

# PARENTAL KIDNAPPING CRIME ACT

## Introduction

## Background

Criminal parental kidnapping statutes, also called criminal custodial interference, have been enacted by 50 states and the District of Columbia. These statutes are designed to stop one parent (and those who assist the parent) from taking a minor child from the custodial parent. The intent of these statutes is twofold: to deter parental kidnapping and to punish those who, without good cause, destroy the bonds between parent and child.

Because each state legislature has enacted its own law, statutes vary from state to state. This variation in state laws has created problems in investigating and prosecuting abductions, particularly in interstate cases. Law enforcement agencies, in two recent surveys, identified variation in the terms of custodial interference statutes as a significant obstacle to the recovery and return of parentally abducted children. Appellate case law has highlighted gaps and inconsistencies in many statutes that have allowed abductor-parents to evade responsibility for their wrongful acts. This prompted one judge to complain about the Balkanization of the administration of criminal justice among multiple jurisdictions.

To facilitate the investigation and prosecution of parental kidnapping cases, the Obstacles to the Recovery and Return of Parentally Abducted Children Project recommended enacting a uniform state parental kidnapping statute. A proposed uniform law is attached for consideration by state legislatures. The statute should enjoy strong bipartisan support.

The statute and commentary were drafted by Janet Kosid Uthe, legal consultant to the Parental Abduction Training and Dissemination Project at the ABA Center on Children and the Law. Co-editors were Linda K. Girdner, project director, and Patricia M. Hoff, legal director. This project was supported by Grant No. 93-MC-CX-0002 from the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

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## Shortcomings of current law on parental kidnapping

A parent who wrongfully takes or keeps a child may escape criminal liability for his or her actions if the criminal custodial interference statute in effect in either the state from which the child is removed or the haven state does not encompass the specific conduct that has occurred. Some states have so narrowly defined the crime that current state laws fail to address the full variety of circumstances that actually constitute parental kidnapping. For example, some states do not treat parental abduction as a criminal offense if the custody order being violated was issued by a court of another state, even if the left-behind parent was a resident of the state from which the child was removed at the time of the abduction. Numerous states have not criminalized the frequent kidnappings that occur before a custody order has been issued.

Other states criminalize abduction (or elevate the crime to felony status) only if the child is removed from the jurisdiction. In evaluating such a case for investigation, there must be evidence that the child has been removed from the jurisdiction. In cases of concealment of the child, such evidence is not available at the outset of the case. Since the elements of the crime are not met at the outset, no investigation is commenced and no evidence of removal of the child from the jurisdiction is developed. Thus, cases involving the successful concealment of a child, which are the most serious and disruptive of parental abductions, can be those least likely to receive law enforcement assistance.

Law enforcement efforts in pursuit of abductor-parents are hampered when an abductor crosses state lines. Because the range of prohibited behavior is frequently limited to the taking of a child from the state, it is unlikely that the abductor will be criminally charged under the laws of the haven state. Where the initial taking was lawful (such as during the exercise of visitation) and the subsequent withholding of the child from the custodial parent at the conclusion of the visit is the wrongful act, neither jurisdiction may be able to prosecute. The state in which the custodial parent lives cannot prosecute because the initial taking was lawful and the unlawful acts occurred in another jurisdiction. The state in which the child is being withheld from the custodial parent cannot prosecute because the child has not been removed from that jurisdiction.

On occasion, extradition might be pursued to require the return of the abductor to the state from which the child was taken. If extradition is accomplished, there is no assurance that the abducted child will be returned to the custodial parent as return of the child is beyond the scope of most criminal parental kidnapping statutes.

Interstate investigations also encounter complications where investigators must pursue labor intensive investigative methods such as tracing financial records across state lines. Court orders to produce records may not always be honored by financial (and other) institutions outside of the jurisdiction issuing the court order.

Interstate consistency in criminal parental kidnapping laws should produce greater cooperation between law enforcement officers and prosecutors across the country as familiarity with uniform concepts and procedures grows. This will help overcome another real shortcoming of existing practice: the failure to enforce these laws consistently or uniformly.

#### Proposed uniform law

What can be done to achieve the goals common to the diverse parental kidnapping statutes in effect across the country? A uniform statute could be enacted by every state. This would deprive abductors of safe havens. Interstate consistency in criminal parental kidnapping laws would also remove an obstacle to cooperation among law enforcement officers across the country in locating abducted children, and would help prosecutors bring abductors to justice wherever they are found. An interstate network of law enforcement officers and prosecutors committed to enforcing the same parental kidnapping law could have a remarkable educational and deterrent effect on would-be abductors.

#### Summary of "Parental Kidnapping Crime Act"

The proposed "Parental Kidnapping Crime Act" combines into a comprehensive statute the best features of laws in effect around this country.

The Act consists of nine sections. Section 1 contains definitions of terms used in the statute. Section 2 sets forth the prohibited acts. Section 3 states the jurisdictional reach of the statute. Section 4 addresses bail. Section 5 provides defenses. Section 6 provides penalties for violating the Act, including restitution. Section 7 establishes procedures for the return of abducted children and to "pick up" children when they are at risk of being abducted. Section 8 immunizes law enforcement officers for actions they take under this Act. Section 9 is an evidentiary provision.

The proposed Act is intended as a substitute for existing laws that cover the issues addressed in this statute. Even states that have recently enacted or revised parental kidnapping statutes should reconsider their laws in light of this proposed statute. If state law is broader in scope than the proposed Act, then the provisions of this Act should replace only similar provisions, leaving in place additional remedies in state law.

A uniform approach to the nationwide problem of parental kidnapping will send this message to parents: There is no safe haven for child abductors. Every state treats child abduction as a punishable offense according to the same terms. Faced with predictable criminal consequences for parental kidnapping, more parents are apt to seek civil solutions to their child custody problems, which is in the best interests of children.

## PARENTAL KIDNAPPING CRIME ACT

### Section 1. Definitions

For the purposes of this Act:

- (1) "Child" means a person under the age of 18.
- (2) "Court order/custody order/custody determination" means any decree, judgment, or order, whether permanent or temporary, initial or modification, issued by a court of competent jurisdiction of this state or another state consistently with the Parental Kidnapping Prevention Act, Title 28 U.S.C. 1738A, which affects the custody or visitation of a child. An order once made shall continue in effect until it expires, is modified, rescinded or terminates by operation of law .
- (3) "Keeping/withholding" means retaining physical possession of a child, whether or not the child resists or objects.
- (4) "Lawful custodian" means a person, guardian, or public agency having a "right of physical custody" of a child.
- (5) The term "person" includes, but is not limited to, a parent, agent of a parent, or person acting as a parent.
- (6) "Right of physical custody" means the right to physical possession of a child which may arise (1) by order of any court of competent jurisdiction, including an order for sole physical custody, or joint or shared physical custody, or (2) by operation of law when there is no court order.

Whenever a public agency takes protective custody or jurisdiction of the care, custody, control, or conduct of a child by statutory authority or court order, that agency is a "lawful

custodian" of that child. In any subsequent placement of the child, the public agency continues to be a "lawful custodian" of that child until the public agency's right of physical custody is terminated by court order or by operation of law.

A parent whose parental rights have been terminated by court order is no longer a lawful custodian and no longer has a right of physical custody.

(7) "Visitation" means the time for access to the child allotted to any person by court order.

#### Section 2. Prohibited Acts

(a) A person shall not take, entice away, keep, withhold, or conceal any minor child from a parent, or other lawful custodian, or person having visitation rights, and substantially deprive the other of his or her right of physical custody or visitation. This section shall apply whether the right of physical custody (sole, joint, or shared) arises from a custody order or, in the absence of a custody order, by operation of law.

(b) A person shall not knowingly violate the terms of an order prohibiting the concealment of a child or the removal of a child from the jurisdiction.

(c) A person shall not, before or during the commission of an offense prohibited by this section and with the intent to promote or facilitate the offense, aid or abet another in the planning or commission of the offense.

(d) Nothing contained in this Section shall be construed to limit the court's contempt power.

#### Section 3. Extraterritorial Jurisdiction/Continuing Offense

(a) Any violation of this section by a person who was not a resident of, or present in, this state at the time of the alleged offense is punishable in this state, whether the intent to commit the offense is formed within or outside of this state, if:

(1) the child was a resident of, or present in, this state at the time the child was taken, enticed away, kept, withheld, or concealed; or

(2) the child is found in this state; or

(3) a parent, other lawful custodian, or person having visitation rights was a resident of this state at the time the child was taken, enticed away, kept, withheld, or concealed.

(b) The offenses enumerated in this section are continuous in nature, and continue for as long as the child is kept, withheld, or concealed.

(c) The keeping, withholding, or concealing on or after the effective date of this Act of a child who was taken, enticed away, withheld or concealed prior to the date of this Act shall be punishable under this Act.

#### Section 4. Bail

When a person is arrested for an alleged violation of this section, the court, in setting bail, shall consider whether the child has been returned to the lawful custodian or person having

visitation rights and, if not, shall consider whether there is an increased risk that the child may not be returned, or that the defendant may take the child and flee the jurisdiction, or, that the defendant, by flight or concealment, may evade the authority of the court.

## Section 5. Defenses

(a) In addition to any other defense provided by state law, it shall be an affirmative defense that:

(1) The defendant's purpose was to protect the child, the child's sibling, or himself or herself from imminent physical harm, that the belief in the existence of the imminent physical harm was held in good faith and was reasonable; or that the defendant was fleeing a pattern of domestic violence; and

(i) Within 30 calendar days of the taking, enticing away, keeping, withholding or concealment of a child, the defendant makes a report to the [police department], [sheriff's office], [prosecutor] in the county in which the child was residing before such acts. The report shall include the present address and telephone number of the child, the name of the person taking the action, and the reasons for such acts; and

(ii) Within 45 calendar days of such action, the defendant files an action for a custody determination in a court which has jurisdiction consistent with the Parental Kidnapping Prevention Act, 28 U.S.C. 1738A and gives notice in accordance with state law. For purposes of the application of this section, it is sufficient if filing occurs within 45 days provided notice is given within the time limits provided by state law;

2. The address and telephone number of the person and the child provided to the [police department], [sheriff's office], [prosecutor] as specified in subsection 1 shall remain confidential unless released pursuant to state law or, in the absence of such state law, subject to appropriate safeguards to ensure the safety of parent and child.

(b) The complainant had, prior to the defendant committing the acts giving rise to the alleged offense, for a protracted period of time, failed to exercise his or her rights of custody or visitation, provided that such failure was not the direct result of the defendant's denial of access to the child.

(c) The acts giving rise to the charges were consented to by the complainant.

(d) A custody order obtained after the commission of an offense under this section shall not constitute a defense to a crime charged under this section.

## Section 6. Penalties

(a) Violation of this Act shall be a felony and shall be punishable by imprisonment in the state prison for a period of [two years] or fine of [\$5,000.00] [\$10,000.00] or both.

(b) The court may reduce the offense to a misdemeanor and impose sentence as for a misdemeanor, if, after consideration of the circumstances of the offense including the factors in aggravation and mitigation, he or she finds that the interests of justice so require.

(c) The court shall have the authority to suspend the sentence and to place the defendant on probation.

(d) The court may enhance the penalty for each of the following aggravating factors established at trial or at a sentencing hearing. In addition to any other aggravating factors otherwise established by state law, the court shall consider whether the defendant:

(1) Abused, neglected, or abandoned the child during commission of the offense;

(2) Inflicted or threatened to inflict physical harm on a parent, lawful custodian of the child, or on the child during commission of the offense;

(3) Committed the abduction while armed with a dangerous or deadly weapon;

(4) Took, enticed away, kept, withheld, or concealed the child outside of the United States;

(5) Exposed the child to a substantial risk of illness or physical injury during commission of the offense;

(6) Encouraged the child to participate in the abduction or in the planning of the abduction;

(7) Inflicted emotional harm on the child by telling the child derogatory lies about the other parent or telling the child the other parent was dead;

(8) Threatened or warned the child not to be cooperative with the other parent regarding visitation or custody;

(9) Substantially altered the appearance and/or the name of the child during commission of the offense;

(10) Denied the child the education or training appropriate for the child during commission of the offense;

(11) Kept, withheld, or concealed the child for an extended period of time; or

(12) Previously abducted the child or threatened to abduct the child; or

(13) Has not returned the child to the lawful custodian, or has refused to divulge the whereabouts of the child.

(e) The court may mitigate the penalty for each of the following mitigating factors established at trial or at a sentencing hearing. In addition to mitigating factors otherwise established by state law, the court shall consider whether the defendant:

(1) Returned the child unharmed and prior to arrest or issuance of a warrant for arrest, whichever is first;

(2) Provided information leading to the child's safe return;

(3) Has no prior criminal record;

(4) Acted in response to abuse by the other parent or a cohabitant of either the defendant or of the child, or child's sibling.

(f) Factors in aggravation and mitigation shall be proved by [a preponderance of the evidence] [clear and convincing evidence].

(g) Conditions of probation may include, but are not limited to:

(1) Probationary supervision;

(2) Compliance with court orders, including a no contact order;

(3) Jail time;

(4) Participation in a counseling program;

(5) Participation in a mediation program if the defendant is amenable and the other parent or lawful custodian consents; and

(6) Community service in lieu of incarceration in jail if allowable under state law.(h) Restitution:

In addition to other penalties for violation of this Act, a court shall order a violator to pay restitution for reasonable expenses incurred by any person, organization, or government entity in locating and securing the return of the child unless the violator establishes that such order would be clearly inappropriate. An award made pursuant to this section shall constitute a final judgment and shall be enforceable as such.

#### Section 7. Recovery of the Child

(a) A law enforcement officer shall take a minor child into protective custody when:

(1) It reasonably appears to the officer that the child is a missing or abducted child or that any person is likely to conceal the child, flee the jurisdiction with the child, or by flight or concealment evade the authority of the court; or

(2) A minor child is found in the company, or under the control, of a person arrested for an offense under this Act.

(b) When a law enforcement officer takes a child into protective custody pursuant to Section A the officer shall do one of the following:

(1) Release the child to the lawful custodian or person having visitation rights unless it reasonably appears such placement would cause the child to be endangered, or it reasonably appears that such person is likely to conceal the child, flee the jurisdiction with the child, or, by flight or concealment, evade the authority of the court;

(2) Return the child as ordered by a court of competent jurisdiction; or

(3) Release the child to the social services agency responsible for arranging shelter or foster care until a hearing can be held in a court of competent jurisdiction.

#### Section 8. Law Enforcement Immunity

A law enforcement officer and a prosecutor and his or her representatives shall not be liable for actions taken pursuant to this Act.

#### Section 9. Evidence

In a prosecution under this section, existing provisions of law prohibiting the disclosure of confidential communications between husband and wife do not apply, and both husband and wife are competent to testify for or against each other as to all relevant matters.

#### Section-by-Section Analysis and Commentary

##### Comment to Section 1. Definitions

1. In most jurisdictions, children reach the age of majority at eighteen. For that reason, children who have not yet attained eighteen years of age are covered by this statute.
2. The definition of court order/custody order/custody determination is intended to be consistent with the usage in the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. 1738A. See recommendations in *Obstacles to the Recovery and Return of Parentally Abducted Children*, pp 3-101 - 3-102 (para. 15), Linda K. Girdner & Patricia M. Hoff, eds., Office of Juvenile Justice and Delinquency Prevention, Washington, D.C. (1994). The terms are intended to be interpreted broadly enough to cover other court-ordered, custodial arrangements allowed under state law, such as parenting plans. An elastic definition is important in an area of law where traditional concepts of custody and visitation rights are giving way in some states to terminology focused on parental responsibilities toward the child. Prosecutors and judges should apply this statute flexibly to follow emerging legal trends.
3. This Act is designed to prohibit interference with the custody of any person committed under judicial warrant, any neglected, dependent, or delinquent child, mentally defective or insane child, or any other incompetent child entrusted to another's custody by authority of law.
4. "Lawful custodian" refers to a person or public agency with a right of physical custody.
5. The prohibited acts in Section 2 are intended to prohibit interference with the lawful exercise of physical possession of the child by a person with custody, whether sole, joint or shared, or visitation rights granted by court order. It is also intended to prohibit interference with custody rights that arise by operation of law. Section 2 is not intended to protect rights of legal custody (the right to participate in parenting decisions).
6. The term, "person" includes, but is not limited to, a parent, or agent of a parent, or person acting as a parent. Under certain circumstances, it may be appropriate to charge abductions committed by other family members under this section. Although, ordinarily, the general kidnap statutes would be preferable where the abductor is a nonfamily member, there may be circumstances in which it is appropriate to charge nonfamily members under this section.



7. The term, "a right of physical custody arising by operation of law" is intended to include the equal custodial rights of each parent in the absence of a custody order where those rights are provided by state law. Married parents have equal custody rights prior to divorce, and neither parent may unilaterally remove, retain, or conceal a child without violating the other's equal custodial rights.

The term "a right of physical custody arising by operation of law" is intended to include those rights provided by state statutes to parents of children born out of wedlock. Some state statutes presume that, when the parties have never been married to each other, the mother has custody of the child unless a valid court order states otherwise. Other states address this issue within the context of Uniform Parentage Act presumptions.

The prohibitions of Section 2 are intended to protect the rights of parents of children born out-of-wedlock to the extent that the otherwise applicable state laws provide such custody rights. It is recommended that states without clear legislative guidance directing whether and when a father of a child born out-of-wedlock acquires a "right to physical custody" revise their civil family law to provide such guidance.

8. A parent whose parental rights have been terminated by court order is no longer a lawful custodian and no longer has a right of physical custody. A parent whose parental rights have been so terminated and who abducts his or her child can be charged under the general kidnapping statutes. This definition is consistent with federal law, 18 U.S.C. 1201 (h) (1994), pursuant to which parents whose parental rights with respect to the victim have been terminated by final court order are subject to prosecution for kidnapping.

#### Comment to Section 2 Prohibited Acts

1. Section 2(a) prohibits the taking of the child if the initial taking is wrongful (e.g., not pursuant to the lawful exercise of visitation or custody rights). It specifically prohibits the keeping or withholding of a child from the parent entitled to possession of the child at the expiration of visitation or the commencement of the other parent's parenting time. Thus, the retention of the child past the expiration of one parent's time with the child is prohibited even if the initial taking was not wrongful provided the defendant's actions substantially interfere with the other parent's custody or visitation rights.

2. This section prohibits the taking, enticing away, keeping, withholding, or concealing of a minor child when these acts substantially deprive the other parent or lawful custodian of his or her right to custody or visitation. The acts are wrongful whether or not the child resists or objects.

Examples of a "substantial deprivation" could include a deprivation that encompasses at least half of the period of visitation, or a retention where a reasonably diligent inquiry by the searching party does not disclose the child's whereabouts. However, it would not be a "substantial deprivation" for a parent to leave the family home with the child upon the separation of the parties where the separating parent remains in contact with the other parent and access to the child is arranged with or without court order.

3. Concealment of the child from the other parent or lawful custodian is specifically prohibited. Cases of successful concealment are among the most disruptive and serious of parental kidnapping cases. The parent from whom the child was taken has no idea whether the child was safe or well-cared for. The destruction of the parent-child bond is complete.

4. The wrongful acts of taking, enticing away, keeping, withholding, or concealing are prohibited by this section even before custody orders have been issued or custody proceedings commenced. Prior to the issuance of a custody decree and in the absence of statutory custody presumptions, the parents have equal powers and duties with respect to the child. Neither parent has any greater right to the child than the other parent. A parent who takes exclusive possession of a child--even before issuance of a custody decree--does so in derogation of the rights of the other parent.

The National Incidence Study of Missing, Abducted, Runaway, Thrownaway Children in America found that 41% of the family abduction cases studied occurred before the parents were divorced. The Massachusetts Supreme Court has acknowledged that the policy considerations underlying the criminalization of pre-decree abduction are compelling and has requested a legislative resolution. *Commonwealth v. Beals*, 541 N.E.2d 1011 (Mass. 1989).

5. The prohibitions of Section 2(a) are intended to prohibit wrongful acts of abduction even though the abductor has been granted shared or joint physical custody. When parents share physical custody, each parent has been granted a shared right of physical custody. When a joint physical custodian abducts the child, he or she does so in derogation of the rights of the other joint custodian. The abductor violates the custody order by depriving parent and child of their court-ordered right to shared parenting time. The abductor also violates the public policy fostered by such custody arrangements.

It is always advisable for a joint custody order to specify residential arrangements for the child to enable all parties to determine with whom the child is to reside and when. Specific terms in a custody order facilitate implementation of criminal remedies and enforcement of custody orders.

6. Parental abductions' as defined in this statute also occur when the custodial parent refuses to allow the noncustodial parent to exercise rights of visitation. Although minor violations of visitation provisions can be appropriately handled by the family law courts and do not constitute criminal conduct, substantial violations can be as destructive to the parent-child bond as any other abduction and should be treated as such.

Concealment of the child by the custodial parent destroys the parent-child bond. Further, because many services available to custodial parents are not available to noncustodial parents, the noncustodial parent faces even greater obstacles in locating the abducting parent and child and in reestablishing his or her relationship with the child.

Section 2(a) prohibits the taking, enticing away, keeping, withholding, and concealing of a child by the custodial parent in derogation of the visitation rights of the other parent if those actions will substantially deprive the other parent of his or her court-ordered parenting time. The limitations imposed by this requirement should criminalize significant violations without flooding the criminal justice system with cases of minimal significance.

7. Section 2(b) specifically prohibits the abduction of a child in violation of restraining orders prohibiting the concealment or detention of a child or in violation of orders prohibiting the removal of the child from the jurisdiction. This section is applicable whether or not custody orders have been issued in conjunction with or in addition to the restraining orders. The term "restraining order" is used generically as these orders may be called by different names in different states.

8. Section 2(c) specifically prohibits others from assisting a parent in the commission of a parental abduction. This section is intended to supplement, rather than supersede, the state law prohibiting aiding and abetting. It is intended to specifically prohibit persons from intentionally preventing or delaying the apprehension of a person charged with an offense prohibited by this Act. The intentional obstruction of, or interference with, efforts to locate the minor child is prohibited. The intentional destruction, alteration, or concealment of evidence and the furnishing of false or misleading information concerning the abduction are also prohibited.

9. Section 2(d) clarifies that prosecution under this Act is not intended to interfere with or limit the contempt power of either the criminal courts or a court of competent jurisdiction for the underlying custody proceedings. Nonetheless, the principles of double jeopardy remain applicable and may bar prosecution of both contempt and a criminal offense where the elements of both offenses are identical or the conduct that forms the basis of the offenses is identical. *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). For additional information, see Janet Kosid Uthe, "Key Issues in the Criminal Prosecution of Parental Kidnapping," in *Obstacles to the Recovery and Return of Parentally Abducted Children*, Appendix A, Linda K. Girdner & Patricia M. Hoff, eds, Office of Juvenile Justice and Delinquency Prevention, Washington, D.C. (1994).

10. Section 2 is derived primarily from Idaho Code 18-4506 (1987); Minn. Stat. Ann. 609.26 (1991); 720 Ill. Comp. Stat. Ann. 5/10-5 (1992); and Cal. Penal Code 277 (1992).

### Comment to Section 3 Extraterritorial Jurisdiction/Continuing Offense

1. Most criminal offenses are prosecuted in the state in which the crime occurs. However, in some types of crimes, acts done in one state are intended to, and do, cause an effect in another state. Parental kidnapping is one of those crimes. Children are routinely sent to visit a parent who resides in another state and then are not returned by the noncustodial parent. Similarly, a custodial parent may not send the children for court-ordered visitation.

The majority of the state courts considering the extraterritorial jurisdiction issue have permitted prosecution. However, other courts have refused to allow prosecution for acts performed outside the state's territorial boundaries. Many states have enacted statutes expanding their criminal jurisdiction in general in order to provide the state with the authority to prosecute for crimes committed outside of the state, whose effects are felt in the state. The U.S. Supreme Court has upheld such expanded jurisdictional statutes. *Strassheim v. Daly* 221 U.S. 280 (1911). The Model Penal Code (U.L.A. Section 1.03(1)(a)) contains an expanded jurisdiction statute.

Other states have enacted provisions in their criminal custodial interference statutes specifically authorizing prosecution when the child was a resident of the state or was present in the state at the time the child was taken, kept, withheld, or concealed, or the child is subsequently found in the state, or when a parent or lawful custodian resides in the state at the time the violation occurs. Cal. Penal Code 279 (1992); D.C. Code Ann. 16-1023 (1989); N.M. Stat. Ann. 30-4-4 (1989).

2. If the abducting parent succeeds in concealing his or her whereabouts and those of the child for long enough, prosecution may be barred by the statute of limitations if the statute begins to run on the day of the initial taking. Yet, the longer the child is withheld, the more serious the

offense due to both the increasing destruction of the bond between parent and child and the harmful effects of living in hiding.

The intent of this section is to make clear that the keeping, withholding, and concealing of the child recurs anew each day the child is detained. In the event that the initial "taking" was not wrongful or was not felonious, the continued acts of keeping, withholding, or concealing the child recurring anew each day may be wrongful or felonious. An abduction (i.e., taking, enticing away,) that occurred prior to the effective date of this Act is not actionable under this Act. However, conduct that continues after the effective date of this Act (i.e., keeping, withholding, or concealing) is actionable under this Act.

3. The language in this section is drawn from Cal. Penal Code 279 (1992); D.C. Code Ann. 16-1023 (1989); N.M. Stat. Ann. 30-4-4 (1989).

#### Comment to Section 4. Bail

1. When the child has not been returned to the lawful custodian, this section directs that the court, upon setting bail, shall consider that as a factor enhancing the risk that the defendant will flee the jurisdiction, or by flight or concealment, further evade the authority of the court. (c.f. *Smith II v. State*, 829 S.W.2d 85 (Tex. Cr. App. 1992).

2. Victim safety issues should be considered, to the extent permissible under existing state law, when determining the release of offenders. Conditions of bail might include protective orders such as a "no unsupervised contact" order or an order barring the defendant from coming within a certain distance of the left-behind parent or the child's school or daycare center. *State v. Kane*, 625 A.2d 1361 (R.I. 1993).

The court should consider whether prior convictions, child abuse, threats against the left-behind parent or child, or failure to comply with prior court orders increase the likelihood of re-offense or flight. If the defendant posts bail, no information about the child's location should be released to the defendant to minimize the possibility of reabduction or assault.

3. See also *Parental Kidnapping, Domestic Violence and Child Abuse: Changing Legal Responses to Related Violence*, Eva J. Klain, American Prosecutors Research Institute, Alexandria, Va. (1995).

#### Comment to Section 5. Defenses

1. This section applies in addition to, rather than supersedes, the laws pertaining to self-defense and defense of others applicable in the enacting state. Child abuse and domestic violence are both issues of special concern in parental kidnapping prosecutions as they are in all family law cases.

2. Consistent with those concerns, victims of domestic violence and abuse are entitled to assert the affirmative defense of necessity. The necessity for such action must be perceived in good faith and be reasonable. The burden of proof is on the person asserting the defense and the standard of proof shall be the same as that applicable to other affirmative defenses under the law of the enacting state. The defense of necessity has been expanded to protect persons fleeing a pattern of domestic violence in addition to persons fleeing imminent harm.

3. Section 5(a) provides that flight from family violence shall not constitute an offense under

this Act. However, the fleeing parent is obliged to notify the appropriate law enforcement authorities in the jurisdiction from which the child has been removed of the circumstances that made such action necessary as well as the whereabouts of parent and child.

The address and telephone number of the child shall be kept confidential by the law enforcement agency receiving the report except as otherwise provided pursuant to state law, e.g. domestic violence statutes. In the absence of applicable state law, the information may be released but subject to appropriate judicially or administratively imposed safeguards designed to protect the safety of parent and child.

Furthermore, a fleeing parent must commence an action for custody within 45 days in a court of competent jurisdiction which is exercising jurisdiction consistently with the federal Parental Kidnapping Prevention Act. These requirements ensure that appropriate civil actions begin promptly to establish custody or to remedy a custody violation, that inordinate public and private resources are not invested to locate a "missing child," and that the potential for violent or otherwise destructive "self-help" resolutions are minimized. These requirements also ensure that the potential for misuse of such defenses by those abductors who are not (and whose children are not) victims of family violence is minimized.

See also, "Parental Abduction: Relevant State and Federal Statutes, Court Rules, and Recent Case Law," by Miriam A. Rollins, in *Obstacles to the Recovery and Return of Parentally Abducted Children*, p. 3-52, Linda K. Girdner & Patricia M. Hoff, eds., Office of Juvenile Justice and Delinquency Prevention, Washington, D.C. (1994).

4. The defendant shall also be allowed to assert as an affirmative defense that the complainant has abandoned the family or, for a protracted period of time, failed to exercise his or her rights to custody or visitation, and the defendant and children have lost track of the complainant through no fault of the defendant. Evidence of abandonment or failure to exercise visitation rights may be direct or circumstantial.

5. Consent of the complainant shall constitute a complete defense.

6. Section (d) provides that when a crime has been committed under this Act, a subsequently obtained court order will not constitute a defense to the crime.

7. The content of this section was drawn primarily from Wash. Rev. Code 9A.40.080 (1989) and Cal. Penal Code 277 (1992). See also 720 Ill. Comp. Stat. Ann. 5/10-5 (1992); Minn. Stat. Ann. 609.26 (1991) and Cal. Assembly Bill 3179 (1994).

#### Comment to Section 6. Penalties

1. Serious cases of parental kidnapping cause traumatic disruption in the lives of the left-behind parent and of the child. Effective remedies are essential to achieving the dual purposes of the parental kidnapping statutes--detering others from similar conduct and punishing those whose conduct causes such disruption. Felony status affects, not only the severity of the penalty ultimately imposed, but also whether effective investigation and prosecution will occur in the first place. Scarce law enforcement resources will be assigned more readily to felony cases.

Charges can only be brought under this section if the deprivation is substantial. Therefore, all charges will, at least initially, be treated as felony charges. However, it is acknowledged that

there can, at times, be a conflict between law and equity. It is important to give prosecutors and judges the flexibility to treat as a misdemeanor those cases which, in the interest of justice, should, ultimately, receive less than felony treatment.

The option of treating the offense as a misdemeanor is provided in order to ensure fairness and equity in charging and sentencing. It is in no way intended to abuse or misuse the assistance of the FBI upon issuance of an Unlawful Flight to Avoid Prosecution (UFAP) warrant.

2. In this section, the sentencing court is given the discretion to enhance or to reduce the penalty of the defendant based upon the circumstances of the crime. Although the court is given the discretion to fashion a just sentence, it is mandatory for the sentencing court to consider the listed aggravating and mitigating factors.

3. Evidence that the child or another person was exposed to harm or the risk of harm constitutes a factor the judge can use to increase the severity of the penalty. Similarly, evidence that the defendant has previously committed the same or similar crimes shall be considered by the judge to increase the severity of the penalty. Evidence that the child has been removed from the country shall also be considered by the judge to increase the severity of the penalty due to the substantially increased difficulties in locating and obtaining the return of the child.

Other factors that may be considered by the sentencing judge as increasing the severity of the sentence include the infliction of psychological trauma to the child, for example, by attempting to polarize the child's affections or to change the child's identity.

The sentencing judge should aggravate the penalty if the child has not been returned to the lawful custodian by the time for sentencing unless extreme circumstances dictate otherwise.

4. Evidence that the child was returned unharmed and at an early stage in the proceedings is a factor that the judge can use to mitigate the severity of the penalty. A defendant who fails to return the child in time to receive a mitigated sentence may avoid an enhanced penalty by returning the child prior to sentencing, and as a policy matter is encouraged to do so. The sentencing judge can also consider the fact that the abductor has no prior criminal record and no prior history of abductions or threats to abduct as factors mitigating the sentence.

Further, the sentencing judge can consider proven acts of abuse or domestic violence not arising to a complete defense in mitigation of the sentence where those acts were causal factors in the commission of the abduction. However, the fact that the defendant provided information leading to the child's safe return is not intended to mitigate the penalty where the defendant provided such information in order to extort an advantage--whether that be an advantage in criminal or civil litigation or a reconciliation of the parties.

In appropriate cases, willingness to participate in a program of mediation if the defendant is amenable and the other parent or lawful custodian consents, is suggested as a possible mitigating factor. However, this rests within the sound discretion of the trial court. It is recognized that mediation may not be appropriate where there is a history of domestic violence or abuse.

5. The suggested factors in aggravation and mitigation are intended to supplement, and not to supersede, the applicable sentencing factors otherwise provided by state law. If any factor listed in this Act duplicates a factor already provided by applicable state law, the factor listed herein may be considered redundant.

6. Factors in aggravation and mitigation should be proven [by the preponderance of the evidence] [by clear and convincing evidence]. The burden of proof should be consistent with the burden of proof applicable in the sentencing of other crimes in the state.

7. In the event that the Court grants a defendant probation, it is recommended that the conditions of probation protect the victim parent and child while the victim parent obtains protective orders or a modification of the custody order from the family court or other court of competent jurisdiction to guard against another abduction. Relevant custody determinations should be provided to the judge prior to sentencing so that appropriate conditions of probation can be set. If feasible, information about the criminal case and sentence should be brought promptly to the family court's attention so that appropriate changes can be made in the custody order to protect the child's welfare and prevent reabduction.

Conditions of probation may include requiring the defendant to comply with all family court orders or not contact the child until a family court can determine proper visitation. Conditions of probation may also include requiring the defendant to agree to supervised visitation, or post a bond (if available in the jurisdiction) to assure the safe return of the child.

8. The restitution section is intended to supplement, rather than supersede, any other applicable restitution provision in the state law. As a matter of policy, the court should order restitution, rather than a fine, where the financial resources of the defendant are limited.

9. Parental kidnapping cases result in often costly losses suffered by the victim parent. It is common for victim parents to incur attorney's fees to obtain and enforce custody orders. Victims of parental abduction also commonly lose money due to time taken off work to search for and, ultimately, to recover their missing child.

Many must employ private investigators and nonprofit missing children's organizations to assist in the search and recovery process and to expend funds to facilitate the search. Others expend additional funds in traveling to recover the child once the child has been located. Given the limited financial resources of most families, the losses incurred by the victim parents can be substantial. Government agencies also may incur expenses in parental kidnapping cases. For example, the social services agency will incur the cost of shelter care for housing the minor child pending his or her return to the lawful custodian. It is appropriate that restitution be ordered paid by the offender whose criminal conduct necessitated the expenditure, unless otherwise inappropriate.

10. This section provides that restitution is to be paid by the offender to both the victim parent and to private organizations for expenses incurred in parental kidnapping cases. This Section further provides that restitution is to be paid by the offender to government agencies incurring extraordinary expenses in parental kidnapping cases. To facilitate collection of restitution, orders of restitution made pursuant to this section shall constitute a civil judgment and shall be enforceable as such.

11. The provisions of the penalty sections were drawn from N.J. Rev. Stat. 2C:13-4 (1990); Ohio Rev. Code Ann. 2919.23 (1991); Wash. Rev. Code 9A.40.060 (1994); Ind. Code 35-42-3-4 (1990); Ky. Rev. Stat. Ann. 509.070 (1984); Minn. Stat. Ann. 609.26 (1991); N.M. Stat. Ann. 30-4-4 (1989); Tenn. Code Ann. 39-13-306 (1990); and Nev. Rev. Stat. 200.359 (1993); Cal. Penal Code 17(b).

In addition, many of these terms were adapted from the work of Patricia Ann Kelly and the participants in the American Prosecutor's Research Institute "Model Sentencing and Custody Guidelines in Parental Abduction Cases" project.

The language of the restitution section was drawn primarily from Cal. Penal Code 279 (1992); Idaho Code 18-4506 (1987); 720 Ill. Comp. Stat. Ann. 5/10-5 (1992); Mich. Comp.