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Habeas Corpus—A Better Remedy in Visitation Denial Cases

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HABEAS CORPUS—A BETTER REMEDY IN VISITATION DENIAL CASES

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I. Introduction 239
II. Visitation Is Essential to the Well-Being of the Child 241
III. Visitation Is Important to the Noncustodial Parent 245
IV. The Denial of Visitation and Analysis of Existing Remedies 248
A. Cessation of Support Payments 248
B. Contempt of Court 251
C. Modification of Decree to Change Custody 254
D. Tort Causes of Action 256
V. Habeas Corpus: The Better Remedy 258
A. Habeas Corpus Generally 258
B. State Court Precedent for the Use of Habeas Corpus to Challenge Unlawful Detention of a Child 262
C. The Appropriate Nature of the Hearing 265
D. The Advantages of Habeas Corpus as a Remedy 267
E. A Model Visitation Denial Statute with Habeas Corpus Teeth 269
VI. Conclusion 271

I. INTRODUCTION

Most family law statistics are sobering. For example, in 1986, there were 2,400,000 marriages in the United States and 1,159,000 divorces.[1] In 1985, there were 2,425,000 marriages and 1,187,000 divorces.[2] Millions of children are affected by these divorces each year as courts decide which parent should be awarded their custody. In 1986, there were approximately 63,000,000 American children and

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The opinions expressed in the article are those of the authors.

1. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 59 (1988) [hereinafter STATISTICAL ABSTRACT].

2. *Id.*

6,139,000 of these children came from broken homes.[3] According to official census statistics, twenty-one percent of America's children live only with their mother while less than three percent live only with their father.[4] In most divorce cases, Mom gets custody and Dad gets visitation.[5]

The parent who is awarded custody is responsible for ministering to the daily needs of the child while the noncustodial parent is allowed visitation time in order to maintain some relationship with the child. To many noncustodial parents, the term "visitation" is a derogatory term connoting a visit by the child to a barely known relative in another part of the state or a trip to some inanimate tourist attraction like the Sear's Tower or Mount Rushmore.[6] Ideally, however, the time children spend with the noncustodial parent

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3. *Id.* at 50. *See also* WORLD ALMANAC AND BOOK OF FACTS 811 (1989).

4. STATISTICAL ABSTRACT, *supra* note 1, at 50. Family law studies reveal that trial judges award custody of children to mothers in more than 90% of the cases. Keshet & Rosenthal, *Single Parent Fathers: A New Study*, CHILDREN TODAY 13, 14 (May-June 1978); Young, *The Fathers Also Rise: Battling to Stay in Their Children's Lives*, NEW YORK, Nov. 18, 1985, at 50, 73. *See also* Wallerstein & Kelly, *California's Children of Divorce*, PSYCHOLOGY TODAY, Jan. 1980, at 66, 67-68 (noting that 75% of children continue to live with their mothers five years after separation and divorce). An exhaustive national study, however, observes that fathers are awarded custody in 51% of the cases at the appellate court level. 1 J. ATKINSON, MODERN CHILD CUSTODY PRACTICE § 4.05, at 226 (1986).

In addition, the parents of 3,720,000 children have separated but not yet formally dissolved their marriages and all but 432,000 of these children live with their mothers. WORLD ALMANAC AND BOOK OF FACTS 811 (1989).

5. J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 121 (1980) ("[T]he dominant shape of over 80 percent of the post-divorce families is that of a custodial mother with whom the children reside and a father who has visitation rights."); McCant, *The Cultural Contradiction of Fathers as Nonparents*, 21 FAM. L.Q. 127, 133 (1987) ("Contemporary society assumes maternal custody of children when there is a divorce in the United States."); Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 701 (1985) (noting that most state court custody decisions "still favor the mother").

For additional discussion of child custody and visitation issues, see Folberg, *Joint Custody Law—The Second Wave*, 23 J. FAM. L. 1 (1984-85); Novinson, *Post-Divorce Visitation: Untying the Triangular Knot*, 1983 U. ILL. L. REV. 121; O'Kelly, *Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian*, 63 N.D. L. REV. 481 (1987); Note, *Intentional Interference with Visitation Rights: Is This a Tort?*: Owens v. Owens, 47 LA. L. REV. 217 (1986); Note, *Louisiana Family Law—The Visitation Rights of a Non-Custodial Parent*, 59 TUL. L. REV. 487 (1984); Note, *Making Parents Behave: The Conditioning of Child Support and Visitation Rights*, 84 COLUM. L. REV. 1059 (1984); Note, *No Federal Habeas Corpus in Child Custody Disputes*: Lehman v. Lycoming County Children's Services Agency, 22 J. FAM. L. 129 (1983-84); Note, *Visitation After Adoption: In the Best Interest of the Child*, 59 N.Y.U. L. REV. 633 (1984); Note, *Visitation Rights: Providing Adequate Protection for the Noncustodial Parent*, 3 CARDOZO L. REV. 431 (1982).

6. *See* 1 J. ATKINSON, *supra* note 4, § 5.03, at 322 ("For some noncustodial parents, the term 'visitation' carries a stigma, making them feel like second-class citizens with few parental rights.").

is frequently quality time, and noncustodial parents would doubtlessly prefer that that time be known as "parenting time" rather than "visitation." Nevertheless, the term "visitation" will be used in this Article because it is employed throughout the country by state legislatures in their family law statutes.

The terminology of visitation reveals an insensitivity on the part of legislatures to the plight of noncustodial parents and, perhaps more importantly, a disregard for the important role that noncustodial parents should play in rearing their children. This attitude is further manifested by the substantive law governing enforcement of court-ordered visitation. Because negative emotions such as vengeance and bitterness frequently attend divorce, custodial parents often deny noncustodial parents visitation with their children.[7] The most common remedy for such denial is the jail-or-comply approach of contempt of court.[8] Many judges, however, refuse to jail the custodial parent who violates visitation rights because imprisonment is considered too harsh for the custodial parent, and potentially detrimental to the child. A noncustodial parent is typically left, therefore, with no effective mechanism for demanding that the custodian obey the visitation provisions of the divorce decree.

This Article argues that both the needs of the child and those of the noncustodial parent warrant improved protection of visitation rights. The Article outlines the existing remedies open to noncustodial parents for enforcing the visitation provisions of divorce decrees, and it explores the grave inadequacies characterizing these remedies. The Article then discusses the writ of habeas corpus as a means to challenge the unlawful denial of visitation. After providing historical evidence of its use in child custody matters, the Article contends that, when properly used, the writ of habeas corpus affords the most effective relief for such denials. Finally, the Article proposes a model visitation denial statute which incorporates the remedy of habeas corpus as the device best suited to vindicate the rights of noncustodial parents in the visitation context.

II. VISITATION IS ESSENTIAL TO THE WELL-BEING OF THE CHILD

The evidence is absolutely unshakeable that frequent interaction with both parents is crucial to a child's healthy psychological adjust-

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7. Young, *supra* note 4, at 55 (noting the findings of a study of the first two years after divorce which "revealed that 40 percent of the custodial wives admitted that they'd refused, at least once, to let their ex-husbands see the children, and that their reasons were punitive.").

8. People *ex rel.* Winger v. Young, 78 Ill. App. 3d 512, 513, 397 N.E.2d 253, 254 (App. Ct. 1979) ("The proper remedy for the violation of visitation rights is a petition for a rule to show cause why the non-complying party should not be held in contempt."); 1 J. ATKINSON, *supra* note 4, § 5.34, at 352 ("When the custodial parent refuses to abide by the visitation terms of a custody order, the usual remedy is a contempt action against the custodial parent.").

ment following a divorce.[9] Not surprisingly, much of the research supporting this conclusion has focused on the father, who is most often the visiting parent. Accordingly, surveying the literature in the field, author Jane Young observed that "[r]ecent research suggests that the absence of a father in a child's life is a serious matter—indeed, in many instances, disastrous."[10] Other published studies confirm the existence of "a positive relationship between a child's self-esteem and continued contact with the noncustodial parent; the greater the contact, the higher the sense of self-esteem."[11]

The importance of the noncustodial parent's visitation to the post-divorce child is perhaps best expressed by Judith S. Wallerstein and Joan Berlin Kelly, two of the most noted and prolific researchers in the field of post-divorce family studies. In their seminal book, *Surviving the Breakup: How Children and Parents Cope with Divorce*, Wallerstein and Kelly identified seven factors which impact on a child's successful post-divorce adjustment:

> (1) the extent to which the parents had been able to resolve and put aside their conflicts and angers and to make use of the relief from conflict provided by divorce; (2) the course of the custodial parent's handling of the child and the resumption or improvement of parenting within the home; (3) the extent to which the child did not feel rejected in relationship with the noncustodial or visiting parent, and the extent to which this relationship had continued on a regular basis and kept pace with the child's growth; (4) the range of personality assets and deficits which the child brought to the divorce, including the child's history within the pre-divorce family and the capacity to make use of his or her resources within the present, particularly intelligence, the capacity for fantasy, social maturity, and ability to turn to peers and adults; (5) the availability to the child of a supportive human network; (6) the absence of continuing anger and depression in the child; and (7) the sex and age of the child.[12]

Taken as a whole, these factors underscore the post-divorce child's need for meaningful and consistent contact with *both* parents. This is so because the "different components are intricately interrelated."[13] The authors explained this interrelationship as

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9. J. WALLERSTEIN & S. BLAKELEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE 234 (1989); J. WALLERSTEIN & J. KELLY, *supra* note 5, at 218-19; Wallerstein & Kelly, *California's Children of Divorce*, *supra* note 4, at 71; Young, *supra* note 4, at 50. The seminal research in this area is summarized in Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267 (1987).

10. Young, *supra* note 4, at 64.

11. Clawar, *One House, Two Cars, Three Kids*, 5 FAM. ADVOC. 14, 15 (Fall 1982). *See also* Jacobs, *The Effect of Divorce on Fathers: An Overview of the Literature*, 139 AM. J. PSYCHIATRY 1235 (Oct. 1982).

12. J. WALLERSTEIN & J. KELLY, *supra* note 5, at 207.

13. *Id.* at 206.

follows:

> [C]hildren turned to the noncustodial parent for support and yearned for him when the relationship with the mother was troubled and when they were lonely in the divorced family, as well as when they missed him for himself alone. In this way, the attitude of the child toward the father was both separate from *and* inseparable from the child's feelings toward the mother.[14]

Wallerstein and Kelly studied sixty families five years following divorce and concluded that "the relationship between the child and both original parents did not diminish in emotional importance to the child."[15] They calculated from their review of the data that at least two-thirds of the children "yearned for the absent parent, one-half of these with an intensity which we found profoundly moving."[16] They elsewhere specifically concluded that spending time with the visiting parent was psychologically beneficial to the child and insulated him from harmful feelings of self-doubt and rejection.[17] Thus, their ultimate conclusion was that the maintenance of close relationships with both parents after a divorce was essential to a child's positive ego functioning, self-esteem, mental health and stability.[18]

While many of the Wallerstein and Kelly findings coincide with the dictates of common sense, their findings nonetheless have been lost on many trial judges. A recent personal experience of one of the authors is illustrative. In his chambers at the Polk County courthouse on August 21, 1987, Iowa District Court Judge Rodney Ryan explained to attorney Albert that he generally allowed noncustodial fathers one week of visitation each summer with young children. On top of that, he noted that because toddlers miss their mothers, he has ordered visiting rights for custodial mothers in the middle of the fathers' week with their child. Exasperated at Albert's plea for maximum visitation, the Judge leaned back in his chair, threw up his arms and belittled fathers seeking more time with their kids: "These guys think it's going to be the same after divorce and it isn't."[19] Unfortunately, Judge Ryan's views are probably typical of those expressed by many judges deciding custody matters.

Perhaps less surprising, however, is the fact that virtually no research supports the proposition that frequent visitations are harm-

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14. *Id.*
15. *Id.* at 307.
16. *Id.* at 46.
17. Wallerstein & Kelly, *California's Children of Divorce*, *supra* note 4, at 72.
18. J. WALLERSTEIN & J. KELLY, *supra* note 5, at 215.
19. Conversation with Judge Rodney Ryan, Polk County Courthouse, Des Moines, Iowa (Aug. 21, 1987). For discussion of the role of judges in contested custody cases, see Lindsley, *Ruling Without Bias*, 24 JUDGES' J. 19 (Winter 1985); Pearson & Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703 (1982-1983).

ful to a child's environmental stability or development, even when such visitations disrupt a child's schedule.[20] By contrast, as noted above, there is ample support for the view that visitations are in fact vital to a child's well-being. The reasoning that visitations are disruptive and harmful, therefore, can arguably be attributed to outdated thinking and lazy stereotyping about the minimal value of the noncustodial parent.[21]

In summary, a child's need for a warm and loving relationship with both parents becomes even more pronounced when that child is thrust onto the emotional rollercoaster of divorce. The dise-

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20. Studies reveal a minimum of harm results from the shuttling of a child between two homes in joint or split custody situations. Jacobs, *The Effect of Divorce on Fathers: An Overview of the Literature*, 139 AM. J. PSYCHIATRY 1235, 1238 (Oct. 1982) (noting that one researcher found that "for most children there is little discontinuity and no evidence of developmental pathology in having two regular homes instead of one."). *See generally* I. RICCI, MOM'S HOUSE, DAD'S HOUSE: MAKING SHARED CUSTODY WORK (1980).

In considering whether the two home phenomenon was necessarily detrimental to children, Ricci explained:

> We all questioned: "Would children be confused when there were two homes?" "Didn't children need one home base alone?" "What about the possibility of increased contact (or agitation) with a former spouse whom one would rather keep in the background?" The answer as to whether or not the children needed a single home base with only one authority came quickly. Every day most children demonstrate their ability to adapt to different authorities, different family rules. After all, they follow different rules at school, in their organized sports, in their neighborhood games, at camp. They live every moment of their lives in a fast-paced pluralistic world, where rules change with settings. . . . Differences are the norm. . . . *Furthermore, when the second-home parent began to act like a real parent again, children visibly relaxed.*

Id. at 5-6 (emphasis added).

21. Judith Wallerstein's most recent book concisely contrasts custody reality and custody stereotyping:

> For many years, child psychology was preoccupied with the mother-child relationship, as if fathers were secondary figures whose primary role psychologically was to help their sons consolidate a sexual identity.
>
> Our research is part of a growing body of knowledge that puts this lopsided view of child development back into perspective. Fathers exert a critical influence on their sons and daughters throughout childhood and adolescence, helping to shape their characters, values, relationships with other people, and career choices. Divorced fathers continue to exert such influences—in what they do or don't do, both in the reality and in the fantasies that children weave around them—even though they may move away, take a new wife, or visit their children infrequently. . . . Indeed, it is the children of divorce who taught us very early that to be separated from their father was intolerable. . . . I have been deeply struck by the distress children of every age suffer at losing their fathers.
>
> Whether living three blocks away and visiting regularly or absent and visiting erratically, fathers remain a significant psychological presence in the lives of children after divorce.

J. WALLERSTEIN & S. BLAKELEE, *supra* note 9, at 234.

quilibrium that a child inevitably suffers following the breakup of the family can be greatly ameliorated by allowing the child to continue a relationship with each parent. Tragically, judges frequently deny children the full promise of frequent visitation and all that it offers to their psychological well-being and development. Commenting on this unfortunate tendency in our legal system, Wallersein and Kelly argued:

> Furthermore, there is evidence in our findings, that lacking legal rights to share in decisions about major aspects of their children's lives, that many noncustodial parents withdrew from their children in grief and frustration. Their withdrawal was experienced by the children as a rejection and was detrimental in its impact.[22]

Accordingly, the children of divorce are better served by a judicial attitude which promotes, through the vehicle of visitation, the vital role of the noncustodial parent as a nurturing element in the child's development.

III. Visitation Is Important to the Noncustodial Parent

Apart from communication by telephone or letter, the post-divorce child's occasional visits constitute the only available opportunity for maintaining the vital parental relationship with the noncustodial parent. According to a leading child custody treatise,[23] an "average" visitation schedule usually includes visits every other weekend, alternating holidays and two to four weeks in the summer.[24] Not surprisingly, the loss of regular contact with one's child is often a traumatic experience for the noncustodial parent. Indeed, Jane Young has observed that "[p]sychologists who counsel divorcing men agree that anguish over the loss of day-to-day contact with their children explains, in part, why some don't visit more often and why many stop visiting altogether."[25] Dr. John Jacobs, associate clinical professor of psychiatry at Albert Einstein College of Medicine, puts it this way: "It's hard for a man to part with his children over and over again, to feel the diminution of his parental role. Often the most devoted fathers can deal with intense sadness only by withdrawal and fewer visits."[26]

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22. J. Wallerstein & J. Kelly, *supra* note 5, at 310.

23. 1 J. Atkinson, Modern Child Custody Practice (1986).

24. *Id.* § 5.05, at 322-23. *See also* Tuma v. Tuma, 389 N.W.2d 529, 532 (Minn. Ct. App. 1986) (describing "visitation every other weekend and one overnight every two weeks" as a "typical custody arrangement").

25. Young, *The Fathers Also Rise: Battling to Stay in Their Children's Lives*, New York, Nov. 18, 1985, at 50, 66.

26. *Id.* Judith Wallerstein effectively explains the noncustodial parent's psychological dynamic in her most recent book:

> Courts assume that any father who loves his children will visit them. Mothers and children assume the same. These assumptions completely fail to appreciate how hard it is to retain the subtle, multifaceted father-child

While maladaptation to post-divorce parenting on the part of noncustodial parents undeniably occurs, there is a growing movement among post-divorce fathers to forge a greater parenting role in the lives of their children after divorce.[27] Writing in 1989, Judith Wallerstein observed: "We have seen a major shift in the attitudes of fathers, more of whom are trying to maintain an active parenting rule in their children's lives."[28] Reporting on this new trend, author Jane Young writes that

> while the media continue to dramatize the grievous financial and psychological plight of single mothers and their children, some men are fighting hard to stay in their children's lives after divorce. It's a tough fight—society and the courts put serious obstacles in their way. These men run up against such suspicion and mistrust, in fact, that all across the country they've formed fathers'-rights groups to lobby for custody laws that are fair to them, and for overall divorce reform.[29]

Owing to the dearth of research focusing on noncustodial parents in their visitation role, the authors have been unable to locate any hard demographic data comprehensively quantifying noncustodial parenting attitudes. Nevertheless, recent studies involving the effect of divorce on parents and children indicate that, contrary to popular stereotypes, noncustodial parents often take their post-divorce parenting role very seriously. Thus, at the five-year mark of their study, Wallersein and Kelly found that

> most of the fathers continued to visit their children and to maintain interest in their welfare and progress. Although the overall trend had been a gradual decrease in visiting frequency, there had been no sharp decline, and some youngsters experienced considerable consistency. For more than one-third there had been no change at all in the visiting frequency since the first follow-up, and 20 percent of the group actually experienced an increase in visiting

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> relationship after the family has come apart. People do not understand how vulnerable the visiting relationship is to the passions of the divorce and the father's complex feelings. Men . . . who desperately love their children, can fail to visit; although they want to remain close and committed, they may also want to escape the painful feelings associated with the failed marriage. Each visit may ignite lingering hurt, anger, shame, loss, pain, guilt, and nostalgia. For many men, the urge to take flight is irresistible.

J. WALLERSTEIN & S. BLAKELEE, *supra* note 9, at 235.

27. The role of men as parents, both before and after divorce, has been the subject of considerable study in recent years. *See generally* FATHER AND CHILD: DEVELOPMENTAL AND CLINICAL PERSPECTIVES (S. Cath, A. Gurwitt, & J. Ross eds. 1982); S. HANSON & F. BOZETT, DIMENSIONS OF FATHERHOOD (1985); K. PRUETT, THE NURTURING FATHER: JOURNEY TOWARD THE COMPLETE MAN (1987); K. ROSENTHAL & H. KESHET, FATHERS WITHOUT PARTNERS: A STUDY OF FATHERS AND THE FAMILY AFTER MARITAL SEPARATION (1981).

28. J. WALLERSTEIN & S. BLAKELEE, *supra* note 9, at 303.

29. Young, *supra* note 4, at 50.

frequency.[30]

The implication of the Wallerstein and Kelly findings is that visitation is important not only for the children's welfare, but for that of the noncustodial parent as well. Moreover, such was the explicit conclusion of sociologists Kristine M. Rosenthal and Harry F. Keshet, who conducted a study of fathers' roles in the post-divorce family. In their book detailing the results of their research,[31] Rosenthal and Keshet explained: "Once a child is born to a man and a woman there is a connection between them which must be considered no matter how their life situation or their feelings about each other change. . . . It is this direct relationship to a child that characterizes fathering outside the marriage."[32] Thus, the authors announced that while "[m]any social scientists have said that children need fathers. . . . We have concluded that men need their children."[33]

At least one commentator has argued that a noncustodial parent's interest in visitation should be entitled to federal constitutional protection. In his article, *Post-Divorce Visitation: Untying the Triangular Knot*,[34] Professor Steven L. Novinson argued that, because visitation is the essence of parental rights for the noncustodial parent, the same substantive due process protection that safeguards the parent-child relationship in the marital context should extend to the noncustodial parent's right of visitation in the post-divorce context.[35] Thus, the foregoing construction of the federal Constitution undoubtedly enhances the justifications discussed above for vigorous enforcement of visitation rights.

A variety of considerations, therefore, mandate protection of the noncustodial parent-child relationship following divorce. The following discussion argues that existing visitation enforcement remedies are woefully ineffective, and hence fail to protect adequately the parenting relationship that should exist between the noncustodial parent and the children of divorce.

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30. J. WALLERSTEIN & J. KELLY, *supra* note 5, at 236.

31. K. ROSENTHAL & H. KESHET, FATHERS WITHOUT PARTNERS: A STUDY OF FATHERS AND THE FAMILY AFTER MARITAL SEPARATION (1981).

32. *Id.* xiii.

33. *Id.* After interviewing numerous post-divorce fathers, Rosenthal and Keshet observed: "The more our respondents were able to preserve and protect . . . family functions, the more satisfied they felt with their lives and with themselves." *Id.* at 157.

34. Novinson, *Post-Divorce Visitation: Untying the Triangular Knot*, 1983 U. ILL. L. REV. 121.

35. *Id.* at 131.

IV. The Denial of Visitation and Analysis of Existing Remedies

Despite the importance of visitation to both the child and the noncustodial parent, the harsh reality is that custodians too often fail to honor the visitation provisions of the divorce decree. A 1979 National Institute of Mental Health study revealed that during the first two years following divorce forty percent of the custodial parents surveyed refused visitation on occasion, usually out of disdain for their ex-spouses.[36] This finding is supported by Wallerstein and Kelly, who reported that twenty percent of the custodial parents they studied saw no benefit at all in allowing the child to remain in contact with the noncustodian, considered visitations to be bothersome, empty rituals and actively tried to sabotage the visits in a variety of ways, including hiding the children or falsely claiming they were too ill to spend the weekend with the visiting parent.[37]

While many of the techniques employed by custodial parents in their attempt to frustrate visitation are outwardly mischievous,[38] others are far more subtle. The classic setting for the latter type is where the custodial parent simply cannot psychologically cope with a child maintaining a strong relationship with both parents after the divorce. In this situation, while visitation is not openly challenged, "[t]he *unspoken* threat to many of the children was that their relationship with their mother might well be in danger if the youngsters retained some loyalty to the father."[39]

Considering the frequency of visitation denials, as well as the resulting negative impact on both the post-divorce child and the noncustodial parent, the legal and equitable remedies for these abuses are sorely inadequate. Indeed, each of the four generally recognized remedies—cessation of support payments, contempt of court, modification of custody, and a cause of action in tort—is so fraught with disadvantages that a noncustodial parent faced with an intransigent ex-spouse is often left with no effective means to enforce the visitation provisions of the divorce decree.

A. Cessation of Support Payments

The cessation of child support payments is a controversial and hotly litigated remedy that allows the noncustodial parent, who is typically required by court order to pay child support to the custodian, to discontinue payments until the custodian restores visita-

36. Young, *supra* note 4, at 55.

37. J. Wallerstein & J. Kelly, *supra* note 5, at 125.

38. *See, e.g.*, J. Wallerstein & J. Kelly, *supra* note 5, at 29 ("More often, the embittered-chaotic mother's rage focused on the father's continued efforts to see his children. Visits were portrayed to the children as *bothersome, empty rituals.*") (emphasis added).

39. *Id.* at 30 (emphasis added).

tion.[40] The states permitting this remedy reason that child support and visitation are both court-ordered and therefore *interdependent* obligations.[41] Procedurally, the suspension-of-child-support remedy can take several forms, from lean rules allowing the payor to suspend payments without court approval to more elaborate procedures requiring the payor to first seek court approval upon a full hearing.[42]

The jurisdictions in which this remedy is available advance several justifications in support of its availability. In *Appert v. Appert*,[43] the court succinctly summarized these justifications:

> Grounds frequently asserted by these courts as a basis for allowing such relief include the following: (1) that the custodial parent should not be allowed to enjoy the benefits of the support order while denying the visitation rights of the other parent, (2) that the obligation to pay child support and the obligation to permit visitation are dependent obligations and (3) that such measure is necessary to coerce the custodial parent's compliance with the visitation order.[44]

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40. *See generally* Note, *Making Parents Behave: The Conditioning of Child Support and Visitation Rights*, 84 COLUM. L. REV. 1059 (1984); Annotation, *Violation of Custody or Visitation Provision of Agreement or Decree as Affecting Child Support Payment Provision, and Vice Versa*, 95 A.L.R.2d 118 (1964). For a sampling of cases discussing the relationship between the noncustodial parent's payment of child support and the custodial parent's interference with visitation rights, see Richardson v. Richardson, 122 Mich. App. 531, 533, 332 N.W.2d 524, 525 (Mich. App. 1983); Miller v. Miller, 117 A.D.2d 719, 720, 498 N.Y.S.2d 443, 444 (App. Div. 1986); Marie C.G. v. Guy L., 133 Misc. 2d 291, 293-94, 506 N.Y.S.2d 547, 549 (Fam. Ct. 1986); Giacopelli v. Giacopelli, 82 A.D.2d 806, 807, 439 N.Y.S.2d 211, 212 (App. Div. 1981); Rohr v. Rohr, 709 P.2d 382, 383 (Utah 1985).

Custodial parents frequently deny visitation rights when the noncustodial parent has refused to tender support payments. *See generally* Annotation, *Withholding Visitation Rights for Failure to Make Alimony or Support Payments*, 65 A.L.R.4th 1155 (1988).

41. Note, *Making Parents Behave: The Conditioning of Child Support and Visitation Rights*, 84 COLUM. L. REV. 1059, 1061 (1984) ("In attempting to fashion sufficiently coercive remedies, some courts have chosen to view the obligations of support and visitation as *interdependent* and have allowed the willful breach of one provision in a decree to be remedied by the intentional withholding of the other.") (emphasis added).

42. For an example of a relatively elaborate procedure, see OR. REV. STAT. § 107.431 (1987). Some courts have criticized the self-help approach whereby the noncustodial parent simply suspends payment without judicial approval. *See, e.g.*, Reardon v. Reardon, 3 Ariz. App. 475, 478, 415 P.2d 571, 574 (1966) ("This is a power that the court only may have and it is basic that the parties themselves do not have the authority to so modify the orders of the court."); *In re* EWB, 441 So. 2d 478, 483 (La. Ct. App. 1983) ("By not paying his child support he has, in effect, taken the law into his own hands and such behavior is to be condemned."); Stancill v. Stancill, 286 Md. 530, 539, 408 A.2d 1030, 1035 (1979) ("Self-help enforcement of these important provisions subjects the interests of minors to the will, whim, and bargaining of their parents, and is pregnant with the possibility of harm to their children.").

43. 80 N.C. App. 27, 341 S.E.2d 342 (Ct. App. 1986).

44. *Id.* at 37, 341 S.E.2d at 347.

Although not mentioned by the *Appert* court, a fourth and related justification is the deterrence rationale, that is, the belief that the conditioning of visitation and support obligations will effectively deter both parties from breaching a court-ordered duty.

Several of these jurisdictions, however, limit the remedy to cases where "the noncustodial parent is wrongfully denied visitation rights *unless* suspension of those payments would adversely affect the children for whose benefit the payments are made."[45] Although this limitation may seem to be in the best interest of the child, it also guts the remedy. After all, it would only be in the most extraordinary situation that the cessation of support payments would not adversely affect the child. Even if it could be established that cessation would force *future* visitation compliance and thus benefit the child, it is difficult to envision a judge weighing that interest above the *immediate* need to put food on the child's table.

Mindful of such economic realities and their effect on children, the majority of courts categorically reject suspension, reduction or termination of the child support obligation as a result of the custodial parent's willful interference with the noncustodial parent's visitation rights.[46] By refusing to consider the support and visitation obligations as contingent, the Revised Uniform Reciprocal Enforcement of Support Act also rejects the suspension-of-child-support remedy.[47]

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45. Richardson v. Richardson, 122 Mich. App. at 533, 332 N.W.2d at 525 (emphasis added). *See also* Rohr v. Rohr, 709 P.2d at 383 (noncustodial parent's right to visitation may be denied where refusal to pay child support is willful if the welfare of the child requires).

46. *See, e.g.*, Moffat v. Moffat, 27 Cal. 3d 645, 651, 612 P.2d 967, 970, 165 Cal. Rptr. 877, 880 (1980) ("Regardless of whether we might view this as an unjust result from the noncustodial parent's point of view, in such circumstances the child's need for sustenance must be the paramount consideration."); Siegel v. Siegel, 80 Ill. App. 3d 583, 589, 400 N.E.2d 6, 10 (App. Ct. 1980) ("In determining matters relating to support, the welfare of the children is of paramount concern and the children should not be deprived of support because of alleged misconduct on the part of the mother."); People *ex rel.* Winger v. Young, 78 Ill. App. 3d 512, 513, 397 N.E.2d 253, 254 (App. Ct. 1979) ("The duty to permit visitation is completely independent of the duty to make support payments."); Appert v. Appert, 80 N.C. App. 27, 41, 341 S.E.2d 342, 350 (Ct. App. 1986) ("We conclude that visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and that one is not, and may not be made, contingent upon the other."); Johnson v. Johnson, 52 Ohio App. 2d 180, 181, 368 N.E.2d 1273, 1274 (Ct. App. 1977) ("The vast majority of the reported decisions find disfavor with the theory and the practice of conditioning visitation on child support. We agree with this position.").

47. REVISED UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT § 23, 9B U.L.A. 381, 484 (1968) ("The determination or enforcement of a duty of support owed to one obligee is unaffected by any interference by another obligee with rights of custody or visitation granted by a court."). *See* Moffat v. Moffat, 27 Cal. 3d at 651-52, 612 P.2d at 970, 165 Cal. Rptr. at 880 (1987) (holding under the uniform act that even flagrant misconduct by the custodial parent in defeating noncustodial parent's visitation rights does not preclude enforcement of support obligation); People *ex rel.* Winger v.

The wide opposition to this remedy can be traced to concern for the child. Indeed, the court in *Appert v. Appert* concluded that the suspension-of-child-support remedy "is inherently detrimental to the best interest of the minor child."[48] Thus, the remedy is rejected as affecting the wrong person; it punishes the child for the misconduct of the custodial parent.

The advantages of the remedy are that it is quick and deadly. Cutting off the custodian financially would certainly get that person's attention and would likely coerce compliance because typically the parent and child could not survive without the support. On the other hand, it is arguably barbaric and harsh on the custodian and the child. Even from the noncustodian's perspective, the remedy is time consuming and costly to pursue if the statute allowing it requires an evidentiary hearing. Delays of weeks or months before such an application could be heard hardly recommend this course of action. If visitation is being denied for months while the noncustodian waits his turn at the crowded courthouse, it is difficult to see the adequacy in this remedy given the solid psychological data confirming that it is the continuing and uninterrupted relationship with the noncustodian which the child needs.

Moreover, such a hearing would most certainly devolve into a factual dispute concerning the violator's motives, intent and justification for denying the visitation. That a judge would be able to satisfy himself or herself on those illusive points and find against the custodian is problematic at best and highly unlikely at worst.

B. Contempt of Court

Contempt proceedings to enforce court-ordered visitation are authorized by statute in numerous states.[49] In those jurisdictions, a custodial parent who violates the visitation provisions of a dissolution decree or court order is subjected to incarceration or other punishment for contempt of court.[50] Depending upon the nature of the

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Young, 78 Ill. App. 3d at 514, 397 N.E.2d at 255 (holding that under the uniform act, "a responding court lacks authority to withhold child support payments until a custodial parent makes the child available for visitation."); Todd v. Pochop, 365 N.W.2d 559 (S.D. 1985) (collecting cases and following the majority holding that interference with the noncustodial parent's visitation rights may not be raised as a defense in an enforcement of support action under the uniform act). For a representative state legislative adoption of this provision, see CAL. CIV. PRO. CODE § 1694 (West 1982).

48. Appert v. Appert, 80 N.C. App. at 40, 341 S.E.2d at 349.

49. For representative applications of various state contempt statutes, see Coursey v. Superior Court, 194 Cal. App. 3d 147, 239 Cal. Rptr. 365 (Ct. App. 1987); People *ex rel.* Winger v. Young, 78 Ill. App. 3d 512, 397 N.E.2d 253 (App. Ct. 1979); Phillips v. Iowa Dist. Court, 380 N.W.2d 706 (Iowa 1986); Ferry v. Ferry, 444 So. 2d 797 (La. Ct. App. 1984); Mather v. Mather, 70 N.C. App. 106, 318 S.E.2d 548 (Ct. App. 1984); Sutliff v. Sutliff, 361 Pa. Super. 194, 522 A.2d 80 (Super. Ct. 1987); *In re* Marriage of King, 44 Wash. App. 189, 721 P.2d 557 (Ct. App. 1986).

50. Upon a finding of contempt, some courts also impose monetary fines as pun-

wrongful conduct, the contempt is considered either civil or criminal in nature.[51]

Procedurally, the visiting parent seeking to invoke this remedy must file a petition for a rule to show cause why the custodian should not be held in contempt for violating the decree.[52] At the trial on the petition, the noncustodian must prove that the alleged contemnor *willfully* disobeyed an express court order.[53] Many jurisdictions also require proof that the terms of the visitation order were unambiguous, and that the custodial parent sufficiently grasped their meaning so as to have fair warning that particular conduct is wrongful.[54] Several states also require proof that the custodian was motivated by a bad or evil purpose in denying the visitation, particularly if the action is for criminal contempt.

While the contempt remedy may possess advantages, it is characterized by numerous handicaps.[55] The principal benefit of the rem-

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ishment for violation of court ordered visitation. *See, e.g.*, Hudson v. Hudson, 429 So. 2d 1100, 1101 (Ala. Civ. App. 1983); Young v. Young, 129 A.D.2d 794, 795, 514 N.Y.S.2d 785, 786 (App. Div. 1987).

51. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 20.10, at 563 (2d ed. 1987) ("Contempt as a device for enforcing compliance with the custody order is civil, but the court may also punish past violations of the decree by a criminal contempt conviction.") (citations omitted).

Three courts have upheld criminal prosecutions against noncustodial parents who failed to return a child following visitation. *See* Wheat v. Alaska, 734 P.2d 1007 (Alaska Ct. App. 1987); Illinois v. Caruso, 152 Ill. App. 3d 1074, 504 N.E.2d 1339 (1987); Rios v. Wyoming, 733 P.2d 242 (Wyo. 1987). Arguably, the custodial parent who wrongfully denies visitation should be subject to the same criminal liability.

52. People *ex rel.* Winger v. Young, 78 Ill. App. 3d at 513, 397 N.E.2d at 254 (App. Ct. 1979) (stating that the proper procedure for "the violation of visitation rights is a petition for a rule to show cause why the non-complying party should not be held in contempt.").

53. Entwistle v. Entwistle, 61 A.D.2d 380, 384, 402 N.Y.S.2d 213, 215 (App. Div. 1978) (willful deprivation of visitation rights as ground for civil contempt); Mather v. Mather, 70 N.C. App. 106, 109, 318 S.E.2d 548, 550 (Ct. App. 1984) (willful disobedience of court order governing visitation as ground for criminal contempt). *See also* Skinner v. Ruigh, 351 N.W.2d 182, 184-85 (Iowa 1984) (holding that the court had authority to punish for contempt based on willful violation of its child support order).

54. Copic v. Iowa Dist. Court, 356 N.W.2d 223, 226 (Iowa 1984) ("If its violation is to be the basis of contempt, it is well settled that a judgment must be definite and clear. Rights and duties must be readily understandable by the party involved.") (citing Lynch v. Uhlenhopp, 248 Iowa 68, 72-75, 78 N.W.2d 491, 494-95 (1956)); *Ex parte* Karr, 663 S.W.2d 535, 537 (Tex. Ct. App. 1983) ("Indisputably, for one to be held in contempt for disobeying a court order, the order must be clear, specific and unambiguous enough that one will readily know what duties or obligations are imposed on him or her.") (citing *Ex parte* Slavin, 412 S.W.2d 43, 44 (Tex. 1967)).

55. In comparing the contempt remedy with the advantages of a tort cause of action for interference with parental custody, one court offered a succinct appraisal: "The usefulness of a contempt action is doubtful. It would provide no recovery of expenses or compensation, and if the party has left the state, any sanctions which are imposed will be of no effect. Further, it provides no basis for extradition." Wood v. Wood, 338 N.W.2d 123, 127 (Iowa 1983).

edy is the likelihood that a custodial parent will never again deny visitation rights after spending time in jail. The numerous disadvantages of the remedy, however, clearly outweigh that benefit. In many parts of the country, packed family law dockets force delays of several weeks or months before contempts come up for trial. Again, visitation denied during the pendency of the action compounds the injuries to the child and the noncustodial parent. In addition, few parents can readily afford the attorney fees that weeks of legal maneuvering and a full trial would require. Moreover, at least one court has held that an action for contempt of court may not be used to collect attorney fees and costs incurred by the noncustodial parent in seeking enforcement of the visitation order.[56]

But the primary inadequacy of the contempt remedy flows from the proceeding itself. Not only is it extremely difficult to establish all of the elements listed above, including intent and evil purpose, but each must be proved by proof beyond a reasonable doubt if the action is for criminal contempt.[57] Given the fact that there are rarely any non-party witnesses to the denial and virtually never any witnesses to the custodian's mental calculations forming purpose and intent, most contempt trials feature but two witnesses—the petitioner and the respondent. In nearly all cases, the petitioning noncustodian is without personal knowledge or evidence regarding the tough purpose and intent elements, and unless the violator is careless or brazen enough to admit to them on the stand, the burden of proof can rarely be satisfied.

Another problem attaching to the two-witness reality in these cases is that there are no impartial, disinterested witnesses—only warring parents fighting over their children. In many cases, the con-

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56. *Ex parte* Karr, 663 S.W.2d at 538. *But see* Clark v. Atkins, 489 N.E.2d 90, 98 (Ind. Ct. App. 1986) (upholding trial court's award of $1500.00 to father for "legal fees and unnecessary expenses" incurred by the father in contempt action to enforce his visitation rights).

In contrast to the visitation enforcement context, courts will imprison the noncustodial parent for contempt if he or she fails to pay the attorney fees and costs incurred by the custodial parent in enforcing the child support obligation. *Ex parte* Helms, 152 Tex. 480, 259 S.W.2d 184 (1953) (holding that the constitutional prohibition against imprisonment for debt is not violated by a contempt order enforcing a child-support judgment which incorporates an award of attorney fees); *Ex parte* Rogers, 633 S.W.2d 666, 670-71 (Tex. Ct. App. 1982) (discussing the rationale for the exception as to child support enforcement but the lack of such an exception as to visitation enforcement).

57. Carter v. Brodrick, 750 P.2d 843, 845 (Alaska Ct. App. 1988) ("Every element of a criminal contempt must be proved beyond a reasonable doubt, and the accused cannot be compelled to render testimony that might be self-incriminatory.") (citing Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 420 (1911)); Watters v. Watters, 112 Mich. App. 1, 10, 314 N.W.2d 778, 781-82 (Ct. App. 1981). *See also* Ridgway v. Baker, 720 F.2d 1409, 1413-15 (5th Cir. 1983) (holding that a father was denied due process rights upon being imprisoned for contempt for failure to comply with court order governing child support obligations).

tempt proceeding is quickly reduced to nothing more than a swearing contest. Finally, with incarceration the most typical punishment option, many judges actually could never be presented with enough evidence in one of these cases to convince them to send a parent, particularly a mother, to jail. As the foregoing discussion demonstrates, the contempt-of-court remedy is often no more than a remedy only on paper.

C. *Modification of Decree to Change Custody*

The modification remedy is recognized in many states and allows the noncustodial parent who has been denied visitation the opportunity to petition the court for a change in custody of the child.[58] The burden of proof generally imposed on such a petitioner is that the circumstances since the entry of the original decree awarding custody have so substantially and materially changed that it would now be in the child's best interests to change custody.[59] The custodial parent's misconduct in wrongfully denying contact between the noncustodial parent and his or her children would seem to satisfy the modification test; however, courts take conflicting approaches in that regard.[60]

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58. For representative applications of various state modification procedures, see Watts v. Watts, 17 Ark. App. 253, 707 S.W.2d 777 (Ct. App. 1986); Pisch v. Pisch, 7 Conn. App. 720, 510 A.2d 455 (App. Ct. 1986); Hadley v. Cox, 470 So. 2d 735 (Fla. Dist. Ct. App. 1985); Bays v. Bays, 489 N.E.2d 555 (Ind. Ct. App. 1986); Clark v. Bullard, 396 N.W.2d 41 (Minn. Ct. App. 1986); Morgan v. Morgan, 701 S.W.2d 177 (Mo. App. 1985). *See generally* Annotation, *Interference by Custodian of Child with Noncustodial Parent's Visitation Rights as Ground for Change of Custody*, 28 A.L.R.4th 9 (1984).

For a discussion of child custody modification standards, see Comment, *Legal Standards Governing Modification of Child Custody Orders*, 41 MAINE L. REV. 361 (1989).

59. Ramos v. Ramos, 683 S.W.2d 84, 86 (Tex. Ct. App. 1984) (visitation denial and additional facts must amount to material and substantial change of circumstances that affect the welfare of the children).

60. The following cases represent a conglomeration of different perspectives in regard to consideration of the custodian's wrongful denial of visitation and the extent to which it should be weighed in modification hearings: Moffat v. Moffat, 27 Cal. 3d 645, 652, 612 P.2d 967, 971, 165 Cal. Rptr. 877, 881 (1987) ("The deliberate sabotage of visitation rights not only furnishes ground for modification, it is a significant factor bearing on the fitness of the custodial parent.") (citing *In re* Marriage of Ciganovich, 61 Cal. App. 3d 289, 294, 132 Cal. Rptr. 261, 264 (Ct. App. 1976)); Everett v. Everett, 433 So. 2d 705 (La. 1983) (holding that interference with the noncustodial parent's visitation rights does not justify a change of custody in the absence of a showing of detriment to the children); Lopez v. Lopez, 97 N.M. 332, 334, 639 P.2d 1186, 1188 (1982) (noting "the modern trend that when the custodial parent intentionally takes action to frustrate or eliminate the visitation rights of the non-custodial parent, a change of custody is an appropriate action."); Entwistle v. Entwistle, 61 A.D.2d 380, 384, 402 N.Y.S.2d 213, 215 (App. Div. 1978) (noting that the custodial parent's "very act of preventing the two children of tender age from seeing and being with their father is an act so inconsistent with the best interests of the children as to, per se,

The petitioner must also typically prove that he or she can now minister more effectively to the child's daily needs and offer parenting superior to that of the present custodian. In all jurisdictions, those petitioning to modify custody bear a heavy burden due to the express preferences of the courts to make one custody decision in a child's life—at the time of the entry of the original decree. The policy thereafter is to insure stability in the child's life by not modifying custody except in the most egregious circumstances.

For those noncustodial parents who do seek custody, the burden of persuasion and the difficulty of overcoming the presumption of first placement is virtually impossible to clear in every case. The most that many courts seem willing to do in visitation denial cases, absent other compelling facts which cry out for a custody change, is issue warnings to the custodial parent. They typically admonish the custodian that such denials are one factor to be considered in deciding the ultimate question of whether the custodian is adequately meeting the child's needs. They occasionally admonish the parent that continued denials will indeed justify modification.[61]

While the remedy conceptually goes to the heart of the visitation problem by placing the child in the custody of a parent who would not deny visitation, it frequently ill serves the visiting parent for a variety of reasons. A large percentage of noncustodians do not want to change custody because they are not able to assume primary custody of the child; they just want the visitation time to which they are entitled.

Like the other remedies discussed above, the modification-of-custody remedy requires protracted litigation which provides relief that often is too little, too late, too costly and too speculative. Retrying actual physical custody fails as a remedy because the stakes are the highest, the litigation the most complex and the court's inquiry the most far-reaching. It is often dirty, nasty litigation that leaves the parties embittered and emotionally scarred. Rather than encouraging the parents to respect each other's rights, these legal catfights send them away even more hostile toward each other than before. Most significantly, many parents cannot afford the $5,000 to $20,000 in legal fees, $1,000 to $10,000 in expert witness fees and thousands more in expenses to litigate a change in custody. Accordingly, the modification-of-custody remedy offers no hope.

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raise a strong probability that the mother is unfit to act as custodial parent.").

61. The court in Spotts v. Spotts, 197 N.W.2d 370 (Iowa 1972), issued the following warnings: "[W]e note this mother's conduct in depriving these children of their right to see and know their father, is a most serious reflection on her capacity to retain custody. . . . Any continuation of this conduct will furnish ground for similar applications for modification and for contempt citation." *Id.* at 372.

D. Tort Causes of Action

On the cutting edge of both family law and tort law are civil causes of action available to parents whose custody rights have been obstructed.[62] While a few jurisdictions have embraced at least the premise in some form,[63] these torts are in the embryonic stage of development as those states lumber toward defining them and determining their reach. The central question relevant here is whether the violation of a noncustodian's visitation rights will subject a custodian to liability or whether the tort is limited to protection of custodial parents and their time with the child. The early results have been inconsistent. For example, some courts have decided that only custodians can maintain a cause of action for tortious interference with parental custody.[64] Others have recognized visitation denial causes of action as offshoots of intentional infliction of emotional distress,[65] and one has allowed an action for interference with visita-

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62. Such a cause of action is explicitly recognized by the *Restatement (Second) of Torts*:

> 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.

RESTATEMENT (SECOND) OF TORTS § 700 (1977).

See generally Note, *Abduction of Child by Noncustodial Parent: Damages for Custodial Parent's Mental Distress*, 46 Mo. L. REV. 829 (1981); Note, *Intentional Interference with Visitation Rights: Is This a Tort?:* Owens v. Owens, 47 LA. L. REV. 217 (1986); Note, *Tortious Interference with Custody: An Action to Supplement Iowa Statutory Deterrents to Child Snatching*, 68 IOWA L. REV. 495 (1983).

63. *See* DiRuggiero v. Rodgers, 743 F.2d 1009 (3d Cir. 1984) (applying New Jersey law); Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982) (applying Wisconsin law); Bennett v. Bennett, 682 F.2d 1039 (D.C. Cir. 1982); Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir. 1980) (applying Texas law), *noted in* 46 Mo. L. REV. 829 (1981); Kajtazi v. Kajtazi, 488 F. Supp. 15 (E.D.N.Y. 1978) (applying New York law); Surina v. Lucey, 168 Cal. App. 3d 539, 214 Cal. Rptr. 509 (Ct. App. 1985); Wood v. Wood, 338 N.W.2d 123 (Iowa 1983); Finn v. Lipman, 526 A.2d 1380 (Me. 1987); Kipper v. Vokolek, 546 S.W.2d 521 (Mo. Ct. App. 1977); Plante v. Engel, 469 A.2d 1299 (N.H. 1983); LaGrenade v. Gordon, 46 N.C. App. 329, 264 S.E.2d 757 (Ct. App. 1980); McEvoy v. Helikson, 277 Or. 781, 562 P.2d 540 (1977).

64. Wood v. Wood, 338 N.W.2d 123, 124 (Iowa 1983); Owens v. Owens, 471 So. 2d 920, 921 (La. Ct. App. 1985), *cert. denied*, 475 So. 2d 362 (La. 1985), *noted in* 47 LA. L. REV. 217 (1986); Kipper v. Vokolek, 546 S.W.2d 521 (Mo. Ct. App. 1977); Friedman v. Friedman, 79 Misc. 2d 646, 647, 361 N.Y.S.2d 108, 109-10 (Sup. Ct. 1974).

The *Restatement* follows the rule adopted by the foregoing cases:

> When the parents are by law jointly entitled to the custody and earnings of the child, no action can be brought against one of the parents who abducts or induces the child to leave the other. When by law only one parent is entitled to the custody and earnings of the child, only that parent can maintain an action under the rule stated in this Section. One parent may be liable to the other parent for the abduction of his own child if by judicial decree the sole custody of the child has been awarded to the other parent.

RESTATEMENT (SECOND) OF TORTS § 700 comment c (1977).

65. Pyle v. Pyle, 11 Ohio App. 3d 31, 463 N.E.2d 98 (1983); Sheltra v. Smith, 392

tion as a freestanding tort.[66]

The essence of the remedy is to open the courthouse to noncustodial parents and allow them to seek money damages from offending custodians in civil jury trials. A principal advantage of this remedy is the award of compensation for any severe emotional distress suffered by a noncustodian who is wrongly prevented from seeing his or her child. Allowing a jury to pass on whether the denial was sufficiently extreme and outrageous to justify compensation in a given case merely extends to noncustodians the remedy available to every other citizen in those states recognizing causes of action for infliction of emotional distress. In that regard, determining as a matter of law that visiting parents either could never suffer actionable distress or should never be allowed to recover, regardless of the facts of the case, seems coldhearted.

Rather than act discriminatorily and hypocritically, courts should act evenhandedly by recognizing this cause of action for custodial and noncustodial parents alike. Thus, courts should reject the position adopted by the *Restatement (Second) of Torts* which only permits custodial parents to sue persons who have interfered with parental custody.[67] The time a child spends with his or her noncustodial parent is as deserving of judicial protection as the time spent with the custodial parent. To allow only the custodian to sue for this deprivation is to deny the noncustodian equal access to justice.

The compensatory nature of this remedy is attractive not only for its sensitivity to the pain that noncustodians feel, but for its deterrence potential as well. If a jury of one's peers revolts at the denial of visitation, the violator may be forced to comprehend for the first time the wrongfulness of conduct that obstructs contact with the children's other parent. If the jury stings the defendant with an adequate judgment, the defendant will immediately appreciate the fact that he has acted in a way that jeopardizes his own economic self-interest.

A.2d 431 (Vt. 1978). In Finn v. Lipman, 526 A.2d 1380 (Me. 1987), the Maine Law Court enumerated four elements which a noncustodian must establish in order to recover for intentional infliction of emotional distress: (1) the defendant/custodial parent "intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain that such distress would result from his [or her] conduct"; (2) that the conduct was so extreme and outrageous that it exceeded all bounds of decency; (3) that the custodial parent's conduct caused the noncustodial parent severe emotional distress; and (4) that the emotional distress was so severe that it cannot be expected to be endured. *Id.* at 1382.

66. Ruffalo v. United States, 590 F. Supp. 706 (W.D. Mo. 1984). *Cf.* Owens v. Owens, 471 So. 2d 920 (La. Ct. App. 1985) (rejecting a cause of action in tort for interference with visitation rights).

67. RESTATEMENT (SECOND) OF TORTS, § 700 & comment c (1977). *See also* Note, *Abduction of Child by Noncustodial Parent: Damages for Custodial Parent's Mental Distress*, 46 Mo. L. REV. 829 (1981).

The last advantage which this remedy offers is its avoidance of judges and its reliance on juries. Of course, trial judges enjoy wide discretion in family law matters. Moreover, imprecise substantive standards in this area of the law, such as the best interests of the child standard, assure the application of broad judicial discretion.[68] The fact of the matter is that many judges have preconceived biases about custody and visitation issues, and those judges often discriminate against noncustodial parents seeking enforcement of visitation rights. As one state supreme court candidly concedes, family law judges simply "apply intuition" when making custody determinations.[69] The consequences of judicial intuition and bias take several repugnant forms, including reduction in visitation time or the outright cutting of noncustodial parents out of their children's lives. When, however, the noncustodial parent is allowed to bring a civil cause of action, he is able tell his story to a jury composed of diverse persons. As a result, the bias of the single judicial decisionmaker is tempered.

At the same time, there are major disadvantages characterizing this remedy. As a visitation enforcement remedy, it is rendered unrealistic and ineffective in most cases because of the great expense in preparing and litigating a jury trial, and the months or years it takes a civil case to inch its way through a court's backlog before ever reaching a jury. Indeed, if immediate visitation enforcement is the goal, one's child may be attending college by the time the jury returns its verdict. To most visiting parents who want nothing more than time with their children, money damages do not even come close to what has been lost.

V. HABEAS CORPUS: THE BETTER REMEDY

A. *Habeas Corpus Generally*

Extensively utilized by the criminal defense bar and a favorite of every jailhouse lawyer in the country, habeas corpus provides a means "for protecting the individual liberty of persons . . . from illegal imprisonment under [governmental] authority" by compelling the release of those persons.[70] The writ's history at the federal level

68. *See generally* Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (Summer 1975).

69. State *ex rel.* Lewis v. Lutheran Social Servs., 59 Wis. 2d 1, 9, 207 N.W.2d 826, 831 (1973).

70. *In re* Burrus, 136 U.S. 586, 590-91 (1890). The writ of habeas corpus has been the subject of considerable discussion in the law review literature. For a sampling of these articles, see Rosenberg, *Constricting Federal Habeas Corpus: From Great Writ to Exceptional Remedy*, 12 HASTINGS CONST. L.Q. 597 (1985); Wright, *Habeas Corpus: Its History and Its Future*, 81 MICH. L. REV. 802 (1983); Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985). For a useful but dated treatise on federal habeas corpus, see R. SOKOL, FEDERAL HABEAS CORPUS (2d ed. 1969).

is a rich one; already well established in English common law and revered in Blackstone's time as "the Great Writ," the framers of the United States Constitution expressly mandated that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[71] Consistent with the above constitutional command, Congress, in enacting the nation's first Judiciary Act in 1789, empowered the federal courts to "grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment."[72] Today, the habeas corpus power of the federal courts is provided by title 28, chapter 153 of the United States Code.[73]

In addition to federal habeas jurisdiction, most states have statutes explicitly providing a state habeas remedy to persons held pursuant to state law.[74] In the majority of these states, such statutory

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71. U.S. CONST. art. I, § 9, cl. 2. *See generally* W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980).

72. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (1789).

73. *See* 28 U.S.C. §§ 2241-2256 (1982 & Supp. IV 1986).

74. The following state statutory provisions provide for habeas relief: ALA. CODE § 15-21-1 to 15-21-34 (1982); ALASKA STAT. § 12.75.010-12.75.230 (1984); ARIZ. REV. STAT. ANN. § 13-4121 to 13-4147 (1978); ARK. STAT. ANN. § 16-112-101 to 16-112-123 (1987); CAL. PENAL CODE §§ 1473-1508 (West 1982 & Supp. 1989); COLO. REV. STAT. § 13-45-101 to 13-45-119 (1987); CONN. GEN. STAT. ANN. § 52-466 to 52-470 (West 1960 & Supp. 1988); DEL. CODE ANN. tit. 10, § 6901 (1974); D.C. CODE ANN. § 16-1901 to 16-1909 (1981); FLA. STAT. ANN. § 79.01 to 79.12 (West 1987); GA. CODE ANN. § 9-14-1 to 9-14-53 (1979); HAW. REV. STAT. § 660-1 to 660-33 (1985); IDAHO CODE § 19-4201 to 19-4236 (1976); ILL. ANN. STAT. ch. 10-101 to 10-137 (Smith-Hurd 1984 & Supp. 1988-89); IND. CODE ANN. § 34-1-57-1 to 34-1-57-25 (Burns 1982); IOWA CODE ANN. § 663.1 to 663.44 (West 1985); KAN. STAT. ANN. § 60-1501 to 60-1507 (1983); KY. REV. STAT. ANN. § 419.020 to 419.130 (Michel Bobbs-Merrill 1972 & Supp. 1988); LA. CODE CIV. PROC. ANN. arts. 3781-85, 3821-31 (West 1961 & Supp. 1989); LA. CODE CRIM. PROC. ANN. art. 351-70 (West 1967 & Supp. 1989); ME. REV. STAT. ANN. tit. 14, § 5501 (1964 & Supp. 1988); MD. [CTS. & JUD. PROC.] CODE ANN. § 3-701 (1984); MASS. GEN. LAWS ANN. ch. 248 §§ 1 to 34 (1982); MICH. STAT. ANN. Chapter 43 § 600.4301 to 600.4387 (1987); MINN. STAT. ANN. § 589.01 to 589.35 (1988); MISS. CODE ANN. § 11-43-1 to 11-43-55 (1972); MO. ANN. STAT. § 532.010 to 532.710 (1953 & Supp. 1989); MONT. CODE ANN. § 46-22-101 to 46-22-307 (1987); NEB. REV. STAT. § 29-2801 to 29-2824 (1943); NEV. REV. STAT. § 34.360 to 34.830 (1986); N.H. REV. STAT. ANN. § 534.1 (1974); N.J. STAT. ANN. § 2A:67-1 to 2A:67-36 (1986); N.M. STAT. ANN. § 44-1-1 to 44-1-38 (1978); N.Y. HABEAS LAW § 7001-7012 (McKinney 1980); N.C. GEN. STAT. § 17-1 to 17-46 (1982); N.D. CENT. CODE § 32-22-01 to 32-22-43 (1976); OHIO REV. CODE ANN. § 2725.01 to 2725.28 (Baldwin 1987); OKLA. STAT. ANN. tit. 12, §§ 1331 to 1355 (West 1988); OR. REV. STAT. § 34.310 to 34.730 (1987); PA. CONS. STAT. ANN. § 6501 to 6505 (Purdon 1982); R.I. GEN. LAWS § 10-9-1 to 10-9-32 (1956); S.C. CODE ANN. § 17-17-10 to 17-17-200 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 21-27-1 to 21-27-29 (1987); TENN. CODE ANN. § 29-21-101 to 29-21-130 (1980); TEX. CRIM. PROC. CODE ANN. § 11.01 to 11.64 (Vernon 1986); UTAH CODE ANN. § 78-35-1 to 78-35-5 (1987); VT. STAT. ANN. tit. 12, §§ 3951 to 3985 (1973 & Supp. 1988); VA. CODE ANN. § 8.01-654 to 8.01-668 (1984); WASH. REV. CODE ANN. § 7.36.010 to 7.36.250 (1982 & Supp. 1989); W. VA. CODE § 53-4-1 to 53-4A-11 (1981 & Supp. 1988); WIS. STAT. ANN. § 782.01 to 782.46 (1981); WYO. STAT. § 1-27-101 to 1-27-134 (1988).

grants of habeas relief follow from state constitutional provisions which are parallel to the above-mentioned federal provision.[75] Thus, the average criminal defendant who has been convicted under state law and is being confined in a state facility has at his disposal *both* a state *and* a federal habeas option with which to challenge his detention.

In *Lehman v. Lycoming County Children's Services Agency*,[76] decided in 1982, the United States Supreme Court was faced with the question whether a natural mother whose three sons were placed in foster homes pursuant to state law could by means of federal habeas collaterally challenge the state statute under which her parental rights were terminated.[77] Ending decades of controversy on the subject, the Court held that the habeas corpus statute does not confer jurisdiction on federal courts over state child custody matters.[78] In reaching its decision, the Court ruled that the sense in which foster children are in the "custody" of their foster parents is not contemplated by the "in custody" language of the federal habeas statute, and that both considerations of federalism and the need for finality in child custody disputes cautioned against a broader interpretation.[79]

Notwithstanding the above, habeas corpus has long been utilized at the state level as an appropriate remedy in the family law context. The writ of habeas corpus was initially used to release children from the custody of private persons in England during the eight-

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75. The following state constitutional provisions provide for habeas corpus relief: ALA. CONST. art. I, § 17; ALASKA CONST. art. I, § 13; ARIZ. CONST. art. II, § 14; ARK. CONST. art. II, § 11; CAL. CONST. art. I, § 11; COLO. CONST. art. II, § 21; CONN. CONST. art. I, § 12; DEL. CONST. art. I, § 13; FLA. CONST. art. I, § 13; GA. CONST. art. I, § 1, ¶ 15; HAW. CONST. art. I, § 15; IDAHO CONST. art. I, § 5; ILL. CONST. art. I, § 9; IND. CONST. art. I, § 27; IOWA CONST. art. I, § 13; KAN. CONST. BILL OF RIGHTS § 8; KY. CONST. art. I, § 16; LA. CONST. art. I, § 21; ME. CONST., art. I, § 10; MD. CONST. art. III, § 55; MASS. CONST. pt. 2, ch. 6, art. VII, § 7; MICH. CONST. art. I, § 12; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 21; MO. CONST. art. I, § 12; MONT. CONST. art. II, § 19; NEB. CONST. art. I, § 8; NEV. CONST. art. I, § 5; N.H. CONST. art. I, § 9; N.J. CONST. art. I, § 14; N.M. CONST. art. II, § 7; N.Y. CONST. art. I, § 4; N.C. CONST. art. I, § 21; N.D. CONST. art. I, § 14; OHIO CONST. art. I, § 8; OKLA. CONST. art. II, § 10; OR. CONST. art. I, § 23; PA. CONST. art. I, § 14; R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 18; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; TEX. CONST. art. I, § 12; UTAH CONST. art. I, § 5; VT. CONST. art. II, § 41; VA. CONST. art. I, § 9; WASH. CONST. art. I, § 13; W. VA. CONST. art. III, § 4; WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 17.

76. 458 U.S. 502 (1982). *See generally* Note, *No Federal Habeas Corpus in Child Custody Disputes:* Lehman v. Lycoming County Children's Services Agency, 22 J. FAM. L. 129 (1983-84). For discussion of federal habeas corpus in child custody disputes prior to *Lehman*, see Note, *Federal Habeas Corpus in Child Custody Cases*, 67 VA. L. REV. 1423 (1981).

77. Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. at 502.

78. *Id.* at 516.

79. *Id.* at 511-13.

eenth century.[80] Early American state courts also made use of the writ in child custody disputes, reasoning that a child could in fact be unlawfully restrained or "in custody" by a parent or other person not entitled to custody at the time.[81] Notably, the first American appellate decision in a child custody dispute involved an appeal from the denial of a writ of habeas corpus.[82] Because in such cases the inquiry was limited to whether the custody was legal, there was no requirement that the child be physically restrained or that the detention be by governmental authorities in order to obtain habeas relief.[83] The thinking in England and the states was that no physical restraint need be exercised over the child for habeas corpus purposes, only that he or she be in the possession or custody of someone who was without the legal right to custody. Courts certainly did not require detention by governmental authorities to confer habeas corpus jurisdiction in child custody cases; the inquiry was always whether the custody was illegal, not who the custodian was. In addition, it was irrelevant that the child consented and wished to remain with the one wrongfully exercising the restraint.[84]

The use of the Great Writ has always been to challenge the depri-

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80. *See* Rex v. Smith, 2 Strange 982, 93 Eng. Rep. 983, (1734); Rex v. Delaval, 3 Burrow 1434, 97 Eng. Rep. 913 (1763). *See also* Lyons v. Blenkin, 1 Jac. 245, 264, 37 Eng. Rep. 842, 849 (Ch. 1821).

81. *In Re* Burrus, 136 U.S. 586, 603 (1890) (collecting and discussing early American court cases involving habeas corpus in child custody disputes). For historical discussion of American child custody disputes and the writ of habeas corpus, see Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 270-274 (1965); Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U.L. REV. 1038, 1052-1059 (1979).

82. Nickols v. Giles, 2 Root 461 (Conn. 1796).

83. R. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES 454 (1858). In discussing the use of the writ in child custody cases, Hurd explained:

> *1. Degree of restraint necessary to authorize the writ.* The use of the writ of habeas corpus in this class of cases, infers some modification of the general idea of imprisonment, and an extension of the original design of the writ.
>
> The term *imprisonment* usually imports a restraint contrary to the wishes of the prisoner; and the writ of habeas corpus was designed as a remedy for *him*, to be invoked at *his* instance, to set him at liberty, not to change his keeper.
>
> But in the case of infants an unauthorized absence from the legal custody has been treated, at least for the purpose of allowing the writ to issue, as equivalent to imprisonment; and the duty of returning to such custody, as equivalent to a wish to be free.

Id.

84. *Id.* at 454-55 ("It has been held that the writ may not only issue without privity of the child . . . *but against its express wishes.*") (citation omitted) (emphasis added). *See* Thomas v. Sprinkle, 299 Ky. 839, 187 S.W.2d 738 (1945); *Ex parte* Reinhardt, 88 Mont. 282, 292 P. 582 (1930); *Ex parte* Swall, 36 Nev. 171, 134 P. 96 (1913).

vation of a person's liberty, and custodial restraints on a child constitute a deprivation sufficient in the states to invoke it. The application of this remedy to the visitation denial problem is unlabored—visitation is undeniably a form of court-ordered custody for a time specific when the child is to be in the care and custody of the visiting parent. If a custodial parent retains the child during the noncustodian's visitation time, that parent is unlawfully restraining the child's liberty and illegally exerting custody over that child at that time. When faced with visitation denial, the noncustodian should immediately seek a writ of habeas corpus to compel the custodian to deliver up the child. A wealth of historical and present day authority supports such a response.

B. State Court Precedent for the Use of Habeas Corpus to Challenge Unlawful Detention of a Child

Courts have considered the applicability of habeas corpus in several compelling cases involving the removal of children from their home states by a parent not entitled to custody or visitation rights at the time of removal.

In *State ex rel. Butler v. Morgan*,[85] the Oregon Court of Appeals held that habeas corpus was a proper remedy to enforce the custody terms of a divorce decree.[86] That case involved an Arizona decree which had awarded custody of the parties' two children to the father who continued to live in that state and who enrolled the children in the local schools. The mother took the children to her new home in Oregon one weekend and refused to send them back. The father then filed a copy of the Arizona decree in Oregon and sought the return of the children by means of an Oregon writ of habeas corpus.[87]

Despite the mother's "repeated efforts during the habeas corpus proceeding to introduce new evidence on the circumstances of the children,"[88] the trial judge refused to permit the enlargement of the inquiry beyond the writ's basics of whether the person exerting custody over the child at the time was legally entitled to do so. Accordingly, the trial court granted the writ and ordered the children returned.[89] That decision was affirmed by the Oregon Court of Appeals, which reasoned that Arizona had jurisdiction over the children when the decree was entered, but it had jurisdiction to enforce the decree in Oregon under the terms of the Uniform Child Custody and Jurisdiction Act (UCCJA).[90]

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85. 34 Or. App. 393, 578 P.2d 814 (Ct. App. 1978).
86. *Id.* at 396, 578 P.2d at 815.
87. *Id.*
88. *Id.* at 398, 578 P.2d at 816.
89. *Id.* at 396, 578 P.2d at 815.
90. *Id.* at 398, 578 P.2d at 816. For the text of the UCCJA, see UNIF. CHILD CUS-

In *Buchanan v. Malone*,[91] the Louisiana Court of Appeal affirmed the use of a writ of habeas corpus to enforce the custody provisions of a Washington state decree. In that case, the children, who under the decree were in the custody of their mother, travelled to Louisiana for visitation with their father and he refused to return them.[92] At the hearing on the mother's petition for a writ of habeas corpus, the father attempted to convert and expand it into a full-blown determination of whether custody should be changed.[93] He was flatly refused; the trial judge made the narrow lawfulness-of-restraint inquiry and ordered the children immediately turned over to their mother.[94] The appellate court, affirming, held that under the UCCJA a court only has authority to enforce an out-of-state decree; it may not modify it.[95]

In *Snyder v. Schmoyer*,[96] the custody of a two-year-old boy was split between the parents and the mother refused to allow the child to go with his father at the appointed time. In response, the father sought and obtained a writ of habeas corpus awarding him custody pursuant to the decree.[97] The Colorado Supreme Court, affirming, observed: " 'The writ of habeas corpus is a proper remedy on the part of one parent to recover a child from the other parent. . . .' "[98]

The teaching of the above precedents relative to the appropriateness of the writ to redress visitation denials could not be clearer. Most decisions recognizing the writ in child custody cases, however, have not involved the enforcement of foreign decrees but have arisen from far more pedestrian facts.

For example, in *Ex parte Ray*,[99] a Missouri father successfully invoked habeas corpus to gain custody of his two children who were being cared for by their maternal grandparents after the mother, who had been awarded custody in the divorce decree, died.[100] The father alleged that the children were being unlawfully restrained and that as a natural parent he was entitled to custody.[101] In reaching its decision, the Missouri Court of Appeals explained that the father "has a primary right to custody of his children as against all the world" and that "[h]e is clothed with a presumption of law that

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TODY JURISDICTION ACT, 9 U.L.A. 115 (1968).

91. 415 So. 2d 259 (La. Ct. App. 1982).

92. *Id.* at 261.

93. *Id.*

94. *Id.*

95. *Id.* at 263-64. For a pre-uniform act decision which reached the same result, see *Ex parte* Bauman, 82 Cal. App. 2d 359, 186 P.2d 154 (1947).

96. 106 Colo. 290, 104 P.2d 612 (1940).

97. *Id.* at 291, 104 P.2d at 612.

98. *Id.* at 294, 104 P.2d at 613 (quoting 25 AM. JUR. *Habeas Corpus* § 79 (1940)).

99. 573 S.W.2d 152 (Mo. Ct. App. 1978).

100. *Id.* at 156.

101. *Id.* at 152.

the best interests of his children are served in his custody . . . absent a showing of some special and extraordinary reason why he should not have custody."[102]

Similarly, in *People ex rel. Boulware v. Martens*,[103] a divorced New York father relied on habeas corpus to pry his two children from the custody of their aunt, who was keeping them pursuant to the wishes of their recently deceased mother.[104] In sustaining the writ, the Appellate Division of the Supreme Court of New York held that "a surviving parent's right to the custody of his minor children is paramount to that of all other persons . . . ."[105]

A variety of representative states recognize the writ of habeas corpus as a proper remedy to challenge the wrongful detention of children by persons exceeding the custody provisions of divorce decrees. These diverse states include Arizona,[106] Florida,[107] Montana,[108] Ohio,[109] Pennsylvania,[110] Vermont,[111] and Wisconsin.[112] While the utility of the writ is quite pronounced in these cases, some general limitations have been imposed by most states on its application.

For example, the threshold element of illegal restraint must be established. Thus, in *Bryant v. Kentucky Department For Human Resources*,[113] the habeas petition of natural parents was denied for failure to prove that the State Department of Human Resources was exercising illegal restraint or unlawful detention of their three children.[114] In *Bryant*, the parents had been found earlier to have neglected and physically abused their children, and a judge had placed the children with the state.[115]

Such a limitation should be easily overcome by a noncustodial parent whose visitation rights were enumerated in a court's decree. Indeed, anyone contravening those terms would by definition seem to be unlawfully detaining the child from being where he or she should be at the time.

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102. *Id.* at 155.

103. 232 A.D. 258, 249 N.Y.S. 600 (App. Div. 1931).

104. *Id.* at 259, 249 N.Y.S. at 601. *See also In re* Boulware's Will, 144 Misc. 235, 258 N.Y.S. 522 (Surr. Ct. 1932) (explaining the facts of the habeas petition).

105. People *ex rel.* Boulware v. Martens 232 A.D. at 259, 249 N.Y.S. at 601.

106. Morales v. Glenn, 114 Ariz. 327, 560 P.2d 1234 (1977).

107. Trotman v. Thomas, 154 Fla. 71, 16 So. 2d 640 (1944).

108. *Ex parte* Reinhardt, 88 Mont. 282, 292 P. 582 (1930).

109. Trout v. Trout, 136 N.E.2d 474 (Ohio Ct. Comm. Pleas 1956).

110. Commonwealth *ex rel.* Laws v. Laws, 249 Pa. Super. 355, 378 A.2d 333 (Super. Ct. 1977); Commonwealth *ex rel.* Moss v. Moss, 159 Pa. Super. Ct. 133, 47 A.2d 534 (Super. Ct. 1946).

111. *In re* Cooke, 114 Vt. 177, 41 A.2d 177 (1945).

112. Anderson v. Anderson, 36 Wis. 2d 455, 153 N.W.2d 627 (1967).

113. 548 S.W.2d 165 (Ky. Ct. App. 1977).

114. *Id.* at 167.

115. *Id.* at 166.

Another generally accepted limitation on the use of the writ is the requirement that the person invoking it have a legal right against the person possessing the child. It has been held in this regard, for example, that an aunt cannot use habeas corpus to seek custody of a child from a parent because no court order conferred any custodial rights on the aunt.[116] Again, a visiting parent could readily satisfy this requirement if a judge has awarded that person visitation rights in a decree or order.

Finally, in enforcing foreign custody decrees under the terms of the UCCJA, the hearing state must satisfy itself that the state issuing the order had jurisdiction over the child before granting habeas relief.[117] Where states differ with respect to habeas corpus is on the reach of the hearing on the writ.

C. *The Appropriate Nature of the Hearing*

Procedurally, in order to obtain a writ of habeas corpus to compel visitation compliance, most states require an aggrieved parent to first file a petition in the state's court of general jurisdiction. A hearing on the petition will then be scheduled and an order for hearing served on the person allegedly restraining the child. At this juncture, the states take two different approaches. Some states perform what has come to be known as the best interests inquiry. Briefly put, this test attempts to answer whether upon consideration of all *present* circumstances, the best interests of the children require that the custody provisions of the decree be enforced. Another group of states confines the hearing to a more traditional inquiry which focuses on the narrow question of whether the children are in fact being held in violation of the decree.

Wisconsin is representative of the states allowing a best interests inquiry. In *Anderson v. Anderson*,[118] while acknowledging the appropriateness of the writ as a remedy for a mother to challenge the father's retention of their children, the Supreme Court of Wisconsin explained that "[w]hen it is used in custody matters . . . [habeas corpus] is not the narrow legal remedy that it is in criminal cases."[119] Rather, it escalates into a full-blown consideration of all the facts relative to whether the best interests of the child would be served by issuing the writ enforcing the earlier order.

Thus, the court explained:

> The court is in no case bound to deliver a child into the custody of any claimant, but should, in the exercise of a sound judicial discretion, after a careful consideration of the facts, leave it in such cus-

116. Thomas v. Sprinkle, 299 Ky. 839, 187 S.W.2d 738 (1945). *Accord* Blue v. Boisvert, 143 Me. 173, 57 A.2d 498 (Me. 1948).

117. Slidell v. Valentine, 298 N.W.2d 599 (Iowa 1980).

118. 36 Wis. 2d 455, 153 N.W.2d 627 (1967).

119. *Id.* at 459, 153 N.W.2d at 629.

tody as the welfare of the child *at the time appears to require.*[120]

Similarly, the inquiry of Illinois courts in habeas corpus hearings is not whether the person seeking custody has that right, but whether the child's best interests would be served by honoring it.[121] In *In re Bertelson*,[122] the Montana Supreme Court, approving this more liberal approach to habeas corpus, stated the principle in the clearest terms: "[t]he child's welfare, rather than the technical legal rights of the parent, is the paramount consideration by which the court must be guided."[123]

The reasoning underpinning these decisions is that since those states emphasize the best interests of the child in custody determinations, a habeas corpus decision which also determines who will have custody of the child must also be based on evidence satisfying that same best interests standard. Thus, the hearings on the writ devolve into *de novo* considerations of custody and visitation decisions already made. It can be argued, therefore, that it is not only wrong-headed, but it is also a waste of time to duplicate previous hearings and considerations of the same issue.

Moreover, the best interests approach to habeas hearings is illogical in its failure to appreciate that the order which one parent is seeking to enforce has already been based on the best interests of the child. At that earlier time, a sitting judge, applying the best interests standard, entered an order granting custody of the child to the custodial parent and access to the child to the noncustodian.

Finally, the psychological research discussed in Part II of this article strongly supports the conclusion that access to both parents is ordinarily in the child's best interests. One state, Iowa, has even defined the best interest of a child in its dissolution statute as including "the opportunity for maximum continuous physical and emotional contact possible with both parents . . . ."[124] If more states took this position with respect to habeas hearings, the practice of family law would be elevated, and a child's need to bond with both parents after divorce would be facilitated. The fact is that a child's interest in spending time with both parents is met by a judge awarding the noncustodial parent visitation rights. If the visiting parent poses some kind of risk to the child, the judge will not allow visitation or will limit it. If a visiting parent evolves into a risk to the child after the initial custody hearing, the custodial parent has only to file a petition to modify in order to reduce or eliminate the visitation. But as an original decree awarding visitation stands, it is by

120. *Id.* at 459-60, 153 N.W.2d at 629.

121. *See, e.g.*, Mitchell v. Henderson, 65 Ill. App. 3d 363, 382 N.E.2d 650 (App. Ct. 1978).

122. 189 Mont. 524, 617 P.2d 121 (1980).

123. *Id.* at 541, 617 P.2d at 130.

124. IOWA CODE ANN. § 598.1(6) (West Supp. 1988).

definition in the best interests of the child.

Furthermore, to revisit the best interest issue again at a hearing on a petition for a writ of habeas corpus creates significant systemic problems as well. For, by relitigating a major issue, a parent who refuses to accept the terms of the original decree is provided with a back door appeal of the original decree which is not at all contemplated by any state's rules of civil or appellate procedure. There are also considerations of time and expense involved in requiring a full-blown hearing. For example, such a hearing might involve many expert witnesses, requests for discovery and continuances, require a judge to spend days or weeks rendering a decision because of the depth of the inquiry and flatly defeat the applicant's goal of trying to get something done quickly so he or she can see their child. In sum, this approach is little less than a full hearing on the question of modifying the decree.

The general rule is that unless a state statute expressly empowers courts to modify custody in a habeas corpus proceeding, they must follow the traditional English practice of limiting the inquiry to freeing the child from unlawful detention. Ohio is representative of those jurisdictions employing the traditional approach. As one of its courts observed: "The only determination legally authorized in a habeas corpus proceeding directly between parents concerns illegal restraint of liberty, which in turn depends upon evidence of a superior right to the children on the part of the other spouse. . . ."[125] The Ohio court expresses in a nutshell the striking advantage of habeas corpus as a remedy in visitation denial cases; however, other advantages are also ascertainable.

D. The Advantages of Habeas Corpus as a Remedy

This remedy is far better than the cessation of support payments because the child is not punished financially for the wrongful conduct of the custodian. In fact, nobody is punished—the child is allowed to spend time with the visiting parent as provided in the decree, and the custodial parent is taught a sharp lesson in the sanctity of court orders. Habeas corpus is more effective in enforcing visitation provisions of divorce decrees than contempt proceedings because it does not require the judge to put the offender in jail or otherwise punish him or her, or force the noncustodian to bear such a heavy burden of proof. It is also superior to the remedies of contempt, modification and the filing of tort causes of action in that it avoids lengthy delays in being heard, protracted trials, excessive attorney fees and costs of litigation, and the speculativeness and high

125. Trout v. Trout, 136 N.E.2d 474, 474-75 (Ohio Ct. Comm. Pleas 1956). *Accord* Buchanan v. Malone, 415 So. 2d 259 (La. Ct. App. 1982); State *ex rel.* Butler v. Morgan, 34 Or. App. 393, 578 P.2d 814 (1978).

risk which characterizes the end results each of those remedies produces in spite of all the bombastics.

Primary among the advantages of this remedy is that it is an easy and straightforward call for a judge to make. A habeas corpus hearing need take no longer than fifteen minutes and involve no more than the judge reading the visitation terms of the decree, soliciting evidence of the child's whereabouts, and asking the custodian whether that person has some superior right to the child at the time.

Key here is that the judge's decision is essentially objective, leaving him or her virtually no discretion with which to indulge his or her biases against noncustodians or for custodians. It is either up or down—the child is being restrained in violation of the decree or not. By limiting the judge's inquiry and opportunity for discretion, the officious bane of the matrimonial practice is avoided—the reality that custody and visitation decisions in a jurisdiction can vary the full range of 360 degrees depending not on the facts of the case or the law, but on which judge you draw.

Assuring more consistency in family law decision making and uniform enforcement of decrees are not insignificant collateral benefits attending the use of this remedy. In fact, the parties would be forced onto higher ground from the combat zone of contempt, as their continued warring over the child would be discouraged by this remedy's commitment to enforcement of the court order already in place and to the finality of that judgment on visitation.

Habeas corpus is quick and efficient. Depending on the statute, the parties can be sitting before a judge within hours and certainly days. The vehicle devised centuries ago in England which effectuates the remedy—a writ compelling the custodian to immediately produce and turn over the child—is perfectly tailored to these cases. That is precisely what the noncustodian wants, and all that is necessary to enforce the decree. Thus, it avoids the overbreadth of modification and the "wrong target" aspect of cessation of child support. This remedy goes right to the wrongful conduct and corrects it.

The only negative facet of habeas corpus in these cases involves time, and even that can be overcome in the statute. The problem could develop, even in states which require that petitions for habeas corpus be heard within forty-eight hours, that the visitation term is over by that time. If the visitation being denied is for a weekend's duration and the custodian refuses to release the child on Friday afternoon, even court action on Monday morning would be too late. To put it in perspective, the matter would come before a judge nine months sooner than most petitions to modify, but still by Monday the child would not be unlawfully restrained because on that day the custodian is entitled by the terms of the decree to the child's custody.

For enforcing one week, two week or summer-long visitations, a delay of forty-eight hours would not be significant in most cases, but

for the short-term visits care must be exercised in drafting the statute and developing the procedures so that no unlawful detention escapes the reach of this remedy's net.

The answer is two-fold: develop procedures ensuring quick access to judges and allow make-up time. Judges should be empowered in habeas corpus proceedings to award make-up time to the noncustodian if that person has been denied visitation time before the matter got to the judge. If that person lost a weekend with his or her child before the hearing the following Monday—or even if the hearing were one week or more later—the judge's writ would compel a replacement week-end the following week. Of course, the statute should allow a degree of flexibility so that if a week-end visitation is denied, those days can be replaced during the week as well—preferably beginning the minute the hearing concludes if the logistics permit.

The deterrent value of such a statutory provision is clear, as noncustodians learn that the law's reaction to their denials of visitation will always be the same—a day for a day. A day denied is a day at once replaced. In addition, legislatures should consider whether the appropriate response to repeat offenders should be the doubling of replacement days for each day denied. Finally, repeat offenders are always subject to contempt of court, and with one or two writs of habeas corpus already in the file evidencing a pattern of disobedience to the court's visitation order, the odds of proving contempt and persuading a judge to do something about it increase dramatically.

By enacting statutes comparable to the model that follows, state legislatures will not only harness the traditional benefits of habeas corpus to meet one of today's cutting edge children's rights issues, but also enhance the sanctity of every family law court order issued thereafter in those states.

E. A Model Visitation Denial Statute with Habeas Corpus Teeth

Section 1. Prosecution of Writ

A noncustodial parent who has been awarded visitation with his or her child by a court of competent jurisdiction may petition for and prosecute a writ of habeas corpus to enforce said visitation if the custodial parent restrains the child or in any manner denies or obstructs any court-ordered visitation.

Section 2. Application for Writ

Application for the writ shall be made by verified petition, signed by the noncustodial parent. The court order entitling him or her to visitation shall be attached. The petition must allege that visitation was obstructed or denied by the custodian, and specify the place and time at which the obstruction or denial occurred. The present location of the child, if known, and the person exercis-

ing custody over that child shall be stated in the petition.

Section 3. Granting of Writ

The writ of habeas corpus may be granted by the state supreme court or any judge thereof, or by the district court (or other nomenclature to designate the state court of general jurisdiction), or any judge thereof in their respective counties.

A court or judge authorized to grant a writ of habeas corpus, to whom a petition therefore is presented, if it appears that the writ ought to issue, shall grant it without delay.

The writ shall command the defendant, the person allegedly exercising, or who has exercised, custody of the child in violation of the noncustodial parent's visitation rights (the defendant), to appear and defend the allegations at a hearing set for a time and date certain and noted on the face of the writ, not to exceed seven (7) days from the date the writ is issued, unless the defendant cannot be located and served.

The writ shall also command the defendant to produce the child before the court at the time of the hearing.

The writ shall also notify the defendant that if he or she fails to appear and produce the child at the hearing, a bench warrant will issue for his or her arrest.

The writ shall be served on the defendant in the manner prescribed for the service of civil process, and expedited for these purposes to be effected no later than twenty-four (24) hours prior to the hearing. [Note - Many states' rules of civil procedure require seven days' advance notice of civil hearings. To obviate that necessity, the domestic relations statute can be amended to include an implied consent or implied waiver of the lengthier notice period by any parent to whom a judge awards custody of a child, with visitation rights to a noncustodian.]

Section 4. Hearing on the Writ

The court shall inquire into the lawfulness of the restraint of the child, alleged in the petition to be violative of specified visitation rights.

The purpose of the hearing is to enforce extant court-ordered visitation, not to reevaluate judgments already entered.

If the applicant proves by a preponderance of the evidence that his or her visitation rights are being or have been violated, the relief specified in Section 5 must be awarded. Specifically, the applicant must prove that he or she has or had a superior right viz-a-viz the custodian to the care and custody of the child at the time in question, and that the custodian obstructed or denied that right.

Section 5. Remedies

If the noncustodial parent is successful at hearing in proving the allegations contained in the petition for the writ, the court shall grant the application for the writ and:

(a) if the violation is in progress, command the defendant to obey the visitation order and immediately relinquish control of the child to the noncustodial parent; and

(b) if the violation has occurred but is not in progress or if the violation in progress has resulted in the denial of any court-ordered

visitation time, the court must order that any time denied be made up within a time certain as soon as practicable as determined by the court.

Section 6. Disobedience of Command of Writ

A person to whom a writ of habeas corpus is directed who disobeys the command thereof is guilty of a class 1 misdemeanor and subject to prosecution for contempt of court.

Section 7. Disobedience of Court Order

A person to whom an order of the court is directed, pursuant to Section 5 herein, who disobeys the command thereof is guilty of a class 1 misdemeanor and subject to prosecution for contempt of court.

VI. CONCLUSION

State legislatures and the legal profession can make the world a better place for the children of divorce if they make an honest assessment of the raging visitation denial problem and do something about it. In this Article, we have argued that the remedies most utilized today are inadequate, and that dusting off and polishing one of history's gems offers wide-ranging benefits to everyone involved in these cases. We call for the tough, unequivocal enforcement of court orders, for an equal justice remedy which recognizes the rights of both custodial and noncustodial parents, for a sensitivity to the reality that it is only the children who are hurt when visitation is denied, and for a rethinking of the current sorry approach taken by the majority of courts and legislatures when custodial parents try to cut their ex-spouses out of their children's lives.