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Law, Social Change and Child Snatching

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INTRODUCTION

"[The] rapidity of modern social change . . . demands a legal system that does not slowly adjust to social problems. . . . Rather, the system must increasingly anticipate, implement, and direct the change in order to maximize the realization of desired values."¹

To determine how well the law performs, one must continuously question the legal system's capacity to adapt to and direct social change. How is the system informed about the nature and causes of social change and how does it respond? Critical to this inquiry are the interactions within the legal system of legislators, judges, practicing attorneys, bar associations, governmental officials, and social forces to fashion legal policy.² An especially instructive case study of law and social change is child snatching, or the abduction of one's own child, because one can discern who initiated action within the legal system, how the action was commenced, and why specific parts of the system were approached when they were.³ Such a study also affords insights into the contributions and limitations of the actors

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² Id.
³ Id. at 513.
involved in child custody problems. Not least, an examination of child snatching reveals distressing realities about the American family and the malfunction of law in contemporary life, a condition certain to affect our society in the future.

Some of the questions this article attempts to answer are whether the legal system has acted too quickly or too slowly in dealing with the problems of child snatching; whether the adversarial nature of the court system and statutory law have combined to exacerbate rather than eradicate child snatching; and whether legislative responses have addressed the symptoms or the underlying causes of child snatching. Initially, the article discusses the contemporary social context out of which child snatching emerged and reviews the history behind the criteria for determining child custody. It then considers the impact of the initial legal response to child snatching, the Uniform Child Custody Jurisdiction Act, as well as the legislative-political history and impact of the second response, the Parental Kidnapping Prevention Act of 1980. Finally, the article examines the traditional means of resolving child custody conflicts and recommends several alternative approaches.

DIVORCE, CUSTODY CONFLICTS, AND RELITIGATION

Although child snatching captured the attention of the media and the legal field in the late 1970's, its emergence as a serious social problem must be placed within the context of the fundamental social and legal changes of the 1960's and early 1970's. During this time divorce rates mushroomed, child custody statutes underwent significant changes, and the work and family roles of men and women shifted radically. As a result, the decisions of lawyers and judges in resolving custody disputes became more complex. Alongside this complexity developed a concomitant swell of dissatisfaction with the methods and standards of the legal system. An understanding of child snatching and the turmoil it has created in American courtrooms requires an examination of the factors that produced the phenomenon.

4. See text of congressional hearings on this subject cited infra notes 119-21, 137-41.
5. See infra notes 39-44.
Foremost among these factors is the unparalleled rise in the number of divorces in the past two decades. While divorce rates actually dropped slightly during the 1950's from their World War II highs, 1960 and 1970 rates more than compensated for this temporary decline. Between 1960 and 1979, the divorce rate climbed from 9.2 to 22.8 per 1000 married women,\(^7\) approximately a fourfold increase in the number of divorces in twenty years.\(^8\) In addition, despite decisions to postpone having children and the resulting decline in the birthrate,\(^9\) the proportion of divorcing couples with and without children remained relatively constant.\(^10\) The increased divorce rate has thus resulted in a cor-

7. **Divorce Statistics: 1960 to 1979.**

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<tr>
<th></th>
<th>1960</th>
<th>1970</th>
<th>1979</th>
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<tr>
<td><strong>Divorces</strong></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Number</td>
<td>393,000</td>
<td>708,000</td>
<td>1,170,000</td>
</tr>
<tr>
<td>Rate per 1000 total population</td>
<td>2.0</td>
<td>3.5</td>
<td>5.4</td>
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<tr>
<td>Rate per 1000 married women</td>
<td>9.2</td>
<td>14.9</td>
<td>22.8</td>
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<tr>
<td>15 years and over</td>
<td></td>
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<tr>
<td><strong>Divorces Involving Minor Children</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number</td>
<td>223,000</td>
<td>424,000</td>
<td>Not available</td>
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<tr>
<td>Percent of all divorces</td>
<td>56.7</td>
<td>59.9</td>
<td>56.3*</td>
</tr>
<tr>
<td><strong>Number of Children Experiencing Parental Divorce</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>463,000</td>
<td>870,000</td>
<td>1,181,000</td>
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</tbody>
</table>

**Minor Children Living with a Divorced or Separated Parent**

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<thead>
<tr>
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<tbody>
<tr>
<td>Number living with mother</td>
<td>2,697,000</td>
<td>4,633,000</td>
<td>7,237,000</td>
</tr>
<tr>
<td>Number living with father</td>
<td>258,000</td>
<td>345,000</td>
<td>749,000</td>
</tr>
<tr>
<td>Percent living with father</td>
<td>8.7</td>
<td>6.9</td>
<td>9.4</td>
</tr>
</tbody>
</table>

* An estimate based on Divorce Area Registration statistics reported in Table 5 in *Advance Report of Final Divorce Statistics, 1979* 6 (May 29, 1981).


Another source used in the compilation of these statistics is *Bureau of the Census, Divorce, Child Custody, and Child Support* (1977).

8. It is worth noting that divorce rates have remained relatively stable over the last several years, suggesting that we have reached a plateau, at least for the time being. The estimated divorce rates per 1,000 population were 5.2 in 1980, 5.3 in 1981, and 5.3 in 1982. See *Bureau of the Census, Annual Summary of Births, Deaths, Marriages and Divorces: United States, 1981* 1 (1982); *Bureau of the Census, Births, Marriages, Divorces and Deaths for 1982*; *Monthly Vital Statistics Report* 1 (1983).


10. See *supra* note 7.
responding increase in the number of divorces involving minor children. In fact, the number of minor children experiencing a parental divorce has increased by about 155 percent. As a consequence, the courts were deciding the custodial fate of over one million children a year by 1979.11

Historically, when parents divorced, the courts awarded custody of the children to only one parent. More recently, courts have granted the noncustodial parent specific visitation rights.12 For the parent who does not receive custody, a divorce signals a severe restriction on the time spent with a child and may mean the end of the relationship. Not surprisingly, this prospect leads to vehement disagreements on custody issues.13 Although each parent in a custody struggle may genuinely believe that a custody award to the other parent would be detrimental to the child's welfare, it may be that such struggles are actually parental attempts to exact retribution from each other.14

Estimating the frequency with which couples engage in disputes over children is difficult because it is not possible to draw a hard and fast line between those divorces that are contested on custody issues and those that are not.15 Although empirical research on this topic is extremely scant, apparently fewer than five percent of divorcing couples with children actually contest custody in court.16 This figure, however, does not account for those couples who disagree on custody initially, but who reach a resolution prior to a court hearing.17 Further, although custody

11. Id.
12. This situation is beginning to change as more couples begin to experiment with joint custody and more states allow judges to make joint custody determinations. Eleven states presently have laws specifically authorizing joint custody. See D. Luepnitz, Child Custody 4 (1982).
16. This estimate is based on Robert Levy's research on custody investigations in Minnesota, which will be published by the American Bar Association in 1983.
17. For example, one recent study found that 20% of divorcing couples disagreed initially about custody issues. Kohen, Brown & Feldberg, Divorced Mothers: The Cost and Benefits of Female Control, in Divorce and Separation 232 (G. Levinger & O. Moles ed. 1979). This figure is very close to a 1956 finding that 16% of divorcing couples disagreed over custodial arrangements. See W. Goode, supra note 13, at 313. In both these studies, however, the estimates were based only on reports from wives. If questioned, the husbands may have answered quite differently and estimates may have been higher.
is rarely disputed during divorce proceedings, evidence suggests that litigation following a divorce decree is rampant. In fact, it appears that rather than ending custody conflict between parents, the divorce decree signals their beginning. A study in Wisconsin, for example, found that in childless divorces only five percent of the partners returned to court to enforce or modify a decree within two years. The corresponding figure for divorces involving children, however, was fifty-two percent. Similarly, a Denver study found that fifty-five percent of divorcing couples who had originally disagreed about custody, but who had not necessarily challenged the matter in court, returned to court within a year to modify their divorce decrees. While not all re-litigation following divorce concerns children, a significant portion arises from specific custody arrangements and includes disputes over visitation, child support, and legal custody.

The dramatic increase in the divorce rate over the past twenty years has been accompanied by simultaneous increases in custody disputes. Predictably, these disputes result in extreme bitterness and disappointment on the part of many participants. In addition, changes in traditional custody rules have emerged with the rising divorce rate and have, at least in the short run, increased the dissatisfaction and frustration of parents who lose custody battles.

Some observers have suggested that the percentage of custody disputes is increasing because of a greater likelihood that fathers will press claims for custody. See Orthner & Lewis, Evidence of Single Father Competence in Childrearing, 13 FAM. L.Q. 27 (1979). However, there is an absence of longitudinal data to support this claim and, at present, it remains no more than a hypothesis.

20. Id.
21. See Pearson & Thoennes, The Benefits Outweigh the Costs, 4 FAM. ADVOC. 26, 31 (1982). This percentage is obtained by adding the top two figures in the last column of the chart found on page 31. These numbers represent the percentage of individuals in the control group who returned to court within 12 months.
22. Longitudinal evidence documenting increases in the absolute number of child custody disputes does not exist. However, some evidence suggests that family-related matters now dominate American courtrooms. A study of two trial courts in California revealed that in 1970 domestic cases composed over 50% of the civil load of these two courts. See Friedman & Percival, A Tale of Two Courts: Litigation in Alameda and San Benito Counties, 10 LAW. & SOCY REV. 267, 280 (1976). Of course, not all family-related cases involve struggles between parents over the custody of children. For example, a recent study of divorced parents found that 56% of divorced mothers with custody of their children returned to court to enforce child support payments. See D. Luepni, supra note 12, at 67. Disputes over property and visitation also bring divorced parents to court.
The Emergence of the "Best Interests" Principle

Although the father's right to custody of his children was irrebuttable in England prior to 1800, it was never absolute in the United States.\textsuperscript{23} American courts asserted that the father's right derived not from any natural law, but from a presumption that paternal custody furthered the child's best interests.\textsuperscript{24} Thus, what is often considered the modern doctrine of the "child's best interests" actually appeared as early as the beginning of the nineteenth century.\textsuperscript{25} Thereafter, powerful cultural conceptions of the family and men's and women's roles operated to assure that the best interest of the child was not open to question. Until the mid-nineteenth century, mothers rarely gained custody of their children when couples divorced.\textsuperscript{26}

The paternal preference was clearly based in the organization of early nineteenth century family life. The father was not only responsible for the support of his children, but was thought to best understand the workings of society by virtue of his position as head of the family enterprise.\textsuperscript{27} He was thus considered best suited to educate and rear his children. The mother, on the other hand, was viewed as requiring the direction of the male head of the family and essentially incapable of supporting children or preparing them for adult roles.\textsuperscript{28}

This view of the family and the mother's role in child rearing began to change dramatically in the mid-nineteenth century.\textsuperscript{29} As the United States industrialized and men began to work outside the home, the family was treated less as an enterprise than as a haven or retreat from the outside world.\textsuperscript{30} Women became the guardians and natural inhabitants of the home\textsuperscript{31} and respon-

\begin{footnotesize}
\textsuperscript{25} Foster & Freed, supra note 23, at 327.
\textsuperscript{27} Weiss, Issues in the Adjudication of Custody When Parents Separate, in Divorce and Separation 325 (G. Levinger & O. Moles ed. 1979).
\textsuperscript{28} Id. at 326.
\textsuperscript{29} Welter, The Cult of True Womanhood: 1820-1860, 18 Am. Q. 151 (1966).
\textsuperscript{30} C. Lasch, Haven in a Heartless World (1977); Jeffrey, The Family as Utopian Retreat from the City, in The Family, Communes and Utopian Societies 21 (S. TeSelle ed. 1972).
\textsuperscript{31} J. Jeffrey, Frontier Women (1979).
\end{footnotesize}
sibility for the socialization of children devolved to them.\(^\text{32}\)

Eventually, these social changes altered the legal criteria used in making custody awards, when a maternal preference replaced the earlier prejudice in favor of the father.\(^\text{33}\) Often referred to as the "tender years doctrine," the maternal presumption derived from the belief that women were the natural caretakers of children\(^\text{34}\) and, like the paternal preference, reflected a particular cultural view of the family. By 1900, the courts were regularly awarding custody to the mother\(^\text{35}\) and several states had passed laws mandating that the mother be considered the preferred parent.\(^\text{36}\)

The 1960's and 1970's witnessed the erosion, but not the disappearance, of the maternal presumption. Gradually, state courts and legislatures began to assert that the "best interest of the child" would be served by abandoning presumptions in favor of either parent.\(^\text{37}\) As was true of previous changes in child custody laws, the nascent triumph of the best interest principle originated in changes in the organization of family life, most basic of which was the entry of married women with children into the labor force in large numbers.\(^\text{38}\) Accompanying this influx were altered conceptions of the roles of men and women in child rearing. The nineteenth century notion that women were naturally fit to rear children was perpetuated in the twentieth century by psychological theories that purported to demonstrate a maternal instinct or a natural attachment between mother and child.\(^\text{39}\) Sociological theories, in addition, suggested that a division of labor between men and women was a universal as well as a functional necessity.\(^\text{40}\) In the 1970's, however, social science

\(^{32}\) See Vandepol, supra note 26, at 227.

\(^{33}\) Id. at 228.

\(^{34}\) Weiss, supra note 27, at 326.

\(^{35}\) Derdeyn, supra note 24, at 719.

\(^{36}\) Weiss, supra note 27, at 327; Vandepol, supra note 26, at 228.

\(^{37}\) A 1978 review of statutes and court decisions revealed that the "tender years doctrine" has been specifically rejected in 22 states, remaining in effect as "gospel" to "tie breaker" in the rest. See Foster & Freed, supra note 23, at 332.

\(^{38}\) In 1950, 18% of married women with children under eighteen and 12% of married women with children under six worked outside the home. By 1980, these percentages were 54 and 45 respectively. Bureau of the Census, Trends in Child Care Arrangements of Working Mothers (1982).


research began to demonstrate the parenting capabilities of men, as well as men's importance in child rearing.\textsuperscript{41} The same period also witnessed an upsurge in the interest on the part of men in child care.\textsuperscript{42} Not only is it becoming clear that fathers are able to care for their children, it is also true that many children are now cared for by someone other than a parent.\textsuperscript{43} These developments have made retention of a maternal preference in custody cases difficult.

With the increasing obsolescence of the relatively unambiguous standards associated with the "best interests" and "tender years" doctrines came the search for new custody criteria. The Uniform Marriage and Divorce Act,\textsuperscript{44} for example, lists five factors to be used in deciding custody disputes: the wishes of the child's parents, the wishes of the child, the interaction of the child with his parents, the child's adjustment to home, school and community, and the mental and physical health of all individuals involved.\textsuperscript{45} Some states have expanded this list to include factors ranging from the specific capabilities of each parent to the preferences of the child.\textsuperscript{46} Such factors suggest that judges subject the emotional life of the family to intense scrutiny when deciding what is best for a child.\textsuperscript{47}

The criteria contained in the Uniform Marriage and Divorce Act and various state statutes are understandably difficult to apply, and many judges have stated that custody decisions are among the most difficult that they make.\textsuperscript{48} While in some instances one parent may clearly be the best choice for custody,

\begin{itemize}
\item \textsuperscript{42} As evidence one can point to the popular books on fatherhood that appeared in the 1970's. See, e.g., F. Dodson, How to Father (1974); M. Green, Fathering (1977); J. Levine, Who Will Raise the Children? New Options for Fathers (1976).
\item \textsuperscript{43} See Note, The Father's Right to Custody in Intercparental Disputes, 49 Tul. L. Rev. 189 (1974).
\item \textsuperscript{44} 9A U.L.A. § 402 (1979).
\item \textsuperscript{45} Id.
\item \textsuperscript{46} For example, Michigan includes several additional factors that the court should weigh in deciding custody such as the moral fitness of the competing parties, the capacities of the competing parties to nurture the child, and the emotional ties between the competing parties and the child. Mich. Stat. Ann. § 25.312(3) (Callaghan 1974).
\item \textsuperscript{47} Derdyn, Child Custody: A Reflection of Cultural Change, 7 J. Clinical & Child Psychology 172 (1978).
\item \textsuperscript{48} M. Wheeler, supra note 15, at 24.
\end{itemize}
in many others each parent is equally involved with and capable of rearing the child. In the latter situation, any custody award is bound to generate dissatisfaction in the noncustodial parent. In addition, the new criteria, while attempting specificity, allow a great deal of latitude for subjective judgments. Judges may therefore reach radically different decisions in similar cases.

Perhaps more important in generating dissatisfaction over custody awards is the failure of judicial decisions to keep pace with the legal and social changes that have occurred in the last two decades. Although the law now defines both men and women as "fit" to rear children, several commentators have suggested that judges continue to employ a maternal presumption in making awards, with mothers receiving custody in nine out of ten cases. The number of fathers' rights groups that have formed in recent years illustrates men's frustration with this continued trend. Thus, while society encourages men to become more involved in the care of their children, and evidence indicates this is occurring, the prospects of divorced men gaining custody of their children are dismal. As a result, a perception of the legal system as contradictory and unfair has developed.

49. See Foster & Freed, supra note 23, at 332.
51. Id. at 36; Orthner & Lewis, supra note 17, at 33-34.
52. Although the new criteria attempt to provide an objective standard for custody decisions, they lack the one virtue that the old standards had: clarity. In fact, one analyst has likened contemporary custody decisions based on the new criteria to a lottery. H. Irving, Divorce Mediation 126 (1980).
53. Foster & Freed, supra note 23, at 332.
54. See M. Wheeler, supra note 15, at 36; Kram & Frank, The Future of the Tender Years Doctrine, 12 Trial Mag. 14 (1976); Roman & Haddad, supra note 6, at 164; Weiss, supra note 27, at 327.
55. As shown in the Table, supra note 7, the percentage of children living with their fathers has increased only slightly in the last 20 years. It is becoming easier for fathers, however, to obtain custody of their children, as reported in a recent North Carolina survey, where judges stated that they awarded custody to the father in one-half of all contested cases. See Orthner & Lewis, supra note 17, at 28. Similar findings were reported in California. Id. at 29. These statistics, however, do not account for the advice of counsel to fathers not to pursue custody. Id. at 27. See also D. Luepertz, supra note 12, at 25.
57. For example, more men have become involved in the daily care of their children as their wives enter the labor force. In 1975 about two-thirds of children three to thirteen years of age whose mothers worked were cared for in the home by one of their parents. J. Scanzoni & L. Scanzoni, Men, Women and Change 342 (1981).
The increasing number of conflicts between divorcing and divorced parents and the growing distrust of the legal system form the background against which the emergence of child snatching must be viewed. More couples with children are divorcing than ever before, and many of them have lost confidence in the ability of the legal system to resolve their disputes fairly and justly. Whether dissatisfied with a custody decree or the anticipation of one, unhappy with the workings of a specific custody arrangement, or seeking revenge against a spouse, many parents have resorted to child snatching to resolve their disputes or vent their frustrations. While very little is actually known about parents who steal their children, a recent study of police records in Los Angeles County found that approximately seventy percent of those charged with parental kidnapping were men. It comes as no surprise that men are the primary perpetrators of this crime since most divorced men do not receive custody of their children.

It is on the question of motive, however, that the greatest lack of information exists, although several different theories on the issue have surfaced. Representatives of parents' groups testifying at Senate hearings on child snatching maintained that revenge is the primary force behind child snatching and discounted such motives as love of the child and protection of the child's interests. Feminists have also emphasized the role of revenge, suggesting that child snatching is an attempt by men

58. See supra note 7.
59. As examples of this lost confidence, see the testimony of fathers' rights groups during the Senate hearings on the Parental Kidnapping Act. Parental Kidnapping Prevention Act of 1979: Hearings on S. 105 Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 87-103 (1980) [hereinafter cited as Senate Hearings on PKPA].
61. M. AGOPIAN, supra note 60, at 59.
62. Orthner & Lewis, supra note 17, at 27. In fact, because 90% of custody decrees favor the mother, it appears that women are proportionately overrepresented in parental kidnapping cases. See supra note 7 and accompanying text.
63. Senate Hearings on PKPA, supra note 59, at 64.
Child Snatching

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to strike back at women who seek independence through divorce.\textsuperscript{64}

Fathers’ rights groups, meanwhile, have presented a contrary view of the motives of child snatchers. In testimony before the Senate committee on federal child snatching legislation, representatives of such groups suggested that the cause of parental kidnapping lies in the unjust laws that give women sole custody of children after divorce.\textsuperscript{65} A recent book on fathers and custody has aptly described the dilemma of the divorced father: “He is faced with the choice of being either a functioning father or a law abiding citizen.”\textsuperscript{66} Under this view, child snatching is the result of a genuine but frustrated desire on the part of fathers to maintain continuing relationships with their children.

There is some validity in each explanation advanced as to the motives of parents who kidnap their children. Together they illustrate the complexity of the social and legal changes out of which child snatching arose.\textsuperscript{67} This phenomenon has also been encouraged by the way in which child custody laws are implemented.

\textit{The Law as an Incentive to Self-Help}

Until recently, the legal system actually encouraged a parent to engage in child abduction. Several factors contributed to this result. First, jurisdictional rules in most states gave more than one court the authority to make the initial custody determination or to modify the decree of a sister state.\textsuperscript{68} Although historically a state court had jurisdiction only if that state were the child’s domicile,\textsuperscript{69} modern jurisdictional rules also allowed a state court to assume jurisdiction if the child were physically present in the

\begin{footnotes}
\item[65] Senate Hearings on PKPA, supra note 59, at 93.
\item[66] Victor & Winkler, supra note 56, at 78.
\item[67] In his study of child snatching in Los Angeles, Agopian concluded that the most common motives of parents who abducted their children were the following: a desire for a more permanent relationship with the child, a belief that an ex-spouse was an unfit parent, and an attempt to use the child as leverage to re-establish a relationship with a spouse. Agopian minimizes the role of revenge in child snatching. See M. Agopian, supra note 60, at 96.
\item[68] See infra text accompanying notes 69-72.
\end{footnotes}
Thus, if a child were domiciled in one state but physically present in another, two courts could have jurisdiction over the same case. Ideally, the state court with the most complete knowledge of the child’s situation would hear the case, and the other courts would follow the principles of comity and self-restraint and decline jurisdiction. This was not the case, however, due to certain legal presumptions which encouraged the courts to respond to custody petitions.

Under the doctrine of *parens patriae*, the state, as guardian of persons under legal disability, had a direct interest in the outcome of a custody battle brought within the jurisdiction. Because the standard for awarding custody was the child’s best interests, the state courts generally examined the custodial circumstances of the child regardless of whether another court might also have jurisdiction. Their exercise of jurisdiction could then be justified in a post hoc manner.

Although well intentioned, this ready assumption of jurisdiction by state courts helped facilitate child snatching. If a custody decree had not yet been granted, the parent with possession of the child had a significant advantage in the struggle for legal custody. Possession frequently enabled one parent to choose the forum and be favored as the local petitioner, while the other parent was forced to litigate in a distant forum. Further, until a

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70. See, e.g., Batchelor v. Fulcher, 415 S.W.2d 828 (Ky. 1976); Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925).
72. See Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948). The approach of accepting alternative bases of initial jurisdiction was adopted in the Second Restatement and was widely accepted by the states. RESTATEMENT (SECOND) OF CONFLICT OF LAW § 79 (1971).
73. See, e.g., Helton v. Crawler, 241 Iowa 296, 312, 41 N.W.2d 60, 70 (1950); See generally H. CLARK, supra note 69, §§ 17.1, 17.2; 43 C.J.S. Infants § 5 (1978).
75. See H. CLARK, supra note 69, § 11.5.
custody decree had been issued, the courts could not consider it wrongful for one parent to have possession, even if gained by abduction, since both parents were legally entitled to custody. The time for child snatching was thus ripe after custody proceedings had commenced but before the final decree.

Even if a state court had issued a custody decree, the parent denied legal custody could easily find another forum willing to relitigate the issue. Although some courts applied the “clean hands doctrine” and would not assist the child snatcher, most courts agreed to take jurisdiction on the basis that the child should not be punished for the wrongdoing of the parent. The parent without legal custody could therefore take a child to a potentially more favorable forum to modify the original custody decree, even though the proceeding involved essentially the same set of facts.

Apart from jurisdictional problems and legal presumptions, the criminal penalties and civil remedies available to the parent with legal custody were also woefully inadequate to discourage child abduction. Although child snatching is literally the criminal act of kidnapping, federal and state kidnapping statutes have traditionally exempted parents from prosecution. The
rationale for this exemption, as expressed by Congress, was that parents, even when acting wrongly, do what they think is best for the child and thus lack the requisite criminal intent for conviction. Moreover, even when state kidnapping statutes did not expressly exempt such activity, the courts often found an implicit exemption for parents who, as natural guardians, were merely asserting their claim to the possession of their children.

In order to regain possession of the abducted child, custodial parents were left with the civil remedies of habeas corpus or contempt. On its face, the habeas corpus action was limited to the determination of which parent had legal custody. The courts seized this opportunity, however, to reexamine the custody decision in light of the child's best interests. Thus, recovery of a child under a writ of habeas corpus was by no means certain. Furthermore, the habeas corpus action was only available in the jurisdiction where the child was physically present. This meant that the parent with legal custody but without possession of the child had to travel to the forum of the abductor. If the abductor's whereabouts were unknown, the services of a private detective might be required, resulting in more cost and delay for the custodial parent.

The second remedy, a decree of civil contempt, could be used to compel compliance with a custody ruling. Once the custody decree had been issued, a person found in contempt of the decree could be fined or imprisoned for continued refusal to comply with the court order. The power of the contempt citation, however, was limited to the jurisdiction of the issuing court. A child snatching parent could evade the contempt decree simply by going to another state. Although some courts were loath to provide a forum to a parent charged with contempt of another court, the plea was often heard because of the "child's best interests" doctrine. Finally, where the abductor sought merely refuge in another state and not modification of the decree, the custodial

87. See infra text accompanying notes 88-92.
88. See, e.g., Wicks v. Cox, 146 Tex. 489, 208 S.W.2d 876 (1948).
89. See generally Katz, supra note 84, at 124-35.
parent had to resort to the habeas corpus action because the contempt violation did not warrant extradition proceedings.

As a result of these inadequacies, efforts were made to pass legislation which would limit the jurisdictional discretion available to state courts in custody determinations. The first product of these efforts was the Uniform Child Custody Jurisdiction Act ("UCCJA").

**THE UCCJA**

In 1968, the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the UCCJA in order to "remedy [the] intolerable state of affairs where self-help and the rule of 'seize and run' prevail." Despite an initial reluctance to adopt the Act, by 1982 forty-seven states had passed substantial portions of the UCCJA. The UCCJA was designed to serve two purposes: it was to limit the discretion of state courts in exercising jurisdiction over child custody cases and to promote among the states cooperation and the exchange of information. To avoid jurisdictional conflicts

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93. See UCCJA, supra note 78.

94. Id. at 113.

95. As of 1978 only 25 states had adopted the UCCJA. See id. at 111.

96. The UCCJA has not yet been adopted in Massachusetts, Mississippi, the District of Columbia, Puerto Rico, and the Virgin Islands. For a listing of pertinent statutory provisions as enacted in each state, see Coombs, Interstate Child Custody: Jurisdiction, Recognition, and Enforcement, 66 Minn. L. Rev. 711, 720 n.60 (1982).

97. Section 1 of the Act states:

(a) The general purposes of this Act are to:

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

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

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

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

(5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;
and confusion, the UCCJA limited custody jurisdiction to the state of the child’s home or other significant contacts. Thus, the jurisdiction with the closest relationship with the child or the circumstances of the case would make the custody determination. In addition, jurisdiction would lie when the child was physically present within the state and had been abandoned or was in danger of mistreatment. Once the court issued a proper

(6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;
(7) facilitate the enforcement of custody decrees of other states;
(8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and
(9) make uniform the law of those states which enact it.

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

UCCJA, supra note 78, § 1.

98. Section 3 provides:
(a) A court of the State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child’s home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or
(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child’s present or future care, protection, training, and personal relationships; or
(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or
(4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.
(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.
(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.


99. Friedman & Marcus, supra note 98, at 306.
decree, jurisdiction to modify continued in the same court until it could no longer satisfy the jurisdictional requirements of the UCCJA, or unless it declined to modify the decree. Concurrent proceedings in the state courts were strictly prohibited under the Act. The UCCJA also provided for recognition and enforcement of out-of-state custody decrees, including the custody decrees of states that had not yet adopted the UCCJA but nevertheless satisfied its jurisdictional requirements.

Apart from the Act's mandatory jurisdictional provisions, discretionary rules allowed a state court to decline to take jurisdiction if it believed either that another state was a more appropriate forum, or that the petitioner had acted wrongfully by abducting the child. Moreover, to satisfy due process requirements, the UCCJA required that proper notice be given to all parties before the issue was adjudicated, although it was not necessary for all parties to be present. In addition, money for travel could be allocated for the personal appearance of nonresidents who claimed custody.

In spite of its virtues, the Act failed to provide a comprehensive solution to the child snatching dilemma for several reasons. First, the UCCJA was not universally adopted. Hence, non-adopting states still provided a haven for abducting parents seeking modification or nonenforcement of a decree. In addition, the UCCJA's jurisdictional provisions were sufficiently flexible to allow states to continue the parochial pattern of free jurisdiction. Moreover, the UCCJA lacked the means for locat-
ing a parent who abducted a child and then disappeared, nor did it provide any criminal or civil penalties for such acts. In response to these inadequacies, Congress intervened with the Parental Kidnapping Prevention Act ("PKPA").

THE PKPA

Legislative History

While recognizing that child custody determinations are a matter of state law, Congress nevertheless undertook limited federal action to remedy the interstate jurisdictional conflicts and to diminish the continuing problem of child abductions across state lines. In February 1973, Congressman Charles Bennett, a Democrat from Florida, introduced parental kidnap-
ping legislation that would remove the parental exemption clause from the Federal Kidnapping Act.\textsuperscript{112} Because the Act’s sanctions were severe and would make criminals of parents who took their own children, Bennett’s proposal was unattractive politically. Knowledgeable observers viewed it as not “well suited to make a major contribution to solution of the problem.”\textsuperscript{113} By January 1975, Bennett had modified his bill to provide that any parent who kidnapped his minor child would be fined not more than $1,000 or imprisoned for not more than one year, or both.\textsuperscript{114} Although a ceiling on penalties was an important response to critics, no further legislative action was taken until 1979 when Senator Malcolm Wallop, a Republican from Wyoming, and Congressman Bennett introduced substantially identical legislation in the Senate and the House.\textsuperscript{115} The two bills proposed a three-pronged approach which: 1) made the full faith and credit


Bennett’s original 1973 bill didn’t pass because it was too strong; it merely struck the ‘parental exemption’ clause from the Lindbergh Act. His first revision was too weak . . . . Neither bill would have applied when custody had not been awarded, and the FBI did not ‘want to get into the child-collection business’. . . . Many congressmen also believed it would be hard to convict any parent of kidnapping under that law. ‘What jury would convict a loving parent for taking his or her own child’, they questioned.

\textit{Id.} at 124. Hearings were held on Bennett’s bill on February 27, 1974, but Subcommittee Chairman John Conyers (D. Mich.) was frankly unenthusiastic about it and no action was taken. See Amendments to the Federal Kidnapping Statute: Hearings on H.R. 4191 and H.R. 8722 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 93d Cong., 2d Sess. 55 (1974) [hereinafter cited as House Hearings on Federal Kidnapping Statute].

\textsuperscript{114} Senate Hearings on PKPA, supra note 59, at 16-19.

\textsuperscript{115} Parental Kidnapping: Hearings on H.R. 1290 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 2d Sess. 133 (1980) [hereinafter cited as House Hearings on Parental Kidnapping]. Of the Wallop bill, Professor Russell M. Coombs of Rutgers Law School stated:

The Wallop proposal is unique among the various proposals made over the years for Congressional action in the soundness of its conception, in the scope of its treatment of the federal aspects of this problem, and in the respect it shows for the proper division of roles between the state and federal governments and between civil and criminal approaches to the problem.

\textit{Id.} See also Wallop, Children of Divorce and Separation: Pawns in the Child-Snatching Game, 15 Trial Mag. 36 (1979).
clause applicable to specified custody determinations; 2) provided that the Parental Federal Locator Service would help locate abducted children; and 3) made kidnapping one's children a federal crime.\textsuperscript{116} Political opposition from the Department of Justice and the Department of Health, Education and Welfare prevented the adoption of such legislation until December, 1980.

\textit{Opponents to the PKPA}

Persistent and strong opposition to federal parental kidnapping legislation within the two departments came specifically from the Federal Bureau of Investigation ("FBI") and the Parental Locator Service ("FPLS").\textsuperscript{117} FBI policy frowned on Bureau involvement in child abduction cases unless there was a local felony charge pending and evidence of physical or moral danger to the child.\textsuperscript{118} FBI officials considered child snatching a state and local problem, and argued that the states could usually handle the problem on their own.\textsuperscript{119} Nevertheless, the FBI was willing to make available, upon request, its laboratory and identification divisions, and to check out-of-state leads. In addition to the policy arguments against federal intervention, the FBI maintained that a federal parental kidnapping law would require significant expenditures for additional FBI agents\textsuperscript{120} and would divert manpower and resources from criminal activity allegedly more dangerous to the nation.\textsuperscript{121} Further, the FBI was hesitant

\begin{thebibliography}{117}
\item \textsuperscript{116} See \textit{generally} Wallop, \textit{supra} note 115.
\item \textsuperscript{117} Westgate, \textit{supra} note 113, at 44. Westgate stated: Opponents . . . are hard to find, according to [the Wallop and Bennett] staffs and that of Senator Alan Cranston. . . . Curiously, three organizations with Washington legislative offices, which you might imagine would have strong stands on the issue, do not plan to back—or oppose—the bills: The American Civil Liberties Union, Child Welfare League of America, and National Association of Social Workers.
\item \textit{Id.}
\item \textsuperscript{118} House Hearings on Federal Kidnapping Statute, \textit{supra} note 113, at 55. As of January 1980, Senator Wallop indicated the FBI was taking about 10 to 15 cases annually under these rigid criteria. \textit{See} Senate Hearings on PKPA, \textit{supra} note 59, at 7.
\item \textsuperscript{119} \textit{See supra} note 118.
\item \textsuperscript{120} \textit{See} House Hearings on Parental Kidnapping, \textit{supra} note 115, at 22.
\item \textsuperscript{121} \textit{Id.} at 93. An FBI spokesperson stated: For each 5,000 cases, we estimate it would take between 160 and 205 agents at a cost of $5.5 to $7.5 million . . . . In the unlawful flight program . . . we currently have over 4,000 . . . investigations under way. Most . . . involve murderers, rapists, robbers. We think . . . we should concentrate on the individuals who are of the most danger to the community as a whole.
\item \textit{Id.}
\end{thebibliography}
to become involved in "domestic relations disputes," traditionally a matter of local concern.

Like the FBI, the FPLS opposed a parental kidnapping act which would impose on it different and additional burdens. The FPLS, which helps locate delinquent child support obligors, argued that it could not successfully locate child abductors because its computer records were inadequate to uncover persons in hiding. Moreover, use of these records might amount to an invasion of privacy in instances where no substantial federal interest has been shown.

Both opposition groups were roundly criticized, however, during the hearings. The FBI was branded as interested in investigating car thefts, but uninterested in investigating thefts of children. The FPLS was accused of being concerned with support payments, but not with rejoining children with their parent. Finally, after 1978, support for the FBI and FPLS opposition eroded as important members of Congress, bolstered by lobbying parent-victim groups, discounted the objections.

122. Domestic relations disputes appear to be universally disliked by law enforcement officials at all levels. See J. Kaplan & J. Skolnick, Criminal Justice 136 (3d ed. 1982).


124. In June 1980, a spokesperson summarized the long-held position of the FPLS: [W]hile this system may be good for locating child support obligors, who typically do not attempt to conceal themselves, it may not be particularly successful in locating people who are attempting to conceal themselves. Somebody who is attempting to conceal himself may not be found in a computer check of records. House Hearings on Parental Kidnapping, supra note 115, at 91.

125. Id.

126. The FPLS argued that to "extend the use of tax return information where no substantial Federal interest has yet been demonstrated would be inconsistent with congressional and administration policies to protect most strictly privacy of taxpayers and information supplied in their returns. See Senate Hearings on PKPA, supra note 59, at 30.

127. House Hearings on Federal Kidnapping Statute, supra note 113, at 70-71. See also Senate Hearings on PKPA, supra note 59, at 42.

128. See Senate Hearings on PKPA, supra note 59:

Fathers, for example, resented bitterly the FPLS: We want the correct use of the Federal Parental Locator Service or else change its name to a collection agency. This is all it is. There are collection agencies that will collect for less of a fee than they charge . . . . I wouldn't mind paying a little more in taxes if I could find a responsive Government that was more concerned with love than the mere collection of money, personal greed and profit.

Id. at 98-99.
Grass Roots Politics: Parent-Victim Groups

Perhaps the clearest example of politics surrounding the passage of parental kidnapping legislation was the organization of parent-victim groups to assist new victims, publicize the child snatching problem, and pressure state and federal legislators to pass effective legislation.\(^{129}\) Although these groups frequently made emotional arguments, they also addressed questions concerning jurisdiction, the role of state and federal governments in domestic relations cases, and the feasibility and desirability of FBI and FPLS involvement.\(^{130}\) By 1975, parent-victims had formed Children's Rights, Inc., a national organization and an influential political lobbying group.\(^{131}\) Despite constant efforts by Children's Rights, Inc. and other such groups, it was not until 1979 that these efforts were recognized.\(^{132}\)

In the fall of 1979, the Senate Judiciary Subcommittee on Criminal Justice held hearings on child abduction in conjunction with the Child and Human Development Subcommittee of the Committee on Labor and Human Resources. These subcommittees made child abduction legislation their first priority,\(^{133}\) and in September of 1980, the Senate approved the PKPA.\(^{134}\) Due to changes in the bill and continued opposition from conservative “pro-family” groups, however, the PKPA did not pass both Houses until December 5, 1980.\(^{135}\)

Impact of the PKPA

The purposes of the PKPA were to aid parents in locating

\(^{129}\) Politics is viewed here according to Harold Lasswell's definition as the process of who gets what, when, and how. See H. LASSWELL, POLITICS: WHO GETS WHAT, WHEN, AND HOW? (1958 ed.).

\(^{130}\) A consistent theme of those testifying at the hearings was that the abducting parents' motivation was revenge against the other spouse for initiating a divorce rather than concern for the child. For a discussion of the revenge factor in child snatching, see Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, Part I, 95th Cong., 1st & 2d Sess. 722 (1977-1978). Regarding nonemotional testimony, see Senate Hearings on PKPA, supra note 59, at 64-103.

\(^{131}\) See Senate Hearings on PKPA, supra note 59, at 70, 77.


\(^{133}\) See Senate Hearings on PKPA, supra note 59, at 4-5.

\(^{134}\) The Act passed despite “fierce” lobbying in opposition to it by conservative Christian groups. See 36 CONG. Q. ALMANAC 443 (1980).

abducted children, to eliminate the safe havens in states that had not adopted the UCCJA, and to compel states to give full faith and credit to the judicial proceedings of other states.\textsuperscript{136} Although the PKPA addressed the inadequacies of the UCCJA and the demands of parent-victims, it too had weaknesses. For example, the full faith and credit provision attempted to eliminate forum shopping by the dissatisfied party.\textsuperscript{137} Thus, under the PKPA, the original custody determination must be honored in other states if the issuing state had proper jurisdiction under the Act.\textsuperscript{138} If, however, the issuing state had not complied with the Act's jurisdictional requirements, its decision would not have to be respected in other jurisdictions.\textsuperscript{139} In addition, the PKPA makes the exercise of jurisdiction to modify a custody decree an "and" proposition; the court requested to modify the decree must have jurisdiction under the Act and the state which issued the original decree must no longer have jurisdiction or have declined to exercise it.\textsuperscript{140} Despite this provision, some states have made this an "or" proposition,\textsuperscript{141} thus raising additional full faith and credit questions.

Ostensibly, the PKPA provides access to the FLPS.\textsuperscript{142} Although this service has been successful in locating parents attempting to evade child support obligations,\textsuperscript{143} parents of abducted children cannot apply directly to the FPLS. A state or federal representative must do so on the parent's behalf.\textsuperscript{144} The parent may have to petition the state court to request FLPS

\textsuperscript{136} See supra note 111.
\textsuperscript{137} See supra notes 68-72 and accompanying text.
\textsuperscript{138} 28 U.S.C. §§ 1738A(d), (g) (Supp. IV 1980).
\textsuperscript{139} See, e.g., State ex. rel Valles v. Brown, 97 N.M. 327, 639 P.2d 1181 (1981). The New Mexico court held that Arizona did not have jurisdiction under the PKPA to grant custody and thus New Mexico was not required to give Arizona's decision full faith and credit.
\textsuperscript{141} See, e.g., ILL. REV. STAT. ch. 40, §§ 2114-2115 (1981) in which Illinois may modify a decree issued in another state if that state did not have jurisdiction, declined jurisdiction, or if Illinois has jurisdiction.
\textsuperscript{143} The FPLS was established in 1976 and has been operating successfully since then. See supra note 123. The FPLS relies on the Internal Revenue Service, Social Security Department, the Veteran's Administration, the Department of Defense, the Department of Transportation (Coast Guard), the National Personnel Records Center of the General Services Administration, Post Office records, and state tax and employment files for its information.
involvement, thereby complicating and protracting the search for the missing child.

Although the PKPA provides for FBI involvement,\textsuperscript{145} the Bureau’s reluctance to involve itself in child snatching cases has continued. For example, the Justice Department has interpreted the PKPA to require a state to prosecute under its parental kidnapping felony statute once the FBI locates the abductor.\textsuperscript{146} If the abduction occurs prior to the issuance of a decree, however, it is generally considered not a violation of the statute. The FBI can therefore decline to participate. Similarly, there can be no FBI involvement in the many states which have no parental kidnapping statute. Moreover, regardless of the existence of a state statute, the Justice Department will not involve the FBI unless there is “independent credible information that the child is in physical danger or is then in a condition of abuse or neglect.”\textsuperscript{147} As a result of these restrictions, of the 576 parental complaints received from December 28, 1980 to September 30, 1981, only 99 were eligible for consideration and the FBI was actually involved in only 31.\textsuperscript{148} The PKPA’s ameliorating provisions have thus reached only an insignificant number of complaints.

**MODERN REMEDIES**

Two changes in the criminal and civil remedies related to child snatching may stem the problem substantially in the future. First, a number of state legislatures have removed the parental immunity provisions from kidnapping laws,\textsuperscript{149} and state courts have convicted parents for child snatching as a result.\textsuperscript{150} Parents with visitation rights or with joint custody who fail to

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\textsuperscript{147} Id. at 3.


\textsuperscript{149} See Katz, supra note 84, at 141-47 (Table of State Criminal Statutes).

return the child will now be prosecuted.\textsuperscript{151} In addition, some prosecuting states have attempted to make it a felony to detain a child in another state.\textsuperscript{152} Such statutes, however, may be beyond the reach of state jurisdiction.\textsuperscript{153} Thus, a uniform approach to criminal liability for child abduction may be more appropriate.

In addition to criminal liability, state and federal courts have recently recognized that tort liability may be imposed upon a child snatching parent. Historically, a father could recover in tort for the deprivation of his child’s working services,\textsuperscript{154} but this cause of action has been discredited in modern times.\textsuperscript{155} Recent cases have based liability on the breach of a duty to not deprive a legal custodian of custody. The source of this duty is derived most often from a state kidnapping statute.\textsuperscript{156} In Louisiana, for instance, the court of appeals allowed a plaintiff father $6,000 in damages for the removal of his children by his former wife.\textsuperscript{157} The kidnapping statute formed the basis of the legal duty to the father to not remove the children, and the ensuing debate over custody did not negate the breach of that duty.\textsuperscript{158}

A child abduction statute is not the only source of the legal duty however. Even where there is no statute or where parents are immune from prosecution, it “does not mean that what is obviously an invasion of a [parent’s] legal right is not a legal wrong.”\textsuperscript{159} The legal duty can be found in the custodial arrangement of the parties.\textsuperscript{160} In fact, although a judicial grant of sole legal custody is ordinarily a prerequisite to recovery for deprivation of custody,\textsuperscript{161} a contractual separation agreement has supported such a claim.\textsuperscript{162} The agreement vests the custodial party with a superior right to the child “until such time as the matter [is] resolved in court as stipulated in [the] agreement.”\textsuperscript{163}

\begin{footnotes}
\item[151] Id. See also People v. Harrison, 82 Ill. App. 3d 530, 402 N.E.2d 822 (1980).
\item[152] See, e.g., State v. McCormick, 273 N.W.2d 624 (Minn. 1978).
\item[153] Id. at 626-27.
\item[154] See, e.g., Howell v. Howell, 162 N.C. 283, 78 S.E. 222 (1913).
\item[155] See generally, Katz, supra note 84, at 114.
\item[157] 373 So. 2d at 204.
\item[158] Id. at 202-03.
\item[159] 221 Cal. App. 2d at 430, 34 Cal. Rptr. at 482.
\item[160] Id.
\item[161] See supra note 156.
\item[162] Laranjo v. Laranjo, 6 FAM. L. REP. (BNA) ¶ 2522 (1980).
\item[163] Id.
\end{footnotes}
Once the threshold duty question has been resolved and causation established, the issue of damages must be assessed. In addition to general damages for the costs of recovering the child, special damages for emotional distress are often awarded. In one case, a father was awarded $70,000 for the loss of society of his abducted daughter, the expenses incurred in attempting to regain her custody, and severe mental distress. The continuing efforts to conceal the child's whereabouts entitled the father to punitive damages in the amount of $25,000, with an additional assessment of $2,000 per month until the child's return.

Although tort liability is a secondary remedy in the field of child abduction since it does not effect the child's return directly, it may deter an abducting parent who, prior to the establishment of tort liability, did not face the specter of special or punitive damages. In addition, because such tort claims do not involve a custody ruling, the injured party is not limited to actions in state court; the plaintiff may proceed in federal court under diversity jurisdiction. Although the tort remedy may be limited by the inability to locate the missing parent and child, it is nonetheless a very potent weapon in the battle to find a legal resolution that deters, rather than encourages, child abduction.

Another possible means for solving divorce and child custody problems, including child abduction, is to divert divorcing couples from the adversarial legal system altogether.

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164. See Katz, supra note 84, at 117.
166. Id.
167. Diversity jurisdiction is invoked under 28 U.S.C. § 1332 where the parties to the action are, inter alia, citizens of different states and the amount in controversy exceeds the sum of $10,000.
168. Divorce and family law mediation organizations and literature are proliferating rapidly. A sampling of these organizations are: (1) the Special Committee on Alternative Means of Dispute Resolution, American Bar Association, Washington, D.C. The Committee serves as a national resource center on alternative dispute resolutions, such as mediation, conciliation, and arbitration. It provides information, publications, and technical assistance to programs, governmental agencies, lawyers, and individuals throughout the United States. In January 1983, the staff director of the committee provided the authors a potpourri of newspaper clippings, unpublished manuscripts, and other documents which aided in the preparation of this article; (2) the Family Mediation Association, Washington, D.C. The Association is dedicated to enhancing the quality of family life through cooperative processes involving marital separation and divorce; and (3) the American Arbitration Association, New York, New York. The Community Dispute Services Department and Family Dispute Service use conciliation, mediation, and the issuance of a binding arbitration award when necessary. The Association has regional officers and serves about 25 cities in the United States.
outside the adversarial system may be less costly than the traditional process in money, time, and emotional scarring. The primary purposes of mediating a divorce are to instill cooperation rather than competition among participants, to permit separation with the least amount of emotional damage to parents and children, to permit shared custody arrangements, and to have the parties share in decisions to avoid post-judgment litigation. There is, apparently, general recognition that “the legal system itself—the time-honored adversary system—is better designed to produce a confrontation than a mutually acceptable termination of marriage.” If mediation works to ease the financial and psychological strains of divorce, it may also be useful in preventing child snatching.

169. Lawyers too have become involved in divorce mediation. Richard E. Crouch, Consulting Editor of the Family Law Reporter and Chairman of the ABA Family Law Section’s Ethics Committee has considered the arguments against lawyers mediating divorces: “There is danger of ethics code violations and malpractice liability for lawyers, along with tremendous potential for the exploitation of unsuspecting clients.” Crouch, The Dark Side is Still Unexplored, 4 Fam. Advoc. 33, 33 (1982).


171. See M. AGOPIAN, supra note 60, at 98-106 (1981) where the author makes these recommendations for dealing with child snatching: 1) create state and federal laws against child snatching; 2) increase the use of joint custody awards; 3) establish appropriate international treaties concerning parental child-stealing and child custody awards; 4) require parents to post a security bond with the court; and 5) provide special training for judges. Agopian merely mentions promoting “negotiations of custody conditions between ex-spouses prior to a custody award,” id. at 105, and does not discuss the burgeoning movement of mediation and community-based dispute settlement centers.

Community dispute settlement centers in which laypersons are trained to mediate problems ranging from neighborhood nuisances to divorce settlements appear to be springing up frequently. The director of the Linn County, Iowa Community Dispute Settlement Center, Peg Cronk, was interviewed in January 1983, less than a month after opening the center. According to Cronk, community mediation centers grew out of the National Justice Centers that were established in Atlanta, Los Angeles, and Kansas City by Attorney General Griffin Bell during the Carter administration to determine the subject areas most successfully handled by centers, as well as the most appropriate source and control of funding. It was discovered that when the judiciary controlled the distribution of funds, the support of the legal community was more assured. In Iowa, the state legislature appropriated $100,000 to be disbursed to centers by the Iowa Supreme Court.

The key to success in these centers, in Cronk’s view, lies in diverting persons from the adversarial legal system to the peaceful resolution of disputes through mediation. Acknowledging the need for professional training in marital dispute areas, Cronk questioned whether persons undergoing a bitter marital break up could be enticed to use the center’s services or whether layperson mediators could handle such a case. Interview with Peg Cronk, Director of the Linn County, Iowa Community Dispute Settlement Center (Jan. 13, 1983).
CONCLUSION

The role of the legal system in identifying, characterizing, and offering solutions to child snatching, although laudable, may have delayed more effective ways of achieving the goal of preventing child abduction by parents. One can argue that federal parental kidnapping legislation deals only with the symptom, child snatching, rather than the underlying problem of adjusting the contested child custody system to reflect societal changes in parenting roles and expectations. While the legal system has moved relatively quickly toward containing the symptom, it has only begun to experiment with solutions to the underlying problem.

Because the United States is a highly litigious society, it is not surprising that the impact of social change is felt in some instances by those in the legal field first, before those outside the system even begin a serious analysis of the problem. It was lawyers who initially framed the child snatching problem in terms of the UCCJA. Rather than preventing an abduction, that act may have caused the abducting parent to go underground and avoid attempts by the custodial parent to obtain legal custody in another jurisdiction. This result produces a greater evil still in that the victim parent loses contact with the child, while the child suffers both the loss of one parent and the lack of a stable home environment due to frequent and oftentimes sudden moves from state to state.

The mental set of legal system actors understandably constrains recommended solutions to traditional legal means. But in the child custody area especially, losers are often left with little. A solution must be found so that divorcing parents and their children share in the winning. On this view, the UCCJA and PKPA will not succeed because of the limits of the law and the legal system itself. Indeed, the legal system appears to malfunction in contested child custody cases causing considerable human suffering as well as a dangerous erosion of faith in the legal system and the rule of law.

There appears to be a general dissatisfaction with the child

172. See supra notes 7-22 and accompanying text.
173. See supra notes 93-112 and 138-46 and accompanying text.
174. See supra notes 92-110.
175. See supra text accompanying notes 136-49.
Admittedly, an extremely emotional and difficult problem is involved: What happens to the family when spouses divorce? The most appropriate remedy to child snatching may be to divert divorcing couples with children from the present win-lose system. The reasons are obvious: 1) to truly serve the best interests of the child by continuing a relationship, when beneficial and not dangerous, with both parents; 2) to adjust the concept of family to a post-divorce stage (divorce need not be the end of the family unit); and 3) to protect the sanctity of the law upon which our society so much depends.

It appears to us that two things are necessary at this juncture. The first is empirical research into the scope, magnitude, and character of the gap now existing between societal and rhetorical changes involving parental roles and the capacity of the legal system to deal with these. Second, we need a continued exploration of alternatives to the present system and an evaluation of these in action. These two things should occur quickly, for the stakes—the family and the rule of law—are extremely high.

176. See supra note 6 and accompanying text.
177. See King, Child Custody—A Legal Problem?, 54 CAL. ST. B.J. 156, 157 (1979). King, a domestic relations judge in San Francisco, states:

It seems incredible to tie up a courtroom, a court clerk, a court reporter, a bailiff and a judge, not to mention supporting court personnel, to resolve a human problem—which of two parents is best suited to have custody of their child. . . . Child custody is a legal problem only because the Legislature, by statute, requires the judge to decide it. In reality, it is not a legal problem. It is a human problem, an interpersonal problem. . . .