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MAY v. ANDERSON: PREAMBLE TO FAMILY LAW CHAOS

GEOFFREY C. HAZARD, JR.*

IN 1953, the Supreme Court decided *May v. Anderson*.¹ Justice Burton wrote an opinion in which three of his brethren joined. Justice Frankfurter concurred, and three judges dissented. Justice Clark did not participate. There is language in the majority and concurring opinions which, if taken to be the law, raises serious problems of family law, special protection of neglected children, and social control of juvenile delinquency. A reconsideration of the issues at stake and of the consequences flowing from the decision seems in order. Such a reconsideration should lead to an abandonment, or at least a retreat from, the unfortunate position taken in the case.

Before proceeding to the case, it is perhaps appropriate to rehearse certain familiar propositions about the role of the Court in our legal system. As our ultimate legal arbiter, the Supreme Court of the United States has at once great power and great responsibility. The power of judicial review is, however, a negative one. It is negative in the technical sense that it "amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right."² It is negative in a more fundamental sense, too, for the Court has only a restricted capacity to initiate remedies for acknowledged social ills.³ Thus the power of judicial review is characteristically one of veto of the proposals advanced by some other organ of government.

The impact of the power on congressional legislation presents problems enough. As against state legislation, the negative character of the Court's power has additional dimensions. Notwithstanding the pervasiveness of federal activity, the largest part of the nation's daily

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1. 345 U.S. 528 (1953).

2. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

3. See *Colegrove v. Green*, 328 U.S. 549 (1946) ("no court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system."). But see *Brown v. Board of Educ.*, 347 U.S. 483 (1954), *rehearing on relief*, 349 U.S. 294 (1955).

affairs are and will continue to be regulated by the law, statutory or common, of the several states.⁴ This means that when the Court strikes down state action as violative of the Constitution, under the due process clause or otherwise, or when it imposes limitations on the extraterritorial validity or effect of state action, as by withholding full faith and credit, the consequence is very likely to be that *no* agency of government will provide a substitute solution to the problem in question. This is particularly true, it might be added, in family law.⁵

In the exercise of its power of judicial review, the Court is subject to little restriction, at least immediately, except the conscience of its members. It is not, of course, responsible to any other chamber or to the voters. But the Court is also unrestricted in that it is not required to anticipate or to solve the problems which are unresolved or are created by its pronouncements. Having said what may not be done, the Court is under no obligation to say what should be done. This unpleasant task is often left for others, the legislature and the executive. And the task must be undertaken within the legal limits imposed by the Court on the one hand and the political limits imposed by the electorate on the other.

In recognition of the heavy personal responsibility imposed by its political independence, the Court has in the past adhered to certain methodological canons designed to keep the exercise of its power within tolerable bounds.⁶ Principal among these is the rule that the Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."⁷

One important function of these canons, and the foregoing rule

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4. See Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954). The point is demonstrated clearly, if not scientifically, by comparing the subject index to the United States Code with the subject index of the codified statutes of any of the states.

5. Congress has never attempted to regulate matters of family law. Even if a constitutional basis for congressional action exists, the controversial character of many aspects of family law, such as grounds for divorce, makes it improbable that Congress will undertake to act. Consider, for example, that in the much disputed field of labor law a "no man's land" has existed for over a decade, and the boundaries of the "no man's land" delimited for over four years, but Congress has done nothing to remedy the situation. See *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957). See also Note, *Congressional Reversal of Supreme Court Decisions: 1945-1957*, 71 HARV. L. REV. 1324 (1958).

6. The classic summary of the rules is found in Justice Brandeis' concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936).

7. *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885).

in particular, is to limit the size of the swath cut by judicial negation so that the legislative power is presently circumscribed no more stringently than is necessary. In this way, the organs of government which are capable of and responsible for initiating action to meet social problems will be able to do so with minimal restrictions on their choice of means. Furthermore, if the decision is confined to the issue presented, hopefully the record will disclose the practical consequences of a judicial veto. Whether this is so, of course, varies with the nature of the case, the procedural stage at which the constitutional question arises, and, above all, the skill and resourcefulness of counsel. But even in the face of the most unilluminating record, the court will usually have some idea of the practical consequence of deciding the issue presented. When the court sweeps beyond the immediate issue presented, however, the danger is that its choice of rule, indeed its choice of language, may have unanticipated ramifications imperiling social interests of the most pressing character.

What has been said so far is rudimentary. But in *May v. Anderson* the Court neglected the canons of narrow decision. The tragic consequences may be with us for many years.

THE CASE PRESENTED

The facts in *May v. Anderson* were these:⁸ Mrs. Anderson (now Mrs. May) was a native of Wisconsin. She married Anderson in that state and lived there with him continuously thereafter. They had three children. In December, 1946, as a result of growing marital unhappiness, Mrs. Anderson considered getting a divorce and went to Ohio "to think it over." She took the children with her. In a telephone conversation on New Year's Day, 1947, she told her husband from Ohio that she was not coming back to him.

The husband then filed suit for divorce in Wisconsin, delivering a copy of the summons and complaint to Mrs. Anderson in Ohio. A decree was entered granting him a divorce and awarding him custody of the children, subject to visitation rights given Mrs. Anderson. Armed with the decree, Anderson came to Ohio in February, 1947 and obtained the children (peaceably and without stealth) from Mrs. Ander-

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8. The facts are taken from the Supreme Court's opinion and also from the opinion of the lower court in *Anderson v. May*, 91 Ohio App. 557, 107 N.E.2d 358 (1952), from which the appeal to the Supreme Court was taken. The Ohio Supreme Court had refused to entertain an appeal. See *Anderson v. May*, 157 Ohio St. 436, 105 N.E.2d 648 (1952).

son. The children continued to live with him from that date until July, 1951. In that month, Anderson brought the children to Ohio to visit their mother, apparently in pursuance of the visitation right given her by the Wisconsin decree. Mrs. Anderson, now remarried, refused to redeliver the children. Anderson brought habeas corpus to obtain their return.

Under Ohio practice, habeas corpus draws in question only the right of immediate possession of the children. The court is not permitted to reconsider the merits of a custody award or to inquire whether the welfare of the child is best served by the prior decree. The Ohio court found that at the time of the divorce (1) Mrs. Anderson was domiciled and present in Ohio, (2) Mr. Anderson was domiciled and present in Wisconsin, and (3) the children were domiciled in Wisconsin but present in Ohio. No significance was attached to the fact that between the granting of the decree in February, 1947, and the visitation of the children to Ohio in 1951, the children had been both domiciled and present in Wisconsin.

The Ohio court determined that the Wisconsin domicile of the children was a sufficient basis for the courts of that state to determine custody and, since Wisconsin had awarded custody to the husband, Ohio was bound to honor and enforce that decree. The mother appealed to the Supreme Court. The Supreme Court reversed.

As has been suggested, *May v. Anderson* was a case in which observance of the Court's methodological canons was peculiarly appropriate. The scope of inquiry in the proceedings below made irrelevant much background information.⁹ The opinions both of the trial court and the lower appellate court left much to be desired regarding the legal principles involved and were silent as to applicable policy considerations. The brief submitted to the Supreme Court by the appellant mother was perhaps adequate; the brief of the respondent father was not. No public body was involved, no public interest asserted. But a moment's reflection, even if confined to the problems presented in the Court's own precedents, should have warned that important issues were at stake. In these circumstances any decision at all would entail

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9. This information would include the character and parental competence of the respective parents, the degree to which the children were attached to them, the quality of the home provided by the husband, the quality of the home which the mother could provide, the quality of the adjustment which the children had made and the probable effects on the children of changing their domestic environment.

risk of unforeseen consequences. Certainly a decision on grounds any broader than immediately necessary would entail that risk.

In presenting the issue, counsel for appellant complied with the canons of narrow adjudication. Both in his jurisdictional statement and his brief he stated the problem thus:

First, can a court have jurisdiction to award a child's custody when the *child is outside* the State at the time the court enters its decree *and* the court has jurisdiction *neither* of the child's person *nor* the person of the parent who has the child with him outside the state?

Second, there having been only constructive service on the parent who has the child outside the state, is that parent in any way bound by the custody decree?¹⁰

Thus, as counsel reiterated, the issue was whether domicile of the child, the parent and child both being absent from the state, was a sufficient basis for a state to make a custody award binding on the absent parent.

Now, it should be said at once that if the decision is read for the *least* that it holds, if it is read as deciding only the foregoing issue, it may be unexceptionable. It is true that many courts have assumed jurisdiction to decide custody on the basis of the child's domicile alone.¹¹ It is also true that Beale's *Restatement of Conflicts* says that the child's domicile is not only a sufficient basis but the *exclusive* basis for determining his custody.¹² However, it seems clear that these views have been repudiated, if indeed they were ever fully accepted.¹³

The decision in *May v. Anderson* can be interpreted as deciding only the issue tendered,¹⁴ and has been so interpreted.¹⁵ But the language

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10. Jurisdictional Statement of Appellant, p. 4; Brief for Appellant, p. 4. (Emphasis added.)

11. Many of the cases are collected in Annot., 9 A.L.R.2d 434 (1950). See also Goodrich, *Custody of Children in Divorce Suits*, 7 CORNELL L.Q. 1, 5 (1921).

12. See RESTATEMENT, CONFLICT OF LAWS §§ 117, 146, 148 (1934). *But cf. id.* §§ 118, 150.

13. See 1 EHRENZWEIG, CONFLICT OF LAWS 277 (1959); EHRENZWEIG, SELECTED READINGS ON CONFLICT OF LAWS 822 (1956); Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953); Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROB. 819 (1944); *cf.* Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. CHI. L. REV. 42 (1940).

14. An indication of the fact that the issue presented required no broader disposition is the last footnote in the Court's opinion, 345 U.S. at 534 n.8., where Justice Burton says: "[There is no jurisdiction over] . . . children who are not within the jurisdiction

goes further. Justice Burton said the "narrow issue"¹⁶ presented was this:

[W]e have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*. Rights far more precious to appellant than property rights will be cut off if she is to be bound . . . .¹⁷

He then went on to say this:

In *Estin v. Estin* . . . we held Nevada powerless to cut off . . . a spouse's right to financial support. . . . In the instant case, we recognize that a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.

Wisconsin [did not have] . . . the personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession.¹⁸

If this language means anything, it means that a state may not deprive a parent of custody unless the parent has been personally served with process within the territorial limits of the state. Justice Burton quite apparently intended this rule to apply even if the child had been present in the state and before the rendering court. The opinion has been so interpreted.¹⁹

The concurring opinion of Justice Frankfurter went off on a different tack. He seems to say that Wisconsin had jurisdiction to enter

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of the court when the decree is rendered, where the defendant . . . has neither been personally served . . . nor appeared . . . ."

15. *Cunningham v. Cunningham*, 166 Ohio St. 203, 141 N.E.2d 172 (1957); *Guyette v. Haley*, 286 App. Div. 451, 144 N.Y.S.2d 493 (Sup. Ct. 1955); *Swope v. Swope*, 163 Ohio St. 59, 125 N.E.2d 336 (1955); see *Hutchins v. Moore*, 97 So. 2d 748 (Miss. 1957). *But cf.* *Kovacs v. Brewer*, 356 U.S. 604, *on remand*, 248 N.C. 742, 104 S.E.2d 882 (1958).

16. 345 U.S. at 532.

17. 345 U.S. at 533.

18. 345 U.S. at 533-34.

19. See 345 U.S. 536, 539-40 (dissenting opinion of Justice Jackson); *Cooper v. Cooper*, 318 S.W.2d 587 (Ark. 1958); *Dahlke v. Dahlke*, 97 So. 2d 16 (Fla. 1957); *Aufiero v. Aufiero*, 332 Mass. 149, 123 N.E.2d 709 (1955); *Kallet v. Fitzpatrick*, 131 N.Y.S.2d 9 (Sup. Ct. 1954); *cf.* *Meredith v. Meredith*, 226 F.2d 257 (D.C. Cir. 1955); *Hopson v. Hopson*, 221 F.2d 839 (D.C. Cir. 1955).

the original custody decree²⁰ but that child custody awards, and perhaps other adjudications touching children, are not entitled to full faith and credit when pitted against a claimed local interest in the child, here Ohio's interest.²¹ Because Justice Frankfurter's vote was necessary to the disposition of the case, and perhaps also because his response was within the issue tendered the Court, *May v. Anderson* has been read as deciding what he says it decided.²²

Both the majority and concurring opinions in *May v. Anderson* invite questions concerning precedent and logic. It is not the purpose

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20. "This Court does not decide that Ohio would be precluded from recognizing, as a matter of local law, the disposition made by the Wisconsin court. For Ohio to give respect to the Wisconsin decree would not offend the Due Process Clause." 345 U.S. at 535-36.

21. "Property, personal claims, and even the marriage status . . . give rise to interests different from those relevant to the discharge of a State's continuing responsibility to children within her borders . . . . [T]he child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time." 345 U.S. at 536. He developed this theme at greater length in *Kovacs v. Brewer*, 356 U.S. 604, 609 (1958) (dissenting opinion).

22. In light of Burton's language, some courts have read Frankfurter's opinion as saying that the prior custody decree is not entitled to full faith and credit if it was rendered without personal jurisdiction of the parent now attacking it. See *People ex rel. Pritchett v. Pritchett*, 1 App. Div. 2d 1009, 151 N.Y.S.2d 481 (1956); *Armstrong v. Armstrong*, 99 Ohio App. 7, 130 N.E.2d 710 (1954), *aff'd*, 350 U.S. 568 (1956); *Worthley v. Worthley*, 258 P.2d 588 (Cal. App. 1953), *aff'd*, 267 P.2d 23 (Cal. 1954), *aff'd as modified*, 44 Cal. 2d 465 283 P.2d 19 (1955); *cf. In re Adoption of a Minor*, 214 F.2d 844 (D.C. Cir. 1954). Other courts have interpreted Frankfurter as saying that a custody decree is not binding in a sister state even if both parents were before the rendering court. See *Casteel v. Casteel*, 45 N.J. Super. 338, 132 A.2d 529 (App. Div. 1957); *Aufiero v. Aufiero*, 332 Mass. 149, 123 N.E.2d 709 (1955); *cf. Bachman v. Mejias*, 1 N.Y.2d 575, 136 N.E.2d 866 (1956). *But see Brazy v. Brazy*, 5 Wis. 2d 352, 92 N.W.2d 738 (1958). In the light of Justice Frankfurter's dissent in the subsequent case of *Kovacs v. Brewer*, 356 U.S. 604, 609 (1958), the latter seems to be the correct interpretation.

Justice Jackson dissented in *May v. Anderson* on the ground that the state in which the children were domiciled had jurisdiction to make a custody award and that such an award should be granted full faith and credit, subject, however, to the power of any other interested state to modify the decree or to intervene to protect the child. Justice Jackson would adhere to the rule in *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947), that a custody decree which is subject to modification where granted is subject, as a practical matter, to modification elsewhere. He thus disagreed with Burton on the jurisdictional point and with Frankfurter on the effect to be given the Wisconsin decree.

Justice Reed concurred with Jackson. Justice Minton dissented on the ground that the question of the jurisdiction of the Wisconsin court had not been raised below.

here to explore these questions so much as to raise them. Extended answers will have to await further scholarship.

THE MAJORITY OPINION

Justice Burton tells us that a parent may not be deprived of the custody of his child unless the parent is personally served with process within the state. For this proposition he cites no precedent whatever.²³ On the contrary, even a cursory examination would have disclosed that courts large both in number and respectability had thought otherwise. Many have held that personal jurisdiction of both parents is *sufficient*, even though the child is absent from the state.²⁴ Many have held that presence of the child is sufficient, even though there is no personal jurisdiction over one of the parents.²⁵ But until *May v. Anderson*, no one supposed that personal jurisdiction over both parents was *indispensible* to jurisdiction.

Justice Burton's views are not only without support in precedent, but they will not, in my view, withstand critical analysis. To sustain his position, Justice Burton relied on the rule in *Pennoyer v. Neff*,²⁶ and particularly its application in *Estin v. Estin*,²⁷ where an *ex parte* divorce was held not to cut off the absent wife's rights under a previous support award. The argument is that since the right to custody is "far more precious" than mere money claims, a fortiori custody cannot be denied without personal jurisdiction.

There are several objections to this argument. First, the Court has sapped *Pennoyer v. Neff* of most of its vitality, particularly in cases where practical considerations make its application onerous.²⁸ Secondly,

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23. The cases on which he relies, *Carter v. Carter*, 201 Ga. 850, 41 S.E.2d 532 (1947); *Sanders v. Sanders*, 223 Mo. App. 834, 14 S.W.2d 458 (1929); *Weber v. Redding*, 200 Ind. 448, 163 N.E. 269 (1928), all involved situations where the rendering court had neither personal jurisdiction over the objecting parent nor over the child. Burton's view has been correctly characterized as a "major upheaval." Comment, *Full Faith and Credit to Child Custody Awards*, 5 KAN. L. REV. 77, 81 (1956).

24. For a discussion and analysis, see *Sampson v. Superior Court*, 32 Cal. 2d 763, 197 P.2d 739 (1948). For a collection of the cases see Annot., 9 A.L.R.2d 434 (1950). See also Note, *Jurisdictional Bases of Custody Decrees*, 53 HARV. L. REV. 1024, 1026 (1940).

25. See Annot., 4 A.L.R.2d 7 (1949); cf. *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925). See also *Aufiero v. Aufiero*, 332 Mass. 149, 123 N.E.2d 709 (1955); *Stumberg*, *supra* note 13.

26. 95 U.S. 714 (1877) (personal jurisdiction required to render in personam judgment).

27. 334 U.S. 541 (1948).

28. See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Mullane v. Central*

Pennoyer v. Neff itself excepted cases involving "status,"²⁹ and there is abundant authority treating problems of children generally and custody problems in particular as involving "status."³⁰ While caution is required in dealing with a concept so vague as "status," surely an inquiry is merited into the policy considerations which underlie its repeated invocation.

Objection to the argument is made more cogent by the developments in *ex parte divorce*.³¹ Why is it that personal jurisdiction is not required to sever a spouse's marital ties to his mate but is required to sever (or curtail) a parent's parental ties to his child? There is no logical basis at all on which to differentiate so sharply between the two situations.³² By any calculus, the rights are in substantial parity, both of them "far more precious" than monetary claims. This is not to suggest that the jurisdictional basis for severance of parental ties should necessarily be the same as that for severance of marital ties. It only suggests how unsound it is to say, as the Court has, that *Pennoyer v. Neff* applies with full vigor to the one and not at all to the other.

There are more fundamental objections. In telling us that the parental rights are "far more precious" than monetary claims, the Court makes an appeal which only obscures the problem. The rights of a parent in his child are indeed precious. The parent is a human being in whom parenthood evokes the deepest feelings, needs, and hopes.

Hanover Trust Co., 339 U.S. 306 (1950); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Hess v. Pawloski*, 274 U.S. 352 (1927). See generally Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305 (1951). But see *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957); cf. *Hanson v. Denckla*, 357 U.S. 235 (1958).

29. 95 U.S. at 733-34 (1877). Furthermore, Justice Field defined due process as "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." *Id.* at 734. It might have been well worth while to inquire into the historic usages of equity courts, as distinct from common law courts rendering money judgments, regarding the necessity for personal jurisdiction in custody and similar proceedings. Cf. *Coler v. Corn Exch. Bank*, 250 N.Y. 136, 164 N.E. 882 (1928), *aff'd*, 280 U.S. 218 (1930).

30. See, e.g., *Beckmann v. Beckmann*, 358 Mo. 1029, 218 S.W.2d 566 (1949); *Hersey v. Hersey*, 271 Mass. 545, 171 N.E. 815 (1930); 2 BEALE, CONFLICT OF LAWS §§ 144.1-148.1; Goodrich, *supra* note 11, at 2.

31. For a brief summary of the cases since *Williams v. North Carolina 1*, see *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 421-23 (1957) (dissenting opinion).

32. See *May v. Anderson*, 345 U.S. 528, 541 (1953) (dissenting opinion); *Hartford v. Superior Court*, 47 Cal. 2d 447, 453-54, 304 P.2d 1, 4 (1956).

But the child is also a human being, with feelings, needs, and hopes corresponding to those of the parent. The child, however, has not yet developed those protective devices summarized in the term "maturity" which enable an adult to maintain equilibrium in the face of the emotional battering life inflicts upon him. Thus, the *child's* right to parental care, if anything, is greater than the parent's right to have care of the child. We search Justice Burton's opinion in vain for any awareness of this consideration. On the contrary, by telling us how precious are the rights of the parent, he implies that these rights alone are involved.³³

There is more to it than this. The divorce materially changes the content of the custody right of the respective parents. While the parents live together in marriage, each is able to exercise his right without infringing on the right of the other parent. When the divorce occurs, the parent given custody retains much the same right of custody as before. For the other parent, however, the parental right will be substantially or completely extinguished. This is true no matter which parent has custody of the child and no matter how many times custody is changed. No amount of adjudication, indeed nothing short of the parents' remarrying each other, can change this basic fact. Thus, to speak of the right of custody after divorce as "precious" is, so far as concerns the parent denied custody, to characterize the agony of its severance rather than to describe its content.

Finally, there is no mention by Justice Burton of the parental duties which accompany the parental right. When the family is split by divorce the parents become independent entities, each more or less capable of going his own way and of making a new home for himself. Not so the child. Someone must provide for him, and it remains the

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33. Justice Burton even goes so far as to say that the problem of parental rights is "separated . . . from that of the future interests of the children." *May v. Anderson*, *supra* note 32, at 533. Underlying Justice Burton's analysis seems to be the idea that a parent seeking the custody of his child invariably does so because of his love for the child. Compare with this naive view, Davis, *Children of Divorced Parents—Sociological and Statistical Analysis*, 10 LAW & CONTEMP. PROB. 700, 708 (1944) ("[The child] is, after the divorce, the sole remaining link between the former mates, and consequently serves as the only instrument through which they can express their mutual resentment."); Plant, *Children of Divorced Parents—The Psychiatrist Views Children of Divorced Parents*, 10 LAW & CONTEMP. PROB. 807 *passim*. (1944). Indeed, the parent who most loves the child may be the one who is willing to suffer the loneliness of the child's absence rather than upset the child's life by squabbling over his custody. For an earlier judicial recognition of this problem, see 1 *Kings* 3:16-28.

parents' duty to see that this is done. The parent having custody must provide an approximation of the home which the divorce destroyed; the parent not given custody must so conduct himself as to make the approximation successful. These duties are obviously different from the parental duties arising in an undivided family. Moreover, the duties are more difficult to discharge. They are made so by loneliness, lingering enmity between the spouses and, in the case of the parent not having custody, the lack of recompense arising from the child's companionship.

What has been said is so commonplace as to make surprising the necessity for its mention. But the Court is completely silent on these important points. When the Court speaks of the "precious" parental right, without recognizing that in the case of one parent or the other the right has little or no content, without recognizing that the child has some rights at stake also, and without mentioning parental duties, one has the feeling that the Court simply failed to face the problem squarely. Worse, one must conclude that the Court has ignored the implications which these facts hold for resolving the jurisdictional problem.

THE CONCURRING OPINION

Justice Frankfurter, it will be recalled, placed his decision, not on the want of Wisconsin's jurisdiction to award custody, but on the want of duty in Ohio to honor the award. Thus, superficially at least, he speaks only of full faith and credit and not of due process. Although perhaps subject to fewer infirmities than Justice Burton's opinion, Justice Frankfurter's view seems also subject to serious objections.

In the first place, if the full faith and credit clause is taken literally, it applies to custody decrees as well as to other judicial decrees. It is indeed true that forceful arguments can be made that it should not be so applied. We may grant that in child custody cases, as in other matters of intense local interest,³⁴ full faith and credit perhaps should not be given willy-nilly to all aspects of all sister state adjudications. But to concede that the clause should not be applied inexorably is not to demonstrate that it should not be applied at all. Furthermore, it is not to demonstrate that the policy underlying the clause—interstate stability of established legal relations—has no application to child custody problems.

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34. See, e.g., *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935) (workmen's compensation).

Second, the problems of jurisdiction and full faith and credit are so intertwined as a practical matter that when credit is wholly withheld from a decree, the jurisdictional basis on which it is rendered is simultaneously eroded. What content is there in a power to act if the consequences of its exercise can be avoided simply by taking the child elsewhere? When it is said that the present forum's interest is so great that the judgment of the rendering state is entitled to *no* credit, is it not necessarily said that the rendering state's interest is wholly temporary? When everyone is able to decide a question, surely it is decided by no one.

Finally, while Justice Frankfurter is eloquent about the interests of the state in protecting its children, he is silent about the interest of the child who is the subject of protection. In allowing each state to decide afresh what is good for the child, we assure that the child can be the subject of inconsistent commands, and yet consistency of command is a precept in rearing children. Justice Frankfurter's rule would thus allow a child's domestic environment to be transitory. Even worse, a conscientious court, aware that it will lose control of the situation if the child is permitted to be out of the state, may feel that it has a narrowed choice of alternatives in trying to determine what will be best for the child.³⁵

THE CONSEQUENCES OF THE DECISION

The logical deficiencies in the Court's decision have been suggested. If, as we are told, the life of the law is not logic but experience, it is appropriate to inquire into the consequences of *May v. Anderson*. This examination reveals even greater deficiencies.

Because of the grounds of decision chosen by Justice Burton for the Court, and Justice Frankfurter as the decisive voter, *May v. Anderson*

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35. See *Butler v. Perry*, 210 Md. 332, 123 A.2d 453 (1956), for an illustration of this consequence in particularly heartrending circumstances. In that case, the child's father killed his mother and was sent to prison. The paternal grandparents, residents of Pennsylvania, and the maternal grandmother, a resident of Maryland, each sought the child's custody. A most careful examination was made of the child, of the respective grandparents themselves, and of their economic and domestic circumstances. Both prospective custodians were found suitable, although the Pennsylvania grandparents could offer the child somewhat better material surroundings. Custody was awarded the Maryland grandmother. The Court cited *May v. Anderson* and expressed as the deciding element the fact that if the child were moved to Pennsylvania, Maryland's power to continue control of the situation would be lost. See also Note, 1953 U. ILL. L.F. 644, 647, to the effect that the *May* case will lead the rendering court to withhold the right to have children visit a parent who lives out of state.

can be used and is being used as a double-barrelled weapon for assaulting custody decrees. If the parent attacking the decree was not personally served within the state in the proceeding in which the decree was rendered, then he relies on Justice Burton's jurisdictional language and claims himself not bound.³⁶ He does this even if the child was before the rendering court.³⁷ If the parent *was* before the rendering court, then he relies on Justice Frankfurter's concurrence and claims that the local court should make an independent inquiry regarding the child's custody.³⁸ The results of this instability are manifold. Some of them have already manifested themselves; others are foreseeable.

Divorce Custody Cases

The impact of *May v. Anderson* on divorce custody cases has been to exacerbate the condition created by *New York ex rel. Halvey v. Halvey*.³⁹ In that case the family lived in New York. The wife went to Florida with the children and obtained an *ex parte* divorce containing a custody award in her favor. The husband abducted the children and took them back to New York. In the wife's New York habeas corpus proceeding to obtain custody of the children, the Supreme Court held that New York was not required to enforce the Florida decree's terms because those terms were subject to modification by the Florida court

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36. See cases cited notes 15 & 19 *supra*.

37. See cases cited note 19 *supra*.

38. See *Commonwealth ex. rel. Gregory v. Gregory*, 146 A.2d 624 (Pa. Super. 1958); *Casteel v. Casteel*, 45 N.J. Super. 338, 132 A.2d 529 (App. Div. 1957); *Aufiero v. Aufiero*, 332 Mass. 149, 123 N.E.2d 709 (1955); cf. *Bachman v. Mejias*, 1 N.Y.2d 575, 136 N.E.2d 866 (1956).

39. 330 U.S. 610 (1947). It is not proposed here to add to the voluminous literature on "divisible divorce" otherwise than in connection with child custody. The starting place for "divisible divorce" was, of course, *Williams v. North Carolina*, 317 U.S. 287 (1942), holding that the state in which one spouse is domiciled may grant a divorce to which full faith and credit must be given even though the matrimonial domicile was elsewhere, and even though there was no personal jurisdiction of the other spouse. Subsequent developments cast a queer light on the reasons assigned for the first *Williams* decision. Speaking for the Court, Justice Douglas said, "each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders . . . . Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal." 317 U.S. at 298. With this, compare *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947) and *May v. Anderson*, 345 U.S. 528 (1945) (protection of offspring); *Armstrong v. Armstrong*, 350 U.S. 568, 575 (1956) (concurring opinion) (property interests); *Estin v. Estin*, 334 U.S. 541 (1948) and *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957) (enforcement of marital responsibilities).

itself. According to *Halvey*, it would seem that a custody decree subject to modification in the state where rendered was subject to practical modification in any other state in which the children might subsequently be found.

The logical coherence of *Halvey* is doubtful.⁴⁰ The practical consequences of *Halvey* are certainly not. As Justice Rutledge then feared, the struggle between divorced spouses over the custody of their children has transcended the brutality and irregularity of guerrilla warfare.⁴¹ The child is filched from classroom,⁴² playground,⁴³ public street,⁴⁴ or his home,⁴⁵ transported out of the state and perhaps across country by the abducting parent,⁴⁶ there to be held pending a counter-foray by the other parent. Meanwhile, each parent recruits the assistance of his home court,⁴⁷ sometimes of courts elsewhere,⁴⁸ seeking

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40. The argument ran this way: (1) Full faith and credit requires the enforcing state (New York) to give the foreign decree only such force as it has in the rendering state (Florida); (2) A Florida custody decree is subject to modification in Florida on the basis not only of changed circumstances but also on the basis of facts existing but not presented at the original hearing, and is therefore "not *res judicata* . . . except as to the facts before the court at the time of judgment." 330 U.S. at 613. (3) Therefore, "what Florida could do in modifying the decree, New York may do." 330 U.S. at 614. But one of the facts presented in Florida and *not* subject to modification was that the child was within the protective jurisdiction of the Florida court, however that jurisdiction might from time to time be exercised. The argument in *Halvey* confuses the finality of the disposition with the finality of the assumption of power to *make* a disposition. Perhaps it was a glimmering of this infirmity which led the court to decide *May v. Anderson* the way it did.

41. He anticipated "a continuing round of litigation over custody, perhaps also of abduction, between alienated parents. That consequence can hardly be thought conducive to the child's welfare." 330 U.S. at 619 (concurring opinion).

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

43. *Scott v. Scott*, 227 Ind. 396, 86 N.E.2d 533 (1949).

44. *Casteel v. Casteel*, 45 N.J. Super. 338, 132 A.2d 529 (App. Div. 1957).

45. *Conley v. Conley*, 324 Mass. 530, 87 N.E.2d 153 (1949). A more frequently used device is the refusal to return a child at the end of a visitation period, as occurred in *May v. Anderson*. *State ex rel. Girtman v. Ricketson*, 221 La. 691, 60 So. 2d 88 (1952), *appeal dismissed*, 222 La. 576, 63 So. 2d 3 (1953); *Helton v. Crawley*, 241 Iowa 296, 41 N.W.2d 60 (1950).

46. See *Heard v. Heard*, 323 Mass. 357, 82 N.E.2d 219 (1948). Sometimes the abduction is followed by prolonged concealment. *Lorenz v. Royer*, 194 Ore. 355, 241 P.2d 142 (1952).

47. See *State ex rel. Huhn v. Huhn*, 224 La. 591, 70 So. 2d 391 (1954); *Forbell v. Forbell*, 276 App. Div. 785, 93 N.Y.S.2d 1 (1949), *opinion on remand*, 198 Misc. 753, 103 N.Y.S.2d 242 (Sup. Ct. 1950).

48. See *Little v. Little*, 249 Ala. 144, 30 So. 2d 386 (1947); *cf. Scott v. Scott*, 227 Ind. 396, 86 N.E.2d 533 (1949). See generally Note, U. FLA. L. REV. 337, 342 (1958).

by various procedures⁴⁹ to strengthen his grip on the child and to loosen that of the other parent.

Under the *Halvey* rule, a parent could be advised to stay out of any custody proceeding commenced by the other parent if there appeared any serious chance of an adverse result. He could then resort to self help, get the child before a more friendly court, and hope that the latter would find either "changed conditions" or that the facts were not fully presented in the prior proceeding. Thus, child custody battles between parents receiving good legal advice typically took the form of parallel but inconsistent *ex parte* proceedings in which the opposite sides of the same question were presented in separate actions rather than in one.⁵⁰

But there was some risk in this strategy. If the court which first made the award had a recognized jurisdictional basis for doing so, the parent who stayed away in the first proceeding ran the risk that the second court would honor the prior decree. The second court might do so on one of several grounds: the abducting parent's "unclean hands" in defying the prior decree,⁵¹ the fact that the first court acted on a jurisdictional basis acknowledged by the second court to be superior,⁵² the fact that the prior court's award was not subject to modification except on the ground of changed conditions and no such change appeared,⁵³ or for some other reason.⁵⁴ Moreover, the second court, if it did not feel obligated to enforce the prior award, still might feel obligated not to ignore it. At least there would be lip service to the

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49. See *Walker v. Walker*, 325 Mass. 738, 92 N.E.2d 373 (1950) (special statutory proceedings); *Forbell v. Forbell*, 276 App. Div. 785, 93 N.Y.S.2d 1 (1949), *opinion on remand*, 198 Misc. 753, 103 N.Y.S.2d 242 (Sup. Ct. 1950); *Eddy v. Stauffer*, 160 Fla. 944, 37 So. 2d 417 (1948) (divorce; equity bill); *Sampsel v. Superior Court*, 32 Cal. 2d 763, 197 P.2d 739 (1948) (separate divorces); *Little v. Little*, *supra* note 48.

50. See *Edwards v. Edwards*, 8 N.J. Super. 547, 73 A.2d 759 (Ch. 1950); *cf.* *Commonwealth ex rel. Schofield v. Schofield*, 173 Pa. Super. 631, 98 A.2d 437 (1953). See also, Graves, *Strategy for Children Custody Suits Involving Conflict of Laws*, 2 DUKE B.J. 11 (1951).

51. See Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 357-69 (1953), and cases there cited.

52. See *Lorenz v. Royer*, 194 Ore. 355, 241 P.2d 142 (1952) (state of child's domicile has exclusive jurisdiction); *In the matter of Morgan*, 192 Misc. 352, 80 N.Y.S.2d 472 (Sup. Ct. 1948), *modified on other grounds*, 301 N.Y. 127, 93 N.E.2d 336 (1950) (parties personally appeared in prior proceedings).

53. See *Sappington v. Fort*, 258 Ala. 528, 63 So. 2d 591 (1952); *Lambertson v. Williams*, 61 So. 2d 478 (Fla. 1952); *cf.* *Heard v. Heard*, 323 Mass. 357, 82 N.E.2d 219 (1948).

54. See *McKee v. McKee*, 239 Iowa 1093, 32 N.W.2d 379 (1948), *aff'd*, 241 Iowa 434, 40 N.W.2d 924 (1950) (plaintiff failed to make timely challenge to foreign decree set up by defendant).

prior decree, and that lip service might be enough to decide a close case.⁵⁵

May v. Anderson has eliminated even this risk. Under the view adopted by Justice Burton, the second court is required to ignore the first decree if the parent adversely affected was not a party thereto. This is so, of course, because the first court was without jurisdiction and its decree is a nullity. If this is to be taken as the law, a parent could be advised to stay away from any custody proceeding in which his chances of success appear to be in the slightest degree less than his chances of success in some other court.

Under the Frankfurter view in *May v. Anderson*, the parent has even wider choice. He can appear in the first court, litigate to the bitter end, and if he loses, simply take the child to some other state and start all over again.⁵⁶ In sum, under the majority's rule parents may ignore the courts;⁵⁷ under the rule of the concurrence, they may defy them.

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55. See *People ex rel. Koelsch v. Rone*, 3 Ill. 2d 483, 121 N.E.2d 738 (1954); *Lambertson v. Williams*, 61 So. 2d 478 (Fla. 1952); *McKee v. McKee*, *supra* note 54.

56. Justice Frankfurter's reliance on the proposition that each state must be free to take protective action regarding children within its borders seems misplaced when extended to divorce custody cases. Ordinarily the *parens patriae* doctrine is invoked where the child has been neglected or abused. The public, through some appropriate agency, becomes a party to the proceedings, at least in substance and generally also in form. A more or less disinterested voice on behalf of the child is thus heard. But in the divorce custody cases the "public interest" is not asserted automotively, but rather by a litigating parent whose interests may or may not be the same as the child's; indeed, whether the parent's interests are the same as the child's is the very question before the court. In relying on the *parens patriae* doctrine to withhold full faith and credit to a custody decree in a divorce proceeding, Justice Frankfurter apparently overlooked Cardozo's wisdom in *Finlay v. Finlay*, 240 N.Y. 429, 431, 148 N.E. 624, 625 (1925): "The jurisdiction of a state to regulate the custody of infants found within its territory . . . has its origin in the protection that is due to the incompetent or helpless . . . . For this, the residence of the child suffices, though the domicile be elsewhere . . . . But the limits of the jurisdiction are suggested by its origin. The residence of the child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere, nor for a definition of parental rights dependent on status . . . . Parents so situated must settle their controversies at home. Our courts will hold aloof when intervention is unnecessary for the welfare of the child." It is clear enough that the *parens patriae* jurisdiction is being used as a basis for intervention in controversies between parents. See authorities cited note 58 *infra*. Some courts invoke that jurisdiction with a citation of *Finlay v. Finlay*.

57. Justice Burton purported to reserve decision on cases where one parent evades process or abducts the child: "The instant case does not present the special considerations that arise where a parent, with or without minor children, leaves a jurisdiction for the purpose of escaping process or otherwise evading jurisdiction, and we do not have

In these circumstances, how "precious" is the parental right of custody? What value attaches to a right that is not worth the paper on which it is written? How much is a child protected under a system of rules which encourages his parents to redetermine his custody frequently, forcibly, and extra-legally? It seems quite clear that in its ill-considered efforts to maximize protection of parental rights and to protect the interest of children, the Court has dealt a crushing blow to both.

Adoption

It has been suggested above that the consequences of *May v. Anderson* may extend beyond divorce law.⁵⁸ One body of law which may soon

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here the considerations that arise when children are unlawfully or surreptitiously taken by one parent from the other." *May v. Anderson*, 345 U.S. 528, 535 n.8 (1953).

This seems to be a concession that the Court's formula is too broad to cover the complexities of the problem to which it is addressed. But if the Court means what it says in the body of the opinion, what is saved by the footnote? Personal jurisdiction is personal jurisdiction. To secure it under traditional doctrine, the defendant must be personally served within the state, *Pennoyer v. Neff*, 95 U.S. 714 (1877), or at least domiciled in the state, *Milliken v. Meyer*, 311 U.S. 457 (1940). If something less than this will suffice for personal jurisdiction in a custody case, under the contacts approach of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), what contacts are required that were not present in *May v. Anderson*? Wisconsin was the place of matrimonial domicile, domicile of the husband and children, immediate past domicile of the wife, the place where the divorce cause of action arose, the place where the facts had occurred on which the custody decision was based, and the place where the children were resident before and after rendition of the decree.

The Court's excepting cases where the parent "unlawfully" takes the children really excepts nothing. Until a valid custody decree is entered, both parents have an equal right to the child's custody, and under the Court's rule, no such valid decree is entered unless there be personal jurisdiction over the parent. Hence, under the Court's own rule, the parent not personally served would never make an "unlawful" abduction.

It is difficult to know what is meant by "surreptitiously" taking a child. One man's surreptition is another man's avoidance of breach of the peace. Does the Court mean to say that it will not countenance an "unjustifiable" taking of a child, but will countenance a "justifiable" one?

Finally, we may ask why a parent who deceitfully takes a child from the custody of the other parent is in a worse position, legally or morally, than a parent who, as in *May v. Anderson*, deceitfully keeps a child delivered to him for a visitation.

58. In *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 616 (1947), the Court said it left undecided "whether the State which has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such orders concerning custody as the welfare of the child from time to time requires." Presumably, this is a reference to the power of a state, acting as *parens patriae*, to assume protective jurisdiction over a child. If so, under the laws of many states, the reservation is as broad as the rule announced in *Halvey*. This is so because these states purport to act as

be affected is the law of adoption. This possibility exists, first, because in many situations a divorce custody decree is the foundation for a subsequent adoption proceeding. Secondly, the policy consideration—"precious parental right"—said by the Court to underlie the requirement of personal jurisdiction in custody cases, if it applies at all to adoptions, applies with even greater force since adoption results in total termination of the natural parent's rights in the child.

Adoption is a statutory system designed to provide a new parental relation for a child whose natural parental relation has been destroyed or seriously damaged.⁵⁹ The typical adoption statute provides that the natural parents of the child must consent to his adoption, subject to important exceptions. In almost all of the states one exception is parental abandonment.⁶⁰ A second exception, and one of primary importance in terms of the number of adoptions involved, is that the father of an illegitimate child need not consent to the child's adoption.⁶¹

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parens patriae—that is, "making such orders concerning custody as the welfare of the child from time to time requires," in deciding divorce custody. See, e.g., *Application of Anderson*, 79 Idaho 68, 310 P.2d 783 (1957); *Casteel v. Casteel*, 45 N.J. Super. 338, 132 A.2d 529 (App. Div. 1957); *Bachman v. Mejias*, 1 N.Y.2d 575, 136 N.E.2d 866 (1956); *Aufiero v. Aufiero*, 332 Mass. 149, 123 N.E.2d 709 (1955); Ehrenzweig, *Inter-state Recognition of Custody Decrees*, *supra* note 13 and cases cited therein; Stansbury, *supra* note 13; Comment, 37 CALIF. L. REV. 455, 461 (1949). Indeed, the New York court invoked the *parens patriae* theory in the *Halvey* case itself. See *People ex rel. Halvey v. Halvey*, 185 Misc. 52, 55 N.Y.S.2d 761 (Sup. Ct.), *aff'd per curiam*, 269 App. Div. 1019, 59 N.Y.S.2d 396 (1945), *aff'd mem.*, 295 N.Y. 836, 66 N.E.2d 851 (1946). In any event, the reservation of "temporary" orders would not seem to include the permanent orders involved in adoption proceedings or in pre-adoption proceedings terminating parental rights, discussed in the text following. Moreover, the reservation is not expressly repeated in *May v. Anderson*, though possibly it was so impliedly.

59. See Note, *Improving the Adoption Process: The Pennsylvania Adoption Act*, 102 U. PA. L. REV. 759-63 (1954), for a brief history of adoption in this country and a detailed account of the evolution of the Pennsylvania law, which in its history is fairly typical of most states. For a brief general discussion, select bibliography, and citations to the various state statutes, see LEAVY, *LAW OF ADOPTION* (2d ed. 1954).

60. See Note, *Child Abandonment: The Botched Beginning of the Adoption Process*, 60 YALE L.J. 1240 (1951); Annot., 35 A.L.R.2d 662 (1954).

61. See, e.g., D.C. CODE ANN. § 16-213(b) (Supp. 1958); KY. REV. STAT. ANN. § 199.500 (1955); N.M. STAT. ANN. § 22-2-5 (1935). In most states an unwed mother of an illegitimate child is treated as the child's sole parent not only for the purposes of adoption but for most other purposes as well. However, some courts have recognized that the father of an illegitimate child has some legally protected interest in the child's custody. See *In re Guardianship of Smith*, 42 Cal. 2d 91, 265 P.2d 888 (1954), and cases cited therein. It could be argued that this interest is "precious" enough so that due process requires the consent of, or notice to, the father prior to an adoption of his illegitimate child, at least where he has acknowledged the child. If so, many adoption statutes, and hundreds of adoptions based on them, are jurisdictionally de-

Another recognized exception is that consent is not required from a parent who has been deprived, or at least "permanently" deprived, of the child's custody in a divorce or other proceeding.⁶² Other exceptions include serious neglect of the child⁶³ and failure to perform the obligation of support.⁶⁴

The adoption statutes are based on the premise that local presence of the child, sometimes local domicile of the child, is a sufficient jurisdictional basis on which to proceed.⁶⁵ They require notice to the non-consenting parent, but assume that notice is all that due process requires.⁶⁶ None of them requires that the parent be personally served within the state and, indeed, could not impose this requirement without eliminating abandonment as a ground for dispensing with parental consent.

The threat which *May v. Anderson* poses to these statutory structures, and to the human and social values which they represent, is plain. While the facts of *May v. Anderson* involved divorce only, if a divorce decree depriving a parent of custody is regarded as a nullity because made without personal jurisdiction of the parent, it follows that an adoption resting on the assumed validity of such a decree is also a nullity. This would be the result in adoptions made without

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fective. Furthermore, if personal jurisdiction of the natural parents is to be required for other adoptions, as is discussed in text, it could well be contended that there must be like personal jurisdiction of the father in the adoption of an illegitimate child.

62. E.g., ALA. CODE tit. 27, § 3 (1940); ME. REV. STAT. ANN. c. 158, § 37 (1954); OKLA. STAT. ANN. tit. 10, § 60.6 (Supp. 1957); see Annot., 47 A.L.R.2d 824 (1956).

63. The statutes generally require that the fact of neglect have been previously adjudicated and the parental rights terminated in consequence. See, e.g., ARIZ. REV. STAT. ANN. § 8-103 (1956); DEL. CODE ANN. tit. 13, § 908 (1953); IND. ANN. STAT. § 3-120 (1946); N.Y. DOM. REL. LAW § 111.

64. E.g., COLO. REV. STAT. ANN. § 4-1-6 (1953); MASS. ANN. LAWS c. 210, § 3 (Supp. 1958); ORE. REV. STAT. § 109.324 (1957).

65. See, e.g., CAL. CIV. CODE § 226; DEL. CODE ANN. tit. 13, §§ 906, 907 (1953); MICH. COMP. LAWS § 710.1 (1948); 1 EHRENZWEIG, CONFLICT OF LAWS 86 (1959). An earlier writer has said that local domicile of the child is, or ought to be, required for adoption. See Newbold, *Jurisdictional and Social Aspects of Adoption*, 11 MINN. L. REV. 605 (1927). Neither the cases nor the statutes support him. See Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. CHI. L. REV. 42 (1940); Taintor, *Adoption of Children in the Conflict of Laws*, 15 U. PITT. L. REV. 222 (1954).

66. Presumably, the notice must be as effective as the circumstances reasonably admit. Cf. *Walker v. City of Hutchison*, 352 U.S. 112 (1956); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The notice provisions of some adoption statutes probably do not meet this standard. Cf. Annot., 76 A.L.R. 1077 (1932). Needless to say, compliance with this standard and a requirement of personal jurisdiction in the *Pennoyer v. Neff* sense are two different things.

the consent of a parent previously deprived of custody in a divorce proceeding in which he did not appear.⁶⁷ It might also be the result in adoptions where the non-consenting parent had been deprived of custody for some other reason. If *May v. Anderson* were applied only this far, the consequences would be serious enough. But it does not take great powers of advocacy to make out a case for applying *May v. Anderson* to any adoption proceeding in which the non-consenting parent has not been personally served within the state: if a parent cannot be deprived of the "precious" right of custody without such service, *a fortiori* he cannot be deprived of all legal relationship to the child without being personally served.

Grounds can be found for distinguishing *May v. Anderson*. Probably the best ground is simply that the intensity of the public interest in adoption cases is so much higher than in divorce custody cases that the value of giving the parent the protection of personal service of process is overridden by the value of giving the child a legally unassailable parentage.⁶⁸ I do not suggest that this distinction is particularly logical.⁶⁹ But if the Supreme Court insists on adhering to the personal jurisdiction rule in divorce custody cases, grounds for distinction must be found.⁷⁰

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67. See *In re Adoption of a Minor*, 214 F.2d 844 (D.C. Cir. 1954) (problem raised but decision unnecessary); cf. *Moss v. Ingram*, 246 Ala. 214, 20 So. 2d 202 (1944).

68. Other grounds include the following: (1) Differentiation between the effect to be given a divorce custody decree and a decree entered in a proceeding in which the state asserts an interest in the child's welfare on grounds *other* than the divorce of his parents. As has been noted, many courts treat the two situations as indistinguishable occasions for *parens patriae* jurisdiction. See note 58 *supra*. Judge Cardozo sharply distinguished the two. See note 56 *supra*. In many cases, a line of demarcation can perhaps be observed between welfare of the child as a basis for awarding custody between his parents and welfare of the child as an independent basis of state concern. But the divorce itself and particularly the ensuing custody struggles, frequently produce disturbances in the child which are a sufficient independent basis for state intervention under *parens patriae*. (2) Differentiation could be made between decrees which affect "status" and those which do not—defining the former as including adjudications which have a more or less permanent, as distinct from temporary, character. The trouble with this approach is that the permanency of a decree is only one factor to be considered in evaluating the due process and full faith and credit problems. Another factor is the importance of stabilizing the decree, whether temporary or permanent. Thus, an order divesting a parent of custody because of abuse of the child might be for a temporary probationary period, but during that period it would be vital to assure that the decree was obeyed and recognized.

69. For the reason that the interest in protecting the parent also increases as the consequences of the proposed legal action approach and reach finality.

70. Even if grounds for distinction are found, of course, the familial status of many

This is not a matter *de minimis*. "At the present time some 75,000 adoption petitions are filed annually in American courts, an estimated increase of more than 500 percent over the level of twenty years ago."⁷¹ On the basis of available figures, therefore, it can be estimated that there are roughly *half a million* people alive today whose filial status depends upon adoption. Most certainly a significant percentage of these people were adopted in proceedings in which no personal jurisdiction was obtained of a non-consenting parent. A considerable number were adopted in cases where the non-consenting parent had abandoned the child.⁷² In addition to this harvest of human misery to be reaped on past adoptions is the impending constriction of adoption as an effective device for giving new homes to the children of adversity.⁷³ In the light of these prospects, was Justice Burton correct in suggesting that the issue before him was "narrow"?

Justice Frankfurter's view does not lead to all the difficulties which attend Justice Burton's. But it is not clear where his approach does

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adopted children is now in jeopardy. This follows from the conventions of constitutional law under which a decision today that due process is denied by failure to obtain personal jurisdiction is a decision that such a failure was in the past also a denial of due process. Since the defect is jurisdictional, *res judicata* will not save it. Compare *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), with *McDonald v. Mabee*, 243 U.S. 90 (1917).

71. GELLHORN, *CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY* 241 (1954).

72. I know of no statistical studies on this point. The conclusion is drawn from consultation with social workers in the adoption field, judges having adoption jurisdiction, and lawyers who do adoption work frequently.

73. There is still some controversy about the wisdom of permitting adoptions. Most of it arises from the fact that in the past no adequate investigation was made of the suitability of the prospective adoptive home, a matter which is being remedied in most states. See, e.g., CAL. CIV. CODE § 226; MASS. ANN. LAWS c. 210, § 5A (1955); cf. N.Y. DOM. REL. LAW § 112; PA. STAT. ANN. tit. 1, § 1 (Supp. 1958). Reliable information about the social and psychological consequences of adoption is almost non-existent. The Children's Bureau of the U.S. Dept. of Health, Education & Welfare is presently cooperating with the State of Florida in a long term study of the subject. It is too early to make trustworthy statements on the matter. On the other hand, legal impediments to adoption—flowing from due process problems or otherwise—frequently result in long term institutionalization of children. See, e.g., Note, *Termination of Parental Rights to Free Child for Adoption*, 32 N.Y.U.L.Q. 579 (1957). There is evidence that such institutionalization has a damaging effect on children, how great an effect being the subject of study and controversy. The Division of Research of the Children's Bureau is keeping track of the work on the subject. In any case, adoption is clearly a social experiment for legislative management. The judiciary should take care not to impose, in the name of due process, laboratory conditions which make the adoption experiment impossible.

lead in connection with adoption. The following questions, among others, present themselves:

(1) If a custody decree is not entitled to full faith and credit, may it still be treated as a valid substitute for parental consent under an adoption statute which makes unnecessary the consent of a parent who has been deprived of custody?

(2) If the custody decree may be treated as valid in the forum granting the adoption, must the adoptive decree itself be given full faith and credit elsewhere? In the state where the non-consenting parent is domiciled? In the state where the child was domiciled in the immediate past?⁷⁴

(3) Is *any* adoption decree entitled to full faith and credit? Is it entitled to such credit in the state where the non-consenting parent is and has been domiciled? In the state in which the child was domiciled in the immediate past? Does this mean that the rendering state has a supervening interest in permanently cutting off rights to a child within its borders, as in adoption, but only a coordinate interest in temporarily cutting off such rights, as in divorce custody?

(4) What faith and credit should be given to a temporary order terminating parental custody for a fixed or indeterminate trial period, as is sometimes done in guardianship and juvenile court proceedings?

(5) If these various types of orders are to be given different faith and credit, on what bases can classification be made? In view of the infinite variety of fact situations in custody matters, how stable could a classification system be?

Juvenile Court Jurisdiction

We have seen that *May v. Anderson* carries serious implications for the law of adoption. Its implications for juvenile courts and juvenile law are similar and hardly less serious, for the types of orders involved and the due process and full faith and credit problems are legally quite alike.⁷⁵

All of the states have specialized procedures, in many instances specialized courts, for handling a cluster of problems relating to children. The court in which these procedures apply is known as the

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74. See *Moss v. Ingram*, 246 Ala. 214, 20 So. 2d 202 (1944).

75. The saving language in *Halvey* discussed in note 58 *supra*, if it survives *May v. Anderson*, would forfend some of the problems regarding juvenile court orders, but how many and why is not clear. See notes 58 & 68 *supra*.

juvenile court. From state to state there are many differences in the form and substance of juvenile jurisdiction, but everywhere the jurisdiction extends in greater or lesser degree to two interrelated problems: first, juvenile delinquency,⁷⁶ which includes antisocial behavior by the child—usually conduct which would be criminal if done by an adult, but also including behavior indicating incipient criminality;⁷⁷ second, child neglect, sometimes called child dependency,⁷⁸ which includes parental conduct detrimental to the child—usually cruelty or abandonment, but also including failure to educate the child or to provide him with a necessary minimum of food, clothing, shelter, or care.⁷⁹

The juvenile court is thus the legal institution through which society most commonly comes to grips with the monumental problems of juvenile delinquency and parental failure. The historic roots of this institution have never been thoroughly studied.⁸⁰ In part, the creation of the juvenile court was the culmination of a long reform movement directed at the harsh consequences of treating youthful law violators in the same way as adult offenders. In part, the juvenile court was the successor to the historic powers of courts of equity to intervene, on behalf of the sovereign as *parens patriae*, to protect a child from parental abuse, neglect, or indifference. While the first of these, the supplanting of criminal procedure, was directed primarily at delinquency, and the second, the accession to the powers of equity courts, was directed at

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76. For a brief general discussion along with the text of the 1949 Revision of the Standard Juvenile Court Act [hereinafter cited as the Standard Act] drafted by the National Probation and Parole Association, see SUSSMAN, *JUVENILE DELINQUENCY* (1950). For a brief critical discussion, see Herman, *Scope and Purposes of Juvenile Court Jurisdiction*, 48 J. CRIM. L., C. & P. S. 590 (1958). For more extended discussions, see RUBIN, *CRIME AND JUVENILE DELINQUENCY: A RATIONAL APPROACH TO PENAL PROBLEMS* (1958); TAPPAN, *JUVENILE DELINQUENCY* (1949). For a select bibliography, see NATIONAL PROBATION & PAROLE ASS'N, *SELECTED READING LIST IN DELINQUENCY & CRIME* (1958).

77. E.g., ARIZ. REV. STAT. ANN. § 8-201 (1956); IOWA CODE § 232.3 (1958); N.H. REV. STAT. ANN. § 169:2 (1955); STANDARD ACT § 7.

78. The legal literature on child neglect is limited. The literature on social work and related fields is voluminous. The Children's Bureau has prepared bibliographies, and brief discussions can be found in the Social Work Yearbook, an annual publication.

79. E.g., ARK. STAT. ANN. § 45-203 (1947); MD. ANN. CODE art. 26, § 52 (1957); NEV. REV. STAT. § 62,040 (1957); STANDARD ACT § 7.

80. There are a number of brief accounts. See, e.g., LOU, *JUVENILE COURTS IN THE UNITED STATES* ch.2 (1927). For more recent developments, see U.N. DEP'T OF SOCIAL AFFAIRS, *COMPARATIVE SURVEY ON JUVENILE DELINQUENCY* pt. I, North America (1952) (Paul W. Tappan). For a comprehensive study of the development of child welfare legislation in a single state see O'BRIEN, *CHILD WELFARE LEGISLATION IN MARYLAND, 1634-1936* (1937).

child neglect, the two are necessarily interwoven.⁸¹ At present, juvenile courts are the subject of searching re-examination and debate. As a leading student of the subject has said, "Children's courts are still today in the process of evolution throughout [the country] as to methods, procedures, goals, jurisdictional coverage, quality and adequacy of personnel, and other related matters."⁸²

It is beyond the scope of discussion here to consider the manifold issues presented by juvenile delinquency and child dependency or the efficacy and wisdom of the present juvenile court procedures. It is enough to say that all responsible authorities agree that there are important classes of cases where the juvenile court must intervene to restrict or terminate the rights of the parent in his child. That intervention may occur in one of the following ways:

(1) The child may be institutionalized.⁸³ In the case of a delinquent, the institution may be a detention facility (temporary detention pending disposition of his case), a training school, or a forestry camp, a hospital if the child is mentally disturbed or mentally retarded, or some other sort of institution. In the case of a neglected child, the institution may be a foundling home, orphanage, school, or hospital.

(2) The child may be placed in a foster home.⁸⁴ This disposition

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81. They are interwoven legally because the powers are generally vested in a single court and because the statutory definitions of "delinquency" and "child neglect" overlap. They are interwoven factually because of the following casually related circumstances. (1) In many delinquency cases, an investigation of the child's background will disclose that he has also been subject to parental misfeasance amounting to child neglect. (2) The antecedent parental failings are frequently the cause of the delinquency. See GLUECK, *UNRAVELLING JUVENILE DELINQUENCY* (1950). (3) Because of (1) and (2), a child neglect proceeding early in the child's life may make unnecessary a delinquency proceeding later on. (4) The ultimate objective in both types of proceedings is to maintain the child as a socially useful and acceptable human being, and at the same time to protect society against the consequences of the child's behavior and/or the failings of his parents. In the light of these considerations, it seems erroneous to suggest that the *parens patriae* concept has no relevance to juvenile delinquency, as distinct from child neglect. See Note, *Misapplication of the Parens Patriae Power in Delinquency Proceedings*, 29 IND. L.J. 475 (1954). It is, of course, something else again to suggest that, under whatever name the state intervenes, "parents should not be deprived of the custody of their children unless it is conclusively proved in the juvenile court that by reason of their incompetency the best interests of the child require state intervention." *Id.* at 484.

82. U.N. DEPT OF SOCIAL AFFAIRS, *op. cit. supra* note 80, at 15. For an example of this evolution, see casenote, 45 VA. L. REV. 436 (1959).

83. E.g., MONT. REV. CODES ANN. § 10-611 (1947); N.J. REV. STAT. § 2A:4-37 (1953); VA. CODE ANN. §§ 16.1-197 to -202.9 (Supp. 1956); STANDARD ACT § 18(1).

84. E.g., MISS. CODE ANN. § 7185-09 (1942); UTAH CODE ANN. § 55-10-30 (1953); W. VA. CODE § 4904(61) (1955); STANDARD ACT § 18(1).

is generally encountered with respect to neglected children but is occasionally employed for delinquents. The foster home is a private home, usually licensed or regulated by public authority, into which the child is taken on a short or long term basis. The child lives in the community, goes to school, and otherwise conducts himself as any other child. Depending on the skill and compassion of the foster parents, he may become an integral part of the foster home unit.

(3) The child may be legally severed from his parents as a preliminary to some other disposition, typically adoption or foster home placement.⁸⁵ This disposition, usually referred to as "termination of parental rights," is frequently employed in abandonment cases, especially of infants or very young children.

(4) The child may be required to undergo special treatment of some sort, either in a residence institution or on an "out-patient" basis.⁸⁶ For example, corrective surgery, psychiatric or psychological care, dentistry, or some other sort of treatment may be ordered where the parent is unwilling to provide it.

(5) The child may be placed under supervision but allowed to remain in his own home.⁸⁷ Supervision of delinquents is usually called "probation"; supervision of neglected children is usually known as "protective supervision" or by a term of similar import. In connection with the supervision, conditions and limitations may be imposed on the child's conduct (such as that he refrain from associating with a certain gang) or on the parent (such as that the child be kept in school and not sent out to work).

There are other types of disposition in some states and communities, and obviously the same child may be the subject of different successive dispositions. But the foregoing sufficiently describes juvenile court practice for present purposes.

It should be clear that the first three types of disposition—institutionalization, foster home placement, and termination of parental rights—necessarily involve a deprivation of parental custody. It is also clear that the fourth type of disposition—special treatment—may involve deprivation of parental custody, and that the fourth and fifth types of

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85. *E.g.*, DEL. CODE ANN. tit. 13, §§ 1101 to 10 (1953); KAN. GEN. STAT. ANN. § 38-303 (1949); WASH. REV. CODE § 13.04.090 (1956); STANDARD ACT § 23.

86. *E.g.*, ARIZ. REV. STAT. ANN. § 8-235 (1956); MINN. STAT. § 260.11 (1957); TENN. CODE ANN. § 37-258 (Cum. Supp. 1958); STANDARD ACT § 18(3).

87. *E.g.*, N.C. GEN. STAT. § 110-29 (1952); OHIO REV. CODE § 2151.35 (Page Supp. 1958); R.I. GEN. LAWS ANN. §§ 14-1-32 to -33 (1956); STANDARD ACT § 18(1).

disposition in any case represent a curtailment of the parental sovereignty which is otherwise a concomitant of custody. Finally, it should be evident that the success of any of these dispositions will be jeopardized or frustrated unless the (by hypothesis) damaging or disruptive conduct or presence of the parent is foreclosed.

The jurisdictional basis on which the juvenile courts operate is the presence of the child.⁸⁸ The domicile of the child, the domicile of the parents, and the presence of the parents are assumed by all the statutes to be immaterial. Most of the statutes require or contemplate notice to the parents in any proceeding concerning the child, but all of them assume that notice alone, and not personal jurisdiction, sufficiently affords the parents due process.⁸⁹

It would be redundant to demonstrate the number of familial and societal relationships embraced in this complex structure.⁹⁰ It cannot number less than thousands and may run into hundreds of thousands. But a few hypothetical cases, drawn from the daily experience of anyone in the field, will illustrate the social and legal problems better than a statistical broadside.

Case A: It is harvest time in the truck garden district of an eastern state. Hundreds of migratory workers have come in to pick the crop. They have brought their families and live in barracks, shacks, trailers, and other temporary accommodations. None of them is in the telephone book, the voter registration lists, the local unemployment rolls, or is known to the local postmaster. The contractor who arranged their employment and the farmer who hired them have incomplete, inaccurate lists of the names of those able to work, and no record at all of young children. The season ends, the migrants move on to destinations unknown, leaving no forwarding address with anyone. A three year old boy is found wandering around the deserted trailer camp. The boy

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88. See *Lindsay v. Lindsay*, 257 Ill. 287, 100 N.E. 892 (1913) (leading case); cf. *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624 (1925). For statutory language, see, e.g., CAL. WELFARE & INST'NS CODE § 700; D.C. CODE ANN. § 11-906 (1951); KY. REV. STAT. ANN. § 208.020 (1955); STANDARD ACT § 7.

89. E.g., FLA. STAT. ANN. § 39.06 (1957); LA. REV. STAT. § 13:1575 (1950); ORE. REV. STAT. §§ 419.506 to .514 (1957). For a collection of cases, see Annot., 76 A.L.R. 242 (1932). On the sufficiency of notice, see note 66 *supra*. For an excellent discussion of procedural due process in delinquency proceedings, see Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957).

90. The Children's Bureau regularly publishes statistical summaries of juvenile court business, based, however, on incomplete returns from the roughly 2,500 juvenile courts throughout the country. The data in these summaries is necessarily limited but does reveal the enormous dimensions of the problem.

is in good health, of normal intelligence and utterly unidentifiable. He is turned over to the local police and by them to the Humane Society.

Case B: The John Smiths live in a small rented house in a town in the Pacific Northwest. He is a laborer, she a housewife. They have three children. Unemployment is prevalent locally and the Smiths decide to head for Los Angeles in hopes of finding something better. Their oldest child, a girl of 10, has been ill and the Smiths conclude it would be unwise to take her on the journey. They prevail on their neighbors to take in the girl until they "get a place and send the money for her bus ticket." The Smiths leave. Two months go by. The neighbors hear nothing from the Smiths and consult the local welfare department. The department tells them to hold on for a while. A month later, the Smiths send a card, bearing no return address, saying "Things slow here too. Will send money as soon as we can." Six months go by. There is no further word from the Smiths. The neighbors now come into the local welfare department again. Interviews with the child indicate that she is badly upset by the disappearance of her parents but that she seems to be gaining a growing affection for the neighbors with whom she is living.

Case C: The Browns lived in a midwestern state. They were married 17 years ago and had a boy, John, who is now 15. Six years ago the Browns were divorced in a default proceeding in which the mother was given John's custody and the father ordered to pay for his support. The father made these payments for six months, then moved to another state and since then has neither corresponded with the mother nor sent her the support payments. Several years ago the mother remarried. Relations between John and his stepfather were never good and deteriorated. John began to hang around with a gang, was involved in a car theft, was caught and put on probation. He violated his probation by "borrowing" a car and going joy riding, and was thereupon sent to the state training school. After a year in the training school, he was paroled to a foster family with whom he has lived for the last three months. He is in public school, has kept out of trouble and seems to be making a fairly good adjustment. Last month his father heard from a relative what had happened to John. His father still lives in the other state, has remarried and says he wants his son back "so we can be pals again." The last time his father saw John was when John was nine.

If anyone unfamiliar with the field suspects these illustrations to be exaggerations, let him go down to the local juvenile court or wel-

fare department and find out for himself. The problems which are involved in the hypothetical cases and thousands like them are the problems with which the ranks of public servants in the line—the trial judges, probation officers, social workers—have to contend. What sort of generalship is to be found in *May v. Anderson*? Each one of these situations presents a pressing social and human problem requiring effective solution. None of these problems can be effectively solved under the requirements of the personal jurisdiction rule. In none of them, moreover, is the exaltation of “precious” parental rights the exclusive, or even a very helpful, guide to action.

CONCLUSION

May v. Anderson was decided on grounds unnecessary under the facts presented, untenable in the precedents decided, and uncomprehending of the consequences possibly to follow. In divorce custody cases its disruptive effects are already being felt throughout the land. Its rationale can be extended to adoption law and to juvenile law, where, if applied, it will have an even more disruptive effect. The decision is surely a mistake. It needs judicial re-examination.