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The Problem of Parental Kidnapping

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THE PROBLEM OF PARENTAL KIDNAPPING

It is the purpose of this article to discuss the singular situation wherein one spouse takes and carries away his natural child who is in the physical custody of the other spouse. This type of taking and carrying away of a child has been popularly termed "parental kidnapping." Technically, this term is incorrect in many instances where the "kidnapping" parent retains a right to the child's custody which is equal to that of the parent from whose custody the child is taken. In light of this loose use of the term "parental kidnapping," it would behoove us at the outset to define and distinguish a number of related terms to be used in the context of this article. The terms, of necessity, are defined differently from state to state. However, the various definitions have many common elements which permit us to frame a general definition of each term.

The term "false imprisonment" means the unlawful detention of the person of another, whereby he is deprived of his personal liberty.[1] "Abduction," at common law, refers to the offense of taking away a wife, child or ward by force, fraud or open violence.[2] Abduction, today, is commonly used in a narrower sense, to-wit: the taking away of a female without her consent or her parent's consent for the purposes of marriage or prostitution.[3] "Kidnapping" is, generally, an aggravated species of false imprisonment whereby a person is not only deprived of his personal liberty but is carried away (abducted) to another place.[4] At common law, kidnapping was defined as the forcible abduction or stealing away of a man, woman or child from his own country and sending him to another.[5] Some statutes of the various states define kidnapping in similar terms. Many statutes even go further by adding the element of specific intent to execute an unlawful purpose, e.g., to secretly confine the victim, to send the victim out of the state, to imprison the victim against his will, to conceal the victim, etc.[6] In short, kidnapping, in its most elementary form, consists of (1) an unlawful detention, and (2) an unlawful asportation. These elements are the distinguishing earmarks of kidnapping. The term "child-stealing," as defined by most statutes, refers to the offense of forcibly or fradulently taking or enticing away a child under a certain age with the specific intent to detain or conceal the child from any person having the lawful custody of the child.[7] This offense is primarily directed against the person having the lawful custody of the child, whereas ordinary kidnapping is primarily an offense directed against the victim of the detention and asportation.

In this article, we will be dealing primarily with three types of statutes, to-wit:

1. Miller, Criminal Law § 102 (1934).
2. 3 Bl. Comm. 139-141.
3. Miller, Criminal Law § 104 (1934).
4. 4 Bl. Comm. 219; Miller, Criminal Law § 103 (1934).
5. 4 Bl. Comm. 219.
6. Mich. Comp. Laws § 705.349 (1948); N.Y. Penal Law § 1250 (1933).
7. Wyo. Comp. Stat. § 9-216 (1945).

(1) The ordinary kidnapping statute which protects the victim against the offense of kidnapping, as described above.
(2) The statute dealing with that form of kidnapping which is perpetrated for the purpose of extoration, ranson or reward, e.g., the original Federal Kidnapping Act. This aggravated form of kidnapping usually imposes a very heavy sentence on the kidnapper, e.g., life imprisonment or death.
(3) The child-stealing statutes which are designed not only to protect the security of children, but also to protect parents and guardians against the malicious and disconcerting invasion of their right to custody of such children.

All three of these statutes are found together in many states. We will consider these statutes in more detail at a later point in the article in reference to the problem of parental kidnapping. Meanwhile, we will deal with the judiciary's treatment of the problem of parental kidnapping and the various considerations entertained by the court in so doing.

The courts have recognized parental kidnapping cases as sui generis because of the peculiar relationship existing between the offender and the victim. They have realized that parents are not to be treated as ordinary kidnappers who are not related in anyway to the child kidnapped; that parents are motivated by the natural and sometimes irresistible urge to possess those who are the natural objects of their affections. As one court has said, the child-stealing statute "has no application to contests between parents for the possession of their children"; that it was "enacted to protect parental and other lawful custody of children against the greed and malice of the kidnapper, not to punish their natural guardian for asserting his claim to the possession and control of them."[8]

Be this as it may, the courts have recognized that there are considerations which militate against a sympathic attitude towards a parent exercising his natural claim to the possession and custody of his child. One of these considerations is the welfare of the child. The state, as parens patriae, must protect its children against being deprived of personal security and natural protection.[9] For example, in divorce, the courts will award the custody of the child in such a manner as will inure to the greatest benefit or welfare of the child. These custody decrees are subject to such modifications as the child's welfare necessitates.[10] In the case of parental kidnapping, the child's welfare and his sense of security are also at stake. In the typical parental kidnapping situation, the parents are either separated or divorced. And, in the course of marital difficulties, the parent out of possession of the child will take the child from the parent having actual custody of the child. When one considers that the child's sense of security, to say nothing of his happiness, has been greatly impaired by the disintegration of family solidarity, is it not all the more devastating to the child's security to permit him to become nothing more

8. Burns v. Commonwealth, 129 Pa. 138, 18 Atl. 756 (1889).
9. Gravett v. State, 74 Ga. 191 (1884).
10. Wyo. Comp. Stat. § 3-5915 (1945).

than a "pawn" in this parental controversy? Parents should not be permitted to capitalize freely upon their children's divided allegiance to both parents.

Compounding the undesirability of parental kidnapping is the fact that in many cases of parental kidnapping the court has granted a divorce, and has made a determination as to the disposition of the child, which is most beneficial to him. Why should the court's determination as to what is best for the child's welfare be upset by that parent who (it has been determined) is less qualified to have custody of the child? This not only amounts to contempt of court by virtue of the kidnapping parent's mockery of a judicial resolution, but if condoned, would deprive the kidnapped child of that greatest degree of security and welfare to which it is entitled by virtue of the court decree. In light of the above considerations, it seems clear that parental kidnapping while it is not as reprehensible as kidnapping by a third person, is nevertheless undesirable in terms of the child's welfare and therefore should be prevented through some means, e.g., criminal sanctions.

Keeping in mind the above considerations, it now seems appropriate to examine in detail the judiciary's attitude towards parental kidnapping and the consequent judicial determination of the parental kidnapping problem. As a general rule, a parent is not guilty of kidnapping or child-stealing in taking exclusive possession of his child where there has been no custody decree or order affecting the child's disposition.[11] This rule is based on the theory that both parents are equally entitled to the custody of the child and therefore one parent, in taking possession of his child, is only asserting his legal claim to the child. Since child-stealing statutes are designed to protect parental custody, how can it be said that a parent in this situation was guilty of an offense under a statute which is designed to protect his right to custody of the child?

This same result has been reached where the complaining parents has *no* right to custody of his child because of an earlier abandonment of his family.[12] Since the complaining parent had defaulted in his obligation to support his child, his concurrent right to custody was extinguished. Therefore, he no longer had any right to custody to be protected by the statute. If the abandoning parent had taken possession of his child from the other parent, it would seem that he would be guilty of kidnapping since he no longer has any right to custody as against the other parent. Although there are no reported cases on this question, the above conclusion has been suggested by way of dictum in one case.[13]

Another aspect of parental kidnapping that has been considered by the courts, is the question of whether a father is guilty of kidnapping

11. State v. Elliot, 171 La. 306, 131 So. 28, 77 A.L.R. 314 (1930); People v. Workman, 94 Misc. 374, 34 N.Y. Crim. Rep. 303, 157 N.Y. Supp. 594 (1916).
12. Biggs v. State, 13 Wyo. 94, 77 Pac. 901 (1904).
13. Burns v. Commonwealth, supra note 8.

where he gains possession of his child who is in the custody of the mother under a separation agreement. In short, is custody under a separation agreement of such a kind as to be entitled to protection by the child-stealing or kidnapping statute? The courts have answered negatively to these questions.[14] The court's rationale in this situation has been to the effect that a father cannot completely divest himself of the obligation to support his children by a separation agreement; this being so, the right to custody which is incident to the obligation to support, cannot be so completely contracted away as to make the father guilty of kidnapping. The basis of this reasoning lies in the court's unfavorable attitude towards separation agreements. This reasoning breaks down in a similar situation where a mother takes the child from the father's custody under a separation agreement. However, there are no reported cases covering this situation.

There are no cases reported which have considered the question of parental kidnapping where one of the parents has been awarded temporary custody pending divorce proceedings. However, it would seem that this custody is of the type to be protected by the kidnapping or child-stealing statute since it is awarded by the state through its courts and not by any agreement of the parents. This reasoning is also applicable to that temporary custody wrich is determined by statute and not by judicial order.

No cases have been reported which have dealt with the question of whether or not a putative father is guilty of kidnapping when he takes his bastard child from the possession of its mother. However, it would seem that he might be so guilty because of the mother's superior right to the child. This problem is further complicated in the event that the putative father is compelled to assist the mother in supporting the child. In such case, the primary question is whether or not such support carries with it the incidental right to custody which is equal to the mother's corresponding right. Some jurisdictions have given a legislative solution to this problem by enacting child-stealing statutes which specifically exempt the putative father from their operation.[15]

A very common problem in parental kidnapping is whether or not a third person (not a parent) is guilty of kidnapping or child-stealing when he assists or acts alone on behalf of the parent in gaining possession of the child from its lawful custodian. The courts have generally applied the agency theory to this situation. As a result, the agent is guilty of kidnapping if the parent did not have the right to custody of the child and therefore would have been guilty of kidnapping if he or she had acted in the stead of the agent.[16] However, if the parent-principal had such a right to the custody of the child that he could not be prosecuted for child-stealing, his agent or assistant likewise could not be so prosecuted.[17] How-

14. Hard v. Splain, 45 App.D.C. 1 (1916); State v. Powe, 107 Miss. 770, 66 So. 207, L.R.A. 1915 B, 189 (1914).
15. Pa. Purdon's Stat. 1936, tit. 18, § 2181; Rex v. Duguid, 75 L.J.K.B.N.S. 470 (1906).
16. Re Peck, 66 Kan. 693, 72 Pac. 265 (1903); State v. Elliot, supra note 11.
17. State v. Elliot, supra note 11.

ever, the Missouri court, in *State v. Brandenberg,* has dissented from this latter point of view and has held that the agent of the parent was guilty of kidnapping, even though the parent-principal, in the absence of a custody decree or order, is not guilty of kidnapping.[18] This court, in arriving at its conclusion, took cognizance of certain controlling considerations that go to the very crux of the parental kidnapping problem, to-wit: (1) the child's personal safety and comfort, and (2) the necessity of protecting the parent in custody of the child against the mental anguish and anxiety resulting from the kidnapping of the child. The court in this case held that the parent out of possession of the child could not delegate to an agent his right to invade the possession of the other parent and gain possession of their mutual offspring. The court's distinction between kidnapping by the parent himself and kidnapping by his agent was based on the ground that kidnapping by the parent is less reprehensible since (1) the child's security is protected by the cloak of parental affection, and (2) the anxiety of the parent having lawful custody is greatly reduced from what it would be if a third person had taken the child. Many courts have tried to avoid the result of the *Brandenberg* case in subsequent cases by distinguishing the facts of the *Brandenberg* case from the facts under consideration. These courts have said that the *Brandenberg* holding only applied to those situations wherein the kidnapping agent did not immediately turn over the child to the parent-principal, but kept it independently for an unreasonable period of time.[19]

Before leaving this discussion of that aspect of parental kidnapping wherein the child has not been awarded, by court decree, to either parent, attention should be directed to a Connecticut statute dealing specifically with this very problem.[20] This statute imposes a limited criminal penalty against a parent who, being separated from the other parent, forcibly or by decoy seizes his child from the possession of the other parent with an intent to take the child out of state or having so obtained the child, later removes it from the state. The legislature of Connecticut, in enacting this statute, apparently has recognized the undesirability of parents constantly taking possession of their children from each other. The statute has the merit of tending to induce separated parents to settle their custody disputes in a court of law and not extra-judicially through their own actions.

The second major problem of parental kidnapping that the courts have had to deal with, is the effect of one parent taking his child from the other parent's sole and exclusive custody which has been awarded by a decree of court. The general rule holds that the abducting parent is guilty of kidnapping.[21] This rule has been expanded to include parental kidnapping of a child from the possession of *any* person having legal custody of the child by virtue of a court decree. As a consequence, a parent has

18. 232 Mo. 531, 134 S.W. 529, 32 L.R.A.(N.S.) 845 (1911).
19. People v. Nelson, 322 Mich. 262, 33 N.W.2d 786 (1948).
20. Gen. St. Conn. § 8371 (1949).
21. Lee v. People, 53 Colo. 507, 127 Pac. 1023, Ann. Cas. 1914 B, 272 (1912).

been found guilty of child-stealing or kidnapping when he has taken his child from the legal custody of a grandmother,[22] step-mother[23] or other person who is not the natural parent of the child. The theory behind the general rule is that the kidnapping parent, after having been divested of his right to custody, has the same status as any stranger who kidnaps the child. Therefore, since the child-stealing statute was designed to protect the legal custody of the child against invasion by those having no right to custody, the parent out of custody, as well as a stranger, is subject to the criminal sanctions imposed by the statute for seizing a child from its legal custodian. The effect of the general rule is to make the abducting parent not only guilty of contempt of court, but also to make him guilty of a much more serious crime, *regardless of his purpose in abducting his child.*

The general rule, however, is not without its exceptions. One exception occurs in the situation where the abducting parent is ignorant of any court decree awarding custody to the other parent.[24] However, ignorance of the custody decree is not available as a defense if the abducting parent has reason to believe or suspect that a decree of court might have been rendered awarding custody of the child to one of the parents, e.g., where the abducting parent knows that his spouse has initiated an ex parte divorce proceeding.[25] One court has taken a more extreme position in holding that ignorance of a custody decree is no defense where the abducting parent intends to conceal or detain the child from its lawful custodian.[26]

The most common defense invoked by the abducting parent has been to the effect that the child consented to leave his lawful custodian and go away with the abducting parent. This defense made the distinction between ordinary kidnapping and child-stealing an important one. Kidnapping was defined, generally, as the taking of a person against his will. If this was the case, how could it be said that a child was kidnapped when he consented to leave his lawful custodian? The court's answer to this argument was that a child was incapable of giving consent to a seizure and therefore, a seizure of the child was deemed, as a matter of law, to be without its consent.[27] The court, in effect, substituted the will of the lawful custodian for that of the child. Therefore, if the child was taken against the will of the custodian, it was deemed that the child was taken against his own will and therefore kidnapped. Conversely, if the child was taken with the consent of the legal custodian, the child was deemed not to have been taken against its will and therefore not kidnapped.[28]

In contrast to the court's circuitous reasoning in avoiding the defense of consent in a prosecution for kidnapping, the offense of child-stealing,

22. Re Peck, supra note 16.
23. State v. Taylor, 125 Kan. 594, 264 Pac. 1069 (1928).
24. Hicks v. State, 158 Tenn. 204, 12 S.W.2d 385 (1928).
25. Commonwealth v. Bresnahan, 255 Mass. 144, 150 N.E. 882 (1926).
26. State v. Taylor, supra note 23.
27. State v. Farrar, 41 N. H. 53 (1860); John v. State, 6 Wyo. 203, 44 Pac. 51 (1896).
28. John v. State, supra note 27.

by definition, negates any such defense. Since child-stealing is the offense of taking a child away against the will of its lawful custodian, the defense of the child's consent is irrelevant.[29] In one state having both the kidnapping and child-stealing statutes, it has been held that a mother was not guilty of kidnapping when her minor child, whose age was in excess of the maximum child-stealing age, voluntarily and without parental influence, left her lawful custodians in order to live with the mother.[30] The court, in reaching this decision, reasoned that the legislature, by enacting the child-stealing statute (with a maximum age limit), inferentially recognized that the wishes of a minor, above the maximum child-stealing age, have some standing in court, as well as its welfare. In short, the court said that the effect of the child-stealing statute was to limit the age range within which the child was incapable, as a matter of law, of consenting to a removal from its lawful custody.

Another defense which has been invoked by the kidnapping parent is that the parent took the child under a claim of right, resting upon a reasonable belief that the custody order erroneously awarded the child to the wrong person. This defense was analogous to the defense commonly employed in a larceny prosecution that stolen property was taken by the defendant under an honest but mistaken belief that it belonged to him. However, in the case of parental kidnapping, this defense has been rejected on the ground that the courts were open to entertain the kidnapping parent's contention that an invalid custody decree had been rendered; that it was the function of the courts, and not the parent, to determine the validity of the decree.[31] Thus, it was held in a Kansas decision[32] that a foster mother was guilty of child-stealing, even though she took the child from the natural mother under a belief that the custody order, giving the child to the natural mother, was erroneous since it was based on a similar Illinois judgment which was later reversed by an appellate court.

Another and somewhat unusual defense arises out of the rather unique situation wherein both parents are separated at the time of the divorce and the child is awarded to the parent not having the possession of the child, and not to the parent who has the actual physical custody of the child. Is the parent having physical custody of the child guilty of child-stealing if she takes the child out of the state to avoid the operation of the custody decree? In this situation, the defense which has been invoked is that the defendant-parent could not be guilty of taking the child away from the other parent's possession since he had no actual possession at the time the custody decree was rendered. However, this defense has been unavailing in this situation since child-stealing, by definition, is the unlawful taking of a child with the *intent to deprive* the lawful custodian of that possession to which he is *entitled*. Obviously, the parent entitled to

29. State v. Rhoades, 26 Wash. 61, 69 Pac. 389 (1902).
30. People v. Congdon, 77 Mich. 351, 43 N.W. 986 (1889).
31. State v. Tillotson, 85 Kan. 577, 117 Pac. 1030, Ann. Cas. 1913 A, 464 (1911).
32. Ibid.

possession, in the above situation, is being deprived of that possession.[33]

As it has been previously indicated, an agent acting on behalf of a parent no longer entitled to custody, is guilty of kidnapping or child-stealing if he takes the child away from its lawful custodian. However, it has been held that an agent is not guilty of kidnapping under a statute requiring a specific intent to send the child out-of-state, if the agent was (1) ignorant of the mother's intent to send the child out-of-state, and (2) did not know that the other parent's right to custody was being violated. In short, the agent in this situation cannot be charged with the parent-principal's felonious intent.[34]

In those jurisdictions which expressly exempt a parent from the operation of the kidnapping (child-stealing) statute, it would seem that the agent of the parent seeking possession of the child, would not be guilty of kidnapping. In short, the agent cannot be more guilty than the parent-principal. However, the court, in one jurisdiction having the parental exception in a child-stealing statute, disregarded agency theory and convicted the agent as a party to a conspiracy to do an unlawful act, even though one of the "conspirators," i.e., the parent, was immune to prosecution.[35] By such use of the conspiracy principles in order to circumvent the agency theory, the court unwittingly provided a means whereby the parental kidnapping exception, itself, might possibly be by-passed and thereby make it possible to punish a parent as a conspirator to do an unlawful act. This possibility has been considered, but not decided in one jurisdiction.[36]

While it has been recognized that a parent is guilty of child-stealing or kidnapping by taking his child from its lawful custody, regardless of his somewhat justifiable purpose of gaining parental control, some courts have said that the purpose of the parent should have the effect of mitigating or lessening his punishment.[37] Apparently, a number of state legistures have adopted this view by their enactment of statutes which expressly limit the maximum punishment of a parent found guilty of kidnapping his child (infra).

In light of the foregoing judicial treatment of the vexatious problem of parental kidnapping, we would do well to consider concurrent legislative treatment of the problem on (1) the state level, and (2) the federal level.

As mentioned before, Connecticut, taking a rather dim view of *any* parental abduction, has a statute imposing penal sanctions against a parent who takes his child from the possession of the other parent while both

33. Re Lorenz, Rap. Jud. Quebec 14 K. B. 273, 7 Quebec Pr. Rep. 101, 9 Can. Crim. Cas. 158 (1905).
34. Commonwealth v. Nickerson, 5 Allen 518 (Mass. 1862).
35. Rex v. Duguid, 75 L.J.K.B.N.S. 470 (1906).
36. Rex v. Crossman, 98 L.T.N.S. 760 - Div. Ct. (1908).
37. State v. Farrar, supra note 27; Rex v. Hamilton, 22 Ont. L. Rep. 484, 17 Can. Crim. Cas. 410, 20 Ann. Cas. 868 (1910).

parents are separated. On the other hand, Illinois and South Carolina have codified the general rule that the abducting parent cannot be guilty of kidnapping in the absence of a custody decree.[38] Michigan has inferentially codified the general rule that the abducting parent is guilty of kidnapping if the child is taken from the parent having sole legal custody.[39] This results from a proviso in the Michigan child-stealing statute that the statute applies *equally* to the taking of an adopted child by its natural parent who no longer has custody of the child.

While some legislatures, e.g., New York and Colorado, have not exempted parents from the operation of the kidnapping statute, they have greatly reduced the maximum punishment which may be imposed against the kidnapping parent.[40] This legislative policy recognizes that (1) kidnapping parents cannot be classified with kidnappers who are strangers or third persons and that (2) parents should not be completely free to kidnap their children without the inhibiting influence of a penal statute. Kentucky has a special statutory provision which defines the crime of parental kidnapping and imposes a relatively light maximum sentence.[41] This statute, in effect, embodies the same policy as the New York and Colorado kidnapping statutes do with respect to abducting parents. A substantial minority of states have adopted a much more liberal policy than New York in dealing with kidnapping parents—so much so, that they have completely exempted parents from the operation of either the kidnapping statute,[42] the child-stealing statute[43] or the statute defining the crime of kidnapping for the purpose of ransom, reward or otherwise, i.e., the little Lindbergh Acts (infra).[44] Several jurisdiction, e.g., Pennsylvania, have a similar exemption in their child-stealing statutes with respect to the kidnapping of an illegitimate child by any person claiming to be its father or claiming a right to its custody.[45]

In some of these minority states, e.g., Delaware, the effect of these exemptions is to permit a parent to take his or her child from its legal custodian without the threat of prosecution under any statute restraining the parent's actions. The only deterrent in these states would be contempt of court proceedings, which in all events would seem to be somewhat ineffective, since the relatively small penalties imposed would hardly inhibit the kidnapping parent's conduct, especially if it is of a desperate character. In many cases, contempt of court proceedings would prove highly impractical where the kidnapping parent has fled from the state with his child.[46]

38. Ill. Rev. Stat. c. 28, § 384 (1941); S. Car. Code § 1122 (Supp. 1934).
39. Mich. Comp. Laws § 705.350 (1948).
40. Colo. Stat. Ann. c. 48, § 78 (1935); N.Y. Penal Law § 1250 (1933).
41. Ky. Rev. Stat. § 435.240 (1948).
42. Del. Rev. Code § 5174 (1935).
43. Del. Rev. Code § 2554 (1935); La. Rev. Stat. Ann. § 14:45(2) (1951); Va. Code § 4409 (1936).
44. S. Dak. Code § 13-2701 (1939); N. Mex. Stat. Ann. § 41-2503 (1941); Ariz. Code Ann. § 43-3203 (1939); N.C. Gen. Stat. § 14-39 (1943).
45. See note 15 supra.
46. Lee v. People, 53 Colo. 507, 127 Pac. 1023 (1912).

Several states, e.g., New Mexico, South Dakota and Arizona, have exempted parents from prosecution for kidnapping under statutes which are almost identical to the Federal Kidnapping Act (Lindbergh Act).[47] These statutes define the crime of kidnapping as the act of seizing or taking any person in order to hold him for the purpose of "ransom, reward or *otherwise.*" (Italics ours.) This statute is designed to cover all abductions to which the kidnapping or child-stealing statutes would be applicable, except in the case of parental abduction. In view of the broad and exhaustive applicability of this relatively new statute, it would seem that it would supersede all pre-existing kidnapping and child-stealing statutes which do not exempt parents. However, no such legislative intention was expressed in the enactment of this statute in each of these states. As a result, this "Little Lindbergh Act" co-exists on the statute books with either the child-stealing statute or the ordinary kidnapping statute or both.[48]

In view of the court's reluctance to declare that the enactment of a statute impliedly repeals a prior statute relating to the same subject where both statutes are not inconsistent or may be reconciled, it is suggested that the prior kidnapping or child-stealing statute continues to be operative, even though the "Little Lindbergh Act" has subsequently been passed. With respect to parental kidnapping, it may be possible to reconcile this subsequent statute with the previously existing statutes dealing with kidnapping by saying that it was the legislative intention to except parents from the operation of the "Little Lindbergh Act" which imposes a much greater maximum sentence, e.g., life imprisonment or death, than does the ordinary kidnapping or child-stealing statute; but in so doing, it was not intended to exempt the kidnapping parent from *all* criminal liability, but rather to permit his prosecution under the ordinary kidnapping or child-stealing statute.

In light of the above exposition of the legislative treatment of the problem of parental kidnapping, we can see that there is some tendency on the part of the state legislatures to be somewhat more liberal than the courts in dealing with kidnapping parents. This tendency is given more impetus by the present Federal Kidnapping Act which, as indicated before, excepts kidnapping parents from the criminal sanctions imposed by the Act.[49] This Act, which was passed on June 22, 1932, was designed to combat the menace of organized crime having an interstate operation.[50] The crime was organized in the sense that "professional" extortionists, who had organized together, were specializing in the practice of abducting people and holding them for the purpose of extracting a ransom from those persons interested in the personal welfare of the victim. The victims, in most cases, were quickly transported across state lines, leaving state law enforcement officers completely hamstrung in their detection and pursuit

47. See note 44 supra.
48. E.g., N. Mex., So. Dakota.
49. 47 Stat. 326 (1932), as amended, 48 Stat. 781 (1934), 18 U.S.C. § 120 (1952).
50. 30 Minn. L. Rev. 206 (1946).

of the extortionists.[51] However, it took the infamous Lindbergh kidnapping in 1932, to impress dramatically upon the American public and Congress the reprehensibility of this type of extortion, and more especially, the need for a federal kidnapping law combating this type of criminal transaction which extends across state lines.

As a result, Congress passed the Federal Kidnapping Act on June 22, 1932—just a few months after the Lindbergh kidnapping. The offense, defined by the Act, was the act of transporting in interstate commerce, any person who had been abducted for the purpose of *ransom or reward*. It is readily apparent that the scope of the Act was considerably restricted by confining its operation to extortion cases chiefly. The Act impliedly exempted kidnapping parents from its operation since it is quite obvious that most parental kidnappers do not abduct their children for the purpose of ransom or reward. It is interesting to note that this possibility was recognized and considered in the House Judiciary Committee's hearings on a proposed federal law dealing with interstate kidnapping for the purpose of ransom, reward or *"other unlawful purpose."*[52] Some of the members of the Committee were concerned lest parents come under the operation of the Act, which provided a maximum sentence of death. The source of their apprehension stemmed from the fact that the kidnapping by one parent of his child from the legal custody of the other parent would not only be an unlawful act, but might be construed to have been done for an "unlawful purpose," to-wit: "to defeat the order of the court, which would be the law of the land." However, as we have seen, supra, the words "any other unlawful purpose" were deleted from the federal act in its final form.

On May 18, 1934, Congress amended the Federal Kidnapping Act so as to expand the operation of the Act to cover *all* cases of interstate kidnapping, except those cases involving parental kidnapping.[53] The Act, as amended, makes it unlawful to transport in interstate commerce, any person who has been kidnapped and held for "ransom or reward or otherwise, except in the case of a minor, by a parent thereof." Thus, we see that Congress broadened federal jurisdiction over interstate kidnapping by making the purpose for which the kidnapped person is held, immaterial.[54] But in so doing, Congress, recognizing parental kidnapping as sui generis, was careful to except parents from the operation of the Act and its heavy criminal penalties, e.g., a maximum sentence of death.

There have been very few cases construing this parental exception in terms of those people who might fall under the exception. However, one federal court has said that this exception must be strictly construed not only in harmony with the context of the Act, but with "the end in view."[55]

51. See note 52 infra.
52. Hearing before Committee on the Judiciary on H. R. 5657, 72d Cong., 1st Sess. (1932).
53. See note 49 supra.
54. Brooks v. U. S., 199 F.2d 336 (4th Cir. 1952); H. Rep. 1457, 73rd Congress (May 3, 1934).
55. Miller v. U. S., 123 F.2d 715 (8th Cir., 1941).

This end, the court intimated, would be to exempt those people who are either natural parents or stand in a relation of loco parentis to the child, i.e., actually assume the rights and responsibilities of a parent. Thus, it was held that the husband of the mother of an illegitimate daughter, kidnapped by the husband, could not claim the parental exemption when it was shown that the illegitimate daughter had lived with the husband and mother for only four months before leaving home to live with her grandmother.[56] In short, the husband had not assumed the rights and duties of a parent to the child.

In recapitulation, we see that Congress has placed no statutory barrier in the way of parental kidnapping. As a result, the states are left to their own remedies in dealing with the kidnapping parents. These remedies, of course, prove quite ineffective when one considers (1) the restricted territorial operation of those remedies and (2) the ability of the modern kidnapper to negotiate state boundaries with speed and mobility. As a consequence, the parental exemption in the Federal Kidnapping Act has the effect of greatly encouraging parental kidnapping.

Congress, however, has not been alone in "encouraging" parental kidnapping. The highest tribunal in the federal court system, too, has exercised its judicial powers in such a manner as to effectively encourage parental kidnapping. In 1953, the Supreme Court, in *May v. Anderson*,[57] held that in the absence of *personal jurisdiction* over a wife, a decree awarding custody of the children to the husband in an ex parte divorce proceeding was not entitled to full faith and credit in another state, even though the children were domiciled in the state in which the decree was entered. The effect of this decision is to make the status of such children uncertain in the event that personal jurisdiction cannot be had over both parents in a custody proceeding. In other words, a custody decree awarded in the domicile of one parent is not binding upon the other parent if the latter's state of domicile does not choose to recognize the foreign decree, as a matter of local law. Consequently, the parent who abducts his child from the other parent, may bring the child to his domicile and not be compelled by law to redeliver the child to the custody of the other parents who seeks to enforce his custody order in the abducting parent's state of domicile. The only recourse for the parent having the custody decree is to seize the child again and take him back to his domicile.

Thus, we see that the law of custody is reduced to a "rule of seize-and-run."[58] Or, as the dissent so ably put it: "A state of law such as this, where possession apparently is not merely nine points of the law but all of them, and *self-help* the ultimate authority, has little to commend it in legal logic or as a principle of order in a federal system." Here, again, we find a situation wherein the court gave more consideration to the parental right

56. Ibid.
57. 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953).
58. Id. at 847, 73 S.Ct. 840.

to custody than to the urgency of the child's welfare, e.g., freedom "from an incessant tug of war between squabbling parents."[59] It is strongly suggested that in the course of determining the finality of a custody degree among states, the vital concern of a state over the welfare of children who are domiciled therein, should certainly override the desirable, but not indispensible, need for personal jurisdiction over an absent parent. Are not the same considerations operative in the case of a domicilliary who seeks a divorce in an ex parte proceeding?

In summary, we have noted during the course of this article that the courts have rather rigidly adhered to the rule that a parent who abducts his child is guilty of kidnapping (child-stealing) if a custody decree has been rendered, but not guilty in the absence of such a decree. We have seen how a substantial minority of state legislatures have either (1) departed from this rule by exempting parents from the operation of the kidnapping statutes, or (2) they have mitigated the severity of the criminal penalties under such statutes. Furthermore, we have seen how the federal government has re-enforced this tendency to treat parental kidnappers as a preferred class of kidnappers which is to be dealt with less severely by (1) providing for parental exemption in the Federal Kidnapping Act and by (2) openly inviting parental kidnapping as a result of failure to give, as between states, absolute finality to a custody decree rendered by the child's state of domicile. As has been suggested before, the federal government's failure to impose criminal sanctions against kidnapping parents has the effect of enabling such parents to elude state law enforcement officers by quickly crossing the state boundary without threat of federal prosecution.

Query: Should kidnapping parents be immune to prosecution for *any* offense greater than contempt of court? One commentator has suggested that there is "strong reason to believe that the parent, if he cannot be deterred by the threat of contempt of court, cannot be deterred by the sanction of some further penalty."[60] However, the validity of this statement is questionable—especially when its author fails to buttress it with any reasons or observations.

Assuming that criminal sanctions do not effectively serve as a deterrent to parental kidnapping, what means of inhibiting parental kidnapping shall we employ instead? One possible means of combatting parental kidnapping might be to provide a civil remedy against the abducting parent. In fact, such a remedy does exist in the form of an action for wrongful abduction. This action for damages lies in favor of the lawful custodians of the child against those who abduct such child, including parents who have either (1) given up custody of the child by agreement or through abandonment,[61] or (2) have lost custody by virtue of a court decree.[62] Obviously,

59. Id. at 846, 73 S.Ct. 840.
60. 53 Col. L. Rev. 540 (1953).
61. Howell v. Howell, 162 N.C. 283, 78 S.E. 222 (1913); Clark v. Boyer, 32 Ohio St. 299, 30 Am. Rep. 593 (1877); Morite v. Garnhart, 7 Watts 302, 30 Am. Dec. 762 (Pa. 1838).

this remedy has its limitations when one considers the difficulty of obtaining personal jurisdiction over the abducting parent who has either left the state or has concealed himself. It is most probable that the threat of civil liability would prove to be much less effective than criminal sanctions in deterring parental kidnapping.

Assuming then, that there is no alternative superior to criminal liability in deterring parental kidnapping, what criminal sanctions should be imposed against abducting parents? The statutory answer to this question should be formulated in terms of (1) the peculiar relationship between the offender and the victim and (2) the welfare of the child. As we have noted before, the latter consideration has been consistently neglected in the treatment of parental kidnapping. Therefore, while abducting parents should not be treated as harshly as ordinary kidnappers, it is imperative that parental kidnapping be discouraged in order to preserve the child's sense of security, *regardless of whether or not a custody decree has been rendered.*

This end could be accomplished by the enactment of a statute creating the crime of parental abduction or child-stealing where both parents are either separated or divorced. Such a statute should provide for a maximum sentence which is relatively lighter than that in the kidnapping or child-stealing statute, and yet be harsh enough to substantially induce a parent to refrain from seizing his child from its legal custodian. Furthermore, the statute should be applicable to both (1) abduction in the absence of a custody decree, e.g., as in Connecticut[63] and (2) abduction after a custody decree has been rendered. A suggested form of such a statute, would be to graduate the crime into two degrees, to-wit: (1) abduction after a custody decree has been awarded, and (2) abduction in the absence of a custody decree, with a greater maximum sentence in the case of the former.

No doubt there are a number of other statutory means of achieving the same end which is purported to be reached by the parental abduction statute suggested above. However, no matter how this end may be achieved in the various states, the author submits that these various legislative methods of dealing with parental abduction or kidnapping will come to naught in many cases, unless there is corresponding legislation on the federal level. Such federal legislation would serve to re-enforce similar state legislation by dealing with those cases of parental kidnapping or child-stealing which are interstate in character. It is hoped that such suggested state and federal legislation would not only have the merit of (1) dealing with the abducting parent less harshly and (2) protecting the child's sense of security, but that it would also (3) compel parents to settle their custody disputes in the courts and (4) encourage a more profound respect for custody decress, once they have been entered.

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62. Pickle v. Page, 252 N.Y. 474, 169 N.E. 650, 72 A.L.R. 842 (1930); Rice v. Nickerson, 9 Allen 478, 85 Am. Dec. 777 (Mass. 1864).
63. Gen. St. Conn. § 8371 (1949).