orsini*, 127 Cal. Rptr. 285, 292 (Ct. App. 1976) (applying California version of UCCJA adopted in 1974); *Nelson v. District Court*, 527 P.2d 811, 813 (Colo. 1974) (applying Colorado version of UCCJA adopted in 1973); *Brooks v. Brooks*, 530 P.2d 547, 551 (Or. App. 1975) (applying Oregon version of UCCJA adopted in 1973). Because it is a non-reciprocal act, the UCCJA requires adoption by all fifty states to be fully effective. See Uniform Child Custody Jurisdiction Act, Commissioners' Prefatory Note, 9 U.L.A. 111, 114 (1979) (full effect only when adopted by most states); see also Note, *Tortious Interference with Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching*, 68 IOWA L. REV. 495, 503 (1983) (full effect of Act will not be realized until it is adopted and uniformly interpreted in each state). Though Texas had similar provisions and generally enforced foreign custody decrees prior to the adoption of the UCCJA in 1983, other states frequently presumed Texas a renegade and, therefore, refused to honor Texas decrees. See Sampson & Tindall, *The UCCJA Comes to Texas—As Amended, Integrated, and Improved*, 46 TEX. B.J. 1096, 1098 (1983) ("Yankees" scurrilously defamed Texas as haven for child snatchers).

37. See Uniform Child Custody Jurisdiction Act, 9 U.L.A. 111, 111 (1979) (twenty-eight states had adopted UCCJA by 1979).

38. Parental Kidnapping Prevention Act, Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3568 (1980) (codified in scattered sections of titles 18, 28, & 42 U.S.C.).

39. See *id.* § 8, 94 Stat. at 3569 (codified in 28 U.S.C. § 1738A (1982)) (custody determinations that comply with Act due full faith and credit).

40. See *id.*, 94 Stat. at 3571 (recovery of travel expenses, attorney's fees, costs of private investigations, and other expenses if child is wrongfully abducted).

41. See *id.* § 9, 94 Stat. at 3572 (codified in 42 U.S.C. § 654 (1982)) (assisting in location of abducted child).

42. See *id.* § 10, 94 Stat. at 3573 (codified in 18 U.S.C. § 1073 (1982)) (provided state considers parental kidnapping a felony and child is taken out of state). The Fugitive Felon Act punishes those felons who flee a state to avoid prosecution, custody, or confinement with a \$5,000.00 fine or imprisonment for not more than five years, or both. See Fugitive Felon Act, 18 U.S.C. § 1073 (1982). But a parent who kidnaps his own child is still exempt from federal kidnapping charges. See Lindbergh Act, 18 U.S.C. § 1201 (1982) (exempting parents from sanctions).

43. See Uniform Child Custody Jurisdiction Act, 9 U.L.A. 111, 111 (1979) (28 states had adopted UCCJA by 1979); Comment, *Parental Child-Snatching: Out of a No-Man's-Land of Law*, 13 ST. MARY'S L.J. 337, 345 (1981) (45 states had adopted UCCJA by late 1981). Fi-

parents.⁴⁴ In addition, some states expressly adopted, either legislatively⁴⁵ or judicially,⁴⁶ a remedy of civil damages for the aggrieved parent against the abducting parent.⁴⁷ In 1983, Texas became the forty-ninth state to adopt the UCCJA.⁴⁸ The Texas Legislature also enacted both criminal and civil laws prohibiting interference with child custody.⁴⁹ Additionally, the Texas courts were among the first to recognize civil damages as a method of compensating a victimized parent.⁵⁰

III. ANALYSIS OF CURRENT REMEDIES AND DETERRENTS

A. *The Uniform Child Custody Jurisdiction Act*

With the adoption of the UCCJA by all fifty states, the Act can achieve its full potential for bringing order to the jurisdictional chaos that once

nally, in 1984, Massachusetts became the fiftieth state to adopt the UCCJA. *See* MASS. ANN. LAWS ch. 209B, §§ 1-14 (Law. Co-op. Supp. 1986).

44. *See, e.g.*, FLA. STAT. ANN. § 787.04(2) (West Supp. 1986) (interference with custody is felony if child removed from state); TEX. PENAL CODE ANN. § 25.03(a)(2) (Vernon Supp. 1986) (taking child in violation of lawful custody is felony); WIS. STAT. ANN. § 946.715(1)(a)(b) (West 1982) (parent liable for concealing child from other parent). The statutes listed do not require violation of a court order as a condition precedent to their enforcement, although statutes of other states frequently do so. *See* A. HARALAMBIE, HANDLING CHILD CUSTODY CASES 149 n.86 (1983) (listing criminal statutes in sixteen states).

45. *See* TEX. FAM. CODE ANN. §§ 36.01-.08 (Vernon Supp. 1986) ("Civil Liability For Interference With Child Custody").

46. *See, e.g.*, *Wasserman v. Wasserman*, 671 F.2d 832, 833 (4th Cir.) (intentional infliction of emotional distress), *cert. denied*, 459 U.S. 1014 (1982); *Lloyd v. Loeffler*, 539 F. Supp. 998, 1004 (E.D. Wis.) (unlawful interference with custody), *aff'd*, 694 F.2d 489 (7th Cir. 1982); *Kajtazi v. Kajtazi*, 488 F. Supp. 15, 19 (E.D.N.Y. 1978) (false imprisonment).

47. *See* *Fenslage v. Dawkins*, 629 F.2d 1107, 1110 (5th Cir. 1980) (damages for mental anguish flowing from civil conspiracy); *Lloyd v. Loeffler*, 539 F. Supp. 998, 1005 (E.D. Wis.) (damages for tortious acts as well as conspiracy), *aff'd*, 694 F.2d 489 (7th Cir. 1982); *see also* TEX. FAM. CODE ANN. § 36.03 (Vernon Supp. 1986) (actual costs of locating child, recovering child, attorney's fees, and mental suffering, plus exemplary damages if defendant acted with malice or intended to harm plaintiff).

48. *See* TEX. FAM. CODE ANN. §§ 11.51-75 (Vernon Supp. 1986). Texas became the forty-ninth state to adopt the UCCJA on Sept. 1, 1983. *See generally* Sampson & Tindall, *The UCCJA Comes to Texas—As Amended, Integrated, and Improved*, 46 TEX. B.J. 1096, 1096 (1983) (extolling benefits of Texas version of UCCJA); Solender, *Family Law—Parent and Child: Annual Survey of Texas Law*, 38 SW. L.J. 173-76 (1984) (reviewing 1983's developments in family law, particularly changes wrought by adoption of UCCJA).

49. *See* TEX. PENAL CODE ANN. § 25.03 (Vernon Supp. 1986) (interference with child custody is third degree felony); TEX. FAM. CODE ANN. §§ 36.01-.08 (Vernon Supp. 1986) ("Civil Liability For Interference With Child Custody").

50. *See* *Fenslage v. Dawkins*, 629 F.2d 1107, 1109 (5th Cir. 1980) (court applied Texas law to affirm damages for mental suffering from abduction of child).

shrouded custody litigation.⁵¹ To achieve this end, the Act attempts to limit jurisdiction over the custody of a particular child to one state at a time.⁵² The UCCJA accomplishes this goal by establishing the guidelines that courts can use to decide which state has jurisdiction over that child. Consequently, courts in one state can no longer make a unilateral decision based merely on the child's physical presence within that state.⁵³ Instead, under the Act, courts have the assistance of similar courts in other states in determining the child's "home state."⁵⁴ This determination is based on the child's welfare and best interests.⁵⁵ Jurisdiction will remain vested in this home state⁵⁶ unless the court determines that one of the Act's three specific exceptions is satisfied.⁵⁷ Those exceptions consist of the following: (1) a significant connection with the forum by both the child and one parent;⁵⁸ (2) an emergency

51. See Uniform Child Custody Jurisdiction Act, Commissioners' Prefatory Note, 9 U.L.A. 111, 114 (1979) (enactment by large number of states necessary to reap full benefits).

52. See *id.*, 9 U.L.A. at 114 (one state must assume major responsibility).

53. See *id.* at § 3(b), 9 U.L.A. at 122 (1979) (physical presence of child not alone sufficient to confer jurisdiction); see also *id.* § 3(c), 9 U.L.A. at 122 (physical presence of child, while desirable, not prerequisite for jurisdiction to determine custody). The Texas statute is almost identical. See TEX. FAM. CODE ANN. §§ 11.53(b), (c) (Vernon Supp. 1986).

54. See Uniform Child Custody Jurisdiction Act § 3(a)(1), 9 U.L.A. 111, 122 (1979). The Act defines "home state" as

the state in which the child immediately preceding the time involved lived with his parents, 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 the persons mentioned.

Id. § 2(5), 9 U.L.A. at 119. The Texas statute is nearly identical. See TEX. FAM. CODE ANN. § 11.53(a)(1) (Vernon Supp. 1986) (corresponds with UCCJA § 3(a)(1)); see also *id.* § 11.52(5) (corresponds with UCCJA § 2(5)).

55. See Uniform Child Custody Jurisdiction Act, Commissioners' Prefatory Note, 9 U.L.A. 111, 114 (1979) (court which exercises jurisdiction less important than welfare of child achieved through partnership of courts in several states).

56. See *id.* § 3(a)(1), 9 U.L.A. at 122 (1979) (home state is that in which child has lived with parent for six consecutive months).

57. See *Heartfield v. Heartfield*, 749 F.2d 1138, 1143 (5th Cir. 1985) (jurisdiction remains vested in Texas, the home state, despite move of custodial parent and children from Texas); see also Uniform Child Custody Jurisdiction Act § 3(a)(2) - (4), 9 U.L.A. 111, 122 (1979). The alternatives are these: (1) The best interests of the child would be served by granting jurisdiction either because the child and at least one contestant have a significant connection with this state, or because this state has significant evidence concerning the child's present or future care; (2) The child is physically present and either has been abandoned or is in need of emergency care; and (3) No other state has, or is willing to exercise, jurisdiction. See *id.* The Texas provisions are substantially similar. See TEX. FAM. CODE ANN. § 11.53(a)(2)-53(a)(4) (Vernon Supp. 1986). By eliminating the disjunctive, however, the Texas statute emphasizes that these provisions are ranked in priority order. See Sampson & Tindall, *The UCCJA to Texas—As Amended, Integrated, and Improved*, 46 TEX. B.J. 1096, 1098-99 (1983) (Texas statute follows PKPA's preference for home state jurisdiction over alternative grounds).

58. See Uniform Child Custody Jurisdiction Act § 3(a)(2), 9 U.L.A. 111, 122 (1979).

arising from the child's physical presence within the forum;⁵⁹ and (3) the unwillingness or failure of another state to exercise jurisdiction.⁶⁰ In any of these alternative situations, the forum may exercise custody jurisdiction as the new home state.⁶¹ Should concurrent jurisdiction arise, despite these guidelines, the Act not only requires the court to resolve the conflict,⁶² but also provides the means of communication with other courts to do so.⁶³ At the same time that the UCCJA addresses this jurisdictional dilemma, it directs that custody decrees should be considered *res judicata* and therefore binding on other states,⁶⁴ unless changed circumstances mandate the decree's modification.⁶⁵

59. *See id.* § 3(a)(3), 9 U.L.A. at 122.

60. *See id.* § 3(a)(4), 9 U.L.A. at 122.

61. *See id.* § 3(a), 9 U.L.A. at 122 (court competent to decide custody).

62. *See id.* § 6, 9 U.L.A. at 134 (court shall not exercise jurisdiction if proceedings pending in another state whose jurisdiction is in conformity with Act); *see also* TEX. FAM. CODE ANN. § 11.56 (Vernon Supp. 1986) (virtually identical to UCCJA). The Texas statute is similar in other respects, as well. *Compare* Uniform Child Custody Jurisdiction Act § 7, 9 U.L.A. 111, 137-38 (1979) (encouraging judicial restraint if another state better able to determine custody) *and id.* § 8, 9 U.L.A. at 142 ("clean hands" doctrine, declining jurisdiction because of petitioner's wrongful acts) *with* TEX. FAM. CODE ANN. § 11.57 (Vernon Supp. 1986) (inconvenient forum) *and id.* § 11.58 ("clean hands" doctrine, declining jurisdiction because of petitioner's wrongful acts).

63. *See* Uniform Child Custody Jurisdiction Act § 16, 9 U.L.A. 111, 160 (1979) (registry of out-of-state custody decrees). The UCCJA also makes certified copies of the custody decree available to other states. *See id.* § 17, 9 U.L.A. at 160. In addition, a court may have testimony taken in another state. *See id.* § 18, 9 U.L.A. at 161. A court also may request hearings in another state. *See id.* § 19, 9 U.L.A. at 162. Similarly, the UCCJA encourages courts to assist the courts of other states. *See id.* § 20, 9 U.L.A. at 164. Further, courts shall preserve custody documents and forward them to other states upon request. *See id.* § 21, 9 U.L.A. at 165. Finally, the court asserting jurisdiction shall request documents from other states. *See id.* § 22, 9 U.L.A. at 167; *cf.* TEX. FAM. CODE ANN. §§ 11.66-72 (Vernon Supp. 1986) (provisions virtually identical to those in UCCJA).

64. *See* Uniform Child Custody Jurisdiction Act § 12, 9 U.L.A. 111, 149 (1979) (custody decree conclusive and binding). Texas courts consider home state custody decrees *res judicata*. *See* *Irving v. Irving*, 682 S.W.2d 718, 721 (Tex. App.—Fort Worth 1985, writ *dism'd*) (Texas must recognize Illinois decree because Illinois home state of children). The intra-state finality of the decree provides the basis for interstate recognition and enforcement. *See* Uniform Child Custody Jurisdiction Act, Commissioners' Note, 9 U.L.A. 111, 149-50 (1979). The Act mandates similar recognition and enforcement of out-of-state decrees. *See id.* § 13, 9 U.L.A. 111, 151 (1979) (recognition required if decree complies with section 12); *see also* TEX. FAM. CODE ANN. §§ 11.62 and 11.63 (Vernon Supp. 1986) (Texas provisions substantially similar).

65. *See* Uniform Child Custody Jurisdiction Act § 14, 9 U.L.A. 111, 153-54 (1979) (modification of out-of-state decree warranted only if other state no longer has jurisdiction and this state has properly acquired jurisdiction); TEX. FAM. CODE ANN. § 11.64 (Vernon Supp. 1986) (virtually identical to UCCJA). Texas courts decline to modify decrees over which another state has jurisdiction. *See* *Rush v. Stansbury*, 668 S.W.2d 690, 691 (Tex. 1984) (Texas court could not modify Tennessee decree when children had been gone from Tennessee less than six months).

Despite the Act's vast strides toward eliminating the judicially created incentives⁶⁶ for parental kidnapping, the UCCJA has gaps in its lines of defense. The major loophole occurs in the confluence of the Act's precatory language⁶⁷ and its potential for concurrent jurisdiction.⁶⁸ A related problem is the UCCJA's potential for the home state to retain unlimited jurisdiction to modify its own custody decree, even after the child and the custodial parent have moved to another state and established a home there.⁶⁹ A further set of problems with the UCCJA relates to the limitation of the Act's application to situations in which the abducting parent petitions a court for custody.⁷⁰ Consequently, the Act does not apply in the vast majority of

66. See S. KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 11-13 (1981) (judicial system encourages child snatching).

67. See *Webb v. Webb*, 266 S.E.2d 463, 465 (Ga. 1980) (neither Georgia nor Florida courts met UCCJA's duty to confer before determining jurisdiction, resulting in Georgia's award of custody to one parent despite Florida's award to other), *cert. dismissed*, 451 U.S. 493 (1981). Unfortunately, the UCCJA does not guarantee interstate cooperation. See S. KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 32-33 (1981) (because Act makes cooperation merely desirable, rather than mandatory, court powerless to enforce decree in uncooperative sister state). States cannot mandate application of the full faith and credit clause of the United States Constitution. See Comment, *Child-Snatching: Out of a No-Man's-Land of Law*, 13 ST. MARY'S L.J. 337, 345-46 (1981) (such directive would have to come from Congress or Supreme Court). See generally Sampson, *What's Wrong with the UCCJA?*, 3 FAM. ADVOC. 28 (Spring 1981) (hometown decisions, encouraged by UCCJA's merely precatory language, undermine its spirit of cooperation).

68. Compare Uniform Child Custody Jurisdiction Act § 3(a)(1), 9 U.L.A. 111, 122 (1979) (home state has custody jurisdiction) and *id.* § 3(a)(2), 11 U.L.A. at 122 (jurisdiction in state with significant connection to child and to at least one contestant) with TEX. FAM. CODE ANN. § 11.53(a)(1) (Vernon Supp. 1986) (home state has custody jurisdiction) and *id.* § 11.53(a)(2) (jurisdiction arises from significant connection only if no other state has jurisdiction under section 11.53(a)(1)). The disjunctive phrasing of the UCCJA builds in potential conflict, but the rank order of the Texas scheme establishes the dominance of home state jurisdiction over the other alternatives. See Sampson & Tindall, *The UCCJA Comes to Texas—As Amended, Integrated, and Improved*, 46 TEX. B.J. 1096, 1098-99 (1983) (Texas provision tracks PKPA).

69. Compare Uniform Child Custody Jurisdiction Act § 14, and Commissioners' Note, 9 U.L.A. 111, 154 (1979) (original state, if continuing residence of one parent, has preferred jurisdiction to modify, despite second state's becoming child's home state; such jurisdiction continues until remaining parent moves from original state) with TEX. FAM. CODE ANN. § 11.53(d) (Vernon Supp. 1986) (Texas adds provision denying its courts jurisdiction to modify custody if child and party with custody have established another home state, unless all parties consent). Unlike the UCCJA, the Texas statute assures the left-behind parent jurisdiction to enforce the decree, but not to modify it. Compare Sampson, *What's Wrong with the UCCJA?*, 3 FAM. ADVOC. 28, 31 (Spring 1981) (jurisdiction to modify custody remains in original state as long as one parent resides there) with Sampson & Tindall, *The UCCJA Comes to Texas—As Amended, Integrated, and Improved*, 46 TEX. B.J. 1096, 1103-04 (1983) (left-behind parent in Texas cannot modify decree once child has new home state, but he is assured enforcement of visitation and support).

70. See Uniform Child Custody Jurisdiction Act § 3, 9 U.L.A. 111, 122 (1979) (defining jurisdiction to enter initial or modified custody decree).

parental kidnappings, which occur before any court has adjudicated custody.⁷¹ As a result of this limitation, the UCCJA has no means to locate the majority of kidnapping parents who never avail themselves of the legal process.⁷² Finally, the UCCJA has no provision for imposing any penalty on the perpetrator of such an abduction,⁷³ although it provided the necessary catalyst for both federal legislation and the alteration of state kidnapping laws.⁷⁴

The Texas version of the UCCJA solves several of these problems by ranking the jurisdictional alternatives in their order of preference, thereby establishing the dominance of home state jurisdiction.⁷⁵ Additionally, Texas denies its courts jurisdiction to modify custody based merely on the continuing residence of one parent in the state.⁷⁶ But like the Uniform Act, the

71. See Comment, *Intentional Infliction of Emotional Distress: Recovery of Damages for Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 151 (because UCCJA does not function until abducting parent seeks modification of prior custody decree, Act does not apply to situations in which no prior decree entered). Over 70% of parental kidnappings occur before custody has been adjudicated. See *Proposed Federal Parental Kidnapping Prevention Act: Hearings on S. 105 Before the Subcomm. on Child and Human Dev. of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess., 27 (1979) (article submitted by Bob Westgate).

72. See Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978, 1001 (1977) (UCCJA has no mechanism for detecting whereabouts of parent who has disappeared); see also Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 237 (Act contains no provisions for locating child and abducting parent).

73. See Katz, *Legal Remedies for Child Snatching*, 15 FAM. L.Q. 103, 105 (1981) (UCCJA does not specifically provide any remedies). But see S. KATZ, *CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN* 89 (1981) (UCCJA has indirect potential effect on remedies by implying that if second state cannot exercise jurisdiction, it will logically follow its denial of jurisdiction to litigate custody with *habeas corpus* action to return child); TEX. PENAL CODE ANN. § 25.03 (Vernon Supp. 1986) (interference with child custody is third degree felony punishable by imprisonment and fine).

74. See S. KATZ, *CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN* 11 (1981) (UCCJA supplemented by PKPA); *id.* at 98 (new state laws work in harmony with UCCJA).

75. See TEX. FAM. CODE ANN. § 11.53(a)(2)-.53(a)(4) (Vernon Supp. 1986) (priority order of provisions emphasized by elimination of UCCJA's disjunctive phrasing). Texas courts recognize the dominance of home state jurisdiction. See, e.g., *Rush v. Stansbury*, 668 S.W.2d 690, 691 (Tex. 1984) (Tennessee remains home state when children gone less than six months); *Irving v. Irving*, 682 S.W.2d 718, 721 (Tex. App.—Fort Worth 1985, writ dismissed) (Illinois remains home state of children, despite their physical presence in Texas); *McGee v. McGee*, 651 S.W.2d 891, 893 (Tex. App.—El Paso 1983, no writ) (as Texas had become home state of custodial mother and children, its courts could modify Mississippi decree).

76. See *Soto-Ruphuy v. Yates*, 687 S.W.2d 19, 22 (Tex. App.—San Antonio 1984, no writ) (court issuing decree retains continuing jurisdiction unless child and party with custody establish another home state); see also TEX. FAM. CODE ANN. § 11.53 (d) (Vernon Supp.

Texas statute cannot reach parents who steal their children before custody has been adjudicated or who never attempt to gain legal custody.⁷⁷

B. *The Parental Kidnapping Prevention Act*

The PKPA goes a long way toward closing the gaps in the UCCJA. First, the Act addresses the jurisdictional void by mandating that full faith and credit be given the custody decrees of sister states⁷⁸ and by granting jurisdictional priority to the home state.⁷⁹ The PKPA thereby preempts conflicting state statutes.⁸⁰ The federal Act also assures the recognition of all prior custody decrees, whether or not a state has adopted the UCCJA,⁸¹ a provision

1986) (if child and party with custody have new home state, jurisdiction to modify requires consent of all parties).

77. See Comment, *Intentional Infliction of Emotional Distress: Recovery of Damages for Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 151 (UCCJA functions only when abducting parent attempts to modify prior custody decree).

78. See Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 8(a), 94 Stat. 3568, 3569 (1980) (codified in 28 U.S.C. § 1738A (1982)) (custody decrees due full faith and credit). Both federal and state courts in Texas comply strictly with the PKPA. See, e.g., *Heartfield v. Heartfield*, 749 F.2d 1138, 1140-41 (5th Cir. 1985) (federal district court may enforce full faith and credit provision of PKPA); *Rush v. Stansbury*, 668 S.W.2d 690, 692 (Tex. 1984) (PKPA obliges Texas to give full faith and credit to Tennessee decree); *Bolger v. Bolger*, 678 S.W.2d 194, 196 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) (Texas jurisdiction improper when New York is home state under PKPA). But see *Siler v. Storey*, 587 F. Supp. 986, 987-88 (N.D. Tex. 1984) (PKPA not federal judicial remedy for custodial matters; relief must be sought first in state courts). Application of full faith and credit negates the argument that custody decrees are not final judgments. See Comment, *Parental Child-Snatching: Out of a No-Man's-Land of Law*, 13 ST. MARY'S L.J. 337, 349 (1981) (PKPA prevents courts from denying full faith and credit to custody decrees due to their lack of finality). But see Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 8(a)(a), 94 Stat. 3568, 3569 (1980) (codified in 28 U.S.C. § 1738A (1982)) (full faith and credit due only to custody determinations consistent with PKPA). The state issuing the decree must have asserted jurisdiction under conditions substantially similar to those outlined in the PKPA. See Katz, *Legal Remedies for Child Snatching*, 15 FAM. L.Q. 103, 137-38 (1981).

79. Compare Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 8(a)(c), 94 Stat. 3568, 3570 (1980) (codified in 28 U.S.C. § 1738A (1982)) (alternative jurisdiction subordinate to home state jurisdiction) with TEX. FAM. CODE ANN. § 11.53(a) (Vernon Supp. 1986) (language of Texas' UCCJA identical to PKPA). Although the wording of the PKPA is similar to that of the UCCJA, the federal act casts the alternatives for determining jurisdiction in priority order, rather than merely in the disjunctive. See Sampson & Tindall, *The UCCJA Comes to Texas—As Amended, Integrated, and Improved*, 46 TEX. B.J. 1096, 1098 (1983). In addition, the alternatives are specifically conditioned on the original home state's loss of jurisdiction. See *id.* at 1099. Therefore, a state can no longer assume that circumstances have changed, thereby granting its courts jurisdiction, merely because a parent petitions the court to modify the custody decree. See Comment, *Parental Child-Snatching: Out of a No-Man's-Land of Law*, 13 ST. MARY'S L.J. 337, 349 (1981).

80. See Note, *The Search for a Solution to Child Snatching*, 11 HOFSTRA L. REV. 1073, 1102 (1983) (federal statute must be enforced in all states).

81. See Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 8, 94 Stat. 3568,

that was essential when barely half the states had passed UCCJA legislation.⁸² By allowing states less discretion to assert jurisdiction over custody that has been litigated in another state, the PKPA makes abducting one's child, with an eye toward favorably relitigating custody elsewhere, a far less attractive alternative.⁸³ To encourage compliance, the PKPA adds an award to the custodial parent for travel expenses, attorneys' fees, the costs of private investigations, and any other expenses which the court determines appropriate in cases wherein the child has been wrongfully abducted or detained.⁸⁴ Further, to facilitate locating an absent parent, the Act authorizes states to use the Parent Locator Service.⁸⁵ This federal assistance is a boon, especially to those parents who are financially unable to employ a private investigator to locate their abducted children.⁸⁶ Finally, the PKPA lends

3569-70 (1980) (codified in 28 U.S.C. § 1738A (1982)) (full faith and credit required for custody determinations made consistent with provisions of federal act).

82. See Katz, *Legal Remedies for Child Snatching*, 15 FAM. L.Q. 103, 137 (1981) (goal of PKPA to force non-UCCJA states to enforce compliant decrees). The PKPA provided the catalyst to stimulate more states to adopt the UCCJA. Compare Uniform Child Custody Jurisdiction Act, 9 U.L.A. 111, 111 (1979) (28 states had adopted UCCJA by 1979) with Comment, *Parental Child Snatching: Out of a No-Man's-Land of Law*, 13 ST. MARY'S L.J. 337, 345 (1981) (45 states had adopted UCCJA by late 1981).

83. See, e.g., *Rush v. Stansbury*, 668 S.W.2d 690, 691-92 (Tex. 1984) (court foiled father's attempt to relitigate Tennessee decree in Texas); *Bolger v. Bolger*, 678 S.W.2d 194, 196 (Tex. App.—Corpus Christi 1984, no writ) (father prevented from relitigating New York decree in Texas); *McGee v. McGee*, 651 S.W.2d 891, 894 (Tex. App.—El Paso 1983, no writ) (without showing significant change in child's circumstances, mother cannot modify Mississippi decree in Texas); see also S. KATZ, *CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN* 122 (1981) (jurisdictional provision intended to close courtroom doors even in non-UCCJA states to forum-shopping child snatchers).

84. See Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 8(c), 94 Stat. 3568, 3571 (1980) (codified in 28 U.S.C. § 1738A (1982)) (custodial parent may recover incidental expenses). A custodial parent may find these "incidental" expenses essential to recovery of his child. See *Irving v. Irving*, 682 S.W.2d 718, 722 (Tex. App.—Fort Worth 1985, writ dismissed) (attorneys' fees are necessities rendered for benefit of children in custody suit). This subsection of the PKPA also encourages courts to give priority to custody proceedings. See Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 8(c), 94 Stat. 3568, 3571 (1980) (codified in 28 U.S.C. § 1738A (1982)).

85. See Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 9, 94 Stat. 3568, 3572 (1980) (codified in 42 U.S.C. § 654 (1982)) (Parent Locator Service available to determine whereabouts of absent parent or child, either to enforce federal or state parental kidnapping law or to make or enforce custody determination). The Parent Locator Service was originally established to locate parents who defaulted in child support payments. See 42 U.S.C. § 653 (1982) (purpose of information to enforce child support obligations).

86. See Foster & Freed, *A Legislative Beginning to Child-Snatching Prevention*, 17 TRIAL 36, 37 (Apr. 1981). States have no mandatory duty to request assistance from the Parent Locator Service. See Katz, *The Legal Remedies for Child Snatching*, 15 FAM. L.Q. 103, 138 (1981). Like the UCCJA, the efficacy of the Parent Locator Service depends on the number of states electing to contract for its services. See Comment, *Child-Snatching: Out of a No-Man's-Land of Law*, 13 ST. MARY'S L.J. 337, 350 n.86 (1981) (effectiveness limited by non-adopting

the added deterrence of federal criminal sanctions against the child snatcher.⁸⁷ Provided that parental kidnapping is a felony in the state where the child is stolen, the abducting parent, as soon as he leaves the state,⁸⁸ is subject to the federal Fugitive Felon Act.⁸⁹ The PKPA thus provides both the penalty and enforcement mechanisms lacking in the UCCJA.⁹⁰

Although it solves several problems not answered by the UCCJA, the PKPA's primary function, like that of the UCCJA, is merely to deny the kidnapping parent a forum for relitigating custody.⁹¹ Thus the Act has no effect on those abductions that occur before custody has been adjudicated.⁹² The Act therefore discourages parental kidnapping only to the extent that it deters any potential abductor who bothers to do his forum shopping before snatching his child.⁹³ In addition, because states have no compulsion to contract for the services of the Parent Locator Service,⁹⁴ this provision of the

states). Texas is one of the states that subscribes to the Parent Locator Service. See TEXAS ATTORNEY GENERAL, PARENTAL KIDNAPPING AND CHILD CUSTODY (1985) (pamphlet).

87. See Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 10, 94 Stat. 3568, 3573 (1980) (codified in 28 U.S.C. § 1073 (1982)). *But see* Lindbergh Act, 18 U.S.C. § 1201 (1982) (federal kidnapping statute continues to exempt parents). As originally proposed, section 10 would have amended the Lindbergh Act to include parental kidnappings. See *Proposed Federal Parental Kidnapping Prevention Act: Hearings on S. 105 Before the Subcomm. on Child and Human Dev. of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess., 13 (1982) (submission of Senator Alan Cranston).

88. See Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 10, 94 Stat. 3568, 3573 (1980) (codified in 28 U.S.C. § 1073 (1982)) (Act applies to parental kidnappings involving interstate or international flight). The Act expressly directs the FBI to investigate, locate, apprehend, and return the fugitive parent, in contravention of the Justice Department's administrative policy not to interfere with state authorities in child stealing cases unless the child is in danger of serious, imminent, physical injury. See S. KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 124 (1981).

89. Fugitive Felon Act, 18 U.S.C. § 1073 (1982). The penalty for violating the Fugitive Felon Act is fine and/or imprisonment. See *id.*

90. See Comment, *Child-Snatching: Out of a No-Man's-Land of Law*, 13 ST. MARY'S L.J. 337, 350 (1981) (PKPA is federal mandate, therefore not dependent on discretion of states).

91. Compare Uniform Child Custody Jurisdiction Act § 13, 9 U.L.A. 111, 151 (1979) (courts shall recognize and enforce custody decrees of another state) with Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 8(a), 94 Stat. 3568, 3569 (1980) (codified in 28 U.S.C. 1738A (1982)) (authorities of every state shall enforce custody determinations of another state).

92. See Comment, *Parental Child-Snatching: Out of a No-Man's-Land of Law*, 13 ST. MARY'S L.J. 337, 351 (1981) (PKPA's effectiveness limited where child abducted prior to court order). *But see* Foster & Freed, *A Legislative Beginning to Child-Snatching Prevention*, 17 TRIAL 36, 37 (1981) (parent who meets home state requirement can enforce custody order obtained subsequent to abduction).

93. See Note, *The Search for a Solution to Child Snatching*, 11 HOFSTRA L. REV. 1073, 1113 (1983) (mere denial of forum is not effective deterrent).

94. See Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 9 (b), 94 Stat. 3568,

Act is of no use to a victimized parent residing in an unserved state.⁹⁵ Similarly, if parental kidnapping is not a felony in the state where the child is snatched,⁹⁶ the Fugitive Felon Act provision of the PKPA is without impact. When added to the traditional reluctance of federal authorities to join in the search for a parental kidnapper,⁹⁷ the lack of uniformity among state laws frustrates this provision of the PKPA.⁹⁸ Finally, while the federal Act

3572 (1980) (codified in 42 U.S.C. § 663 (1982)) (state must enter agreement with Parent Locator Service before using its service).

95. See Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 9 (b), 94 Stat. 3568, 3572 (1980) (codified in 42 U.S.C. § 653 (1982)) (Parent Locator Service exists by contract with willing states); see also Note, *Tortious Interference with Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching*, 68 IOWA L. REV. 495, 506 (1983) (federal Parent Locator Service not available to every victimized parent). Texas officials have processed only 66 cases through the Parent Locator Service. See Telephone interview with Walter Hughes, Chief Administrator of the Texas Parent Locator Service (July 2, 1986). Additionally, neither parents nor their lawyers may directly petition the Parent Locator Service for information; they may only request that a court or a prosecutor petition for them. See Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 9 (b), 94 Stat. 3568, 3572 (1980) (codified in 42 U.S.C. § 653 (1982)) (only "authorized persons" may request service of Parent Locator Service). In Texas, these authorized persons include district judges, district attorneys, county attorneys, and the Child Support Enforcement Attorney of the Texas Attorney General's Office. See TEXAS ATTORNEY GENERAL, PARENTAL KIDNAPPING AND CHILD CUSTODY (1985) (pamphlet). This provision has two further limitations: first, the victimized parent pays the bill for the Parent Locator Service. See 42 U.S.C. § 654 (1982) (state may impose and collect costs for use of Parent Locator Service). The fee is \$20.00 in Texas. See TEXAS ATTORNEY GENERAL, PARENTAL KIDNAPPING AND CHILD CUSTODY (1985) (pamphlet). Second, because the Parent Locator Service provides only the abductor's most recent address and place of employment, the Parent Locator Service is useless if the kidnapping parent changes his name or uses a different social security number. See Note, *Tortious Interference with Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching*, 68 IOWA L. REV. 495, 506 n.81 (1983) (Parent Locator Service a civil service, without investigatory powers). This final drawback is particularly frustrating to state officials who are limited to searching IRS and social security records while prevented from searching Department of Public Safety or Texas Employment Commission records. See Telephone interview with Walter Hughes, Chief Administrator of the Texas Parent Locator Service (July 2, 1986). In addition, the federal computers are so far behind that information is frequently too old to be useful by the time state officials receive it. See *id.*

96. See Fugitive Felon Act, 18 U.S.C. § 1073 (1982) (Act applies only to felonies or their equivalent). Six states and the District of Columbia classify parental kidnapping as only a misdemeanor, or no offense at all. See Comment, *The Search for a Solution to Child Snatching*, 11 HOFSTRA L. REV. 1073, 1107-08 n.243 (1983) (Alabama, Connecticut, Kentucky, New Jersey, Washington, and West Virginia).

97. See *Beach v. Smith*, 535 F. Supp. 560, 563 (S.D. Cal. 1982) (Justice Department may deny warrant for fugitive parental kidnapper based on victimized parent's lack of standing to question denial); see also Note, *Tortious Interference with Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching*, 68 IOWA L. REV. 495, 505 (1983) (FBI views mere location of kidnapping parent, without subsequent federal prosecution, as misuse of its limited resources).

98. See Comment, *Parental Child-Snatching: Out of a No-Man's-Land of Law*, 13 ST.

provides for the recovery of incidental expenses,⁹⁹ it does nothing to compensate the true victims of parental kidnapping: the anguished, abandoned parent¹⁰⁰ and the uprooted, bewildered child.¹⁰¹

C. Criminal Sanctions

Prompted in part by the federal PKPA, many states have amended their kidnapping laws.¹⁰² Some have revised the original law to specifically include parents,¹⁰³ while others, like Texas, have passed concurrent statutes aimed particularly at child snatchers.¹⁰⁴ Perhaps because of the PKPA's Fugitive Felon provision,¹⁰⁵ many states have made parental kidnapping a

MARY'S L.J. 337, 351 (1981) (maximum benefit of PKPA requires all states to elevate parental kidnapping to felony status).

99. See Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 8 (c), 94 Stat. 3568, 3571 (1980) (codified in 42 U.S.C. § 653 (1982)) (travel expenses, attorneys' fees, witness fees, costs of private investigations, and other incidental expenses).

100. See Katz, *Legal Remedies for Child Snatching*, 15 FAM. L.Q. 103, 113 (1981) (PKPA, although possibly deterrent, not remedy for wronged parent).

101. See Comment, *Intentional Infliction of Emotional Distress: Recovery of Damages for Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 152 (although help in seeking child's return, PKPA provides no remedies for mental distress incurred by victimized parents and children).

102. See, e.g., CAL. PENAL CODE § 278.5 (Deering 1985) (kidnapping includes violation of custody order); MINN. STAT. ANN. § 609.26 (West Supp. 1983) (kidnapping includes interference with custody); NEV. REV. STAT. § 200.310, .320, .330 (1983) (kidnapping includes keeping child away from person with custody). Previously, most state kidnapping statutes excluded parents from liability. See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 301 (1983) (defense to kidnapping that person abducted is child of actor); MD. ANN. CODE art. 27, § 337 (1982) (kidnapping statute specifically exempts parents); TEX. PENAL CODE ANN. § 20.03 (b) (2) (Vernon Supp. 1986) (affirmative defense to kidnapping that actor related to person abducted).

103. See, e.g., LA. REV. STAT. ANN. § 14.45 (West 1974) (simple kidnapping includes taking child in violation of custody order with intent to defeat jurisdiction of court that issued decree); MASS. ANN. LAWS ch. 265, § 26 (Law Co-op. 1980) (parent not exempted from kidnapping law if in violation of custody decree); NEV. REV. STAT. § 200.310, .320, .330 (1983) (kidnapping law applies to any person who takes child with intent to keep him away from person with lawful custody).

104. See TEX. PENAL CODE ANN. § 25.03 (Vernon Supp. 1986) (offense of "Interference with Child Custody" consists of taking or retaining child under 18, either knowing act violates express terms of custody order or knowing action to determine custody is pending). While the Texas offense is a third degree felony, other states classify the crime differently. See, e.g., ALA. CODE § 13A-6-45 (1982) (interference with custody is class A misdemeanor); FLA. STAT. § 787.03, .04 (West Supp. 1985) (interference with custody is first degree misdemeanor but becomes third degree felony if child removed from state or not produced upon court order); MASS. ANN. LAWS ch. 265, § 26A (Law. Co-op. 1980) (custodial interference by relatives is misdemeanor but becomes felony if child exposed to danger).

105. See Parental Kidnapping Prevention Act, Pub. L. No. 96-611, § 10, 94 Stat. 3568, 3573 (1980) (codified at 18 U.S.C. § 1073 (1982)) (Fugitive Felon Act applies to interstate or international kidnappings under applicable state felony statutes). A fugitive felon located

felony,¹⁰⁶ while others who do not so classify it elevate child snatching to a felony if the child is taken from the state.¹⁰⁷ Most states require the violation of a custody decree as a condition precedent to the enforcement of their criminal statute.¹⁰⁸ Texas and a few other states do not depend on such a violation of custody.¹⁰⁹ Consequently, these states provide a remedy overlooked by the deficient criminal statutes in the majority of states—sanctions against the parent who kidnaps his child before custody has been adjudicated or who violates a joint custody arrangement.¹¹⁰ These statutes fill a

under the Act is extradited from the state where he has been found to the state he fled, which has criminal jurisdiction over him. *See* 18 U.S.C. § 1073 (1982).

106. *See, e.g.*, COLO. REV. STAT. § 18-3-304 (1978) (any person who takes child commits felony); ILL. ANN. STAT. ch. 38 § 10-15 (Smith-Hurd 1979) (child abduction is class four felony); TEX. PENAL CODE § 25.03 (Vernon Supp. 1986) (third degree felony). In the spirit of cooperation encouraged by the UCCJA and required by the PKPA, the Texas Court of Criminal Appeals has even held that it had jurisdiction to determine probable cause for extradition to another state based on the similarity of that state's statute to Penal Code section 25.03, "Interference with Child Custody." *See Ex parte Sanchez*, 642 S.W.2d 809, 810-11 (Tex. Crim. App. 1982) (Texas may determine probable cause to extradite defendant to Indiana to face charges of "confinement").

107. *See State v. Benner*, 385 A.2d 48, 49 (Me. 1978) (because he had not fled state, father avoided prosecution for kidnapping, despite taking his child at gunpoint). For similar statutes, see ARK. STAT. ANN. § 41-2411 (1977) (removal of child from state raises crime from class A misdemeanor to class D felony); FLA. STAT. § 787.04 (West Supp. 1986) (custodial interference becomes felony if child removed from state); GA. CODE ANN. § 16-5-45 (1984) (first and second offenses are both misdemeanors; subsequent offense or taking child from state is felony); MASS. ANN. LAWS ch. 265, § 26A (Law Co-op. 1980) (elevation from misdemeanor to felony occurs if person taken is exposed to danger).

108. *See State v. Kracker*, 599 P.2d 250, 252 (Ariz. App. 1979) (mother convicted for knowingly violating custody order); *People v. Johnson*, 199 Cal. Rptr. 231, 236 (Ct. App. 1984) (knowledge of custody decree required for conviction); *Cline v. Superior Court*, 9 FAM. L. REP. (BNA) 2011, 2011 (Cal. Ct. App. Nov. 17, 1982) (father who snatched child from mother's house could not be convicted of either kidnapping or child stealing, no matter how outrageous his conduct, without custody decree giving custody to mother and thereby denying his custodial rights); *State v. Dirks*, 581 P.2d 85, 86-87 (Or. Ct. App. 1978) (non-parent can also be guilty of custodial interference for removing children from person who has lawful custody); *Cabrera v. State*, 647 S.W.2d 654, 655 (Tex. Crim. App. 1983) (mother cannot be convicted for abducting child without proper notice to her that child's custody had been taken from her). For representative statutes, see, e.g., CAL. PENAL CODE § 278.5 (Deering 1985) (statute requires violation of custody order); COLO. REV. STAT. § 18-3-304 (2) (1978) (liability when parent or other person violates custody order); MINN. STAT. ANN. § 609.26 (West Supp. 1983) (liability arises from intention to prevent another person from retaining custody).

109. *See, e.g.*, FLA. STAT. ANN. § 787.03, .04(2) (West Supp. 1986) (court order not required; statute applies during pending custody proceeding); TEX. PENAL CODE ANN. § 25.03 (a)(2) (Vernon Supp. 1986) (decree unnecessary if custody determination pending); WIS. STAT. ANN. § 946.715 (1)(a)(b) (West 1982) (liability upon concealing child from other parent, regardless of custody order).

110. *See People v. Harrison*, 402 N.E.2d 822, 824 (Ill. App. Ct. 1980) (father with joint custody cannot interfere with mother's physical custody rights by taking children from state);

void left by both the UCCJA and the PKPA by addressing this formidable group of abductors who have previously been beyond the reach of the law.¹¹¹

Despite narrowing the legal crevices through which the parental kidnapper can slip, criminal retribution only indirectly benefits the wronged parent or the abducted child.¹¹² The result of a criminal proceeding may strengthen the other parent's custody case,¹¹³ but criminal sanctions will not guarantee the ideal result: return of his abducted child and compensation to the parent for the loss he suffered while his child was missing.¹¹⁴

D. *Civil Damage Suits*

1. Tortious Interference with Custody

The shortcomings of the foregoing remedies have forced many wronged parents to turn to the redress offered by civil damages, both as compensation for their injury and as a method for regaining physical custody.¹¹⁵ In addi-

People v. West, 10 FAM. L. REP. (BNA) 1691 (Or. Ct. App. 1984) (mother with joint custody convicted for removing child from state without father's knowledge). The Texas statute, while not necessarily requiring violation of a custody decree, also applies when a decree has been violated. See Roberts v. State, 619 S.W.2d 161, 163 (Tex. Crim. App. 1981) (grandmother retained child in Colorado in knowing violation of father's lawful custody decree in Texas).

111. Compare Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 237 (UCCJA effective only after court issues custody decree) with Comment, *Parental Child-Snatching: Out of a No-Man's-Land of Law*, 13 ST. MARY'S L.J. 337, 351 (1981) (primary limitation of PKPA is its ineffectiveness when child abducted prior to court order). Over 70 percent of parental kidnappings occur before court determines custody. See *Proposed Federal Parental Kidnapping Prevention Act: Hearing on S. 105 Before the Subcomm. on Child and Human Dev. of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess., 27 (1979) (article submitted by Bob Westgate).

112. See Katz, *Legal Remedies for Child Snatching*, 15 FAM. L.Q. 103, 113 (1981) (criminal action is potential deterrent).

113. See S. KATZ, *CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN* 98 (1981) (criminal action for abduction is persuasive evidence of unfitness of abducting parent).

114. See Katz, *Legal Remedies for Child Snatching*, 15 FAM. L.Q. 103, 113 (1981) (criminal sanctions do not themselves guarantee child's return or provide remedy to wronged parent); see also Note, *The Search for a Solution to Child Snatching*, 11 HOFSTRA L. REV. 1073, 1113 (1983) (civil sanctions can provide remedy to wronged parent while aiding deterrence of criminal penalties).

115. See Wood v. Wood, 338 N.W.2d 123, 126 (Iowa 1983) (tort claim, "more effectively than any of the alternative sanctions, serve[s] both to prevent child-snatching and to pick up the pieces if it does occur"); see also P. HOFF, *INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW* 14-1 to 14-2 (1982) (while compensating victimized parent for injuries, tort suits expedite return of child by potentially coercive effect of financial liability). Damages usually include the actual cost of recovering the child, special damages for emotional or mental anguish, and even punitive damages to deter both the abductor and other potential child stealers. See S. KATZ, *CHILD SNATCHING: THE LEGAL*

tion, tort suits fall outside the “domestic relations exception” to federal diversity jurisdiction,¹¹⁶ a stumbling block to the federal adjudication of custody itself.¹¹⁷ These tort actions usually follow one of two theories of recovery.¹¹⁸ The first relies on section 700 of the Restatement (Second) of

RESPONSE TO THE ABDUCTION OF CHILDREN 101-02 (1981) (damages, unlike other remedies, address compensation of custodial parent). The tort remedy also enlarges the number of potential defendants and concurrently the potential for recovering the child by subjecting third parties to a prospectively expensive lawsuit. *See* Wood v. Wood, 338 N.W.2d 123, 137 (Iowa 1983) (tort suit more likely to speed return of child because of increased knowledge of child’s whereabouts through broad civil discovery and potential punitive damages); *see also* P. HOFF, INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW 14-1 to 14-2 (1981) (liability for civil conspiracy strengthens incentive to restore child to custodian). *But see* Friedman v. Friedman, 361 N.Y.S.2d 108, 110 (N.Y. Sup. Ct. 1974) (as between parents, action for damages for mental anguish from interference with custody not actionable). Wronged parents may also petition the courts for the judicial remedies of civil contempt or a writ of *habeas corpus*. *See* Wise v. Yates, 639 S.W.2d 460, 461 (Tex. 1982) (*habeas corpus* should be enforced against person wrongfully possessing child); *Ex parte* Karr, 663 S.W.2d 534, 537 (Tex. App.—Amarillo 1983, no writ) (mother jailed for contempt for disobeying custody order); *see also* Comment, *Intentional Infliction of Emotional Distress: Recovery of Damages for Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 153-54 (contempt for violation of custody decree; writ of *habeas corpus* to regain custody of child).

116. *See, e.g.*, Raftery v. Scott, 756 F.2d 335, 338 (4th Cir. 1985) (federal court decision on damages does not require adjustment of family status or contravene domestic relations exception); Wasserman v. Wasserman, 671 F.2d 832, 834-35 (4th Cir.) (tort of intentional infliction of emotional distress not dependent on entitlement to custody, therefore, not within domestic relations exception), *cert. denied*, 459 U. S. 1014 (1982); Acord v. Parsons, 9 FAM. L. REP. (BNA) 2195, 2195 (W.D. Va. Nov. 22, 1982) (suit for intentional infliction of emotional distress not barred by domestic relations exception to federal diversity jurisdiction).

117. *See In re* Burris, 136 U.S. 586, 593-94 (1890) (court extended domestic relations exception to child custody cases and refused to exercise federal jurisdiction to adjudicate custody). Federal courts have traditionally avoided adjusting family relationships. *See* Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1859) (disclaiming federal jurisdiction over divorce or alimony).

118. *Compare* Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 242 (tort of custodial interference only parental kidnapping remedy to compensate custodial parent for financial, physical, and emotional damage) *with* Comment, *Intentional Infliction of Emotional Distress: Recovery of Damages for Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 156 (tort of intentional infliction of emotional distress provides most complete relief in parental kidnapping cases). There are numerous other theories of tort recovery. *See, e.g.*, Wasserman v. Wasserman, 671 F.2d 832, 834 (4th Cir.) (enticement), *cert. denied*, 459 U.S. 1014 (1982); Kajtazi v. Kajtazi, 488 F. Supp. 15, 18 (E.D.N.Y. 1978) (false imprisonment); Gibson v. Gibson, 93 Cal. Rptr. 617, 618 (Ct. App. 1971) (abduction and concealment). This list is not all-inclusive, as the facts of a particular case may suggest creative theories of recovery. *See* P. HOFF, INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW 14-3 (1982) (list not exhaustive; facts of case suggest most appropriate claims). Many tort actions will also support claims of civil conspiracy. *See, e.g.*, Fenslage v. Dawkins, 629 F.2d 1107, 1108 (5th Cir. 1980) (conspiracy among father and his parents, brother, sister, and nephew); Lloyd v. Loeffler, 539 F. Supp. 998, 999 (E.D. Wis.) (conspiracy among mother, her husband,

Torts, allowing a parent to bring an action for "tortious interference with custody."¹¹⁹ This remedy is effective against the kidnapping parent¹²⁰ as well as against third parties who may have conspired with him or acted on his behalf.¹²¹ This tort suit permits the custodial parent to recover the expenses of locating his child and regaining physical custody.¹²² In addition, as illustrated by the Fifth Circuit case of *Fenslage v. Dawkins*,¹²³ the victimized parent can claim damages for mental anguish¹²⁴ and even exemplary damages to punish the abductor.¹²⁵ The primary drawback of this type of

and her parents), *aff'd*, 694 F.2d 489 (7th Cir. 1982); *Rosefield v. Rosefield*, 34 Cal. Rptr. 479, 482 (Ct. App. 1963) (conspiracy between father and paternal grandfather).

119. See RESTATEMENT (SECOND) OF TORTS § 700 (1977). Entitled "Causing Minor Child to Leave or Not to Return Home," this section reads as follows: "One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent." *Id.*

120. See, e.g., *Fenslage v. Dawkins*, 629 F.2d 1107, 1108 (5th Cir. 1980) (father liable); *Kajtazi v. Kajtazi*, 488 F. Supp. 15, 17 (E.D.N.Y. 1978) (abducting father liable); *Wood v. Wood*, 338 N.W.2d 123, 125 (Iowa 1983) (father who refused to return child may be held liable).

121. See, e.g., *Cramlet v. Multimedia, Inc.*, 9 FAM. L. REP. (BNA) 2452, 2452 (D.C. Colo. May 11, 1983) (producers of Phil Donahue Show assessed \$5,900,000.00: \$1,700,000.00 actual damages plus \$4,200,000.00 punitive damages); *Lloyd v. Loeffler*, 539 F. Supp. 998, 1005 (E.D. Wis.) (parents of abducting mother liable), *aff'd*, 694 F.2d 489 (7th Cir. 1982); *Plante v. Engel*, 469 A.2d 1299, 1302 (N.H. 1983) (abducting mother's parents liable). Attorneys who aid abductions are also liable. See *Wasserman v. Wasserman*, 671 F.2d 832, 833 (4th Cir. 1982) (attorneys named as co-defendants with abducting father), *cert. denied*, 459 U.S. 1014 (1982); *McEnvoy v. Helikson*, 562 P.2d 540, 543-44 (Or. 1977) (complicity of mother's attorney in abduction makes him liable to custodial father for malpractice). See generally P. HOFF, INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAW 16-1 to 16-3 (1982) (parental kidnapping and legal ethics); Hoff, *Child Snatching: Getting Legal Relief Through New Tort Remedies*, 5 FAM. ADVOC. 38, 41-43 (Fall 1982) (attorney liability).

122. See *Plante v. Engel*, 469 A.2d 1299, 1302 (N.H. 1983) (expenses incurred in recovering child are damages that flow directly from intentional interference with custody); *LaGrenade v. Gordon*, 264 S.E.2d 757, 758 (N.C. 1980) (action lies for recovery of expenses incurred in regaining custody); see also RESTATEMENT (SECOND) OF TORTS § 700, comment g (1977) (parent entitled to recovery of reasonable expenses incurred in regaining custody).

123. 629 F.2d 1107 (5th Cir. 1980).

124. See, e.g., *Fenslage v. Dawkins*, 629 F.2d 1107, 1110 (5th Cir. 1980) (damages for mental suffering recoverable without actual physical injury); *Lloyd v. Loeffler*, 539 F. Supp. 998, 1005 (E.D. Wis.) (damages for emotional distress recoverable in presence of other substantial damages), *aff'd*, 694 F.2d 489 (7th Cir. 1982); *Kajtazi v. Kajtazi*, 488 F. Supp. 15, 20-21 (E.D.N.Y. 1978) (damages for mental suffering occasioned by vindictive and outrageous conduct).

125. See, e.g., *Cramlet v. Multimedia, Inc.*, 9 FAM. L. REP. (BNA) 2452, 2452 (D.C. Colo. May 11, 1983) (\$4,200,000.00 punitive damages against producers of television show who refused to reveal whereabouts of child and abducting father interviewed on show); *Lloyd v. Loeffler*, 539 F. Supp. 998, 1005 (E.D. Wis.) (lump sum of \$25,000.00 punitive damages

suit, however, is that, like the enforcement of the UCCJA and the PKPA, the tort requires entry of a custody decree before the custodial parent can seek damages.¹²⁶ In addition, although large damage awards may help compel the abductor to return the child,¹²⁷ they do little to prevent the initial abduction, a failing common to all the present remedies for parental kidnapping.¹²⁸

2. Intentional Infliction of Emotional Distress

Unlike an action for tortious interference with custody, a suit alleging intentional infliction of emotional distress provides a remedy for a wronged parent at any stage of the custody determination.¹²⁹ The elements of this

escalating at rate of \$2,000.00 per month until child returned), *aff'd*, 694 F.2d 489 (7th Cir. 1982); *Marshall v. Wilson*, 616 S.W.2d 932, 934 (Tex. 1981) (Ray, J., concurring) (propriety of punitive damages to discourage parental abductions).

126. *See Rosefield v. Rosefield*, 34 Cal. Rptr. 479, 483 (Ct. App. 1963) (father not liable for abducting children before court awarded custody to mother); *Spencer v. Terebelo*, 373 So. 2d 200, 202 (La. 1979) (abducting mother breached duty established by custody decree in father's favor); *see also* RESTATEMENT (SECOND) OF TORTS § 700, comment c (1977) (one parent cannot bring action against other when both are entitled to custody; complaining parent must have superior custody rights). *But see LaGrenade v. Gordon*, 264 S.E.2d 757, 759 (N.C. 1980) (in absence of custody decree, parent may bring suit to enforce contractual custody agreement between parents). Other obvious drawbacks include (1) the judgment-proof defendant; (2) the unlocated defendant, although a suit against third parties may be an adequate substitute; and (3) the necessity of convincing the court that such a cause of action exists. *See Comment, Intentional Infliction of Emotional Distress: Recovery of Damages for the Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 163 (action for custodial interference requires judicial recognition of new, different tort).

127. *See Kajtazi v. Kajtazi*, 488 F. Supp. 15, 21-22 (E.D.N.Y. 1978) (\$100,000.00 lump sum punitive damages plus \$75.00 per day until child was returned). The federal district court in *Lloyd v. Loeffler* also awarded escalating punitive damages to force the return of the child. *See Lloyd v. Loeffler*, 539 F. Supp. 998, 1005 (E.D. Wis.), *aff'd*, 694 F.2d 489 (7th Cir. 1982). The circuit court, however, while affirming the district court's decision, dismissed the escalating damages as being the equivalent of an injunction and, therefore, an impermissible modification of the original decree, because custody is outside the jurisdiction of federal courts under the domestic relations exception to federal diversity jurisdiction. *See Lloyd v. Loeffler*, 694 F.2d 489, 493-94 (7th Cir. 1982) (enforcing injunction to return child equivalent to issuing custody decree).

128. *Compare Comment, The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 237-38 (criminal statutes only partially solve parental kidnapping problem) *with id.* at 249-50 (tort action not complete remedy for parental kidnapping).

129. *See, e.g., Fenslage v. Dawkins*, 629 F.2d 1107, 1110 (5th Cir. 1980) (mother's mental anguish proximately caused by taking of child); *Acord v. Parsons*, 9 FAM. L. REP. (BNA) 2195, 2195 (W.D. Va. Nov. 22, 1982) (father's suit for intentional infliction of emotional distress not barred by domestic relations exception to federal diversity jurisdiction); *Kramer v. Leinweber*, 642 S.W.2d 364, 369 (Mo. App. 1982) (damages for emotional distress due to parent's being wrongfully deprived of his child's custody). The primary advantage of an action for intentional infliction of emotional distress is that it affords relief to parents with joint cus-

tort¹³⁰ are unrelated to the child's custody status.¹³¹ The assessment of damages in a suit for intentional infliction of emotional distress parallels that of tortious interference with custody,¹³² but hinges on proof of outrageous conduct rather than on violation of a custody decree.¹³³ Additionally, both federal and state cases illustrate that this tort has the advantage of use by a non-custodial parent whose visitation rights have been wrongly abridged.¹³⁴

today, either because custody has not yet been determined or because of a court order. *See Marzec v. Rosenberger*, 28 ATLA L. REP. 412, 412 (Ill. Cook Cty. Ct. Mar. 14, 1985) (mother awarded \$1.5 million for intentional infliction of emotional distress caused by joint custodial father in taking child out of state and concealing him from mother); *see also* Comment, *Intentional Infliction of Emotional Distress: Recovery of Damages for Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 162 (tort provides relief to parents whose custody rights are equal or inferior to those of abducting parent).

130. *See Sheltra v. Smith*, 392 A.2d 431, 433 (Vt. 1978) (four elements of tort are (1) outrageous conduct; (2) that intentionally or recklessly causes emotional distress; (3) that actually results in severe emotional distress; and (4) that is actually or proximately caused by the outrageous conduct); *see also* RESTATEMENT (SECOND) OF TORTS § 46 (1977) ("One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress . . . is subject to liability for such emotional distress"). *See generally* Comment, *Intentional Infliction of Emotional Distress: Recovery of Damages for Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 156-58 (discussion of elements of tort of intentional infliction of emotional distress).

131. *See Sheltra v. Smith*, 392 A.2d 431, 433 (Vt. 1978) (regardless of which parent has custody, interfering with other parent's communication with child is outrageous).

132. *Compare Fenslage v. Dawkins*, 629 F.2d 1107, 1110 (5th Cir. 1980) (damages for mental suffering and mental anguish, as well as exemplary damages, available to plaintiff) *with Kajtazi v. Kajtazi*, 488 F. Supp. 15, 19 (E.D. N.Y. 1978) (damages for interfering with custody include loss of services, wounded feelings, expenses incurred in recovery, and punitive damages); *see also* Comment, *Intentional Infliction of Emotional Distress: Recovery of Damages for Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 159 (tort action provides damages for mental anguish, loss of child's society, expenses incurred in recovering child, and punitive damages).

133. *See Kajtazi v. Kajtazi*, 488 F. Supp. 15, 20 (E.D.N.Y. 1978) (parental kidnapping the sort of outrageous conduct that shocks decent society); *Sheltra v. Smith*, 392 A.2d 431, 433 (Vt. 1978) (mental suffering and distress inflicted by father's outrageous acts in preventing daughter's communication with her mother); *see also* RESTATEMENT (SECOND) OF TORTS § 46, comment d (1977) (liability arises from conduct so outrageous, so extreme, that average member of community would exclaim, "Outrageous!").

134. *See Raftery v. Scott*, 756 F.2d 335, 339 (4th Cir. 1985) (mother liable for \$50,000.00, including \$10,000.00 punitive damages, for intentionally inflicting emotional distress by interfering with father's visitation rights); *Ruffalo v. United States*, 590 F. Supp. 706, 711 (W.D. Mo. 1984) (government liable for interfering with mother's right to visit and communicate with son who was sequestered along with his father in Witness Protection Program); *Johannes v. Sloan*, 24 ATLA L. REP. 175, 175 (Ill. Kankakee Cty. Ct. Mar. 25, 1981) (father awarded \$150,000 for severe mental distress suffered from intentional denial of visitation rights); *Sheltra v. Smith*, 392 A.2d 431, 432 (Vt. 1978) (outrageously preventing mother's communication with daughter subjects father to liability); News Note, 6 FAM. L. REP. (BNA) 2764 (Aug. 19, 1980) (custodial parent liable for damages for interference with visitation rights of non-custodial parent); *see also* Comment, *Intentional Infliction of Emotional Distress: Recovery of Damages*

Like the statutes and the tort of custodial interference, though, this tort remedy does little to deter the initial kidnapping or to provide compensation and relief to the wronged child.¹³⁵

3. Statutory Remedies

A third basis for maintaining a damage suit lies in the statutory blessings of Congress and the state legislatures. Violation of the PKPA, the state's version of the UCCJA, or the state's criminal laws will additionally support a damage suit in which the statute supplies the elements of the tort.¹³⁶ The Texas statute which specifically allows civil damages for interference with child custody cements this confluence of legislative and judicial remedies for parental kidnapping.¹³⁷ Under Texas law, any person denied a possessory interest in the child, not just the custodial parent, may bring suit.¹³⁸ In addi-

for *Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 166 (emotional distress suffered by non-custodial parent as real as that of custodian).

135. See Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 249-50 (tort action not complete remedy for parental kidnapping). *But see* Rosefield v. Rosefield, 34 Cal. Rptr. 479, 483 (Ct. App. 1963) (abducted child has cause of action).

136. See *Lloyd v. Loeffler*, 539 F. Supp. 998, 1004 (E.D. Wis.) (tort action supported by state's criminal statute prohibiting interference with custody), *aff'd*, 694 F.2d 489 (7th Cir. 1982); *Spencer v. Terebelo*, 373 So. 2d 200, 202 (La. Ct. App. 1979) (state kidnapping statute provides basis of legal duty owed by mother to custodial father, breach of which incurs liability for damages). Use of a criminal statute to imply a tort action is sanctioned by the United States Supreme Court. See *Cort v. Ash*, 422 U.S. 66, 78 (1975) (three principles apply: whether plaintiff is one of class for whose benefit statute enacted; whether implicit or explicit legislative intent exists to create or deny tort remedy; and whether implication of tort remedy is consistent with underlying purpose of legislation); see also RESTATEMENT (SECOND) OF TORTS § 286 (1977) (court may adopt legislative enactment as standard of conduct). Texas courts similarly recognize a legislatively imposed standard of conduct. See *Moughon v. Wolf*, 576 S.W.2d 603, 604 (Tex. 1978); *Missouri P.R.R. v. American Statesman*, 552 S.W.2d 99, 103 (Tex. 1977).

137. See TEX. FAM. CODE ANN. §§ 36.01-.08 (Vernon Supp. 1986) ("Civil Liability For Interference With Child Custody"). The Texas legislature added Chapter 36 to the Family Code concurrently with its adoption of the UCCJA in September of 1983. See *id.* Allowable damages include actual costs of locating child, recovering possession of child, enforcing court order, and bringing suit, plus mental suffering and anguish. See *id.* § 36.03. Liability may also include exemplary damages for malicious or intentionally harmful intent. See *id.* See generally Solender, *Family Law—Parent and Child: Annual Survey of Texas Law*, 38 Sw. L.J. 173, 174 (1984) (summarizing 1983 legislative changes in family law).

138. See TEX. FAM. CODE ANN. § 36.02 (Vernon Supp. 1986) (any person who interferes with possessory interest in child liable for damages to person denied that interest). Implicitly, therefore, the statute could support damages for interference with visitation or joint custody. See *id.* Additionally, the act makes third parties who aid such interference jointly and severally liable. See *id.* § 36.02 (c). This provision was the basis of a \$53,000,000.00 damage award by a Houston jury in a mother's suit against her in-laws who had assisted her ex-husband's abduction of their two sons. See *Smith v. Smith*, NAT'L L.J., Sept. 9, 1985, at 9, col. 1 (D. Tex.

tion, the statute openly permits concurrent use of any other civil or criminal remedies.¹³⁹ Though the law requires entry of a court's custody order to support a suit,¹⁴⁰ an injured parent can fill this pre-custody deficiency with a common law action for intentional infliction of emotional distress.

A suit for civil damages fills many of the deficiencies left by the other parental kidnapping remedies by compensating the wronged parent for his injuries and expenses. In addition, the possibility of mounting damages levied against an abducting parent or his accomplices goes further to compel the return of the child than any of the aforementioned remedies.¹⁴¹ But, like the other remedies, the tort suit does little to deter parental kidnapping initially.¹⁴² Therefore, although this tort action may financially compensate the victimized child for his injuries eventually,¹⁴³ it falls short of giving him the protection that is ultimately in his best interest: prevention from being kidnapped by his own parent.

IV. A DISARMAMENT PROPOSAL—COURT-SPONSORED CUSTODY MEDIATION TO DIFFUSE THE FIREPOWER OF THE ADVERSARIAL SYSTEM

The motivating factor in all custody-related litigation is ostensibly the best

Sept. 4, 1985) (\$26,000,000.00 actual damages plus \$27,000,000.00 punitive damages, apportioned among five defendants).

139. See TEX. FAM. CODE ANN. § 36.06 (Vernon Supp. 1986). In the *Smith* case, the defendant grandparents are also under felony indictment for interference with child custody. See McGonigle, *Custody-Fight "Kidnap" Spurs \$53M Verdict*, NAT'L L.J., Sept. 9, 1985, at 9, col. 1.

140. See TEX. FAM. CODE ANN. § 36.02 (Vernon Supp. 1986) (statute requires violation of court order).

141. See *Lloyd v. Loeffler*, 539 F. Supp. 998, 1005 (E.D. Wis.) (damages to escalate monthly until child returned), *aff'd*, 694 F.2d 489 (7th Cir. 1982); *Kajtazi v. Kajtazi*, 488 F. Supp. 15, 19 (E.D.N.Y. 1978) (damages for each day until child returned); see also Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 259 (damages especially useful to compel return of child). But see Note, *Abduction of Child by Noncustodial Parent: Damages for Custodial Parent's Mental Distress*, 46 MO. L. REV. 829, 843 (1981) (damages from third parties do not guarantee return of child).

142. See *Bennett v. Bennett*, 682 F.2d 1039, 1045 (D.C. Cir. 1982) (Edwards, J., concurring in part and dissenting in part) (tortfeasor parent may keep child, "renting" him with damage payments); see also Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 249-50 (tort action not complete remedy for parental kidnapping).

143. See, e.g., *Kajtazi v. Kajtazi*, 488 F. Supp. 15, 19 (E.D.N.Y. 1978) (child entitled to recover damages from father and accomplice relatives); *Rosefield v. Rosefield*, 34 Cal. Rptr. 479, 483 (Ct. App. 1963) (child has cause of action against both her father and his accomplice, her grandfather); *Smith v. Smith*, NAT'L L.J., Sept. 9, 1985, at 9, col. 1 (D. Tex. 1985) (portions of both actual and punitive damages held in trust for children).

interest of the child.¹⁴⁴ This interest is protected best by the remedy for parental kidnapping that deters its occurrence entirely.¹⁴⁵ While that relief would spare the child the enormous emotional and social cost of an abduction,¹⁴⁶ no such solution exists in the real world of angry parents and contentious lawyers.¹⁴⁷ Currently, our legal system provides the most comprehensive deterrent to parental kidnapping possible in the complementary effect of the PKPA, the states' enactments of the UCCJA, criminal sanctions, civil liability, and the potential for civil damage awards. Further assaults on the problem of parental kidnapping must attack from a different

144. See, e.g., *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 613 (1947) (best interest of child dictates changing custody decree when child's conditions change); *Irving v. Irving*, 682 S.W.2d 718, 721 (Tex. App.—Fort Worth 1985, writ dismissed) (home state better able to determine best interest of child because evidence concerning care, protection, training, and relationships more readily available); *Perry v. Ponder*, 604 S.W.2d 306, 317 (Tex. App.—Dallas 1980, no writ) (best interest of child may require forum to defer to courts of another state). In determining the child's best interests initially, courts are to consider the wishes of the child and of the parents, the parent-child relationship, the child's relationship with siblings and others, the child's adjustment to his home, his school, and his community, and the physical and mental health of all parties involved in the custody matter. See UNIFORM MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 91, 197-98 (1979). See generally A. HARALAMBIE, *HANDLING CHILD CUSTODY CASES* 145-46 (1983) (ways attorney can use best interest of child to present custodial interference issues).

145. See *Proposed Federal Parental Kidnapping Prevention Act: Addendum to Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the House Comm. of the Judiciary and the Subcomm. on Child and Human Dev. of the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 8 (1980) (testimony of Sen. Malcolm Wallop) ("welfare and well-being of innumerable children" depend on Congress fulfilling "duty to protect them from traumatizing experience of being snatched"); see also Comment, *The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 235 n.49 (ideal remedy one which would end all parental kidnapping, but completely effective deterrent unlikely); Note, *Tortious Interference with Custody: An Action to Supplement Iowa Statutory Deterrents to Parental Kidnapping*, 68 IOWA L. REV. 495, 515 (1983) (child's best interest should be paramount to that of victimized parent). But see *In re Marriage of Settle*, 556 P.2d 962, 969 (Or. 1976) (court determined that child's best interest better served by awarding custody to abducting parent than by again uprooting child). The Oregon Supreme Court finally overruled *Settle* five years later in *In re Ross*, 630 P.2d 353 (Or. 1981).

146. See *Flood v. Braaten*, 727 F.2d 303, 304 (3d Cir. 1984) (children bear overwhelming emotional cost of child snatching); see also J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* 32-34 (1973) (stability and continuity more important than which parent has custody); Comment, *Intentional Infliction of Emotional Distress: Recovery of Damages for the Victims of Parental Kidnapping*, 1984 S. ILL. U.L.J. 145, 148 (parental kidnapping often violent, resulting even in death of child).

147. See *Wood v. Wood*, 338 N.W.2d 123, 129 (Iowa 1983) (Wolle, J., dissenting) (civil damages for parental kidnapping are ingenious weapon of parents and counsel in battle for custody); see also Berman, *Children as Pawns*, 6 FAM. ADVOC. 22, 26 (Fall 1983) (parents use custody suit to vent their hostility); Brown, *Good Lawyers Needn't be Gladiators*, 6 FAM. ADVOC. 4, 5 (Spring 1984) (lawyers convert custody courtroom into battleground).

front: salving the wound before it festers, rather than redressing it retrospectively.

California has found such a prospective solution to the problem of parental kidnapping by providing for mandatory mediation in custody cases.¹⁴⁸ California's statute proposes to reduce acrimony between the parents and to develop an agreement between them assuring the child's best interest.¹⁴⁹ Courts direct the parents and the mediators to consider custody as a question totally distinct from divorce,¹⁵⁰ recognizing that although the parents' relationship with each other may be irreconcilable, they may still cooperate in their child's best interest.¹⁵¹ In practice, California courts have enthusiastically upheld the statute's purposes and its mandatory language.¹⁵² More importantly, the statute works, and works well.¹⁵³

Additionally, a few other states provide similar mediation or counseling before custody determinations; however, such mediation or counseling occurs at the discretion of the court.¹⁵⁴ Each of these statutes has the advan-

148. See CAL. CIV. CODE ANN. § 4607 (Deering 1984) (all contested custody issues must be mediated).

149. See *id.* (agreement assures child's continuing contact with both parents). Each superior court must supply a mediator. See *id.* (mediators must be professionally qualified and may include staff members of mental health agency, probation department, or conciliation court).

150. See *id.* § 4609 (custody mediation shall be separate from family reunification counseling); cf. TEX. FAM. CODE ANN. § 3.54 (Vernon Supp. 1986) (reconciliation counseling for divorcing parties is only type within the discretion of Texas courts). See generally J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* 46-47 (1973) (custody disputes should be settled separately, before divorce action, and not contingent on outcome of divorce proceeding).

151. See CAL. CIV. CODE ANN. §§ 4607, 4609 (Deering Supp. 1984 & Supp. 1985) (mediation separate from and prior to divorce hearing); see also J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* 47 (1973) (child benefits from custody settlement separate from and prior to divorce proceeding).

152. See *McLaughlin v. Superior Court*, 189 Cal. Rptr. 479, 486 (Ct. App. 1983) (mediation of contested custody issues mandatory); *Guardianship of M. S. W.*, 186 Cal. Rptr. 430, 433 (Ct. App. 1982) (purpose of mediation statute's mandatory language is to reduce conflict between parents); see also J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* 46-47 (1973) (best interest of child dictates that custody disputes should be settled before divorce, in separate action, and not contingent on outcome of divorce action).

153. See King, *Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, 2 CAL. LAW. 40, 41 (Jan. 1982) (after five years of mandatory custody mediation in San Francisco Superior Court, no mediated case has come back into court for modification or enforcement). The Los Angeles county courts have experienced a 75% reduction in the number of custody cases adjudicated. See Telephone interview with Hugh McIsaac, Director of Family Court/Conciliation Court Services (July 1, 1986).

154. See ALASKA STAT. § 25.20.080 (1983) (court may order mediation of child custody matter); IOWA CODE ANN. § 598.41 (West Supp. 1985) (court may require custody mediation); MONT. CODE ANN. § 40-3-102, -111, -121, -122, -124, -125 (1985) (court may sit as "conciliation court" to avoid further litigation and promote amicable settlement of domestic

tage of settling the custody question, in most cases, before the parents ever get to court.¹⁵⁵ All of them emphasize that although the parents may be divorcing each other, neither is severing his relation with his child.

The benefits of such a system are numerous. First, successful mediation costs less than expensive litigation, especially when the parents thereby avoid the expenses of private investigations, criminal fines, and damage awards.¹⁵⁶ Second, mediation avoids exacerbating the already unpleasant and emotionally charged relationship between the parents as well as the relationship of each parent with their child.¹⁵⁷ The result of such mediation avoids the

and family controversies, giving priority to those concerning the welfare of children); 23 PA. CONS. STAT. § 1006 (Supp. 1985) (court may require parents to attend counseling regarding custody). Courts commonly stay litigation pending mediation. *See, e.g.*, ALASKA STAT. § 25.20.080 (1985) (pending custody proceeding shall be stayed thirty days upon mediation order); CAL. CIV. CODE ANN. § 4607 (Deering 1984) (mediation set prior to hearing); MONT. CODE ANN. § 40-3-125 (conciliation hearing shall be prior to custody hearing).

155. *See King, Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, 2 CAL. LAW. 40, 40 (Jan. 1982) (mediation focuses on future benefits to child, rather than emphasizing past wrongs, as does adversarial process).

156. *See Bahr, Mediation Is the Answer*, 3 FAM. ADVOC. 32, 34 (Spring 1981) (study showing legal fees plus private mediation cost twenty percent less than non-mediated cases). Mandatory mediation substantially reduces the need for costly legal representation in contested, adversarial hearings or trial. *See King, Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, 2 CAL. LAW. 40, 40 (Jan. 1982) (state bar's support of mandatory custody mediation clearly placed public interest above private economic gain). Attorneys nevertheless reap benefits in terms of less stress, fewer frantic telephone calls, increased client satisfaction, and therefore possibly more referrals. *See F. BIENENFELD, CHILD CUSTODY MEDIATION 6-7* (1983) (attorneys in custody disputes serve their clients best by dampening their adversarial posture and supporting amicable settlements of differences). *But see Coombs, Noncourt-Connected Mediation and Counseling in Child-Custody Disputes*, 17 FAM. L.Q. 469, 492 (1984) (mediation poses potential problem for lawyers in possible violations of ethics code); Foster & Freed, *Child Custody and the Adversary Process: Forum Conveniens?*, 17 FAM. L.Q. 133, 148 (1983) (mediation ultimately more expensive if agreement comes unglued). Additionally, the judicial system benefits by the reduction in the number of custody cases clogging the courts. *See A. HARALAMBIE, HANDLING CHILD CUSTODY CASES 42* (1983) (courts with mediation services more economically efficient); Nestor, *Developing Cooperation Between Hostile Parents at Divorce*, 16 U.C.D. L. REV. 771, 771 (1983) (contested custody matters occupy disproportionate amount of courts' time); *see also King, Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, 2 CAL. LAW. 40, 41 (Jan. 1982) (before mandatory mediation, San Francisco Superior Court had five to fifteen adversarial custody hearings per day; three years after implementation of mandatory mediation, the court heard only five disputed custody cases in all of 1980). For this reason, Chief Justice Warren Burger has also recommended that courts transfer custody matters to mediation and arbitration. *See 2 FAM. MEDIATOR* (Mar.-Apr. 1982) (recommending alternative means of settlement) (cited in A. HARALAMBIE, *HANDLING CHILD CUSTODY CASES 42 n.5* (1983)).

157. *See Flood v. Braaten*, 727 F.2d 303, 304 (3d Cir. 1984) (emotional cost of child snatching borne by children who have already watched their families split asunder by failure of parents' marriage); *see also F. BIENENFELD, CHILD CUSTODY MEDIATION 1* (1983) (custody

appearance of leaving one parent the winner and the other the loser.¹⁵⁸ Instead, it can produce an outcome that satisfies each party.¹⁵⁹ In the end, this potential makes the child the real winner, because he has been spared the emotional turmoil of being used as a pawn in a futile custody fight.¹⁶⁰ Further, by minimizing the chance for future hostilities, successful mediation saves the child the scars and continuing emotional trauma of an adversarial relationship between his parents.¹⁶¹

Texas' greatest deficiency in its panoply of foils to parental kidnapping is its want of a statute, like California's, mandating court-sponsored custody mediation.¹⁶² While superficially similar to custody mediation, neither the

litigation aggravates parental acrimony, increases pain of children, and escalates hostility that may never end); King, *Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, 2 CAL. LAW. 40, 40 (Jan. 1982) (judicial proceedings exacerbate acrimony). "If parents do not have irreconcilable differences when their case comes into court for adversary proceedings over the custody of their children, they certainly will have them when they leave. The adversary process leaves permanent scars on parents and children alike." *Id.* at 40. *But see* Levy & Chambers, *The Folly of Joint Custody*, 3 FAM. ADVOC. 6, 6 (Spring 1981) (children are not negotiable).

158. *See* J. BLADES, FAMILY MEDIATION 3-4 (1985) (mutual cooperation avoids crushed morale and diminished self esteem). In addition, mediation allows the parents to find options for their mutual benefit, while reducing their fear of losing their child. Telephone interview with Hugh McIsaac, Director of Family Court/Conciliation Court Services, Los Angeles County Court (July 1, 1986).

159. *See* F. BIENEFELD, CHILD CUSTODY MEDIATION 13 (1983) (agreement rate through mediation is 71%); King, *Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, 2 CAL. LAW. 40, 41 (Jan. 1982) (after five years of mandatory custody mediation in San Francisco Superior Court, no mediated case has come back into court for modification or enforcement); Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 515 (1984) (relitigation in as few as ten percent of mediated cases).

160. *See* Flood v. Braaten, 727 F.2d 303, 304 (3d Cir. 1984) (overwhelming emotional cost borne by children whose families split asunder); *see also* Berman, *Children as Pawns*, 6 FAM. ADVOC. 22, 22 (Fall 1983) (strife of divorce and custody proceedings damages parent-child relationship).

161. J. BLADES, FAMILY MEDIATION 3 (1985) (future friction and continuing hostile confrontations more likely in adversarial settlement than in mediated settlement). Custody mediation is of inestimable value to everyone involved because it virtually eliminates the problem of parental kidnapping by adversarial parents. Telephone interview with Justice Donald King, California Court of Appeals (June 25, 1986).

162. *Compare* CAL. CIV. CODE ANN. § 4609 (Deering Supp. 1985) (all contested custody issues must be mediated) *with* TEX. FAM. CODE ANN. § 3.54 (Vernon Supp. 1986) (divorce conciliation counseling is only type within discretion of courts). The judicial system is increasingly turning to alternative means of resolving disputes to ease crowded court dockets. *See* Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276-77 (1982) (while not a cure all, alternative dispute resolution mechanisms exemplify solutions preferable to litigation). Only such a legislative directive as a mediation statute, however, can overcome the coolness of a few courts toward alternative dispute resolution. *See* Mendoza v. Canizales, 695 S.W.2d 266, 271 (Tex. App.—San Antonio 1985, no writ) (refusing specific enforcement of agreement to arbi-

discretionary divorce conciliation law¹⁶³ nor the Texas General Arbitration Act¹⁶⁴ can reach the essential issues in custody determinations. These statutes illustrate, however, that the Texas Legislature recognizes the potential for the effective non-adversarial resolution of disputes. By similarly dictating court-ordered custody mediation, Texas can preserve its place among the leaders in the prevention of parental kidnapping.¹⁶⁵

Of course, mediation will not work in every custody dispute¹⁶⁶ and failed mediation will invariably be the subject of litigation.¹⁶⁷ But unlike the other remedies for child snatching, court-sponsored mediation has the greatest promise for actually deterring parental kidnapping by reducing the number of its potential victims: children whose parents either anticipate bitter custody litigation or who cannot abide by the result of such a battle.¹⁶⁸

trate). *But see* Mullinax, Wells, Babb & Cloutman, *P.C. v. Sage*, 692 S.W.2d 533, 535 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (enforcing arbitration award); *Olshan Demolishing Co. v. Angleton I.S.D.*, 684 S.W.2d 179, 184 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (enforcing arbitration agreements resolves disputes faster and more efficiently). *See generally* Comment, *Arbitration: Making Court-Annexed Arbitration An Attractive Alternative in Texas*, 16 ST. MARY'S L.J. 409 (1985) (discussing arbitration as advantageous alternative to litigation, especially to resolve commercial disputes).

163. *See* TEX. FAM. CODE ANN. § 3.54 (Vernon Supp. 1986) (reconciliation counseling for divorcing parties is only type within discretion of Texas courts).

164. *See* Texas General Arbitration Act, TEX. REV. CIV. STAT. ANN. arts. 224 to 238-20 (Vernon 1973 & Supp. 1986) (providing for arbitration, but only in commercial contract disputes).

165. *See* *Fenslage v. Dawkins*, 629 F.2d 1107, 1108 (5th Cir. 1980) (one of first cases to recognize large damage award to compensate victimized parent); *Perry v. Ponder*, 604 S.W.2d 306, 317 (Tex. Civ. App.—Dallas 1980, no writ) (application of UCCJA principles even before Texas adopted UCCJA); TEX. PENAL CODE ANN. § 25.03 (Vernon Supp. 1986) (interference with custody statute aimed at parental kidnapers); TEX. FAM. CODE ANN. §§ 36.01-.08 (Vernon Supp. 1986) (statute imposing civil liability for interference with child custody enacted in 1983).

166. *See, e.g.*, J. BLADES, *FAMILY MEDIATION* 4 (1985) (some couples unable to mediate because of vindictiveness and deceitfulness); D. SAPOSNEK, *MEDIATING CHILD CUSTODY DISPUTES* 217 (1983) (mistrust and hostility between spouses may not cease with intervention); King, *Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, 2 CAL. LAW. 40, 41 (Jan. 1982) (mediation will not resolve all custody disputes). Because nearly 85 percent of custody dispositions are settled amicably, prevention of parental kidnapping focuses on that fifteen percent which are contested. *See* F. BIENENFELD, *CHILD CUSTODY MEDIATION* 1 (1983) (fewer than 15% of custody cases are contested).

167. *See* King, *Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, 2 CAL. LAW. 40, 41 (Jan. 1982) (of cases initially mediated, fewer eventually litigated in a year than were previously heard each day). Custody mediation has reduced the number of custody cases actually adjudicated by 75%. Telephone interview with Hugh McIsaac, Director of Family Court/Conciliation Court Services, Los Angeles County Courts (July 1, 1986).

168. *See* Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497, 516 (1984) (even couples with strained relationships, complex disagreements, and severe financial pressures can produce mediated custody agreements).

While admittedly a first step, judicious use of court-ordered custody mediation can freeze the weapons of domestic warfare.¹⁶⁹ As an essential component in the battle against parental kidnapping, Texas should adopt court-sponsored custody mediation, preferably a mandatory plan like California's,¹⁷⁰ but, at minimum, a court-ordered plan that operates at the court's discretion.¹⁷¹ The children of Texas deserve this protection.

V. CONCLUSION

Unfortunately, the UCCJA, the PKPA, state criminal laws, civil laws, and tort suits all address the problem of parental kidnapping retrospectively, after the abduction has occurred. Although denial of a forum for the relitigation of custody and the threat of criminal sanctions or damage awards may give some potential child stealers second thoughts, none is a sufficiently powerful deterrent. Certainly each of the foregoing remedies is an essential component in the war against parental kidnapping, but none of them actually prevents kidnapping. Similarly, each of them treats the bereaved parent as the victim, rather than providing a remedy to the kidnapped child, the true loser in the tug-of-war between his parents. The arsenal of anti-child-snatching weapons now requires an addition that is truly in the best interests of the child: a solution that prevents parental kidnapping and thereby obvi-

But see Foster & Freed, Child Custody and the Adversary Process: Forum Conveniens?, 17 FAM. L.Q. 133, 146 (1983) (adversary system here to stay, although it requires adaptations to protect children); Nadeau, Fagan & Schunterman, *Child Custody: The Adversarial Process as a Vehicle for Clinical Services*, CHILD CUSTODY DISPUTES 511 (G. Stollak & M. Lieberman eds. 1985) (destiny of children decided within framework of adversarial process).

169. See *Wood v. Wood*, 338 N.W.2d 123, 127 (Iowa 1983) (Wolle, J., dissenting) (proposing freeze on "new weapons of domestic warfare" by urging that Iowa not recognize tort of custodial interference).

170. See CAL. CIV. CODE ANN. § 4607 (Deering 1984) (mandating court sponsored mediation of all custody disputes). The Texas statute authorizing discretionary divorce reconciliation counseling does nothing to protect the children whose parents are committed to dissolving their marriage, but who desire an ongoing relationship with their children. See TEX. FAM. CODE ANN. § 3.54 (Vernon Supp. 1986) (sole purpose of divorce counseling to determine whether there exists reasonable expectation of reconciliation).

171. See, e.g., ALASKA STAT. § 25.20.080 (1985) (court may order custody mediation at its discretion); IOWA CODE ANN. § 598.41 (West Supp. 1985) (court may require custody mediation); MONT. CODE ANN. §§ 40-3-102, -111, -121, -122, -124, -125 (1985) (conciliation court may settle custody controversies). Legislatively mandated court sponsored custody mediation can preserve Texas' place among the leaders in the prevention of parental kidnapping. See *Fenslage v. Dawkins*, 629 F.2d 1107, 1108 (5th Cir. 1980) (one of first cases to recognize large damage award to compensate victimized parent); *Perry v. Ponder*, 604 S.W.2d 306, 317 (Tex. Civ. App.—Dallas 1980, no writ) (application of UCCJA principles of determining custody jurisdiction, even before legislative adoption of UCCJA); TEX. PENAL CODE ANN. § 25.03 (Vernon Supp. 1986) (interference with custody, third degree felony, aimed at parental kidnapers); TEX. FAM. CODE ANN. §§ 36.01-.08 (Vernon's Supp. 1986) (civil liability for interference with child custody enacted in 1983).

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ates the necessity of resort to one of the retrospective remedies. Court-sponsored custody mediation provides that redress. By disarming the custodial combatants before their dispute flares into outright warfare, such mediation may be the measure that will finally stem the tide of parental kidnapping.