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PROSECUTING INTERNATIONAL PARENTAL KIDNAPPING

SUSAN KRESTON*

INTRODUCTION

Parental kidnapping is a crime, recognized as such in the United States by every state, the District of Columbia, and the federal government.1 The harm done to the searching parent and abducted child,2 the siblings of the kidnapped child, and the friends and relatives of both the child and the searching parent is well documented.3 The injury done to society from the occurrence of such a crime and the resulting lost faith in the criminal justice system is immeasurable. This harm, reflected in the estimated 350,000 parental kidnappings that occur yearly,4 has resulted in these cases taking on a new importance to prosecutors.

Parental kidnapping is increasingly recognized as a form of child abuse.5 In its least aggravated form, kidnapping may instill in the child a fear of the police and authority figures, or teach

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1. As used in this article, parental kidnapping refers to the taking, retention or concealment of a child or children by a parent or other family member, or his or her agent, in derogation of the custody or visitation rights of another parent, family member, or legal guardian. Parental kidnapping, parental abduction, and custodial interference are used interchangeably unless specifically referring to a statutory definition. See American Prosecutors Research Inst., Criminal Parental Kidnapping Statutes (2000), for the full text of each statute.

2. As used in this article, the terms searching parent, custodial parent, aggrieved parent, and left behind parent are used interchangeably to refer to the individual whose child has been kidnapped.


the child to be secretive, change his or her appearance, or avoid making new friends.\textsuperscript{6} Kidnappers may emotionally abuse the child by falsely claiming the searching parent is dead or no longer loves the child. Kidnappers may neglect the child's health and education. Finally, in its most severe form, kidnapping may result in physical abuse, sexual abuse, or even murder. Regardless of the form it takes, the consequences for the child are undeniable and may leave permanent scars. It is estimated that between 10\% and 40\% of all children who are abducted become severely disturbed.\textsuperscript{7}

This harm is exacerbated in cases of international parental kidnapping. The additional burdens of culture shock, language barriers, and the more acute feelings of isolation and total separation from the child's former life increase the trauma the child must endure.\textsuperscript{8} The searching parent will also suffer additional trauma. Often, the greater distance separating parent and child, the difficulty of navigating in a foreign culture and legal system, and the increased costs of searching for the child, all combine to heighten the parent's feelings of frustration and despair.

There are two typical scenarios in international kidnapping. In the first, an abductor returns to his or her native country, where there is usually a strong support network in place. In the second, an abductor flees to another country primarily to further deter any attempts to locate the child. In the latter scenario, the abductor usually flees to another jurisdiction with the same language as that of the abductor or to the closest border. The majority of abductions from the United States are to Mexico and Canada.\textsuperscript{9}

It is estimated that one in five parental kidnappings involve taking a child across an international border,\textsuperscript{10} and this number


\textsuperscript{8} See Greif, supra note 6.

\textsuperscript{9} See National Ctr. for Missing & Exploited Children, 1999 Statistic Report.

\textsuperscript{10} See Rebecca Hegar, Parental Kidnapping Across International Borders, 34 Int'l Soc. Work 353 (1991). Between 1995 and 2000 there have been approximately 1000 cases per year of outgoing international parental kidnappings reported to the State Department, with Mexico being the country most often serving as the haven nation. Telephone Interview with Martha Haas, Office of
will increase. As international and/or intercultural unions and dissolutions increase, and as international transit becomes easier, state and federal prosecutors and investigators will find themselves called upon more often to deal with these cases. Prosecutors and investigators must become familiar with methods to secure the safe return of the child. Prosecutors and investigators will also be called upon to discredit the myth that parental kidnapping should be dealt with exclusively in civil court as a family matter. Finally, prosecutors will need to be aware of available options for prosecuting the perpetrator.

Three areas of concern in international kidnapping cases will be addressed in this Article. First, issues involved in considering both civil remedies and criminal penalties will be presented. Second, guidelines are offered to assist in determining if prosecution is a viable option. Third, issues that arise when prosecution is pursued will be addressed. This Article will be of assistance to state and federal prosecutors, as well as investigators, in assessing the strengths and difficulties of their cases. The Article will aid prosecutors in determining how best to overcome or preempt problems arising throughout the prosecution. While prosecutors may be called upon to prosecute incoming cases,11 this Article focuses on outgoing cases. U.S. federal law applies only to outgoing cases.12

I. CONSIDERING BOTH CIVIL REMEDIES AND CRIMINAL PENALTIES

Optimally, all searching parents should be able to avail themselves simultaneously of all possible remedies to a kidnapping. This may not, however, be the most effective course of action. Issues involving possible repercussions and conflicts arising from concurrently pursuing the case in both civil and criminal court must be examined. These issues include the haven country's stance on criminal charges being brought while civil

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11. Incoming cases are those where the child is abducted into the United States. Outgoing cases are those where the child is taken from the United States.

litigation is ongoing and on the haven country's willingness to extradite its nationals to a foreign jurisdiction to face criminal charges.

When a prosecutor is confronted with an international parental kidnapping case, one of two scenarios will be present. Either the kidnapped child has been returned to the searching parent or the child is still missing. If the child has been returned, the only questions remaining for the prosecutor revolve around the viability of criminally prosecuting the case. If the child is still missing, however, the options concerning the location and return of the child must be considered.

A. Investigation and Location of the Child

The following investigative steps, resources, and agencies should be considered in the initial search for the child.13

1. Local Authorities

The local or state police are the authorities with whom the searching parent most commonly comes in initial contact. The report of the child having been kidnapped should be accepted immediately by the police,14 who will then begin a missing person’s investigation. The child’s name should also be entered immediately into the FBI’s National Crime Information Center’s Missing Person’s File (N.C.I.C-M.P.F.), under the involuntary or endangered category, depending on the factual circumstances.15 There is no need for criminal charges to have been filed at that time for the child’s name to be entered.16 The defendant’s name should also be filed in that report as the abductor, even if no charges have been brought at that time. This entry should be followed with a warrant to eliminate the possibility of the abductor evading arrest if located.

Once an arrest warrant for the abductor has been issued, his or her name will be entered in the Wanted Person File (N.C.I.C-W.P.F.). Entry of the abductor’s name into N.C.I.C. implies that the local authorities will seek extradition and failure to follow through with an extradition may result in N.C.I.C. privileges

being revoked. Investigators should always check with the prosecutor to ensure that approval for extradition has been given. The reports on the abductor and the child should be cross-referenced, to assist in the case being handled in the most efficient way and avoid the possibility of the child slipping through the net if the perpetrator is apprehended. Once entered into N.C.I.C., this information is accessible to other investigative agencies, such as the Immigration and Naturalization Service (INS) and Customs.

The searching parent should also be counseled to immediately obtain a sole custody order for the child, if one does not already exist. The existence of a custody order may be required under state law before a kidnapping may be recognized. Regardless of whether or not one is required, an order should be obtained both to legally document the current status of all the parties and to assist in the orderly and expedited return of the child to the searching parent, once located abroad.

Clarification of what the police agency and/or prosecutor’s office can and will do, and how the searching parent can help with the early stages of the investigation should be given. It may also be appropriate to refer the parent to another agency that may be able to provide additional assistance, such as the state’s missing children’s clearinghouse or a reputable private missing children’s organization.

If the case is being pursued under state law, local authorities will conduct the investigation, contact other investigative agencies if necessary (e.g., Federal Bureau of Investigation (FBI), The International Criminal Police Organization (I.N.T.E.R.P.O.L.)), and coordinate efforts with state and/or federal prosecutors for such steps as extradition requests. Early coordination with the prosecutor’s office is essential to provide the most effective communication, continuity of effort, and coordination at crucial steps of the investigation, such as drawing up the charging document and drafting of the arrest warrant. If the case is being prosecuted under federal law, local authorities should still give any necessary assistance to the federal agencies.

2. Federal Bureau of Investigation

The FBI can enter the case in several ways. If the case is proceeding under state law, the FBI may be called upon to assist the state or local authorities through their request of the Unlawful Flight to Avoid Prosecution (U.F.A.P.) warrant.\footnote{See Fugitive Felon Act, 18 U.S.C. § 1073 (Supp. 1999).} The primary purpose of U.F.A.P. is to permit the federal government to assist
in the location and apprehension of fugitives fleeing state law jurisdiction. To obtain a U.F.A.P. warrant, there must be probable cause to believe that the fugitive has fled the state for the purpose of avoiding felony prosecution. The requesting state must also guarantee extradition will be sought and totally subsidized, and that it is the state’s intention to prosecute on the underlying felony offense, i.e. parental kidnapping. The U.F.A.P. warrant request will be drawn up by the FBI agent assigned to the case. It will then be approved by an Assistant United States Attorney and presented to a U.S. magistrate or judge. The FBI investigation would then proceed along the lines of any other fugitive case.

Beyond involving the FBI, the U.F.A.P. warrant may be used to revoke the abductor's U.S. passport. This would be done by the State Department’s Office of Citizenship Appeals and Legal Assistance, Passport Services, upon request by the FBI or the U.S. Attorney’s Office. The revocation of the passport may serve as a basis for deportation, unless the abductor is a dual national. If the passport is revoked, the abductor becomes an undocumented alien, which will expedite the return of the offender to the United States’ jurisdiction. Another possible use for the U.F.A.P. is to alert Customs or the Immigration and Naturalization Service that the abductor is wanted and to bar re-entry into the country, and to facilitate apprehension and subsequent prosecution.

If federal jurisdiction is established from the outset by the Bureau, FBI personnel will make the initial entry of the child’s name into N.C.I.C. If the FBI is not certain that federal jurisdiction has attached to the case, it may counsel the parent to contact the local police to take the report and enter the child’s name into N.C.I.C. Should the local authorities fail or refuse to do so, the FBI must make this entry. Once the FBI is brought onto a case, it will perform an initial assessment to determine what steps should be taken next. Where the case is being criminally pursued in the federal system, the FBI agent will work with the federal prosecutor to draw up a federal warrant under the International Parental Kidnapping Crime Act. A fugitive investigation will then ensue. The FBI will use its legal attaché in the foreign jurisdiction to facilitate the

18. See 22 C.F.R. § 51.70(a)(1) (1989). See also 22 C.F.R. § 51.27 (1996) (conditions of denial of passport to a minor). Once a minor’s passport has been issued, it cannot be revoked. The Reid Amendment No. 717 (Senate—June 22, 1999) will require the passport application for a minor be made by both parents, barring exigent circumstances.
investigation and enlist the assistance of the foreign jurisdiction’s police force. It must be kept in mind, however, that the United States’ decree or warrant has no legal force in foreign jurisdictions and diplomatic avenues must be followed for the defendant’s extradition and possible return of the child.

3. I.N.T.E.R.P.O.L.

I.N.T.E.R.P.O.L. facilitates the exchange of assistance and information among criminal police institutions worldwide. Each of the 177 I.N.T.E.R.P.O.L. member countries has a National Central Bureau (N.C.B.) that assists in investigations within the scope of its own country’s laws, policies, and accords. The United States N.C.B. (U.S.N.C.B.) will become involved in an international parental kidnapping case when it is contacted by the state or federal police agency investigating the abduction. At that time, the N.C.B. Criminal Division will begin to coordinate an investigation. I.N.T.E.R.P.O.L. only accepts requests for assistance from law enforcement.

The investigator will initially conduct internal database searches to determine if any prior investigation or correspondence exists regarding the abductor or the child. I.N.T.E.R.P.O.L. will transmit worldwide diffusion messages, which gives the specifics of the crime based on the information provided by the case agent. These diffusions operate as an immediate, international notification that is electronically transmitted worldwide to seek the provisional arrest and extradition of the abductor, or to trace and locate the child.

Should none of the above provide instant results, general circulation notices will be distributed. Diffusions are issued immediately, whereas notices are used for longer-term investigations and location searches. The three notices in international parental kidnapping cases are the Red, Blue, and Yellow Notices. The Yellow Notice is a missing person notice for the child and the Blue Notice is a trace and locate request for the subject of the investigation.

The Red Notice is an international wanted notice, which requests the provisional arrest of the subject with a view toward extradition. In many countries, this is sufficient to temporarily detain the fugitive pending a formal request for provisional arrest and extradition through diplomatic channels. Only the Department of Justice Office of International Affairs can formally initiate a provisional arrest request. To qualify for a Red Notice, there must be a felony indictment and warrant for the abductor
(other than a U.F.A.P.), and a written commitment from the prosecutor to extradite the abductor.

Once the U.S.N.C.B. confirms the location of the abductor, it immediately informs the U.S. agency that originated the case. The prosecutor in the case then communicates any request for arrest and extradition to the Justice Department's trial attorneys at the Office of International Affairs (OIA). Even with the location of the abductor, there is no legal authority for either I.N.T.E.R.P.O.L. or the foreign police to detain the child or place him or her in protective custody based on U.S. warrants or inclusion in the M.P.F. This is an issue for the civil courts or diplomatic channels to resolve.

4. Office of Children's Issues—Department of State

After the child has been reported missing to the local or federal law enforcement agencies and an international abduction is suspected, the Office of Children's Issues (OCI) should also be informed. A division of the Department of State, the OCI has a number of services available to the searching parent. A brief survey of their services include:

- Assist the searching parent in filing an application for the return of the child with the central authority of the foreign jurisdiction if the haven country is a Hague signatory;
- Attempt to locate, visit, and report on the child's welfare in other cases;
- Provide the searching parent with information on the haven country, including the country's legal system and family law, and a list of attorneys in the foreign jurisdiction who will accept clients from the United States;
- Monitor judicial or administrative proceedings abroad;
- Assist the searching parent in contacting local officials in foreign countries or contact them on the parent's behalf;
- Alert foreign authorities to any evidence of child abuse or neglect; and
- Provide information about authentication of documents.

The OCI may be contacted directly by the searching parent and will provide a point of contact for the searching parent throughout the investigation. The OCI will not assist the searching parent in violating foreign laws or in reabducting a child to

21. See infra Part I.B.
the United States. Between May 1997 and April 2000, the State Department has been able to either effectuate a return of custody to the searching parent or the granting of visitation rights in approximately 25% of the cases it opened during that time.\textsuperscript{22}

5. National Center for Missing and Exploited Children

The National Center for Missing and Exploited Children (N.C.M.E.C.) is a national resource center that provides technical assistance in cases of international and domestic parental kidnapping and provides extensive advice on kidnapping prevention.\textsuperscript{23} When a child has been kidnapped, N.C.M.E.C. should be informed by law enforcement or the searching parent. In response to this reporting N.C.M.E.C. will explain the available location resources they, and other agencies, possess. N.C.M.E.C. will also confirm the listing of the child on N.C.I.C.-M.P.F. N.C.M.E.C. may be contacted directly by parents to receive technical assistance, advice or referrals.

Currently, N.C.M.E.C. processes all incoming cases of international parental kidnapping. In that capacity, they will attempt to locate children kidnapped to or retained in the United States by using public information databases and clearinghouses for missing children. N.C.M.E.C. will also assist the searching parent in obtaining legal assistance in the United States for incoming cases.

6. National Center for Prosecution of Child Abuse

The National Center for Prosecution of Child Abuse (Center) is a national resource center that provides a central resource for improving the criminal justice system’s response to all forms of child abuse, including child abduction. The Center provides assistance to prosecutors, investigators, and victim/witness professionals through provision of technical assistance with the criminal prosecution of these cases. The Center also has an extensive list of publications dealing with the prosecution and investigation of this crime.

\textsuperscript{22} See Study Calls for More Aid in Child Cases, N.Y. Times, Apr. 3, 2000, at A16.

7. Reunification

Even if the investigation results in the child being found and returned, a range of complex matters will still need to be attended. First, it must be recognized that reunification between the searching parent and the child may not be a fairy tale ending to an abduction. Reunification is frequently a long process that begins with preparing both the child and the adult for the event. If not handled properly, the reunification may cause additional trauma for both.

Investigators or victim advocates should prepare the searching parent for the fact that the child may have mixed feelings about seeing him or her again. Children may have been lied to by the abductor and told the searching parent had died or did not love them anymore. If this is the case, the child may fear or resent the searching parent. It is advisable to make certain that the searching parent is prepared for the worst-case scenario.

The child should be prepared also. This may be done by investigators, victim advocates, prosecutors, or counselors, depending on the facts of the case. Before reuniting, the child needs to know the searching parent loves them and has been looking for them ever since they were kidnapped. Missing posters with the child’s picture on them may help show this to the child. The child may also be afraid of what is happening to the abducting parent. If at all possible, law enforcement should not arrest the perpetrator in the presence of the child. It is important to make sure the child knows that he or she did nothing wrong and that the offending parent is being taken to jail because he or she broke the law.

The searching parents should be strongly advised to get counseling, even if only for a brief time, for both themselves and the child. Counseling is a necessity, not a luxury. The healing process will not take place overnight, and the guidance of a trained counselor or therapist can greatly assist in making the transition for the parent and child less traumatic.

If the abduction was treated as a criminal matter, the victim parent meets relevant financial requirements, and there is a certainty that the child will be returned, the Office of Victims of Crime may be able to assist with funds to be used for transportation to the reunification. The N.C.M.E.C. should be contacted for assistance with this matter.
B. Return of the Child Under International Civil Remedies

1. Hague Convention Countries

When the child's location is known and return of the child is sought, the first question to be answered is whether the country to which the abducting parent fled is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, as these countries offer additional mechanisms for the child's return.\(^\text{24}\) The most recent figures available indicate that slightly over half of all international parental kidnappings originating in the United States involve children being taken to Hague signatory countries.\(^\text{25}\)

The Hague Convention is solely an international jurisdictional treaty, which became effective for the United States on July 1, 1988. The Convention is a purely civil remedy, designed to effectuate the return of children who are wrongfully removed or retained across international borders. It also attempts to insure the rights of custody and of access (visitation) under the law of one of the contracting States are respected in other contracting States. The convention is only enforceable between contracting, signatory States and is not retroactively enforceable.\(^\text{26}\) However, if the offense is defined under relevant law as continuous, i.e. covering not only the taking but also the entire period until the child is returned, then an application for return of the child may still be possible. The intent of the Convention is to order the return of the children to their place of "habitual residence" prior to the kidnapping, thereby discouraging forum shopping for


\(^{25}\) Approximately 60% of the current outgoing cases at the State Department involve abduction to Hague signatory countries. Telephone Interview with Haas, supra note 10. Four hundred ninety (490) of the 960 outgoing cases open at the State Department in 1998 were to Hague signatory nations. Anderson, supra note 10. In 1996, 367 of the 454 State Department caseload of outgoing international parental kidnappings were to Hague signatory nations. Interview with Clore, supra note 10 (supporting data on file with author). Between 1990 and 1995, of the 790 outgoing cases reported to N.C.M.E.C., all but 78 were taken to Hague signatory nations. Memorandum from N.C.M.E.C. to The National Center for the Prosecution of Child Abuse (Feb. 9, 1995) (on file with author).

favorable custody determinations and international flight to secure the child. It is not an exclusive remedy and may be used in addition to remedies under other laws, including criminal law.27

Each signatory State designates a Central Authority to process applications seeking the return of children wrongfully removed from or retained in any of the contracting States. The U.S. Central Authority is the State Department, Bureau of Consular Affairs, Office of Children's Issues (OCI). OCI processes all outgoing cases, i.e. where the child has been removed from or retained outside the United States. OCI is also involved in prevention and education initiatives within this area.

If the country in which the child is being held is a Hague signatory, the searching parent should be counseled to contact the State Department immediately and request assistance from them in filing an application with the foreign authorities for the return of the child. The State Department will then forward the application to the foreign jurisdiction and work with that nation until the case is resolved.

Even under the Convention, however, there is no guarantee that the child will be returned. First, Article 4 of the Convention establishes that if the child is over sixteen at the time of the original taking or retention, or becomes sixteen at any time after the taking, the convention does not apply. Second, if the custody rights involved are those of visitation ("access" as they are termed in the convention), the Central Authority may facilitate and secure those rights, but under Article 21, a violation of visitation rights does not trigger procedures for the return of the child.

Other requests for returns may be affected by discretionary factors. It is within the judge’s discretionary power under Article 12 to refuse return of the child if the child has become settled in the new environment and more than one year has passed from the date of the taking or detention. If more than one year has passed and the reason for the delay was concealment of the child’s location, the petition may still be considered under the argument that the one-year limit should be tolled due to the abducting parent’s conduct, as equity demands no one profit from their own wrongdoing.

Discretion is also afforded under Article 13 if the child is deemed mature enough to voice a preference for staying, or if there is a grave risk of harm to the child if returned. Children as young as nine have been found mature enough to have their

wishes considered. Finally, return may also be refused if it would be against the fundamental principles of human rights and freedoms in the requested State to return the child. Signatory countries have rendered a wide variation of decisions interpreting these discretionary criteria. There is also a marked variance in the rate of return among the different signatory countries.

2. Non-Hague Countries

If the country to which the child has been taken is not a Hague signatory, the State Department may still offer some assistance. If the searching parent seeks to have a U.S. custody decree enforced abroad, the State Department will provide a list of English-speaking, foreign attorneys who could take the case. The State Department will also provide general information on the legal practices of the country, including obtaining evidence abroad, service of process abroad, and retaining a foreign attorney. While consular officials may not perform legal services, they will seek to ensure that the searching parent’s rights, as provided for by the laws of that foreign country, are respected through monitoring of the case’s progress. Additionally, the State Department may also be able to provide a whereabouts and welfare check on the child. The FBI and I.N.T.E.R.P.O.L. may also be able to assist in locating either the child or the abductor.

The searching parent may attempt to have the U.S. decree recognized in the other country; however, a custody decree issued in the United States has no inherently binding legal effect abroad. The likelihood of a foreign court enforcing a U.S. order depends, in large part, on the tradition of comity that the legal system in question has with the United States.

One way to attempt to have the U.S. order recognized is by having it registered in the foreign jurisdiction under a “mirror image” order. Registration may be made with consent of both parties or may be pursued unilaterally. Registration allows the U.S. order to be enforced abroad as if it were a decree of the haven foreign jurisdiction itself. Gaining the registration of the U.S. order abroad does not necessarily mean, however, that the U.S. order may not be subsequently modified by the foreign jurisd-

30. See Linda Girdner & Janet Chiancone, A.B.A. Ctr. on Children and the Law, Survey of Central Authorities of the Hague Convention on the Civil Aspects of International Child Abduction (1997) (showing successful return rate varying from 5% (Finland) to 95% (Luxembourg)).
diction. An example of a mirror order can be obtained from the National Center for Prosecution of Child Abuse.

3. Other Solutions

The searching parent may go to court in the foreign jurisdiction and attempt to win custody under the laws of that nation. In addition, the possibility of negotiating with the abductor and/or his or her family for the return, or at a minimum visitation, of the child should be explored. An attempt may be made to secure political support in the United States to give leverage to the request for the return of the child. Depending on the factual circumstances, a child-snatching civil tort suit may be appropriate. If none of these options are available, adequate, applicable, or appropriate, the criminal options will need to be investigated as either an additional method of affecting the return of the child or as the sole manner of redress possible.

II. Determining if Prosecution is a Viable Option

A. Punishment of the Offender Under Criminal Law

1. Possibility that Pending Criminal Charges May Harm Prospects of Civil Remedies

While it is legally permissible to proceed simultaneously under both civil and criminal law, pursuing criminal remedies prior to exhausting civil remedies may have a deleterious effect on the civil aspect of the case. The decision of whether to exhaust civil remedies will have to be made on a fact-specific basis, depending on the country to which the child has been abducted. Contact the State Department, Office of Children's Issues for country-specific advice.

Interestingly, under the Hague Convention, the existence of pending criminal charges may have a counterproductive effect on the proceedings, as the convention's goal is to return the children to their place of habitual residence, not to criminally sanction the offender. Some foreign jurisdictions, both Hague and non-Hague, or individual judges will not return the child if there are criminal charges pending due to a fear that the criminal


33. See Hoff, supra note 23.
charges will eclipse the issue of the child’s return. Some jurisdictions may not or will not want to subject their nationals to a foreign criminal code. For these reasons, the civil aspects should normally be pursued before resorting to the criminal justice system. Consider, however, issues concerning any applicable criminal statute of limitations. If a civil remedy cannot be accomplished before the criminal statute expires, it may be necessary to file a criminal charge simply to prevent it from being barred.

 Conversely, some foreign jurisdictions find criminal charges helpful in locating the child, as they generate the use of their local police resources in finding the child, or in proceeding with the case. Therefore, it may be decided that criminal charges should be brought prior to civil remedies being exhausted to provide for the fullest investigation and subsequent location of the child, even if the desire of the searching parent is only that the child be returned.

2. What Criminal Charges Will Not Do

In deciding whether to criminally prosecute, it is important to recognize the limitations of this approach. Most importantly, criminal remedies will not guarantee the return of the child. Criminal charges are directed only at the perpetrator and generate no enforceable court order that the child be produced either to the U.S. court or the searching parent. Even if the abductor is criminally charged and convicted in the United States, this will not necessarily result in the child’s recovery, although a recalcitrant defendant may be subjected to a longer stay in prison for not producing the child. Barring a particularly heinous factual situation, criminal charges may have no effect on the parental rights of the abductor, even if convicted. However, acknowledgment of the inherent psychological trauma caused to children by these abductions should be urged where appropriate on a court subsequently reviewing parental rights.

Finally, criminal charges should not be indiscriminately used as a bargaining tool in the attempt to recover the child. A charging determination may, however, be influenced by the prompt

34. See Girdner & Chiacone, supra note 30 (citing Australia, Austria, Greece, the Netherlands, and Slovenia as falling into these categories).
35. See id. (citing Argentina, Denmark, Finland, France, Greece, Hungary, Luxembourg, Mauritius, Monaco, Norway, Panama, Poland, Sweden, Switzerland, United Kingdom, United States of America, and Zimbabwe as falling into these categories).
36. See United States v. Amer, 110 F.3d 873 (2d Cir. 1997) (children may remain in Egypt, despite successful prosecution of the abducting parent).
and voluntary return of the child, and this information may be conveyed properly to the suspect. If criminal charges are pursued, it would be preferable, under all but the most extreme circumstances, that these charges not be dropped in exchange for the child, as the criminal justice system should not be used exclusively as leverage to gain the desired result in the civil system. There should be a valid criminal complaint to invoke the criminal system. However, lack of an effective civil remedy should be taken into consideration, while simultaneously keeping the child's best interests in mind.

3. Coordination of Civil and Criminal Proceedings

a. Coordination with Other Counsel

When the searching parent is represented by private counsel in family court proceedings, it is important to maintain contact with private counsel. The private counsel should be advised immediately to obtain a sole custody order. If authorized or permitted by state law, the prosecuting attorney may assist the searching parent in this task. If not, the parent should be referred to legal services, the local bar association, or other appropriate agencies.

b. Coordination of Cases/Double Jeopardy

The searching parent and counsel should be cautioned regarding pursuing contempt proceedings in family court based on the defendant's violation of any civil child custody order. If the defendant is found to be in civil contempt while the criminal prosecution is pending, double jeopardy may bar further proceedings in the criminal case.

Double jeopardy claims have, however, been successfully challenged on a number of grounds. Civil and criminal contempt sentencing have been distinguished on intent grounds, reasoning that criminal contempt is used to "vindicate the dignity or authority of the court" while civil contempt protects and enforces rights of private parties by compelling obedience to

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37. See, e.g., CAL. FAM. CODE § 3133 (West 1994).
court orders.\textsuperscript{39} In sum, criminal contempt punishes, whereas, civil contempt coerces. In the case of Mahoney v. Commonwealth,\textsuperscript{40} the court held that imposing jail time for civil contempt of a civil order until the defendant met a cash bond required to purge the contempt was not violative of double jeopardy.

Double jeopardy claims may also be barred under the Blockburger\textsuperscript{41} “same elements” test,\textsuperscript{42} even if the contempt is criminal.\textsuperscript{43} In Blockburger, the Court stated:

[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether these are two offenses or only one, is whether each provision requires proof of a fact which the other does not.\textsuperscript{44}

If the federal international parental kidnapping statute is used for prosecuting the offender and the state’s law is relied on for the contempt charge, double jeopardy issues will not arise. Dual prosecutions by dual sovereigns for the same conduct usually do not constitute double jeopardy, the exception being where one sovereign merely acts as a tool of another sovereign in order to avoid the prohibition against double jeopardy. An act denounced as a crime by both national and state sovereignties is an offense against both and punishable by each,\textsuperscript{45} as is an act denounced by two different states.\textsuperscript{46}

While it is always best to avoid the possibility of double jeopardy even being raised as a bar to criminal prosecution, the facts of the case and the civil judge’s sentencing must be looked to in order to determine whether or not a bar has been raised. Unfortunately, no definitive rule can be given as to whether or not a civil sanction will bar a criminal prosecution. Therefore, coordination with civil counsel is of the utmost importance to avert a potential disaster.

\textsuperscript{40} 612 N.E.2d 1175 (Mass. 1993).
\textsuperscript{41} Blockburger v. United States, 284 U.S. 299 (1932).
\textsuperscript{43} See Kimbler, 509 N.E.2d at 99.
\textsuperscript{44} Blockburger, 284 U.S. at 304. \textit{See also} Hudson v. United States, 522 U.S. 93 (1997) (setting out test of whether a particular punishment is criminal or civil for purposes of double jeopardy).
\textsuperscript{45} See United States v. L.Z., 111 F.3d 78 (8th Cir. 1997).
c. Coordination with the State Department

If the child is still missing and the State Department is involved in an ongoing search, the prosecutor's office should keep in touch with the State Department to ensure all relevant information is passed along to the criminal prosecution.

B. Case Evaluation

1. The Searching Parent's Rights

Having decided that criminal prosecution should be considered, the viability of the case must be decided. This will be initially determined by whether the rights of the searching parent have been violated under either federal or state law.

Federal law defines parental rights as:

[T]he right to physical custody of the child—
(A) whether joint or sole (and includes visiting rights); and
(B) whether arising by operation of law, court order, or legally binding agreement of the parties.\(^{47}\)

Neither the lack of a custody order at the time of the taking, the abduction occurring prior to the legal dissolution of a marriage, the existence of joint custody rights, nor the violation of visitation rights (as opposed to full custody rights) is necessarily a bar to prosecution under this statute. The parental rights invoked "by operation of law" are determined by state law.\(^{48}\) Therefore, even under the federal statute, the law of the particular state in which the abduction occurred may need to be considered.

Every state has its own unique criminal parental kidnapping statute, often styled as "custodial interference," and a careful review of this statute is essential to proper case analysis. While the requisite elements vary from jurisdiction to jurisdiction, there are some general factors that need to be assessed before proceeding. If there is a requirement of a custody order in the state statute, the existence, validity, and sufficiency of the order must be determined. If there is such a requirement, but no order exists, other illegal conduct that occurred at the time of the taking (e.g. assault, battery, and burglary) may be charged.


\(^{48}\) See United States v. Amer, 110 F.3d 873, 884 (2d Cir. 1997) (taking occurred prior to both the legal dissolution of the marriage and issuance of a custody order, neither of which was a bar to prosecution under New York law).
Some jurisdictions do not require a custody order\textsuperscript{49} or may specifically cover pre-decree situations,\textsuperscript{50} while others prohibit visitation interference\textsuperscript{51} or interference with joint custody.\textsuperscript{52} Issues that arise when non-marital children are involved, such as determination of paternity and presumption of legal custody,\textsuperscript{53} must also be resolved.

While some states have addressed international abductions in their statutes,\textsuperscript{54} charges do not need to be brought under special international provisions of state law. The general state parental abduction statutes can be used for international kidnappings. However, in order to use the federal statute, it must be certain that the child was abducted to a foreign jurisdiction. If the child has yet to be located, there may be difficulties proving he or she has been taken out of the country and charging under the state statute may be advisable.

2. Obtaining Jurisdiction Over the Defendant

Obtaining jurisdiction over the defendant must also be realistically evaluated. It should be determined first where the defendant is currently located and then whether there is an extradition treaty between that country and the United States. The Office of International Affairs (OIA), Department of Justice will assist in that determination. The OIA will establish if the treaty is one of "dual criminality," which requires that the act be an offense in both contracting countries, or if it is a "list" treaty, which permits extradition only for the offenses specifically listed in the treaty. If it is a list treaty, it should be resolved whether parental kidnapping is explicitly named or, if not, whether the case might be tailored for extradition by classifying the act as one of generic kidnapping. Even if an extradition treaty is in exis-


\textsuperscript{50} See, e.g., CAL. PENAL CODE § 277 (West 1999); TEX. PENAL CODE ANN. § 25.03 (West 1994).


tence, the OIA should be contacted to make certain that the contracting country will, as a matter of fact, extradite its own nationals for parental kidnapping, whether styled as such or simply as kidnapping.

Even in the absence of a treaty, there remain several options for securing the return of the kidnapper to the United States. Options include having the defendant deported or expelled to the United States, provided the defendant is not a national of the haven country. Deportation or expulsion may also be to a third country that will extradite to the United States. Failure to have the proper work permits or passport revocation is grounds for either of these remedies. There may be a possibility of informal agreements between the countries that can secure the defendant's return. Finally, if the defendant is a citizen of the haven nation and that nation exercises jurisdiction over its national's extraterritorial offenses, it may be theoretically possible to have the defendant tried in the haven nation for the kidnapping.

For long-term investigations, the possibility of an international "red notice" being issued by the International Criminal Police Organization (I.N.T.E.R.P.O.L.) for the defendant must be explored. Should the defendant leave the haven country to travel to or through any of the I.N.T.E.R.P.O.L. member countries, this notice may result in the defendant being temporarily detained pending a formal request for provisional arrest and extradition.55 Once extradition is granted, jurisdiction will be gained over the defendant.

The collateral issues of venue must also be addressed. While the language in U.S. statutes varies, parental kidnapping, including international cases, generally may be prosecuted where the child or parent is a resident, where the child was kidnapped, or where the custody order was granted. Determine if there is a residency requirement for the searching parent or child in the statute being used. Some states statutorily define appropriate venues for prosecution.56 If there is more than one appropriate venue, it should be determined which location will best provide for the swift and efficient prosecution of the case by assessing such issues as prior experience with these cases or case loads. Resources, both fiscal and personnel, should play a part in this decision.

56. See, e.g., COLO. REV. STAT. ANN. § 18-3-304 (West 1999); MASS. GEN. LAWS ANN. ch. 265, § 27A (West 1992); WIS. STAT. ANN. § 948.31 (West 1996 & Supp. 1999).
3. General Factors to Consider in Criminal Charging

Assuming that the requisite elements of the crime have been met, the decision regarding the viability of a case should be based on an objective evaluation of admissible evidence and the likelihood of conviction. General factors to consider in the decision of whether or not to pursue criminal prosecution include the following:

- Is there sufficient admissible evidence to prove every element of the offense beyond a reasonable doubt;
- How long did the abduction last;
- What were the circumstances surrounding the taking (violence, premeditation, etc.);
- How was the child treated during the abduction (neglect, abuse, etc.);
- What did the abducting parent tell the child about the searching parent (dead, doesn't love the child any longer, loves new family more, other types of brainwashing);
- Has the child been safely recovered and, if so, was it voluntarily;
- What is the probability of future abductions;
- Has the abducting parent previously taken, or threatened to take, the child;
- Are the witnesses prepared to go to court;
- Are the witnesses, especially the searching parent, credible, sympathetic and/or stable;
- Are there allegations of domestic violence/sexual abuse, and
- What is the likelihood of conviction.

It should be the policy of every office to vigorously prosecute international parental kidnapping. Kidnapping is a form of child abuse and must be treated as such. A less than certain outcome to the case should not preclude formal charges. If the evidence is legally sufficient, a "reasonable probability" of conviction supports proceeding with prosecution.58

Other sources of information that may be of importance and should be reviewed are any civil court or family court records that concern this case. These records should be examined to

help assess the factual situation that existed prior to the kidnapping and identify issues that may be raised in court, such as necessity or fleeing domestic violence.

4. Declining Prosecution

If a decision not to proceed is made, the reasons should be explained to the searching parent and involved family members. The decision should be explained using easily understood, nontechnical language and with an acute awareness of the emotional impact this decision will have on the searching parent. The presence of a supportive third party, such as a family member or victim advocate, may help the searching parent cope with this decision. That person should be prepared for the victim to feel another injustice is being done and anticipate how best to respond to this. Sincere, prompt and sensitive communication regarding the consideration given to the case can help the searching parent view the criminal justice process in the least harsh light.

The searching parent should be referred to the local bar association for advice on other legal avenues of redress. Referral to other service providers to secure necessary assistance, such as counseling, may also be appropriate.

Involved victim advocates, guardians ad litem, the searching parent's counsel (especially if there has been contact throughout the process), and therapists or social workers working with the family should also be informed of the decision to decline prosecution. It may be helpful to share the prosecutor's knowledge of the case with other agency attorneys, such as child protection, to ensure the child's safety.

III. WHEN PROSECUTION IS PURSUED

A. Charging

Having decided to accept the case for prosecution, the charging decision becomes the first priority. Issues that must be dealt with at this stage include: whether to proceed under state or federal law; whether the defendant is in the United States or must be extradited; what type of treaties are in effect between the United States and the haven nation; other crimes that might additionally or alternatively be charged; and other defendants who might be charged.

1. Federal International Parental Kidnapping Law Option

In 1993, the International Parental Kidnapping Crime Act (I.P.K.C.A.)\(^6\) came into force, making international parental kidnapping of a child under the age of sixteen a federal felony, punishable by fine and up to three years imprisonment. I.P.K.C.A. was created in response to the need to deter international parental kidnapping, provide a basis for extradition of offenders, provide federal warrants, and underscore the seriousness of the crime.\(^6\) The language of the act clearly states, however, that the Hague Convention is still the preferred method of resolution, making exhaustion of civil remedies the favored course of action prior to invoking criminal jurisdiction.\(^6\)

Factors favoring federal prosecution include: the federal sentencing range of up to three years being more severe than penalties under some state laws, a factual scenario that is not encompassed by a particular state law;\(^6\) or, the desire to charge under a statute which designates parental kidnapping as a continuous offense, particularly where the child has not yet been recovered.\(^6\) The availability of defenses may also play a part in the choice of federal rather than state law. An affirmative defense of the age of the child may preclude prosecution under some state statutes, but not under federal law.\(^6\) I.P.K.C.A. has, however, been used sparingly—more than six years after its enactment, only one published decision of a federal court exists construing this statute;\(^6\) and of the sixty-two federal indictments that have been issued, only thirteen have resulted in convictions.\(^6\)

2. When Abduction is a Continuous Offense

If a parental kidnapping statute prohibits retention, detention, or concealment of a child, the offense is continuous. In


\(^6\) Issues such as visitation, pre-decree coverage and joint custody would be examples of such scenarios.

\(^6\) See United States v. Amer, 110 F.3d 873, at 904 (2d Cir. 1997) (discussing the possibilities of charging under continuous offense statutes).

\(^6\) See COLO. REV. STAT. ANN. § 18-3-304(3) (West 1999) (affirmative defense of child over 14 and child’s desire to go with abductor); 18 PA. CONS. STAT. ANN. § 2904(b) (2) (West 2000) (same); WYO. STAT. ANN. § 6-2-204(c)(ii) (Michie 1999) (same).

\(^6\) See Amer, 110 F.3d 873.

\(^6\) Study Calls for More Aid in Child Cases, N.Y.TIMES, Apr. 3, 2000, at 16.
addition, if it merely prohibits a taking or enticing away, the offense occurs at the time of abduction and may not be continuous. The kidnapping statute itself may state whether the offense is considered continuous. The designation of an offense as continuous is important for two reasons. First, if the crime occurs at the time of the taking only, the statute of limitations begins to run on that date. If the offense is designated as continuous, the statute of limitations does not begin to run until the child is returned.  

Second, a continuous offense leaves the door open to future charges should the child not be returned prior to the defendant's completion of the sentence imposed for the initial period of custodial interference. In United States v. Amer, 69 the defendant was convicted of international parental kidnapping under the federal statute and sentenced to two years imprisonment and a one-year term of supervised release, with a special condition that Amer effect the return of the children to the United States. The three abducted children were not returned to their mother, but continued to be held in Egypt. The Court of Appeals specifically stated in its decision that upon his release, Amer could be recharged with retaining the children over the intervening period of his incarceration. 70 Legislatively designating the crime as a continuous one is an excellent tool to ensure that the defendant either returns the children to their lawful custodian or spends the children's minority years separated from them and incarcerated.

3. State International Parental Kidnapping Law Option

State laws prohibiting parental kidnapping or custodial interference may be used in international abduction cases. No special state statute is necessary. However, as state laws concerning parental kidnapping vary significantly, it is necessary to examine the state law in question to determine if it is preferable to proceed under state or federal law. Reasons to prefer proceeding under state law may include harsher penalties (i.e., in excess of three years possible), 71 the kidnapped child's age as an issue (i.e., child is between sixteen and eighteen), or affirmative

68. See, e.g., State v. Rose, 706 P.2d 583 (Or. Ct. App. 1985) (indictment handed down nine years after the children were taken but one month after the interference ceased held to be within the statute of limitations as the statute began running only after the cessation of interference).
69. 110 F.3d 873.
70. See id. at 904.
71. See, e.g., MONT. CODE ANN. § 45-5-304 (1999) (maximum term of imprisonment not to exceed 10 years).
defenses being more difficult to invoke under state statute. For example, some states require a reporting of the child's location to state authorities to invoke the affirmative defenses of necessity or imminent harm to child. Some states also refuse to recognize necessity as a defense if the child is taken out of state.

4. Generic Kidnapping Law Option

The importance of using generic kidnapping statutes should not be overlooked. While some states and the federal law specifically prohibit the charging of generic kidnapping when a parent is the abductor, some states have not precluded this possibility. In an effort to tailor a state case for extradition, charging the defendant under the generic statutes in addition or in the alternative to using the parental kidnapping statute should be considered. It is important to consult state case law to determine if merger or double jeopardy rules prevent such action. When general and limited statutes prohibit the same conduct, the accused can be charged only under the more specific statute.

This charging designation will become relevant at the extradition stage when the type of treaty that the haven country has with the United States becomes important. If it is a "general" treaty that allows extradition under principles of dual criminality (allowing extradition if the act is a crime in both signatory

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74. See also United States v. Floyd, 81 F.3d 1517 (10th Cir. 1996) (step-parent who has relinquished "parental rights" may be prosecuted under traditional federal kidnapping statute); State v. Ghajari, 695 A.2d 143 (Md. 1997) (non-custodial parent exempt from prosecution under generic kidnapping statute); Johnson v. State, 637 So.2d 3 (Fla. Dist. Ct. App. 1994) (Florida generic kidnapping statute excludes biological parents) (but see Lafleur v. State, 661 So.2d 346 (Fla. Dist. Ct. App. 1995)); People v. Algarin, 558 N.E.2d 457 (Ill. App. Ct.) appeal denied, 561 N.E.2d 695 (Ill. 1990) (term "parent" includes parent related by blood, regardless of amount of contact with child or lack of responsibility for upbringing). See also United States v. Sheek, 990 F.2d 150 (4th Cir. 1993) (biological mother whose rights had been legally terminated still a "parent" under the Federal Kidnapping Act) (superseded by 18 U.S.C. § 1201(h) (1994)).
nations), the parental kidnapping statute may be adequate to generate extradition. If, however, there is a "list" treaty in effect (allowing only for extradition for listed offenses), generic kidnapping may be the only course of action open. This option should be explored in consultation with the Office of International Affairs, which will assist in determining the type of treaty involved and the appropriate crime to charge.

5. Other Crimes/Possible Charges

In addition to the kidnapping charge, the feasibility of charging the defendant with other, equally serious state or federal crimes should be explored. For example, if the defendant has engaged in passport fraud, the Diplomatic Security Service (DSS), which should be contacted because DSS can assist in investigating the case with an eye to charging the following: false statement in application and use of passport;\textsuperscript{76} forgery or false use of passport;\textsuperscript{77} misuse of passport;\textsuperscript{78} false statements;\textsuperscript{79} fraud and related activity in connection with identification documents;\textsuperscript{80} or false claim to United States' citizenship.\textsuperscript{81} Law enforcement may contact the U.S. Department of State, Bureau of Diplomatic Security for information regarding the nearest DSS office. With an international network of DSS agents assigned to 137 U.S. embassies and consulates abroad, DSS is also able to assist U.S. law enforcement in locating abducted/missing children by coordinating investigations with appropriate foreign law enforcement authorities.

Additionally, charges, such as burglary, breaking and entering, or theft from the searching parent's home, may have accompanied the abduction. Felony charges, such as conspiracy, contempt, extortion, assault and battery, child abuse or neglect, domestic violence, or weapons violations, may also apply.

6. The Rule of Specialty

If the defendant has to be internationally extradited, it is of paramount importance that all charges, which will or may be pursued, be listed in the indictment or bill of information. This is necessary under the "rule of specialty," which states that a defendant may not be tried for any crimes that were not listed in

the indictment.\footnote{See United States v. Rauscher, 119 U.S. 407 (1886); Johnson v. Browne, 205 U.S. 309 (1907).} The defendant is surrendered by the foreign government to stand trial on the listed charges and only the listed charges. Bringing any additional charges would be a violation of the terms of the treaty, which generated extradition. In extraordinary circumstances, such as the factual basis for additional charges coming to light only after the return, a waiver may be sought. The OIA should be consulted in these cases.

As there is usually no ability to add charges at a later date, it is advisable to include every genuine and serious charge in the underlying warrant that generates extradition. This should not, however, be viewed as an opportunity to overcharge the defendant, but rather as an opportunity to give serious consideration to all the conduct of the defendant and tailor the charging instrument accordingly.

7. Third Party Liability

Charging third parties who assisted in the abduction should be considered. Parents, who abduct their children, often have accomplices, and family or friends who aid in the kidnapping or its continuation, and therefore, may be criminally liable as aiders, abettors, or conspirators.\footnote{See State v. Simplot, 509 N.W.2d 338 (Wis. Ct. App. 1993) (parent’s immunity from generic kidnapping charge does not extend to parent’s agent).} Some jurisdictions have specifically addressed this in their statutes. These third party agents should be charged with both the kidnapping and conspiracy to kidnap, but if the underlying act of the parent taking or retaining the child does not fulfill the necessary elements of the offense, the failure of the underlying claim may bar the agent’s accountability.\footnote{See ALA. CODE § 13A-4-3 (1994), CONN. GEN. STAT. ANN. § 53a-9 (West 1994), N.D. CENT. CODE § 12.1-03-01 (1997).} Charging these third parties accomplishes two goals simultaneously. First, the parties are held criminally responsible for their conduct. Second, this may provide the prosecutor with leverage, in exchange for leniency, to obtain testimony against the abducting parent or to motivate the third party to assist in the recovery/return of the child.

B. Extradition

Assuming the defendant has not returned to the United States but is charged with the appropriate crime(s), a request for extradition should be made promptly. The office that handles
these requests is the OIA. Prosecutors may contact this office directly.

1. Extradition Packet

An extradition packet must be prepared by the state or federal authorities responsible for prosecuting the charge. The contents of the packet should include the following:

1. An affidavit from the prosecutor describing the case;
2. Authenticated copies of arrest warrant and charging document; and
3. Evidence establishing the crime, including sufficient evidence to identify the fugitive as abductor.

The prosecutor's affidavit should act as a cover letter, introducing and explaining the documents while also providing enough background of the affiant to assure the foreign government that the affiant is familiar with the case and U.S. law. Three other pieces of information are essential. First, the affiant must attest to the authenticity of any court papers or documents submitted in support of the request. Second, the offense(s) with which the fugitive is charged must be clearly identified, including the penalties prescribed. It should be clearly stated that the statute(s) involved were in effect when the offense occurred and the statute of limitations for bringing a case has not expired. Third, a brief description of the facts underlying the charges should be given in plain language and short sentences to facilitate proper translation.

All treaties condition extradition upon the presentation of evidence sufficient to justify committal for trial under the law of the requesting country. Generally, this burden will be met by showing a prima facie case exists. Prima facie evidence exists if the evidence presented, standing alone, would allow a reasonable jury that was properly instructed to accept it and find a verdict of guilty.

These documents will be reviewed by the OIA and, if found to be in order and sufficient, certified and authenticated. The OIA will then prepare the diplomatic note and present the entire packet to the Office of the Legal Advisor at the State Department for presentation to the haven nation's diplomatic representatives.

2. Provisional Arrest Request

Under exceptional circumstances, the possibility of requesting a provisional arrest exists. Exceptional circumstances are reserved for cases in which there is either an imminent danger of
further flight by the abductor or a possibility of harm coming to
the child while the documents and evidence in support of a for-
mal request for extradition are prepared. If confronted with one
of these situations, the prosecutor should make a provisional
arrest request of the OIA and provide them immediately with the
documentation and information necessary to proceed with this
petition. The request should be in writing, but in urgent cases, it
can be made by phone with written confirmation provided imme-
diately thereafter.

If the request is granted, the defendant will be arrested and
detained by local law enforcement pending the completion of
the formal extradition request. Be aware that many countries
have a maximum period of provisional arrest, varying generally
between thirty to ninety days; after which time, the fugitive will
be released if the proper documentation has not arrived. Initial
failure to provide timely documentation may also bar subsequent
rearrest on these charges, even if properly documented. When
provisional arrest is requested, the documents should be com-
pleted and sent to the OIA within fourteen days.

3. State Department’s Role in Extradition

The State Department is the designated administrator of
treaties. After reviewing the extradition packet, it is the Office of
the Legal Advisor at the State Department’s role to present state
or federal extradition requests to foreign governments through
their representatives at either the U.S. embassy site or consulate
location. The State Department also acts as a facilitator in these
matters, performing subsequent checks on the progress of the
request. It may also, depending on relevant circumstances, be
able to exert diplomatic pressure on the haven nation in an
attempt to gain approval of the request. The State Department
cannot, however, force the haven nation to honor the U.S.
request, nor can it force the haven nation to apply its own laws in
any particular way.

4. Foreign Nation’s Decision on the Application

After the formal request has been delivered to the haven
nation, the foreign government will make a decision on the mat-
ter. There is no specific, delineated time frame in which this
decision must be made. Once the authorities in the foreign
country indicate they will surrender the fugitive, OIA notifies the
prosecutor and also coordinates the logistics of the formal sur-
render. Agents, usually from the United States Marshal’s Office,
go to the foreign country, take custody of the fugitive, and return
him or her to the United States, specifically to the state or federal jurisdiction that requested the extradition. The law in many countries provides that a fugitive found extraditable will be freed if not removed within a specified time, so extraditing as quickly as possible is not only efficient, but may also be legally necessary.

Remember, this process applies only to the defendant. The child, even if his or her whereabouts are known, is not going to be returned to the United States via this mechanism. The proper channel for the return of the child is through diplomatic or civil mechanisms, not the criminal process.

If extradition is refused, the indictment should not be closed or dismissed if at all possible. Keeping the case alive will continue the Red or Blue Notice designation put on the defendant by issuance of the I.N.T.E.R.P.O.L. notice. This means that if the defendant leaves the haven nation to travel to or through nations with more extradition-conducive treaties, he or she may still be detained pursuant to the continuing Red Notice on file. The Yellow Notice on the child should also be continued.

5. Costs of Extradition

The requesting governmental party (i.e., the state or federal prosecutor’s office) has to bear the burden of all costs incurred in the extradition process. These costs may include, but are not necessarily limited to, the following:

- Cost of translating documents;
- Legal representation of the state or federal government in the foreign jurisdiction;
- Boarding costs of the fugitive pending extradition;
- Transportation and other expenses of escort officers handling the physical return of the fugitive; and
- Transportation of the fugitive to the United States.

As these costs can be substantial, it is advisable to obtain financial information and a commitment of funds before venturing into this arena. If there is more than one proper venue in the jurisdiction for prosecution, limited funds is an appropriate reason to pass prosecution to a jurisdiction with greater resources. Some statutes, however, specifically provide for costs incurred in locating or returning the child to be assessed against the defendant after conviction. The costs incurred in extradition should be weighed in accordance with the general extradi-

85. See, e.g., CAL. PENAL CODE § 278.6(c) (West 1999); D.C. CODE ANN. § 16-1023(g) (1997); 720 ILL. COMP. STAT. ANN. § 5/10-5(b)(10)(e) (West Supp. 1999); NEV. REV. STAT. ANN. § 200.359(5) (Michie 1999); WASH. REV. CODE ANN. § 9A.40.080(1) (West Supp. 2000).
tion policy of the prosecuting office. International parental kidnapping should not be given less priority than other child abuse or fugitive felon cases.

C. Pretrial Procedures

Pretrial motions should be both offensive and defensive in character. They should preemptively guard the jury from exposure to inadmissible evidence or frivolous innuendo. The ability to shape the issues for trial and anticipate untrue defenses is crucial to the successful prosecution of international parental kidnappings.

1. Arraignment

As outlined above, prosecuting parental kidnapping as a case of child abuse presents several advantages. The arraignment is the first opportunity to do this. If there are either special or expedited procedures for child abuse cases, there should be an attempt to take advantage of them. Regardless of whether these exist, the court should be requested to set timely dates for all future hearings, both to ensure speedy disposition of the case and to encourage resolution of any civil matters in an equally timely fashion. If the child has not been found and returned, a condition of release should be return of the child.\(^{86}\)

If there are multiple, conflicting custody orders from different states or nations, the searching parent's civil attorney (or prosecutor, if allowed by local rule or statute) should request the appropriate state court convene a hearing to resolve this conflict. This determination should be made in accordance with the state law and either the Uniform Child Custody Jurisdiction Act (U.C.C.J.A.), which is determinative in nineteen states, the District of Columbia and the U.S. Virgin Islands, or the Uniform Child Custody Jurisdiction Enforcement Act (U.C.C.J.E.A.), currently adopted in twenty-one states\(^ {88}\) and the District of Colum-

\(^{86}\) This section is adapted from *Am. Prosecutors Research Inst.*, supra note 13, ch. IV.

\(^{87}\) See, e.g., *Cal. Penal Code* § 279.6(d) (West 1999) ("when a person is arrested for an alleged violation ... the court shall, at the time of arraignment or thereafter, order the child shall be returned to the lawful custodian by or on a specific date, or that the person show cause on that date why the child has not been returned as ordered").

bia and being considered by ten others. Section 23 of the U.C.C.J.A. and Section 105 of the U.C.C.J.E.A. specifically state that foreign decrees, if rendered by appropriate authorities of similar custodial institutions, are to be recognized and enforced. The only prerequisite to this is a determination of whether reasonable notice and opportunity were given to all persons affected. This applies to all nations, not simply those that are Hague signatories or have treaties with the United States. A small number of states have, however, refused to recognize foreign decrees under the U.C.C.J.A.

If the prosecution is proceeding in federal court, the determination of parental rights and decisions resolving conflicts arising from conflicting custody orders should be made in accord with federal law, or by reference to state law, in accordance with the Hague Convention with international conflicts. Article 3 of the Hague Convention provides that parental rights are to be defined by "the law of the State in which the child was habitually resident immediately before the removal or retention." In Amer, the conflict between the Egyptian decree, awarding full custody to the abducting father and the United States' (New York) decree awarding full custody to the mother, was resolved under those principles.

2. Bail Hearings

As some jurisdictions set high bail for child abuse offenses, it is important to emphasize (international) parental kidnapping as a form of child abuse. Judges can be educated about the serious psychological, physical, and/or emotional consequences of kidnapping through written materials or detailed motions. There are three key issues to be addressed at the bail hearing. First, whether the child has been located. Second, if the child has

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91. See Hague Convention, supra note 24.
92. See Amer, 110 F.3d at 905.
93. See EVA KLAIN, AM. PROSECUTORS RESEARCH INST., JUDGE'S GUIDE TO CRIMINAL PARENTAL KIDNAPPING CASES (1997). See also Greif & Hegar, supra note 3; Huntington, supra note 5; Greif, supra note 6.
been returned to the searching parent, how re-abduction or harassment can be prevented during the forthcoming period until the trial. Third, how best to ensure the defendant’s presence throughout the trial process.

a. When the Child Has Not Been Located and Returned

When the child has not been located and returned to the proper custodial parent or agency, it is important to seek to have bail denied and the defendant held in custody. As the defendant has already fled the jurisdiction once, the extreme likelihood of flight should be stressed. Other factors supporting bail being denied include the defendant’s substantial ties to another jurisdiction (e.g., family, employment, or prior residency) and willingness to sever any ties that are or were present in the United States, as demonstrated by the abduction. The presence of affluence, previous family-abroad support, or assistance in the kidnapping or retention shows that means exist for the defendant to both flee the country and settle into a new life without difficulty. If the defendant was returned to this jurisdiction involuntarily, this should also be emphasized.

The seriousness of the crime and the fact that kidnapping is child abuse must again be stressed to the court. Any prior incidents of abduction should be brought to the court’s attention, even if the defendant was not criminally charged. A detailed criminal history from state, federal, and/or military authorities to bolster the position should be obtained.

The defendant’s willingness to surrender a foreign passport is of no consequence if the defendant is a dual national, as nothing can meaningfully preclude the replacement of the surrendered passport with another from the foreign government\(^\text{95}\). Willingness to surrender an American passport, even if the defendant is solely a U.S. citizen, offers no genuine security as some countries, most notably Mexico and Canada, do not require a passport for a U.S. citizen to enter. The possibility of appropriating another valid U.S. passport, especially from a sympathetic family member or friend who aided in the abduction, should be brought to the judge’s attention. The defendant may also simply acquire another U.S. passport by reapplying and stating that the previously issued one was lost or stolen. Fraud in the

\(^{95}\) See Pittman v. Grayson, 149 F.3d 111 (2d Cir. 1998) (An Icelandic passport was surrendered in U.S. court and then reissued by the Icelandic government. The abducting parent and victim child are still in Iceland.).
application process is the most common form of passport fraud and should be recognized as a real danger.96

Any threats by the abductor to permanently sever ties between a searching parent and the child should be brought to the court's attention as evidencing no respect for the court and a likelihood to disregard any orders issued. The court should be asked to consider an application for bail only after the child has been surrendered to the proper custodial parent.97 Some jurisdictions specifically state the court shall take into consideration whether the child has been returned with a view toward the increased risk the defendant will evade the authority of the court.98 If the defendant is unwilling to surrender the child, it demonstrates an undeniable lack of respect for the court and strengthens the case that the defendant feels no compunction about violating court rulings. If the court refuses to deny bail, the prosecutor should argue for the highest possible bail, using all the factors outlined above, to attempt to ensure the defendant's future court appearances.

b. When the Child Has Been Located and Returned

If the child has been returned to the person or agency having lawful custody, a number of factors, including but not limited to the following, should be taken into consideration in setting the bail amount:

- Circumstances surrounding the taking (e.g. violence);
- Duration of abduction and circumstances surrounding the surrender of both the kidnapping parent and the child (short length of abduction with expedited return of the child vs. prolonged abduction and involuntary return of the child);
- Risk of re-abduction; and
- Defendant's previous history of complying with court orders (it is advisable to be certain to review both criminal and civil court proceedings to gather relevant indices of this factor).

The presence or absence of these factors should dictate the amount of bail that would be reasonable for the particular defen-


dant. However, as this is a serious crime and the defendant has fled the jurisdiction on at least one prior occasion, a bail that reflects these realities is in order.

c. Other Considerations

Regardless of the amount of bail sought, conditions should be attached to any bail granted. At the very least, a “no unsupervised contact” order should be imposed regarding the child. A “no contact” order may be imposed on the defendant regarding the custodial parent and child, and there should be no disclosure of the child’s whereabouts to avoid the possibility of re-abduction or harassment.\textsuperscript{99} Surrender of the defendant’s passport, for whatever it is worth, should also be made a requirement, as should surrender of the child’s passport if still in the defendant’s control.

As noted previously, if there is an existing right of visitation under a valid custody order, it should be modified in the family court to either eliminate visitation or to require professional supervision during the visits. Coordination of civil and criminal cases, orders, and courts is of paramount importance. Compliance with civil court orders, including “no contact” orders, may also be made a condition of bail.

3. Grand Jury Proceedings and Preliminary Hearings

It is important to a successful prosecution that the custodial parent present well at trial. The preliminary hearing provides an opportunity for that parent to testify without the presence of a jury, providing for an informed evaluation of the custodial parent’s testimonial demeanor.

Conversely, testimony before a grand jury affords the chance to gauge a potential jury’s reaction to the witnesses and the case. A preview of the defense strategy may also become apparent if the defense is allowed to present evidence at this juncture in the proceedings. It may also provide an excellent opportunity to assess the defendant’s strengths and weaknesses as a witness.

If the case is one where friends or relatives are suspected of aiding or abetting the defendant, or if they know the location of the child who is still missing and will not disclose this information, presenting the case to the grand jury and subpoenaing them as witnesses may facilitate their “cooperation.”

\textsuperscript{99} See State v. Kane, 625 A.2d 1361 (R.I. 1993) (trial judge did not abuse discretion in imposing no contact order as condition of bail).
The custodial parent may be requested to waive attorney-client privilege so the prosecutor can discuss pertinent matters with the civil attorney. However, anything told to the prosecutor may be subject to disclosure to the defense under either discovery or Brady\textsuperscript{100} rules regarding turning over exculpatory evidence to the defense. The searching parent must be advised of this before making the decision to waive privilege.

4. Prosecution Motions in \textit{Limine}

The reluctance to view parental kidnapping, even on an international scale, as a crime, and the potential use of the criminal courts to re-litigate divorce and custody issues as part of a “necessity” defense may produce sympathy for the defendant.\textsuperscript{101} Filing various motions \textit{in limine} provides an excellent opportunity to limit the evidence to the criminal case. Foreclosing irrelevant issues can increase the likelihood of a guilty plea or make a guilty verdict more likely by focusing the jury’s attention on truly relevant facts.

a. Evidence of Uncharged Acts or Prior Acts

If the defendant has violated the child custody order on other occasions by taking or not returning the child, the prosecutor should plan to introduce evidence of such conduct at trial to show the defendant’s knowledge of the order, absence of any mistake of law or fact or to show intent to deprive the custodial parent of the child. The admissibility of evidence of the defendant’s acts under Federal Rule of Evidence 404(b)\textsuperscript{102} or the comparable state rule or case law should be addressed.\textsuperscript{103} Written notice of intent to use such evidence should always be given.

\textsuperscript{100} Brady v. Maryland, 373 U.S. 83 (1963) (exculpatory evidence must be disclosed to the defense).

\textsuperscript{101} A necessity defense claims the abductor was acting out of a desire to keep the child from imminent danger. \textit{See generally} Susan S. Kreston, \textit{Prosecuting Parental Kidnapping, Update}, Vol. 11, No. 4, 1998.

\textsuperscript{102} \textit{Fed. R. Evid.} 404(b).

\textsuperscript{103} \textit{See} State v. Driggers, 582 So.2d 369 (La. Ct. App. 1991).
This should be accompanied by an appropriate brief or memorandum addressing precedent, supporting the state's case, and/or refuting the defense's objections.104

b. Necessity/Good Cause

The necessity defense is usually raised within the confines of the defendant making an allegation of child abuse or domestic violence against the searching parent. Some jurisdictions have codified "protection of child" or "flight from domestic violence" defenses in their statutes, while others recognize a general necessity defense that can be raised in any criminal case. Any claims of abuse should be investigated thoroughly and this information should be used in the charging determination or to refute the defense.105

Case law indicates the necessity defense will fail if there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm.106 If the defense is protection of the child, it is important to determine if the alleged abuse was ever reported to child protective services, either before the taking or at the first, reasonable opportunity after the taking. If the defense is flight from domestic violence, it should be determined if it was ever reported to the police or other appropriate agency, such as a battered women's shelter. There must be an objective, reasonable belief that an emergency justifying the act existed, and a determination that of all choices available to the defendant, commission of the crime was the only viable and reasonable option.107 A subjective belief by the defendant is generally insufficient to justify abduction.

Depending on the jurisdiction, necessity may be either a complete defense or an affirmative one. If it is an affirmative

105. See Kreston, supra note 101.
107. See People v. Dworzanski, 580 N.E.2d 1263 (Ill. App. Ct. 1991) (concealment of child, due to mother's perception of father's intoxication, beyond the scope of necessity as no showing of danger to the child); State v. McCoy, 421 N.W.2d 107, 110 (Wis. 1988) (establishing the applicable standard as "what a person of ordinary intelligence and prudence would have done in the position of the defendant under the circumstances existing at the time of the alleged offense"). See also People v. Beach, 240 Cal. Rptr. 50, 58 (Cal. Ct. App. 1987) (the court held that "the necessity defense is very limited and depends on a lack of a legal alternative to committing the crime. It excuses criminal conduct if it is justified by the need to avoid imminent peril and there is no time to resort to the legal authorities or such resort would be futile.").
defense, it should be raised prior to the trial and be proven by a preponderance of the evidence. State statutes and case law should be checked to determine what conditions are required to be met before a defense of necessity can be presented. A motion in limine should seek to preclude evidence of a necessity defense unless the defendant can make the required showing of the existence of all those elements. Despite such threshold requirements, several courts have ruled that the defendant must be given the opportunity to present evidence of necessity to a jury.¹⁰⁸

In some jurisdictions "good cause" may be a defense analogous to necessity and should be dealt with by the same motions.¹⁰⁹ Whether the applicable statute considers good cause to be an element of the offense should be determined.¹¹⁰ Jurisdictions with such provisions will have trouble excluding "good cause" arguments.

c. Validity and Sufficiency of the Custody Order

In jurisdictions that require a custody order for a crime to be committed, a defendant may claim the custody order of the searching parent is invalid or may attempt to litigate validity of the order before the jury. If the defendant has a custody order from another country, this is particularly applicable. Unless there is some factual dispute the jury should hear, the prosecutor should file a motion in limine and ask the judge to determine the validity of the order. The court will decide if the order was valid and enforceable and if the court that issued it had personal and subject matter jurisdiction over the defendant. These are generally questions of law, and should not be submitted to the jury.

It is equally important to determine the sufficiency of the searching parent’s order. This is also a question of law and, barring factual disputes, should be ruled on by the judge prior to trial and not presented to the jury.

d. Motive of the Defendant/State of Mind

State of mind evidence should be limited to relevant matters, such as the defendant’s knowledge of the pertinent court orders and intent to deprive the searching parent of his or her

rights. Motive is generally irrelevant in the prosecution of these cases.\footnote{See State v. Kracker, 599 P.2d 250 (Ariz. Ct. App. 1979) (motivation to help rather than hurt child is not relevant and cannot constitute a defense to charge of child stealing).} A motion to limit or exclude state of mind evidence should be made if it appears the focus will be a "better life" for the child. It should be kept in mind, however, that the jury may be curious about the defendant's motives and it may be impractical or counterproductive to keep this information from them. Under these circumstances, the prosecutor should be prepared to rebut these alleged motives by showing the circumstances of the child during the retention, e.g., living in hiding; totally isolated from former culture; totally isolated from the other parent, lifelong friends, much beloved pets; no education; no health care; etc. A proper jury instruction should also clarify that the defendant's motive is not an element of the crime and does not constitute a valid defense.

e. Searching Parent's Character

As the searching parent is legally the sole victim of the abduction, character evidence concerning the victim in the form of opinion, reputation, or specific instances of misconduct may be admissible under Federal Rule of Evidence 404(a)(2)\footnote{FED. R. EVID. 404(a)(2): Evidence of a pertinent trait of character of the victim of the crime offered by the accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the aggressor.} or its state equivalent. If the defense is one of necessity or imminent harm to the child, character evidence about the searching parent will probably be offered through the defendant's or other witness' testimony. The prosecutor should make a motion \textit{in limine} requesting an offer of proof regarding relevancy of this type of evidence and force the defendant to present character evidence in the manner required by rule, statute, or case law. If the character traits in question are culturally relative, such as "proper" gender roles, it is important to be certain the judge is aware of these issues.

f. Child's Attitude, Cooperation, and Desires

Evidence that the minor child wanted to go with the defendant or cooperated in some way is generally irrelevant to the
criminal action.\textsuperscript{113} The defendant cannot rely on the consent or cooperation of the child as a defense. If it appears likely the defendant plans to call the child to testify regarding consent to the charged conduct, a motion to exclude the child’s testimony as irrelevant should be filed. That the child wanted to go to EuroDisney is understandable, but not a valid defense. When the child suffered substantial trauma as a result of the abduction or reunification, barring the child’s testimony may be especially appropriate to prevent further harm.

5. Defense Pretrial Motions

In cases involving multiple defendants, offenses, or children,\textsuperscript{114} the defense may attempt to have the proceedings severed. Generally, it is better to consolidate and expedite proceedings so that the searching parent, the child(ren), and other concerned witnesses will only testify once. Continuances should also be opposed as unduly prolonging the ordeal of the searching parent and child. Judicial economy and economic considerations also support these goals.

Spousal privilege may also be raised by the defense in an attempt to preclude the victim parent’s testimony. The ability of a spouse or former spouse to testify against the defendant will depend largely on the jurisdiction’s statute and case law governing marital privilege. The privilege is vested in the defendant in some jurisdictions, while in others it vests in the spouse. Some jurisdictions have negated the privilege in cases involving criminal acts, violence, or child abuse.\textsuperscript{115} In addition, the marital privilege generally protects communications only. If this is the law in a particular jurisdiction, the searching parent may still be able to testify to the actions surrounding the abduction.


\textsuperscript{114} See State v. Dirks, 581 P.2d 85 (Or. Ct. App. 1978) (defendant’s taking of two children constituted only single offense against mother’s right to custody).

\textsuperscript{115} See e.g., ALASKA STAT. § 11.51.125(c) (Michie 1999) (no marital privilege in cases involving failure to permit visitation); LA. REV. STAT. ANN. § 14:403(B) (West 1986 & Supp. 2000) (retaining privilege in cases of child abuse or neglect for attorney-client and clergy-penitent only).
6. Plea Negotiations

Generally, plea-bargaining should be undertaken only after the child has been recovered and in conformity with other child abuse case policies. An exception would be the use of plea negotiations to accomplish the child’s safe return. However, plea negotiations with the defendant for the return of a child should only be pursued in the most exceptional cases, as the defendant should not be permitted to use the child’s welfare as a bargaining chip.

A recommended sentence, rather than reduced charges, should be the preferred outcome of negotiations. If the defendant committed additional crimes, it is important that the record reflect the full extent of criminal misconduct. International parental kidnapping, under either state or federal law, is a felony and any plea should be to a felony charge, absent the most unusual factual circumstances.

The following is an illustrative list of issues that should be included in deciding whether to offer a plea bargain and, if offered, what conditions to include in it:

- Distance the child was taken (even if the distance was not geographically distant, the fact remains the child was taken out of the country);
- Duration of the detention, concealment, or abduction;
- Living conditions during the abduction, including schooling (or lack thereof) and frequency of relocation;
- Emotional trauma suffered by the child, including lies told by the defendant, particularly regarding the searching parent, or lies the child was forced to tell;
- Physical or sexual abuse or neglect of the child;
- Trauma suffered by the searching parent, including economic hardship caused by the search;
- Knowledge or disregard of a court order or pending proceeding;
- Chronic violations of court orders;
- Prior criminal conduct or prior abductions of the child;
- Future relationship of the child and the abductor (future visitation realities may argue for some jail time to lessen the likelihood of reabduction, i.e. if the abductor will be given some future access to the child, it is imperative he or she realize that abduction results in incarceration);
- Circumstances surrounding the taking (e.g., violence, weapons, deception);
• Premeditation and sophistication of the plan (e.g., advance purchase of airline tickets, false passports);
• Apprehension by law enforcement without voluntary return of the child;
• Costs of extradition (if applicable);
• Lack of remorse;
• Strength of the prosecution’s case; and
• Wishes of the searching parent.

It would be inappropriate to offer or accept any type of a reduced plea or recommended sentence if the offender has a record of violence, a prior criminal history, or poses a risk of reabducting. Threats against the searching parent, the child, or involved third parties should also preclude negotiations. Refusal to accept and abide by court orders to have no contact with the searching parent and/or the child should be viewed as indicative of a disposition to re-abduct and prevent negotiations.

Due to the inherently serious nature of this crime, it would be appropriate for the defendant to receive some term of incarceration (possibly as a condition of probation), even taking into account the defendant is willing to plead rather than go to trial. Even a small period of jail time will help bring home to the offender that international abduction carries serious consequences. The prosecutor should attempt to educate the judge concerning the harm done to both the searching parent and the child by international abduction. A victim impact statement should be presented to the court. This may also be required by law.116 If a custodial sentence cannot realistically be obtained, the prosecutor should seek a plea with as extended a period of probation as possible, restitution of any costs incurred by the searching parent (and law enforcement, if allowed), and compliance with all court orders, including no-contact orders.

Before entering into negotiations, it is also advisable to explore the searching parent’s expectations and desires. If these desires cannot realistically be accommodated, it should be explained why. Once a plea has been negotiated, the searching parent should be notified, even if not specifically required by law. Once the plea has been entered and accepted, all appropriate parties should be notified.

D. Trial

1. Jury Selection

Jury selection is the first opportunity to educate the jury concerning the dynamics of international parental kidnapping. The searching parent should be characterized as the victim of this crime and any readily identifiable harm suffered by the parent and the child should be noted. It should be emphasized that even if no immediately apparent harm came to the child, it is still a crime and the jury should be prepared to convict.

The prosecutor should be aware of the rules and case law regarding the proper scope of voir dire and the role a judge is allowed to play in it. Jury selection should be used to sensitize the potential jurors to the realities of international parental kidnapping, dispelling myths and stereotypes, while predisposing them to a guilty verdict. This opportunity should be used to personalize the searching parent and abducted child and to begin to overcome weaknesses in the case. The prosecutor should be alert to attempts by the defense to insert issues ruled irrelevant and inadmissible (e.g., motive of the defendant, cooperation of the child) by motions in limine.

Juror profiling techniques in these cases do not differ greatly from other criminal cases. The prosecutor should look for individuals who will be sympathetic to or identify with the victim parent and not be distracted by irrelevant issues. In addition, the prosecutor should look for people who will not be sympathetic to the defendant; those who believe the law should be respected, even if someone is personally aggrieved by a particular decision, such as a custody award.

Specific questions pertinent to international parental kidnapping might include if the jurors, or anyone they know, have ever been victims of this crime. What were the circumstances? How was it resolved, if at all? How do they feel about how it was resolved? Do they have any knowledge of the subject matter? If so, where did they get it? Do they have any preconceived ideas about the type of person who would kidnap their own child? Do they think that the criminal court is an appropriate place to deal with issues arising between parents? The prosecutor should ask about attitudes toward jury nullification and seek a commitment

117. This section is adapted from Am. Prosecutors Research Inst., supra note 13, ch. V.
118. See e.g., La. Code Crim. Proc. Ann. art. 786 (West 1998) (scope of voir dire within the discretion of the court); State v. Hall, 616 So.2d 664 (La. 1993) (judge must give wide latitude to counsel in the conduct of voir dire examination and failure to do so is reversible error).
to base their decision on the evidence and not other factors. The answers should be used to educate the jury about the dynamics of real-life abductions, the harm they do, and why international parental kidnapping is a criminal offense. Open-ended questions should be asked to elicit as much relevant information as is possible.  

The prosecutor should address the standard issues of reasonable doubt, assessing witness credibility, and whether there are any reasons (e.g., philosophical, religious) that they could not sit in judgment of another person. Finally, if allowed in an individual jurisdiction, each juror should be asked if each and every element of the crime charged has, at the conclusion of the case, been proven beyond a reasonable doubt, will they vote to convict. This commitment to convict can then be revisited in closing argument.

2. Opening Statement

An unambiguous commitment to prosecuting international parental kidnapping and to prosecuting this particular defendant’s conduct should be projected. Whether or not the defendant is specifically charged with international parental kidnapping, the international dimension of the case (e.g. language barriers, educational detriment, physical distance, additional obstacles for both the searching parent and law enforcement) should be highlighted, as it may increase the seriousness with which the jury views the taking or retention.

A theory of the case should be developed to carry throughout the trial. A chronological account of the events from the searching parent’s perspective is generally more effective than a mere recitation of the content of the witnesses’ expected testimony. By describing the events from the victim parent’s and child’s perspective, the statement is easier for the jurors to understand, remember, and empathize with. The prosecutor should focus on the fact that legally it is as much a crime to steal one’s own child as to steal a stranger’s child. Morally, to violate the trust of one’s own child and the child’s other parent is an aggravating factor, not a mitigating one.

The defendant should be portrayed as someone who is willing to use children as objects of an adult dispute and to destroy the child’s relationship with the other parent. The harm that is done to the child when he or she is used by the abducting parent as a pawn to retaliate against the custodial parent and/or the

119. Sample voir dire questions may be obtained from the National Center for Prosecution of Child Abuse.
court's custodial decision should be emphasized. It should be stressed that international parental kidnapping is a form of child abuse through which the abducting parent willfully inflicts emotional, economic, and psychological harm on the searching parent and makes the child suffer as a result of being torn from stable relationships with the searching parent, friends from school, other family members (especially siblings, if applicable), and even the child's pets.

The fact that the child was abducted a great distance, totally deprived of contact with their former culture and language, and subjected to cultural norms that are vastly different from what they have always known, should also be noted, if demonstrated by the facts. The amount of premeditation (e.g., acquiring passports, plane tickets), deception, both against the searching parent (e.g., "go to the store, I'll take care of the children") and the child, (e.g., "your mother doesn't love you anymore" or "your father is dead," and other brainwashing) should be emphasized, as should the presence of violence at any time during the entire period of abduction. The prosecutor should project that the defendant's actions attempted to erase the child's entire former life, and that this is legally and morally unacceptable.

It is advisable not to become too detailed in the case outline. In addition, the prosecutor should not overstate the case. The jury should be prepared for weaknesses in the case, such as unsympathetic witnesses or witnesses who may make a poor impression, perhaps due to culture concepts of appropriate gender roles and behavior, such as avoiding eye contact or other non-assertive behaviors that may be misinterpreted as signs of deception. The jury should be prepared for any factual disclosures that have been ruled admissible in pretrial motions but that may put the prosecutor's case in a less than desirable light. By exposing weaknesses first, such as a less than perfect searching parent, the opportunity to respond to them is afforded and the impression of hiding facts from the jury is avoided.

Above all, the jury should be conditioned to be unreceptive to the defendant. The defendant thought he or she was above the law; the defendant was wrong. After concluding the opening statement, the prosecutor should listen carefully to the defense's opening, both for information on the strategy that will follow during the trial (e.g., necessity defense) and to be able to show in closing that the defense did not even measure up to its own statement of what the facts would show.
3. The Prosecution’s Case in Chief
   
a. Witnesses

   The order of the witnesses should be carefully planned. It is advisable for the prosecutor to start strong and end strong. Witnesses should be organized in such a way that the jury can easily follow and understand the importance of their testimony. The following section will individually address the preparation of testimony of the most commonly called witnesses.

(1) The Searching Parent

Witness preparation is crucial in an international parental kidnapping case and this witness is certainly a linchpin in a successful prosecution. Having become familiar with the searching parent’s background, particularly the relationship that existed with the abducting parent, the prosecutor should let the jury become acquainted with the fear and pain of the searching parent through direct testimony. Details of the search for the child should be obtained, including: the fear of not knowing whether the child was dead or alive; worrying if the child was being properly cared for, was ill, or homesick; wondering if the child would ever be seen again; never receiving any news of the child; trying to obtain legal assistance in another country and the difficulties encountered (e.g., language barriers, economic hardship); wondering what the child was being told about where the searching parent was. The prosecutor should have the searching parent explain his or her relationship with the defendant prior to the kidnapping. If the abduction involved deception, the fact that the searching parent was prepared to have the child grow up with access to both parents and trusted the abductor to also put the concerns of the child first should be showcased. If the abduction involved violence or a risk of injury to the child, the abductor’s lack of concern for the child’s physical safety should be stressed.

The searching parent’s demeanor while testifying may be one of anger, frustration, or hostility, or it may project someone who is still recuperating from a traumatic occurrence. Whatever the demeanor, the jury in voir dire should be prepared by pointing out that everyone reacts to personal trauma differently. Some react by becoming angry that they were victimized. Some become fearful that the same act could happen again. Some react by emotional shutdown, a form of shock, and seem to have no feelings about the event, when in fact they are displaying a form of post-traumatic stress disorder. The jury should be acquainted with the searching parent’s demeanor and coping
mechanisms toward what happened, as well as cultural norms, thereby defusing a potentially difficult situation.

If there was domestic violence or child abuse committed prior to the kidnapping, the kidnapping may have been an attempt to re-exert control over the custodial parent or to force a reconciliation. The prosecutor should have the searching parent describe the details of the prior threats or incidents of violence, including those against the child and/or other family members. If the searching parent was not a U.S. national, these threats may have included loss of citizenship or residency rights, and deportation. Evidence of prior acts should already have been deemed admissible at the motion in limine conducted earlier.

(2) Investigators and Police Officers

Officers assigned to parental abduction cases should be educated about relevant issues and should know how to convey to the jury that law enforcement views international abduction as a serious crime. The prosecutor should have the investigator detail the efforts to locate the child (e.g., local police, N.C.M.E.C., FBI, I.N.T.E.R.P.O.L., and foreign police searching techniques) to demonstrate the extraordinary lengths to which the defendant went to conceal the initial taking or subsequent whereabouts of the child and to prove intent to deprive. If the defendant is specifically charged with international parental kidnapping, or if the international aspect is an aggravating circumstance for purposes of sentencing, the prosecutor should be sure to have the officer specifically emphasize the international aspects of the case. These details will show the time and effort the police invested in recovering the child and/or locating the abductor, reinforcing the fact that this conduct is a felony and is treated as such by law enforcement.

Law enforcement officers can often provide extremely useful information about the defendant. The escorting U.S. Marshal may be of particular assistance. Long hours on a plane or in a car can produce useful revelations. Details about the defendant's attitude or statements at the time of arrest and transfer should be elicited. Miranda warnings should be given at the time the fugitive is handed over to U.S. custody. If the defendant invokes those rights, questioning must cease. However, statements made after waiving those rights or spontaneous or unsolicited statements not made in response to interrogation should be

120. See Barone, supra note 32.
deemed admissible. The defendant should be promptly re-interviewed on tape by the police upon return to the requesting jurisdiction. This will prevent the defendant from claiming in court that the marshal or officer was mistaken as to what was said.

Although a showing of harm to the abducted child is not necessary, it is advisable to illustrate the detrimental consequences of the abduction on the child. The investigating officers who participated in the recovery of the child should describe the child's mental and physical condition at the time of recovery, as well as the environment in which the child was found. Photographs of the child before and immediately after the kidnapping and graphic descriptions of both the child and the scene of recovery are the best means of achieving this end. Photographs may show how the defendant attempted to substantially alter the appearance of the child. Testimony of witnesses, such as schoolteachers, daycare providers, and child protective services workers, can also bolster the showing of harm to the child by testifying to the child's emotional response to the abduction.

(3) The Child

Unlike other child abuse cases, the testimony of the recovered child is rarely needed to prove the case, as it is legally the searching parent's rights that are deemed to have been violated, not the child's rights, and the parent's testimony will establish the necessary elements of the offense. Nevertheless, depending on the factual circumstances of the case, it may be deemed necessary or strategic for the child to testify. As with most child abuse cases, it is not easy for a child to testify against a parent, especially when there is the possibility the parent may go to jail. In addition, the abducting parent may have lied to the child about the abduction, so the child's perceptions of the event may be skewed. This is particularly true in cases where foreign travel may have been framed as an "adventure" by the abductor. It is also possible, however, that the distance traveled and the cultural, linguistic, and social differences may have extensively traumatized the child. If the child was lied to and told that the searching parent was dead or did not love the child any longer, this would also add to the ordeal. Unless absolutely necessary, having the child testify should be avoided.

If the child's testimony is necessary, the special issues surrounding children's testimony should be kept in mind. If sensitively handled, the courtroom experience need not be a

Children's anxieties tend to reflect the expectations of those around them. To lessen any stress, the child should be acquainted with the courtroom and, generally, with what will happen when the testimony is given. Children should be assured that they simply need to tell the truth and that they should ask the attorney for a simpler version of the question if they are asked something they do not understand. The fact that the child has done nothing wrong and that the abducting parent's conduct has caused the need to go to court should be reinforced. If the child is in therapy, the therapist should be consulted to determine what else might alleviate anxiety for the child. If allowed, having a support person accompany the child during testimony to make the child feel more comfortable in the court should be considered. In some cases, a child may need the comfort of a stuffed animal or special blanket and should be allowed the security of holding such an object while testifying.\(^{124}\)

(4) Expert Testimony

Many people believe children are "safe" during a parental abduction because they are with a parent. Unfortunately, this is rarely true, and the psychological effects of the international abduction and their long-term consequences must be spelled out for the jury. This is especially true if the abductor did not physically or sexually abuse or neglect the child and the country to which the child was taken was not fundamentally different from the United States. If other witnesses cannot communicate this harm effectively through their testimony, using an expert witness should be considered to testify regarding the realities of international parental kidnapping and the harm suffered by both the child and the searching parent. They should be prepared to render a "worst case" scenario concerning the repercussions of the abduction on both the searching parent and abducted child, as well as current signs of post-traumatic stress evident in either the parent and/or the child. If the defense plans to call its own expert, it is advisable to have the prosecution's expert review the defense expert's materials. Local rules may allow the prosecution's expert to sit in on the testimony and rebut it.


4. Responding to the Defendant's Case

a. Cross-Examining the Defendant

In preparing for cross-examination of the defendant, the prosecution should focus on the individual, as well as the testimony and the defense. Prior statements and testimony from civil proceedings, if present, may provide insight into the defendant's personality traits, as will interviews with the searching parent. Temper, hostility, and controlling behavior may be brought out by skillful cross-examination. The defendant should be portrayed as someone who is willing to use the child as an object in an adult dispute and destroy the child's relationship with the custodial parent. The defendant should be painted as someone with little concern for the child's emotional, physical, and/or developmental well-being. Relevant inquiries might include the following:

- Do you believe that a child has a right to the love and support of both parents?
- Yet you removed your son from his mother to another country for an extended period of time, correct?
- Did you keep your son informed of his mother's whereabouts?
- Did you allow him to say goodbye to his mother?
- Did you allow him to say goodbye to his friends?
- Did you allow him to say goodbye to grandparents, other relatives, or family pets?
- Did you contact his teacher to have his educational records forwarded to his new school in the new country?
- Did you contact his doctor or dentist to have his relevant records forwarded to his new doctor?

A series of questions designed to demonstrate that the defendant is raising an untrue defense should be developed. If the defendant talked freely with law enforcement escorts during the extradition process, the prosecution should get their impressions and information. Defendants often divulge valuable information at the time of arrest, despite Miranda warnings. The abductor has spent long hours engaged in self-rationalization, justifying the kidnapping on any number of grounds and may take advantage of any opportunity to justify it to others. It should be shown that the kidnapping was unreasonable and unnecessary under the scenario given by the defendant. The fact that the defendant failed to take sensible, logical alternative steps to kidnapping, such as contacting child protection services or the police if the defense is "good cause," or going to court to attempt
to modify existing custody decrees based on new circumstances should be highlighted. By showing the defendant to be merely disgruntled about court decisions and not genuinely concerned for the welfare of the child, the jury will see the defense as the unsubstantiated, baseless smokescreen that it is.

If the defendant abducted the child out of unfounded but subjectively genuine concern for the child, the prosecutor should develop a series of questions that prove the elements of the crime by the defendant’s own admissions. If the defendant is being truthful, confessions of knowledge of the court order and intent to deprive the custodial parent of the child should be accomplished with a minimum of confrontation. The deterioration of the child’s relationship with the custodial parent as a result of the kidnapping should be explored. Developmental harm to the child that can be documented, such as school or behavioral difficulties, should be elicited. It is then up to the prosecutor to argue these facts in closing.

b. Meeting Defenses

In addition to defenses raised generally in criminal cases, international parental kidnapping prosecution may involve meeting either affirmative or complete defenses to the charge.\(^{125}\) The prosecutor should be certain that the judge understands the burden of proof for affirmative defenses (usually by a preponderance of the evidence) and always require a pretrial offer of proof. The prosecutor should also check for unusual defenses (e.g., regarding return of child)\(^{126}\) and try to eliminate as many defenses as possible through the use of motions in limine. The following section lists many common defenses and suggests ways to respond.

(1) Mistake of Law or Fact

Except under limited circumstances, mistake of law is not a defense to criminal charges. “Ignorance of the law is no excuse” is a concept understood and accepted by lawyers and lay persons alike. Issues regarding the possible conflict between U.S. orders and foreign orders should be disposed of before trial through motions in limine. The defendant may also have made incrimi-

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125. An affirmative defense accepts the truth of the charge but attacks the right of the government to bring the charge. A complete or absolute defense attacks the truth of the claim. *Black’s Law Dictionary* 60 (6th ed. 1991).

nating statements to friends, relatives, or co-workers regarding the "injustice" of a custody order and the planned kidnapping to defeat the order's decision.

A mistake of fact defense can only succeed if the evidence supports a reasonable inference that the defendant had an honest and good faith belief in the existence of circumstances that, if true, would make the actions lawful. Any evidence of surreptitiousness (taking the child under false pretenses, secretly purchasing plane tickets, concealing the child's location, or engaging in document or passport fraud) clearly disproves an honest and good faith belief.

(2) Necessity/Good Cause/Fleeing Domestic Violence

These issues should be dealt with in motions in limine. Additionally, certain jurisdictions preclude these types of defenses if the abductor leaves the state, thereby negating these defenses of necessity in international kidnapping cases. A kidnapper who had the resourcefulness to organize an international abduction clearly had the wherewithal to take reasonable, legal steps to avoid the alleged harm to the child. Examples might include: calling the police or Child Protective Services regarding the alleged abuse; taking the child to a doctor; or expressing these concerns to the child's teacher. Some jurisdictions also require that the child's location be given to the proper authorities within a designated period of time in order to raise the defense. The time period can vary from hours in some jurisdictions to days in others.

(3) Circumstances Beyond the Defendant's Control/ No Intent to Deprive

The legitimacy of the "circumstances beyond the control of the defendant" defense will be a factual matter, but should be countered by common sense questions, such as "Did you inform the custodial parent (or other appropriate person or agency) of this emergency/event at the first reasonable opportunity?" Some jurisdictions require such notification in order to raise this defense.

129. See, e.g., CAL. PENAL CODE § 278.7(c) (West 1999) (within at least 10 days); N.J. STAT. ANN. § 2C:13-4(c)(1) (West Supp. 1999) (24 hours).
This defense is also an attempt to show no intent to deprive the custodial parent of the child. It will be difficult for a jury to believe that someone "forgot" to tell the other parent that the children were being taken abroad or that an emergency required taking the children to another country. Circumstantial evidence would include subterfuge in the acquisition of the child (feigned vacation/visit), constant moving from one location to the next, changing names or appearances of the child and kidnapping adult, failure to notify the searching parent of the child's whereabouts, or inaccessibility of the place to which the child was taken.\footnote{131}

(4) Other Defenses

Other defenses, such as attacking the sufficiency or validity of the custody order, or the defendant's motive for the taking and consent of the child have already been addressed. Issues surrounding the validity or sufficiency should have been determined in motions \textit{in limine} and, barring some question of fact being present, excluded as a question of law not properly submitted to the jury. Complete defenses, such as the existence of court-ordered custody being vested in the defendant at the time of the abduction\footnote{132} or the consent of the custodial parent to the taking,\footnote{133} are defenses that should be investigated well before trial.

If the defenses were not excluded earlier or the defendant manages to inject them into the trial, the prosecutor should respond by showing the defendant's lack of genuine concern for the child by cutting him or her off from the other parent, friends, family, and the child's former culture. Any neglect in areas, such as schooling or health care, should be raised. For example, many foreign jurisdictions preclude females from education altogether or allow only an elementary education.

Consent of the child may be refuted as both irrelevant and based on lies told by the defendant. Such lies might have been about the searching parent or the nature of the trip (the abduction presented as a foreign adventure). Children often love and want to spend time with adults who do not genuinely put their interests first. This is also evidenced in other types of child abuse cases. The jury must decide whether the defendant broke the law, not whether the child loves the abducting parent.

\footnote{133. \textit{See} State v. Niska, 514 N.W.2d 260 (Minn. 1994).}
5. Closing Statement

Closing argument provides the opportunity to put the entire case together for the jury. The prosecutor should personalize the victims, both the searching parent and the child. The testimony of the searching parent concerning the grief and anxiety the kidnapping produced should be recalled. The prosecutor should emphasize that this is a crime. The fact that people cannot be allowed to break laws merely because they disagree with them should be underscored. The jury should also be reminded of how the abductor put his or her desires ahead of the interests of the child.

The prosecutor should anticipate and respond to defense arguments. It is likely that the defense will take this final opportunity to attempt to paint the defendant as a decent human being who only wanted what was best for the child, to spend more time with the child, and to expose the child to his or her native land and culture. The prosecutor should argue that a person who loves children does not use them as pawns in an adult dispute. There were legal avenues open to the defendant to modify existing arrangements, to report any possible harm to the child, or to resolve disputes, but the defendant did not use them. The defendant should not be allowed to make unilateral judgments and take unilateral actions regarding major life decisions for the child, particularly when they are in derogation of the law and the other parent’s rights, and result in the child suffering the trauma associated with international kidnapping. What occurred was a crime and, based on the evidence, the defendant must be found guilty.

6. Sentencing

As international parental kidnapping prosecutions are infrequent, it is the duty of the prosecutor to educate and advocate for justice. Sentencing hearings provide a forum in which to present the judge with additional information on the impact of the crime on its victims. Publications, such as the Judges’ Guide to Criminal Parental Kidnapping Cases, can assist with this education.

The prosecutor should get a victim impact statement included in the pre-sentencing report. Every state, the District of Columbia, and the federal law allow victim impact evidence at sentencing, either through the pre-sentencing report or through

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134. See Greif, supra note 6.
135. See generally Klain, supra note 94, ch. III.
presentation of a written or oral statement at sentencing. The majority of states require the court to consider the victim's statement in sentencing. The victim parent should be notified of the sentencing date and advised that attendance is allowed. Participation by those most affected by the crime may sensitize the judge. The prosecutor should let the parent know what the judge’s options are and what both the minimum and maximum sentencing possibilities are. If the parent chooses not to attend, the sentencing outcome should be relayed immediately.

a. Aggravating and Mitigating Factors

All relevant factors, both aggravating and mitigating, should be considered in arriving at a sentence. The prosecutor should be certain that the judge is informed and reminded of the presence of any of the following aggravating factors:

- International flight;
- Circumstances surrounding the taking (e.g., violence, risk of harm);
- Distance the child was taken;
- Extended duration of the concealment or detention;
- Harm to the child (e.g., emotional harm suffered due to egregious lies being told about the searching parent, physical harm or neglect, sexual abuse, developmental neglect due to lack of schooling or general isolation);
- Substantially altering the appearance or the name of the child;
- Harm to the searching parent (e.g., emotional or psychological distress, physical harm or risk of harm during the abduction, economic loss due to searching costs);
- Premeditation/sophistication of the abduction and concealment;
- No return of child or involuntary return of child;
- Lack of remorse/threat of re-abduction;
- Prior criminal record or prior abduction(s); and
- Violation of previous court orders.

136. See VICTIMS' RIGHTS SOURCEBOOK, supra note 116.
138. CAL. PENAL CODE § 278.6(a)(4) (West 1999) (specifically recognizing international abduction as an aggravating factor that must be considered at sentencing).
Realistically, even with an international kidnapping, in the absence of some aggravating circumstance, a judge may not sentence a defendant to prison. Circumstances surrounding the kidnapping will have the greatest impact on the judge's decision-making process; however, a judge will also consider the defendant's sense of responsibility for the act and the protection of the child from re-abduction. The fact that the defendant has never accepted responsibility or demonstrated remorse should be brought to the judge's attention. The following section describes sentencing options that should be urged by prosecutors on judges in these cases.

b. Options for Sentencing Recommendations

(1) Incarceration

Incarceration is appropriate when the child is still missing, when physical or sexual violence or abuse occurred at any point during the taking or retention, or when there is a history of abduction or other criminal activity. Parental kidnapping has been recognized as a crime of violence for sentencing purposes, and with the presence of aggravating circumstance(s) should be treated as such. An appropriately severe period of incarceration will drive home to the defendant that the conduct engaged in carries a price. If the offender may be designated a habitual offender under the relevant law, taking steps necessary to have the abductor sentenced under the appropriate enhancement provisions should be considered. Some jurisdictions allow the imposition of jail time as a condition of probation.

(2) Probation

If the court declines to give a sentence of incarceration, a probationary sentence should be urged by the prosecutor. Without supervised probation, it is impossible to enforce any special conditions established. An extended supervised probation

139. See Cal. Penal Code § 278.6(a) (West 1999) (listing 10 aggravating factors that must be considered at sentencing in parental abduction cases).
141. See United States v. Lonczak, 993 F.2d 180 (9th Cir 1993).
period will enable probation officials to monitor the offender and allow the custodial parent and child to begin to rebuild their lives. Probation may also be combined with certain conditions that reflect the severity of the crime.

(a) Deferred or Suspended Sentence

Imposition of a sentence may be deferred or suspended. Both call for the defendant to be placed on supervised probation. Conditions of probation may and should be placed on either deferral or suspension of sentence. With a suspended sentence, successful completion marks the end of any court supervision, but the conviction remains. With a deferral, if the probation is successfully completed, the court has the power to dismiss the underlying criminal case. A deferred sentence should only be given if there are a number of mitigating circumstances. Mitigating factors may be present if the conviction is a first offense, the risk of re-abduction is low, and there was a good faith, though unfounded, belief that abuse of the child was occurring.

If possible, a suspended sentence rather than a deferred sentence should be obtained, as a deferred sentence may not appear on the defendant’s record once supervised probation is successfully completed. It may also fail as a predicate first offense for any subsequent enhanced sentencing provisions under habitual offender requirements.\textsuperscript{144} A lengthy suspended period of imprisonment should be included in case the defendant violates the probation requirements.\textsuperscript{145}

(b) Conditions of Probation

(i) Return of the Child

As a special condition of release, the return of the child may be mandated. If the child has not been returned, this condition should be required. In Amer, the court imposed a twenty-four month imprisonment and a one-year term of supervised release with the special condition that the defendant returns the children to the United States.\textsuperscript{146} This special condition was attacked on a number of grounds. These included the court exceeding its authority under, and acting inconsistently with, Sentencing Guidelines; double jeopardy claims; impossibility claims; and violation of the Egyptian court order giving the defendant custody.

\textsuperscript{146} United States v. Amer, 110 F.3d 873, 879 (2d Cir. 1997).
The special condition of return of the child withstood all these challenges.

(ii) 

Restitution and/or Fine

Restitution, in the form of recovery of expenses for both the searching parent and the government, forces the defendant to take responsibility for at least the economic harm that has been done. Although the searching parent can never be “repaid” for the time the child has been missing, the costs incurred as a result of the abduction, which average over $33,500, should be borne by the defendant. Restitution should include not only reimbursement for the search and transportation fees incurred in returning the child to the lawful jurisdiction, legal fees, and wages lost while searching, but also counseling costs for both the child and the searching parent, any medical costs incurred upon return of the child, and attorney’s and private investigator’s fees. If the child was put in the care of a human services department before reunification, these costs should also be included. It is best to have the costs itemized by the searching parent in order to bolster the case for causal connection and obligation of debt with specificity of loss. Expenses incurred by a nonprofit organization for which the searching parent is not liable may not be included in restitution provisions.

Some jurisdictions have specific language regarding recovery of reasonable costs in their parental kidnapping statutes. Costs are not usually available under the generic kidnapping statutes. The costs of extradition, if applicable, should always be levied against the defendant. If the defendant fails to make restitution, this will be a violation of probation and will serve as grounds to invoke the suspended sentence or refuse to dismiss and impose sentence in deferred cases. Some jurisdictions allow for costs to be assessed against the extradited defendant if found


149. See N.M. STAT. ANN. § 30-4-4(I)(2) (Michie 1994).


guilty, but against the searching parent if the abductor is found not guilty.\textsuperscript{152}

In addition to restitution, a fine may also be ordered. If allowed by local rules, the fine should be made payable to a not-for-profit organization that works in the field of parental kidnapping or that assists recovered children and their families.

(iii) Contact with the Child and Compliance with Other Court Orders

Terms of probation should specify whether contact with the child and/or victim parent is to be allowed. The court may mandate no contact or supervised contact or delineate special circumstances under which the defendant may visit or contact the child and/or other parent and siblings.\textsuperscript{153} This should also include specific language about contact through third parties. Criminal judges can make compliance with both domestic and criminal court orders a condition of probation.\textsuperscript{154} If the orders conflict, appropriate modifications may be made to bring the orders into conformity.

(3) Release Pending Appeal

After a guilty verdict, the defendant may argue for release pending appeal. Such a motion should be vigorously opposed in international cases, as a very real danger of flight exists. The possibility of re-abduction or violence toward the searching parent should also be assessed. As the defendant has now been convicted, the presumption no longer exists that bail should be granted. To the contrary, the conviction should be presumed valid and release should be denied. If release is granted, conditions should be attached, such as an appearance bond, supervision through the probation department, and restrictions on contact with the searching parent, witnesses, and recovered child.

CONCLUSION

International parental kidnapping is a crime that inflicts immediate emotional injury and leaves, at a minimum, permanent psychological aftermath for both the child and the search-

\textsuperscript{152} See S.D. CODIFIED LAWS § 22-19-12 (Michie 1998).

\textsuperscript{153} See State v. Alladin, 408 N.W.2d 642 (Minn. Ct. App. 1987) (condition of probation that the defendant refrain from any contact with former wife and minor child, except by mail, without former wife's permission).

\textsuperscript{154} But see State v. Donovan, 770 P.2d 581 (Or. 1988) (condition of probation that the defendant bring no action to modify custody held excessive).
ing parent. It is, in fact, no different in terms of culpability, criminality, and consequent harm from other kidnappings. The fact that the kidnapper took advantage of a position of trust and is known to the victims is an aggravating circumstance, not a mitigating one. This crime, like those of marital rape and domestic violence, has until recently been ignored or belittled as a "family" or "private" matter, best kept out of the criminal domain. This misdesignation is changing and the public perception of the crime is beginning to undergo the same evolution seen in other, previously neglected, areas of intra-familial crimes.

Prosecutors and law enforcement can play a vital role in hastening this evolution by enforcing these laws to their full extent. The need for specialized knowledge and interagency cooperation is as great here as in other international criminal cases. Making the investigation and prosecution of international parental kidnapping a priority, recognizing it as another form of child abuse, and vigorously enforcing the existing laws, will reinforce the public policy statement that this type of criminal behavior will not be tolerated. Most importantly, it will ensure meaningful access to justice for the searching parent and the abducted child victimized by this crime.