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## Parental Kidnapping, Criminal Contempt of Court, and the Double Jeopardy Clause: A Recommendation for State Courts

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# COMMENTS

## PARENTAL KIDNAPPING, CRIMINAL CONTEMPT OF COURT, AND THE DOUBLE JEOPARDY CLAUSE: A RECOMMENDATION FOR STATE COURTS

Valerie Brummel\*

*In states such as Illinois, courts invoke the Double Jeopardy Clause of the United States Constitution to protect parental kidnappers who have already been held in contempt of court from subsequent prosecution under state child kidnapping laws. State courts should not apply the Double Jeopardy Clause to protect parental kidnappers; instead, they should follow the example of the Ohio state courts by recognizing that contempt of court and child kidnapping are not the same crime for double jeopardy purposes. The many differences between the crimes of contempt and parental kidnapping, the disparity between sanctions delivered by the court for contempt and outlined by state legislatures for child kidnapping, and the inability of contempt sanctions to adequately punish parental kidnappers for the harm inflicted on their children, all provide reasons why the Double Jeopardy Clause should not apply to contempt of court and child kidnapping. This recommendation will help state courts better deter and punish parental kidnapping.*

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\* J.D., Northwestern University Pritzker School of Law, 2017. B.A., The University of Michigan, 2013. Thanks to Dean Susie Spies Roth for her advice. Thanks to my husband for his endless patience and support. Thanks to my parents, who sacrificed everything and came to the United States so that I could be anything that I wanted to be.

## TABLE OF CONTENTS

INTRODUCTION.....	316
I. BACKGROUND.....	319
A. Judicial Oversight in Child Custody Cases: History and Modern Application.....	320
B. The Problem of Parental Kidnapping.....	322
II. CURRENT METHODS OF COMBATING PARENTAL KIDNAPPING.....	324
A. Federal Legislation – the UCCJA and the PKPA.....	325
B. State Legislation – the Crime of Parental Kidnapping or Custodial Interference.....	329
C. Judicial Enforcement of Custody Orders.....	330
D. Civil Liability for Parental Kidnapping Under Tort Law.....	332
E. Court-Sponsored Custody Mediation.....	334
III. THE PROBLEM OF THE DOUBLE JEOPARDY RULE.....	336
A. History of the Double Jeopardy Rule.....	336
B. The Double Jeopardy of Criminal Contempt of Court and Parental Kidnapping.....	337
IV. THE DOUBLE JEOPARDY RULE SHOULD NOT PROTECT CRIMINAL CONTEMNORS FROM CRIMINAL PROSECUTION FOR PARENTAL KIDNAPPING.....	340
A. Criminal Contempt of Court does not Contain the Same Elements as Parental Kidnapping.....	340
B. Criminal Contempt of Court Differs Significantly from the Crime of Parental Kidnapping.....	343
C. Criminal Contempt of Court does not Consistently Punish Parental Kidnapping.....	346
D. Criminal Contempt of Court does not Adequately Punish Parental Kidnapping.....	350
CONCLUSION.....	353

## INTRODUCTION

In the event of a divorce, parents become subject to court-issued child custody orders, which dictate how much time they can spend with their children and where the children will live.<sup>1</sup> When a parent decides to disobey the child custody order and deprive the other parent of her legal right to custody, he has committed parental kidnapping.<sup>2</sup> In 2010, the

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<sup>1</sup> Margaret M. Mahoney, *The Enforcement of Child Custody Orders by Contempt Remedies*, 68 U. PITT. L. REV. 835, 836 (2007).

<sup>2</sup> *Id.*; see also William B. Johnson, *Kidnapping or related offense by taking or removing*

United States Department of Justice estimated that more than 200,000 children are victims of parental kidnapping each year.<sup>3</sup> In 2014, HealthResearchFunding.org reported that domestic parental child abduction figures are expected to increase by 20% annually in the coming years.<sup>4</sup>

In 1980, Congress passed the Parental Kidnapping Prevention Act (PKPA) to fight parental kidnapping.<sup>5</sup> Subsequently, all fifty states adopted the Uniform Child Custody and Jurisdiction Act (UCCJA) and imposed criminal liability for parental kidnapping; some even went so far as to label parental kidnapping a felony.<sup>6</sup> However, some state courts have applied the double jeopardy rule to protect parental kidnapers, undermining efforts by Congress and state legislatures to punish and deter parental kidnapping.<sup>7</sup> These courts claim that a double jeopardy problem arises where a violating parent is guilty of both the crime of parental kidnapping and criminal contempt of court.<sup>8</sup> In addition to breaking state criminal laws, a parent who retains or removes his child in violation of a child custody order has also disobeyed the court that issued the order; thus, the court can hold the parent in contempt for his disrespectful conduct.<sup>9</sup> Accordingly, some courts have held that the double jeopardy rule bars the subsequent prosecution of a criminal contemnor under state criminal statutes.<sup>10</sup>

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*of child by or under authority of parent or one in loco parentis*, 20 A.L.R.4th 823, 823 (1983) (stating that criminal statutes on parental kidnapping make it unlawful for a person to (1) take a child (2) with the intent to detain and conceal such child from a parent or other lawful custodian).

<sup>3</sup> U.S. DEP'T OF JUSTICE, THE CRIME OF FAMILY ABDUCTION: A CHILD AND PARENT'S PERSPECTIVE 4 (May 2010), <https://www.ncjrs.gov/pdffiles1/ojdp/229933.pdf> [hereinafter U.S. DEP'T OF JUSTICE].

<sup>4</sup> 40 *Uncommon Parental Child Abduction Statistics*, HEALTHRESEARCHFUNDING.ORG (Nov. 22, 2014), <http://healthresearchfunding.org/40-uncommon-parental-child-abduction-statistics> [hereinafter HEALTHRESEARCHFUNDING.ORG].

<sup>5</sup> 28 U.S.C. § 1738A (1980).

<sup>6</sup> Kathi L. Grasso et al., *The Criminal Justice System's Response to Parental Abduction*, JUVENILE JUSTICE BULLETIN, 1 (Dec. 2001), <https://www.ncjrs.gov/pdffiles1/ojdp/186160.pdf>; see, e.g., ALA. CODE § 13A-6-45(c) (West 2010); ALASKA STAT. ANN. § 11.41.320(b) (West 2016), COLO. REV. STAT. ANN. § 18-3-304(1) (West 2009), IOWA CODE ANN. § 710.6 (West 2010).

<sup>7</sup> See, e.g., *In re Marriage of D'Attomo*, 570 N.E.2d 796, 802 (Ill. App. Ct. 1991).

<sup>8</sup> See, e.g., *id.* at 796; *People v. Rodriguez*, 514 N.E.2d 1033, 1037-38 (Ill. App. Ct. 1987); *People v. Howard*, 686 P.2d 644, 649 (Cal. 1984); *State v. Hope*, 449 So.2d 633, 636 (La. Ct. App. 1984); see also Jay M. Zitter, *Contempt finding as precluding substantive criminal charges relating to the same transaction*, 26 A.L.R.4th 950 (1983).

<sup>9</sup> See *D'Attomo*, 570 N.E. 2d at 796; see also Zitter, *supra* note 8, at 950.

<sup>10</sup> See, e.g., *In re Marriage of D'Attomo*, 570 N.E.2d at 802; *Fierro v. State*, 653 So. 2d 447, 448-49 (Fla. Dist. Ct. App. 1st Dist. 1995); *State v. Desselle*, 809 So. 2d 460, 466-67 (La. Ct. App. 2001).

*Carlson v. Carlson*<sup>11</sup> demonstrates the potential disparity between sanctions for criminal contempt and the sentencing guidelines of the applicable state parental kidnapping statute.<sup>12</sup> In *Carlson*, the judge held a parent in criminal contempt for violation of a child custody order and decided that the sanction would be incarceration for five hours, “until 5:00 p.m. that day.”<sup>13</sup> However, under Georgia’s state criminal statute outlawing parental kidnapping, the parent could have either been fined between \$200 and \$500, or been imprisoned for between one and five months, or both.<sup>14</sup> Another parent in Georgia who effectively commits the same crime at issue in *Carlson* could face a much harsher punishment: if the state prosecuted him or her under Georgia’s criminal statute, that parent could face at least a \$200 fine or a month of imprisonment.<sup>15</sup>

As *Carlson* demonstrates, applying the double jeopardy rule to protect parents guilty of criminal contempt can lead to disparate results. This Comment outlines four reasons why the double jeopardy rule should not apply to criminal contemnors. First, under the *Blockburger* “same elements” test, the crimes of contempt and parental kidnapping contain distinct elements: contempt requires the existence and violation of a court order while parental kidnapping does not necessarily include such an element, and parental kidnapping requires intent to detain or conceal the child while criminal contempt includes no such element of intent.<sup>16</sup> Second, the crime of criminal contempt and the crime of parental kidnapping contain significant differences such as purpose and the role of the jury in the criminal proceedings.<sup>17</sup> These differences demonstrate that the legislature may not have intended for criminal contempt and parental kidnapping to be considered the same offense for double jeopardy purposes, and state courts must implement legislative intent in their double jeopardy analyses.<sup>18</sup> Third, ensuring that the state may prosecute parental kidnappers

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<sup>11</sup> 748 S.E.2d 304 (Ga. Ct. App. 2013).

<sup>12</sup> *Id.* at 307–08; GA. CODE ANN. § 16-5-45 (West 2010).

<sup>13</sup> *Carlson*, 748 S.E.2d at 306.

<sup>14</sup> GA. CODE ANN. § 16-5-45.

<sup>15</sup> *See id.*

<sup>16</sup> *Dixon v. United States*, 509 U.S. 688, 701–02 (1993) (reaffirming the validity of the *Blockburger* same elements test); *see also* *United States v. Blockburger*, 284 U.S. 299, 304 (1932); *see, e.g., State v. Kimbler*, 509 N.E.2d 99, 104 (Ohio Ct. App. 1986) (holding that criminal contempt and parental kidnapping should not be considered the same crime under the *Blockburger* same elements test).

<sup>17</sup> *Taylor v. Hayes*, 418 U.S. 488, 495 (1974); *Kimbler*, 509 N.E.2d at 103–04.

<sup>18</sup> William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. REV. 411, 448 (1993).

under its criminal statutes results in more consistent sentencing.<sup>19</sup> Finally, considering the significant harms that parental kidnapping inflicts on both the custodial parent and the child, a finding of criminal contempt alone does not adequately punish parental kidnapers.<sup>20</sup> Therefore, courts should hold that the double jeopardy rule does not protect a parental kidnapper from punishment under both criminal contempt of court and state criminal statutes.

First, Part I of this Comment discusses the history of judicial oversight in child custody cases and introducing the problem of parental kidnapping. Next, Part II identifies five methods by which the legal system combats parental kidnapping: federal legislation, state criminal statutes, judicial enforcement of child custody orders, tort law, and court-sponsored mediation. Next, Part III outlines the history of the double jeopardy rule and explains how different courts have applied it to criminal contempt of court and parental kidnapping. Finally, Part IV explains the four aforementioned reasons why courts should hold parental kidnapers responsible under state criminal laws, regardless of any prior criminal contempt sanctions.

## I. BACKGROUND

The history of judicial oversight in American child custody cases begins in the early twentieth century. Over time, child custody jurisprudence evolved from the traditional paternal preference to the “best interests of the child” standard used by courts today.<sup>21</sup> In light of the

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<sup>19</sup> Some states, such as Massachusetts and Nebraska, have no limits on criminal contempt penalties. Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 407 n.379 (2000). In contrast, state criminal statutes provide guidelines as to how parental kidnapers should be sentenced. See generally NDAA Parental Kidnapping Compilation, *infra* note 60.

<sup>20</sup> See Geoffrey Greif, *Parental child abduction and its impact*, PSYCHOLOGY TODAY, (Nov. 13, 2010), <https://www.psychologytoday.com/blog/buddy-system/201011/parental-child-abduction-and-its-impact> (“[R]eactions to abduction include: nightmares, fears of doors and windows, bedwetting (depending on age), fear of authority and strangers, anger at abductor and left-behind parent, depression, anxiety, and school and peer problems. Problems for many adults persist into their 20s, 30s, 40s, and 50s”); Administrative Office of the Courts, *Effects of Parental Abduction in Child Custody Cases*, WASHINGTON COURTS, <https://www.courts.wa.gov/newsInfo/content/pdf/HarmfulEffectsOfParentalAbduction.pdf> [hereinafter WASHINGTON COURTS] (“If the child is very young when abducted and is returned as an older child, the child may suffer serious negative emotional effects because the child feels as if he or she is returned to a stranger, and therefore the return to the parent who was originally left behind seems like an abduction itself.”).

<sup>21</sup> See UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. (Aug. 2, 1973); J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 215–16 (2014) (describing modern courts’ tendencies to

court's decision-making role in child custody disputes, there are various motivations for parental kidnapping, as well as different factors that contributed to the rise of parental kidnapping.

#### A. JUDICIAL OVERSIGHT IN CHILD CUSTODY CASES: HISTORY AND MODERN APPLICATION

In the United States, natural parents have a “fundamental liberty interest . . . in the care, custody, and management of their child.”<sup>22</sup> As Justice Blackmun wrote in *Santosky v. Kramer*, “Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.”<sup>23</sup>

There are four classes of proceedings in United States law that affect the custody of a child: (1) divorce and dissolution of a marriage, (2) guardianship law, (3) juvenile court and neglect laws, and (4) laws relating to the termination of parental authority for adoption.<sup>24</sup> This Comment addresses the first class of proceedings, after the divorce and dissolution of a marriage.

Prior to a divorce, parenting activity is not subject to detailed regulation by the state.<sup>25</sup> However, after a divorce, the court system has the authority to regulate parents through child custody and visitation orders.<sup>26</sup> These judicial orders dictate which parent is the primary guardian, how much time each parent can spend with the child, and where the children will live.<sup>27</sup> In the eyes of the law, child custody orders serve the important purpose of protecting the established relationships between children and both of their parents, in light of the changed family circumstances that result from divorce.<sup>28</sup>

Under traditional English common law—which serves as the foundation of American law in this area—fathers had *patria potestas*, or parental power, over their children, whom the fathers viewed as chattel or servants.<sup>29</sup> However, in the early twentieth century, both British and

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encourage joint legal custody or shared parenting, as long as it is in the best interests of the child).

<sup>22</sup> *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

<sup>23</sup> *Id.*

<sup>24</sup> Christopher L. Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L. J. 291, 297 (1986).

<sup>25</sup> Mahoney, *supra* note 1, at 836.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child*

American courts shifted their custody supposition: under the new “Tender Years doctrine,” courts presumed that mothers should have custody of their young children, unless the father could show that the mother was “unfit.”<sup>30</sup> The tender years doctrine suggested that mothers are “softer and more natural nurturers” than fathers, as well as “biologically better designed” for childrearing.<sup>31</sup>

In 1970, American child custody law evolved to a “neutral best interests of the child” standard in deciding custody, as recommended by the Uniform Marriage and Divorce Act (UMDA).<sup>32</sup> Most states passed statutes listing factors that a judge should consider when determining the child’s best interests.<sup>33</sup> The UMDA also set forth a general presumption of visitation rights for the other parent.<sup>34</sup> Accordingly, most states passed laws protecting the access rights of the noncustodial parent;<sup>35</sup> generally, a court would only deny visitation rights if the judge believed that contact with the other parent would endanger the child.<sup>36</sup> Finally, in the 1980s, courts began to encourage joint legal custody or shared parenting, rather than naming one parent as primary custodian, as long as it was in the best interests of the child.<sup>37</sup> This policy remains in effect today.<sup>38</sup>

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*Standard in American Jurisprudence*, 10 J. L. FAM. STUD. 337, 345–46 (2007).

<sup>30</sup> Laura Bealeu, *Farewell to Heart Balm Doctrines and the Tender Years Presumption, Hello to the Genderless Family*, 24 J. AM. ACAD. MATRIM. LAW 365, 379–81 (2012) (describing the tender years doctrine as the “legal presumption that the mother is the best custodian for infants and young children”); Kohm, *supra* note 29, at 346; June Carbone & Leslie J. Harris, *Family Law Armageddon: The Story of Morgan v. Foretich*, in *FAMILY LAW STORIES* 139 (Carol Sanger ed., 2008).

<sup>31</sup> Bealeu, *supra* note 30, at 380.

<sup>32</sup> UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. (Aug. 2, 1973) [hereinafter UMDA] (“The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including: (1) the wishes of the child’s parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest; (4) the child’s adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved.”).

<sup>33</sup> Carbone & Harris, *supra* note 30, at 141.

<sup>34</sup> See UMDA § 407A(a), *supra* note 32.

<sup>35</sup> Thomas R. Young, *Legal Rights of Children*, 1 LEG. RTS. CHILD. REV. 2D § 3:2 (3d ed.) (2015) (“As a general rule, it is recognized that a noncustodial separated parent has a liberty interest in communicating with and visiting his or her child where custody of the child has been granted to the State or to the other custodial parent.”).

<sup>36</sup> Kohm, *supra* note 29, at 359.

<sup>37</sup> DiFonzo, *supra* note 21, at 215–16.

<sup>38</sup> *Id.*; see also Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L. J. 455, 455 n.2 (1984) (stating that today, approximately 30 states have joint custody laws and many other states have considered similar legislation).



## B. THE PROBLEM OF PARENTAL KIDNAPPING

Because state courts have the power to issue child custody orders, divorced parent may not be able to go wherever they want, whenever they want, with their child. As a result, some divorced parents may decide to violate the child custody order, and in some situations their decisions amount to child kidnapping.<sup>39</sup> In the typical parental kidnapping case, the noncustodial parent, often with the aid of relatives, withholds the child from the custodial parent and attempts to conceal the child's location in violation of a court-ordered custody decree.<sup>40</sup> Kidnapping statutes generally require proof of intent to detain or conceal the child from the custodial parent.<sup>41</sup>

In 1979, Senator Alan Cranston estimated that 25,000 parental kidnappings occurred each year.<sup>42</sup> Congress responded in 1984 by passing the Missing Children's Assistance Act, which directed the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention (OJJDP) to establish a national resource center to provide additional research on the topic.<sup>43</sup> Since the Act's passage, the OJJDP has conducted two major studies: The National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children (NISMAART) in 1988 and the follow up, nicknamed NISMAART-2, in 1999.<sup>44</sup> NISMAART-2 predicted that, in the twenty years since Senator Cranston's statement before Congress's Subcommittee on Child and Human Development, parental kidnapping had risen almost tenfold to an estimated 203,900 children per year.<sup>45</sup>

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<sup>39</sup> William B. Johnson, *Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child*, 49 A.L.R.4th 7 (1986).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*; see, e.g., MICH. COMP. LAWS ANN. §750.350a (West 2014) (setting out a specific intent element for parental kidnapping: "the intent to detain or conceal the child from any other parent or legal guardian of the child who has custody or visitation rights pursuant to a lawful court order at the time of the taking or retention"); IDAHO CODE ANN. § 18-4501(2) (West 2016) (setting out the intent element of kidnapping in the second degree as "intent to keep or conceal [a child] from its custodial parent, guardian, or other person having lawful care or control thereof"); ANN. CAL. PENAL CODE § 278 (West 2011) (setting out the intent element as "intent to detain or conceal that child from a lawful custodian").

<sup>42</sup> Sue T. Bentsch, Comment, *Court-Sponsored Custody Mediation to Prevent Parental Kidnapping: A Disarmament Proposal*, 18 ST. MARY'S L.J. 361, 361 n.1 (1986) (citing Proposed Federal Parental Kidnapping Prevention Act: Hearings on S. 105 Before the Subcomm. on Child and Human Dev. of the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 1 (1979) (statement of Senator Alan Cranston)).

<sup>43</sup> Missing Children's Assistance Act, Pub. L. No. 98-473, Title IV of the Juvenile Justice and Delinquency Prevention Act of 1974 (1974); Adrienne L. Fernandes-Alcantra, *Missing and Exploited Children: Background, Policies, and Issues*, CONGRESSIONAL RESEARCH SERVICE 3, (April 29, 2015), <https://www.fas.org/sgp/crs/misc/RL34050.pdf>.

<sup>44</sup> Fernandes-Alcantra, *supra* note 43, at 4.

<sup>45</sup> *Id.*

Some scholars explain the modern rise of parental kidnapping through social causes.<sup>46</sup> First, high divorce rates have increased the number of children who are potential victims of parental kidnapping.<sup>47</sup> Disgruntled divorcees may use their children as “ammunition” to retaliate against their ex-spouses.<sup>48</sup> Alternately, one parent may seek to move to another state after the divorce—perhaps to live closer to relatives or in the event of a remarriage; however, the other parent may successfully prevent such a move by arguing that relocation would violate the child custody order or make the current arrangement unworkable.<sup>49</sup> If a parent’s efforts to move out of state after a divorce are thwarted, he may resort to parental kidnapping.<sup>50</sup>

Second, parental kidnapping stories attract publicity, which may ironically encourage more parents to use such a strategy to maintain or regain custody and control over their children.<sup>51</sup> Third, the ease of interstate transportation allows for greater mobility for parental kidnapers to move their children out of the other parent’s reach.<sup>52</sup> Finally, some fathers feel that the legal system is biased against them in determining custody and visitation rights, such that they will not be granted custody or favorable visitation rights.<sup>53</sup> These fathers may resort to parental

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<sup>46</sup> Bentch, *supra* note 42, at 364.

<sup>47</sup> *Id.*; see also National Vital Statistics System, *National Marriage and Divorce Rate Trends*, CENTERS FOR DISEASE CONTROL AND PREVENTION, [https://www.cdc.gov/nchs/nvss/marriage\\_divorce\\_tables.htm](https://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm) (stating that in each year from 2000 through 2014, over two million married couples got divorced in the United States).

<sup>48</sup> *Id.*

<sup>49</sup> See Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. OF LOUISVILLE J. OF FAM. L. 1, 2–3 (1996) (“Many women, as they contemplate interstate relocation, find their former husbands seek to prevent such a move. Moreover, the former husbands are frequently successful, particularly in the trial courts.”); Linda D. Elrod, *A Move in the Right Direction? Best Interests of the Child Emerging as the Standard for Relocation Cases*, 3 J. OF CHILD CUSTODY 29, 44 (2006).

<sup>50</sup> Elrod, *supra* note 49, at 44–45 (“A parent who ‘thinks’ that the environment in another location may be better for their health may find the court rejecting the relocation for that reason. Courts have not been sympathetic to parents who unilaterally act in taking the children from the jurisdiction without the court or the other parent’s permission.”).

<sup>51</sup> Bentch, *supra* note 42, at 364–65; see also Jeremy D. Morley, *Preventing International Child Abduction in Divorce*, 28 A.B.A. SOLO, SMALL FIRM & GEN. PRACTICE DIVISION 3, at 5 (April/May 2011) (observing that child custody judges are “aware of the firestorm of publicity” elicited by parental kidnapping cases).

<sup>52</sup> Richard A. Campbell, Note, *Transition: The Tort of Custodial Interference—Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 233 (1983).

<sup>53</sup> Joseph R. Hillebrand, Note, *Parental Kidnapping and the Tort of Custodial Interference: Not in a Child’s Best Interests*, 25 IND. L. REV. 893, 895 n.16 (“The noncustodial father feels alienated from his children and angry at the legal system, which places strict limits on the amount of time noncustodial parents are allowed to see their

kidnapping, believing it maximizes the amount of time they can spend with their children.

Other scholars attribute the rise in parental kidnapping to early jurisdictional problems in child custody matters.<sup>54</sup> Prior to the 1960s, little federal regulation existed to govern child custody jurisdiction.<sup>55</sup> As a result, state courts were often aggressive in asserting jurisdiction in child custody cases, even doing so when they knew that another state's courts had already asserted jurisdiction in the same matter.<sup>56</sup> As a result, a parent could move his child into another jurisdiction and ask the court of the new state to modify the child custody order.<sup>57</sup> Fortunately, after Congress enacted the PKPA in 1982, state courts could no longer grant such requests from parents engaging in parental kidnapping because the PKPA created a federal obligation that all states defer to the prior custody proceedings and decisions of their sister states.<sup>58</sup> Regardless of its causes, parental kidnapping presented a problem for courts and legislatures in the second half of the twentieth century and remains a problem today.<sup>59</sup>

## II. CURRENT METHODS OF COMBATING PARENTAL KIDNAPPING

The legal system currently uses five methods to combat parental kidnapping in the United States: federal legislation (namely, the UCCJA and the PKPA), state criminal laws, enforcement of child custody orders, tort law, and court-sponsored child custody mediation.<sup>60</sup>

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children and punishes them for falling behind on support payments") (citing JOHN E. GILL, *STOLEN CHILDREN* 37 (1981)); see also HEALTHRESEARCHFUNDING.ORG, *supra* note 4.

<sup>54</sup> See, e.g., Amy M. Palesch, *A Small Amount of Change for the Good of Children: Replacing the Uniform Child Custody Jurisdiction Act with the Uniform Child Custody Jurisdiction and Enforcement Act in South Carolina*, 58 S.C. L. REV. 1049, 1051 (2007); Nancy S. Erickson, *The Parental Kidnapping Prevention Act: How can Non-Marital Children Be Protected?*, 18 GOLDEN GATE U. L. REV. 529, 530 (1988).

<sup>55</sup> Erickson, *supra* note 54, at 530.

<sup>56</sup> *Id.*; Blakesley, *supra* note 24, at 293.

<sup>57</sup> Erickson, *supra* note 54, at 530.

<sup>58</sup> Roger M. Baron, *Federal Preemption in the Resolution of Child Custody Jurisdiction Disputes*, 45 ARK. L. REV. 885, 890 (1993).

<sup>59</sup> See Bentch, *supra* note 42, at 361; see also U.S. DEP'T OF JUSTICE, *supra* note 3 (estimating in 2010 that more than 200,000 children are victims of parental kidnapping each year).

<sup>60</sup> See, e.g., CAL. CIV. CODE ANN. § 4607 (1984). See generally David Carl Minneman, *Recognition and enforcement of out-of-state custody decree under § 13 of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA)*, 28 U.S.C.A. § 1738A(a), 40 A.L.R.5th 227 (1996); National District Attorneys Association, *National Center for Prosecution of Child Abuse & National District Attorneys Association Parental Kidnapping Compilation*, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, (June 2010), <http://www.ndaa.org/pdf/Parental%20Kidnapping%20June%202010.pdf> [hereinafter

## A. FEDERAL LEGISLATION – THE UCCJA AND THE PKPA

In the early 1960s, the increase in the numbers of divorces and the consequent child custody disputes brought the problem of parental kidnapping to the forefront of national attention.<sup>61</sup> At that time, the Supreme Court of the United States had not settled the question of whether the Full Faith and Credit Clause of the Constitution applied to child custody orders, so state courts continued to modify their sister states' child custody decrees.<sup>62</sup>

In 1968, the National Conference of Commissioners on Uniform State Laws crafted the UCCJA.<sup>63</sup> The UCCJA laid out a scheme in which one court, the “custody court,” would assume full responsibility for the custody of a particular child, to the exclusion of courts in other states.<sup>64</sup>

The custody court would be chosen based on which state has access to the most relevant information about the child and family.<sup>65</sup>

If the child no longer had ties to the state of the custody court—for example, because the family moved to another state—a new custody court would be selected.<sup>66</sup> By 1979, thirty-nine states had adopted the UCCJA.<sup>67</sup> Unfortunately, many cases decided after the UCCJA noted its failure to prevent interstate conflicts due to a lack of uniformity.<sup>68</sup>

A non-conforming state that had not adopted the UCCJA or had adopted it with modifications could still serve as an attractive “haven” to the losing party in custody decisions.<sup>69</sup> Furthermore, the UCCJA's dependence on judicial interpretation led to inconsistent application: state

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NDAA Parental Kidnapping Compilation]; Mahoney, *supra* note 1, at 836; George L. Blum, *Recognition and Application of the Common Law Action for Tortious Interference with Parental Rights*, 103 A.L.R.6th 461 (2015).

<sup>61</sup> Sheldon A. Vincenti, *The Parental Kidnapping Prevention Act: Time to Reassess*, 33 IDAHO L. REV. 351, 362–63 (1997).

<sup>62</sup> Office of Justice Programs, Juvenile Justice and Delinquency Prevention, *The Uniform Child-Custody Jurisdiction and Enforcement Act*, U.S. DEP'T OF JUSTICE, 2 (Dec. 2001), <https://www.ncjrs.gov/pdffiles1/ojjdp/189181.pdf>.; Erickson, *supra* note 54, at 530.

<sup>63</sup> Vincenti, *supra* note 61, at 365.

<sup>64</sup> *Id.* at 365–66 (quoting Bridget M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1218 (1969)).

<sup>65</sup> Vincenti, *supra* note 61, at 365.

<sup>66</sup> *Id.* at 366 (quoting Bridget M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1218 (1969)).

<sup>67</sup> *Id.* at 368.

<sup>68</sup> Minneman, *supra* note 60, at 227.

<sup>69</sup> Baron, *supra* note 58, at 890 (quoting *Thompson v. Thompson*, 484 U.S. 174, 180 (1988)).

courts often interpreted the flexible provisions of the UCCJA in their own favor to claim jurisdiction.<sup>70</sup>

Still, the widespread acceptance of the UCCJA garnered the attention of the media and, subsequently, Congress.<sup>71</sup> In response to interstate disputes caused by the UCCJA, Congress passed the PKPA in 1980.<sup>72</sup> As an addendum to the full faith and credit statute of the United States Code, the PKPA created a federal obligation that all states defer to the prior custody proceedings and decisions of their sister states.<sup>73</sup> Thus, although the UCCJA could result in more than one state claiming to meet the conditions set forth for the custody court, the PKPA eliminated the possibility of concurrent jurisdiction.<sup>74</sup> The PKPA required that each state “enforce according to its terms” any custody decree that satisfies the jurisdictional criteria of the Act and refrain from exercising jurisdiction if an action was already pending in another qualified forum.<sup>75</sup>

The original PKPA also proposed making parental kidnapping a federal crime.<sup>76</sup> However, Congress ultimately decided not to make interstate parental kidnapping a federal crime.<sup>77</sup> Although the proposal was supported by the American Bar Association (a non-profit organization called Children’s Rights, Inc.) and some individual parents, the measure was strongly opposed by the Department of Justice and the Federal Bureau of Investigation as “unduly harsh and a misuse of scarce resources.”<sup>78</sup> Instead, the final version of the PKPA simply held that interstate parental kidnapers could be punished under the Fugitive Felon Act<sup>79</sup> as long as

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<sup>70</sup> Baron, *supra* note 58, at 890; U.S. DEP’T OF JUSTICE, *supra* note 62, at 2.

<sup>71</sup> Vincenti, *supra* note 61, at 368 (citing *Parental Kidnapping Prevention Act of 1979: Hearing Before the Subcomm. on Child and Human Dev. of the Comm. on Labor and Human Resources*, 96th Cong. 150–59, 244–64 (1979)).

<sup>72</sup> See Blakesley, *supra* note 24, at 355; Linda M. Demelis, Note, *Interstate Child Custody and the Parental Kidnapping Prevention Act: The Continuing Search for a National Standard*, 45 HASTINGS L.J. 1330, 1329-30 (1994); Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813 (1995).

<sup>73</sup> Baron, *supra* note 58, at 891–92.

<sup>74</sup> Vincenti, *supra* note 61, at 356.

<sup>75</sup> *Id.* at 370 (quoting 28 U.S.C. § 1738A(a) (1995)).

<sup>76</sup> *Id.* at 368.

<sup>77</sup> Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnaping Prevention Act*, 25 U.C. DAVIS L. REV. 1, 27 (1992). Notably, Congress did make international parental kidnapping a crime under the International Parental Kidnapping Crime Act (IPKCA). 18 U.S.C. § 1204 (1998). Under the IPKCA, an international parental kidnapper can be punished with fine and/or imprisonment of up to three years. *Id.*

<sup>78</sup> Goldstein, *supra* note 77, at 27.

<sup>79</sup> 18 U.S.C. § 1073 (1982). The penalty for violating the Fugitive Felon Act is a fine

parental kidnapping was a felony in the state where the child was stolen.<sup>80</sup>

Since the PKPA was passed, scholars have disagreed about the relationship between the PKPA and the UCCJA.<sup>81</sup> Professor Sheldon Vincenti of the University of Idaho College of Law, for example, argues that the PKPA was intended to eradicate the so-called “haven state”—any state that did not adopt the UCCJA—where parental kidnappers could seek refuge.<sup>82</sup> Professor Vincenti points to a statement by Senator Malcolm Wallop of Wyoming, the author and sponsor of the PKPA, in which he voiced his hopes that by requiring every state to “enforce the decrees of sister states that have adopted the Uniform Act,” the PKPA would motivate every state to adopt the UCCJA.<sup>83</sup> Senator Wallop wrote, “Assuming all fifty states and the District of Columbia do adopt the [UCCJA, the PKPA] will retain its usefulness in those cases in which a court might ignore the state law but would be hard pressed to ignore both state and federal law.”<sup>84</sup> The Senator further noted that universal adoption of the UCCJA would render the PKPA largely unnecessary and perhaps even mandate its repeal.<sup>85</sup> Thus, based on Senator Wallop’s statements, Professor Vincenti claims that Congress intended for the UCCJA and PKPA to work together.<sup>86</sup>

In contrast, Christopher Blakesley, a law professor at the University of Nevada Las Vegas William S. Boyd School of Law, argues that in adjudicating child custody jurisdictional disputes, courts must ask two questions: (1) whether the court has jurisdiction, and (2) whether to exercise it.<sup>87</sup> According to Blakesley, the PKPA and the UCCJA work together to guide courts in answering the first question, while the UCCJA provides the answer to the second question.<sup>88</sup> However, Blakesley also notes that the PKPA does not prohibit a state from enforcing a custody decree that is not enforceable under the federal act, if the decree is enforceable under the

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and/or imprisonment, as well as extradition to the state from which he or she fled. *See id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See* Blakesley, *supra* note 23, at 355; Demelis, *supra* note 72, at 1330; Wasserman, *supra* note 23, at 866–67.

<sup>82</sup> Vincenti, *supra* note 61, at 369.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (quoting *Parental Kidnapping Prevention Act of 1979, S. 105: Addendum to Joint Hearing Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary and the Subcomm. on Child and Human Dev. of the Comm. on Labor and Human Resources*, 86th Cong. 96–54).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Blakesley, *supra* note 24, at 355.

<sup>88</sup> *Id.*

UCCJA.<sup>89</sup> Thus, where the PKPA and UCCJA disagree, the court has discretion to issue a finding consistent with the “underlying statutory UCCJA policy to discourage child snatching, avoid jurisdictional competition, and create greater stability,” and is not restricted by the provisions of the PKPA.<sup>90</sup> Ultimately, the ambiguity surrounding the relationship between the PKPA and the UCCJA illustrates that courts must take additional steps to consistently and adequately punish and deter parental kidnapping.

In the same vein, some scholars argue that the PKPA and UCCJA are ineffective at combating parental kidnapping.<sup>91</sup> Professor Rhonda Wasserman of the University of Pittsburgh School of Law criticizes the PKPA, arguing that it gives the custody court an unconstitutional power to bind parents solely based on subject matter jurisdiction, regardless of whether the court has personal jurisdiction.<sup>92</sup> Similarly, Linda Demelis, attorney and editor of TheCorporateCounsel.net, points out that state courts often disagree in their interpretations of the PKPA’s jurisdictional rules, just as they had differed in interpreting the UCCJA’s rules.<sup>93</sup> For example, the PKPA provides little guidance for how courts should decide a child’s “home state” in joint custody situations; after all, a child in joint custody may have two established homes in two different states.<sup>94</sup> Due to the inconsistencies in applying the PKPA, Demelis suggests that the best way to establish a uniform national standard is for individual state legislatures to expressly adopt child-based jurisdiction, where the custody court is determined based on where the child spends the majority of the year.<sup>95</sup>

Ultimately, it is unlikely that the UCCJA and PKPA alone can effectively combat parental kidnapping without additional support from state legislatures and courts.

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<sup>89</sup> *Id.*

<sup>90</sup> *Neger v. Neger*, 459 A.2d 628, 639 (N.J. 1983).

<sup>91</sup> *See, e.g., Demelis, supra* note 72, at 1329–31; *Wasserman, supra* note 72, at 813.

<sup>92</sup> *Wasserman, supra* note 72, at 867–68 (explaining that the PKPA gives a state court the power to adjudicate child custody disputes as long as it is the child’s “home state” or had been the child’s home state within six months before commencement of the child custody proceedings, regardless of whether the child or either parent is still domiciled there or whether the state court has in personam jurisdiction over the parents).

<sup>93</sup> *Demelis, supra* note 72, at 1330–31.

<sup>94</sup> *Id.* at 1343–44.

<sup>95</sup> *Id.* at 1344–45.

## B. STATE LEGISLATION – THE CRIME OF PARENTAL KIDNAPPING OR CUSTODIAL INTERFERENCE

Beyond the UCCJA and PKPA, state legislatures have attempted to combat parental kidnapping through criminal statutes, which label such conduct as a misdemeanor or a felony.<sup>96</sup> The U.S. Supreme Court has declared that child custody cases are considered a matter of state law.<sup>97</sup> Accordingly, states have the power to decide whether and how to punish parents who violate child custody orders through parental kidnapping.<sup>98</sup>

Historically, parents could not be criminally prosecuted for kidnapping their own children.<sup>99</sup> Federal kidnapping laws granted parental immunity; for example, the Lindbergh Act, enacted in 1932, exemplified the notion that parents have the sovereign right to do whatever they think is best for the child.<sup>100</sup> Similarly, before the passage of the PKPA and the UCCJA, several state kidnapping laws had instituted parental immunity.<sup>101</sup> However, prompted in part by the PKPA, all fifty states and the District of Columbia have amended their kidnapping laws: some revised their original laws to expressly include parents, others passed statutes specifically criminalizing parental kidnapping.<sup>102</sup> Furthermore, perhaps because of the PKPA's Fugitive Felon provision, many states categorized parental kidnapping as a felony.<sup>103</sup> However, parental kidnapping criminal statutes

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<sup>96</sup> See, e.g., TEX. PENAL CODE ANN. § 25.10 (West 2010) (“An offense under this section is a state jail felony.”); 720 ILL. COMP. STAT. 5/10-5 (2010) (“A person convicted of child abduction under this Section is guilty of a Class 4 felony.”); MICH. COMP. LAWS § 750.350(a) (2010) (“A parent who violates [this section] is guilty of a felony . . .”).

<sup>97</sup> Baron, *supra* note 58, at 885–86.

<sup>98</sup> *Id.*

<sup>99</sup> See *State v. Benner*, 385 A.2d 48, 49 (Me. 1978).

<sup>100</sup> Bentch, *supra* note 42, at 365 n.20 (citing 18 U.S.C. § 1201 (1982) (punishing “whoever unlawfully . . . kidnaps, abducts, or carries away . . . any person, except in the case of a minor by the parent thereof”).

<sup>101</sup> *Id.* (citing ME. REV. STAT. ANN. TIT. 17-A, § 301 (1983) (providing a defense to kidnapping where the victim of abduction is the child of the actor); TEX. PENAL CODE ANN. § 20.03 (b)(2) (1974) (providing an affirmative defense to kidnapping where the victim of abduction is related to the actor)).

<sup>102</sup> Bentch, *supra* note 42, at 378.

<sup>103</sup> *Id.* at 378–79. The Fugitive Felon provision of the PKPA refers to the Fugitive Felon Act, a federal statute that prohibits individuals who have committed a felony under state law from interstate or international travel. 18 U.S.C. § 1073 (1996). Individuals found to be fugitive felons are subject to federal prosecution and penalties. *1780. Fugitive Felon Act—18 U.S.C. 1073*, U.S. DEP’T OF JUSTICE OFFICES OF THE U.S. ATTORNEYS, <https://www.justice.gov/usam/criminal-resource-manual-1780-fugitive-felon-act-18-usc-1073>. The primary purpose of the Fugitive Felon Act is “to permit the Federal government to assist in the location and apprehension of fugitives from state justice.” *Id.*



still vary widely from state to state.<sup>104</sup>

### C. JUDICIAL ENFORCEMENT OF CUSTODY ORDERS

State courts also have the power to combat parental kidnapping by holding parents in contempt of court for violating child custody orders.<sup>105</sup> As products of the court, child custody orders are mandatory.<sup>106</sup> In order to enforce child custody orders, courts use the remedies of civil and criminal contempt.<sup>107</sup> Contempt is defined as the “misbehavior of any person in [the court’s] presence or so near thereto as to obstruct the administration of justice” or “disobedience or resistance to [the court’s] lawful writ, process, order, rule, decree, or command.”<sup>108</sup> The distinction between civil and criminal contempt is significant because if the contempt is considered civil and the relief remedial, the Double Jeopardy Clause does not apply.<sup>109</sup>

Civil and criminal contempt are significantly different. In *Shillitani v. United States*,<sup>110</sup> the U.S. Supreme Court articulated the test for determining whether contempt is civil or criminal in nature: “It is not the fact of punishment but rather its character and purpose that often serve to distinguish civil from criminal contempt. . . . The test may be stated as: what does the court primarily seek to accomplish by imposing [the] sentence?”<sup>111</sup> If the purpose of the sentence is to coerce, the proceeding is civil; if the purpose of the sentence is to punish, the court has imposed

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<sup>104</sup> See generally NDAA Parental Kidnapping Compilation, *supra* note 60. See also J.E.K., *Offense of abduction or kidnapping as affected by defendant’s belief in legality of his act*, 114 A.L.R. 870 (1938).

<sup>105</sup> Mahoney, *supra* note 1, at 854 (“Under the laws of most states, the range of judicial remedies for the violation of custody and visitation orders is wide. First, contempt remedies become available whenever parental noncompliance is viewed as the violation of a coercive or injunctive order of the court.”).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Paul A. Grote, *Purging Contempt: Eliminating the Distinction Between Civil and Criminal Contempt*, 88 WASH. U. L. REV. 1247, 1248 (2011) (quoting 18 U.S.C. § 401 (2006)).

<sup>109</sup> See *State v. Hope*, 449 So. 2d 633, 635 (Fla. Dist. Ct. App. 1995) (“At the onset, we must determine whether the contempt proceeding against defendant was civil or criminal. If the proceeding was civil in nature, trial of defendant on the kidnapping charge would not constitute double jeopardy.”); see also Robert B. Adrine & Alexandra M. Ruden, § 13:13. *Court enforcement of civil protection orders—Double jeopardy concerns*, in OH. DOMESTIC VIOLENCE L. § 13:13 (December 2014).

<sup>110</sup> 384 U.S. 364, 370 (1966).

<sup>111</sup> *Id.* at 369–70 (quoting *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 441 (1911)).

criminal contempt.<sup>112</sup> In *United Mine Workers of Am. v. Bagwell*,<sup>113</sup> the Court further elaborated that the line between civil and criminal contempt sanctions is drawn “not from the subjective intent of a State’s laws and its courts, but from an examination of the character of the relief itself.”<sup>114</sup> The Court explained:

The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as [a court order] . . . Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. . . . By contrast, a fixed sentence of imprisonment is punitive and criminal if it is imposed retrospectively for a ‘completed act of disobedience,’ such that the contemnor cannot avoid or abbreviate the confinement through later compliance.<sup>115</sup>

Previously, in *United States v. Halper*,<sup>116</sup> the U.S. Supreme Court held that a civil suit brought by the government could constitute a second punishment in violation of the Double Jeopardy Clause: “the labels ‘criminal’ and ‘civil’ are not of paramount importance . . . a civil as well as a criminal sanction constitutes punishment.”<sup>117</sup> However, in *Hudson v. United States*,<sup>118</sup> the Court disavowed its previous holding in *Halper* and instead declared that double jeopardy only protects against the imposition of multiple *criminal* punishments for the same offense.<sup>119</sup>

In summary, state courts can prevent parental kidnapping and enforce child custody decrees by holding parents in civil or criminal contempt of court, depending on whether the court’s goal is to coerce the parent into compliance with the custody order or to punish the parent for a prior violation.<sup>120</sup> However, if the state also determines that the crime of parental kidnapping has the same elements as criminal contempt of court, then a parental kidnapper who has already been prosecuted for criminal contempt cannot be subsequently charged with the crime of parental kidnapping.

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<sup>112</sup> *Id.* at 370.

<sup>113</sup> 512 U.S. 821, 828 (1994).

<sup>114</sup> *Id.* (quoting *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 633 (1988)).

<sup>115</sup> *Id.* at 828–29 (quoting *Gompers*, 221 U.S. at 498).

<sup>116</sup> 490 U.S. 435, 447–48 (1989).

<sup>117</sup> *Id.* at 447–48. The Court thus concluded that “the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole.” *Id.* at 451.

<sup>118</sup> 522 U.S. 93, 100–02 (1997).

<sup>119</sup> Ultimately, in *Hudson*, the U.S. Supreme Court announced a return to the previously articulated double jeopardy standard from *United States v. Ward*, 448 U.S. 242 (1980). *Id.* at 103.

<sup>120</sup> Grote, *supra* note 108, at 1248.

## D. CIVIL LIABILITY FOR PARENTAL KIDNAPPING UNDER TORT LAW

Certain states allow parents to sue each other for parental kidnapping through the tort law system.<sup>121</sup> Although the PKPA provides a federal solution to state jurisdictional disputes, it does not provide a federal remedy through civil litigation.<sup>122</sup> In *Thompson v. Thompson*,<sup>123</sup> two private parties tried to sue in federal court to determine which of their conflicting state custody decrees was valid.<sup>124</sup> The U.S. Supreme Court held that although the PKPA furnishes a rule of decision for courts to use in adjudicating custody disputes, it does not create an entirely new cause of action in federal courts.<sup>125</sup>

However, some states recognize a private cause of action for parents who have been victimized by parental kidnapping, issuing damages for “tortious interference with the custodial parent-child relationship.”<sup>126</sup> The second Restatement of Torts codifies this cause of action in § 700, Causing Minor Child to Leave or not to Return Home: “One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent.”<sup>127</sup> Several states, such as Wisconsin and Louisiana, have adopted the tort of unlawful intentional interference with custody of a parent entitled to that custody, as laid out in § 700.<sup>128</sup>

In another example, the Supreme Court of Virginia recognized a private cause of action for parents for loss of custody in *Wyatt v. McDermott*.<sup>129</sup> In *Wyatt*, the biological father—who was not alleged to be an unfit parent—sought legal recourse against the child’s mother for

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<sup>121</sup> See, e.g., *Lloyd v. Loeffler*, 694 F.2d 489, 496–97 (7th Cir. 1982) (applying Wisconsin state law); *Spencer v. Terebelo*, 373 So. 2d 200, 202 (La. Ct. App.1979) (citing 14 LSA-R.S. § 45).

<sup>122</sup> See *Thompson v. Thompson*, 484 U.S. 174, 187 (1988).

<sup>123</sup> 484 U.S. 174 (1988).

<sup>124</sup> *Id.* at 177–78.

<sup>125</sup> *Id.* at 187 (“The context in which the PKPA was enacted—the existence of jurisdictional deadlocks among the States in custody cases and a nationwide problem of interstate parental kidnaping—suggests that Congress’ principal aim was to extend the requirements of the Full Faith and Credit Clause to custody determinations, and not to create an entirely new cause of action. False Congress did not intend the federal courts to play the enforcement role.”).

<sup>126</sup> Blum, *supra* note 60, at 461; see, e.g., *Loeffler*, 694 F.2d at 496–97; *Terebelo*, 373 So. 2d at 202.

<sup>127</sup> RESTATEMENT (SECOND) OF TORTS § 700 (1977).

<sup>128</sup> *Loeffler*, 694 F.2d at 496–97; *Terebelo*, 373 So. 2d at 202 (citing 14 LSA-R.S. § 45).

<sup>129</sup> 725 S.E.2d 555, 562 (Va. 2012).

intentionally preventing him from exercising his parental rights.<sup>130</sup> The Virginia court ruled in favor of the father and established the tort of interference with parental rights, requiring the plaintiff to prove the following elements:

(1) the complaining parent has a right to establish or maintain a parental or custodial relationship with his/her minor child; (2) a party outside of the relationship . . . intentionally interfered . . . by removing or detaining the child from returning to the complaining parent, without the parent's consent, or by otherwise preventing the complaining parent from exercising his/her parental or custodial rights; (3) the outside party's intentional interference caused harm to the complaining parent's . . . relationship with his/her child; and (4) damages resulted from such interference.<sup>131</sup>

The court further held that denying the father a private right of action for parental kidnapping would be "both astonishing and profoundly disturbing."<sup>132</sup> Accordingly, parents in Virginia may sue under the tort of interference with parental rights to seek legal redress.<sup>133</sup>

However, there are also states that do not provide a civil remedy for parents victimized by parental kidnapping.<sup>134</sup> For example, the Supreme Court of Minnesota refused to create such a tort in *Larson v. Dunn*.<sup>135</sup> The *Larson* court expressed its concern that allowing parents to bring civil suits against each other for parental kidnapping would not serve the best interests of the children, as it would only intensify intra-family conflict after divorce:

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<sup>130</sup> *Id.* at 564.

<sup>131</sup> *Id.* at 562 (quoting *Kessel v. Leavitt*, 511 S.E.2d 720, 765–66 (W. Va. 1998)).

<sup>132</sup> *Id.* at 564.

<sup>133</sup> Maryland, Iowa, and Florida courts also allow parents to recover under the tort of interference with parental custody rights. *See, e.g.*, *Stone v. Wall*, 734 So. 2d 1038, 1047 (Fla. 1999) (holding that parental kidnapping causes "real harm that the tort [for intentional interference with the custodial parent-child relationship] is designed to redress, including substantial expenses incurred by a parent in having the child returned"); *Murphy v. I.S.K. Con. Of New England, Inc.*, 571 N.E.2d 340, 352 (Mass. 1991) (recognizing the tort of intentional interference with the parent child relationship as a "contemporary expression encompassing actions for abduction, enticement, harboring, and secreting of a minor child from the parent having legal custody"); *Wood v. Wood*, 338 N.W.2d 123, 127 (Iowa 1983) ("A tort suit will be more likely to effect a speedy return of the child; it will result in better cooperation by potential third-party defendants seeking to avoid the suit; potential punitive damages will serve as an additional deterrent; and increased knowledge of the child's whereabouts will result through the broad scope of civil-case discovery.").

<sup>134</sup> *See Larson v. Dunn*, 460 N.W.2d 39, 46 (Minn. 1990); *Hoblyn v. Johnson*, 55 P.3d 1219, 1225 (Wyo. 2002) (holding that the state of Wyoming does not recognize the tort of intentional interference with parental rights); *Sheltra v. Smith*, 392 A.2d 431, 432–33 (Vt. 1978) (declining to recognize a separate tort for parental kidnapping and instead suggesting that parents seek recovery under the tort of Intentional Infliction of Emotional Distress).

<sup>135</sup> 460 N.W.2d at 46.

Evidence is piling up that children can be devastated by divorce, and their continuing development can be detrimentally affected by subsequent events. For the good of our children, the law should seek to promote such harmony as is possible in families fractured by the dissolution process. . . . The interest in compensation should not outweigh the effects of bitter accusations on young children. . . . [This tort] would place innocent children in the middle of a vigorous, probably vicious, lawsuit between their parents.<sup>136</sup>

The court also added that creating a new tort would not actually deter parental kidnapping because “[f]amily ties are normally stronger than the fear of money damages.”<sup>137</sup> Finally, the court concluded that a parent who suffered from an especially egregious case of parental kidnapping should instead seek recovery through the tort of intentional infliction of emotional distress, rather than the tort of custodial interference.<sup>138</sup> Ultimately, the Minnesota court concluded that the proper remedy for violation of a court order “lies in contempt and other such sanctions; not in providing the other party with compensation.”<sup>139</sup>

The Minnesota, Wyoming, and Vermont supreme courts agree that recognizing a tort action for parental kidnapping does not provide a solution to parental kidnapping.<sup>140</sup> As the *Larson* court explained, creating a new tort does not deter any parent who would gladly pay monetary damages in order to maintain exclusive custody of the child.<sup>141</sup> Ultimately, creating a new tort for custodial interference provides an inadequate deterrent for parental kidnapers.<sup>142</sup>

#### E. COURT-SPONSORED CUSTODY MEDIATION

Finally, courts may refer divorced parents to child-custody mediation as a preventative measure in combating parental kidnapping.<sup>143</sup>

In an attempt to reduce child custody-related conflict between parents after divorce, California courts use mandatory court-sponsored custody

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<sup>136</sup> *Id.* at 45–46.

<sup>137</sup> *Id.* at 46.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Larson*, 460 N.W.2d at 46; *Sheltra v. Smith*, 392 A.2d 431, 432–33 (Vt. 1978); *Hoblyn v. Johnson*, 55 P.3d 1219, 1225 (Wyo. 2002).

<sup>141</sup> *Larson*, 460 N.W.2d at 46–47.

<sup>142</sup> Whether or not a state decides to recognize the tort of custodial interference does not have any impact on double jeopardy analysis. *See United States v. Halper*, 490 U.S. 435, 451 (1989). (“The protections of the Double Jeopardy Clause are not triggered by litigation between private parties.”).

<sup>143</sup> *See CAL. CIV. CODE* § 4607 (requiring that all contested custody issues be mediated).

mediation.<sup>144</sup> In 1984, the California legislature passed a statute requiring each superior court to supply a mediator that is professionally qualified; for example, the mediator can be a staff member of a mental health agency, probation department, or conciliation court.<sup>145</sup> Furthermore, the California system requires courts to separate the child custody mediation from the parents' divorce hearing, recognizing that although the parents' relationship with each other may be irreconcilable, they can still work together as co-parents for their child's best interests.<sup>146</sup> Other states, such as Alaska, Iowa, and Montana provide similar mediation or counseling before custody determinations; however, the mediation generally occurs at the discretion of the court.<sup>147</sup>

The California child custody mediation system provides three benefits for post-divorce families.<sup>148</sup> First, successful child custody mediation is less expensive than litigation.<sup>149</sup> Second, mediation is more likely to salvage the relationship between the parents by avoiding "the appearance of leaving one parent the winner and the other the loser," as the process strives to produce an outcome that satisfies both parties.<sup>150</sup> Third, by minimizing the chance for future hostilities between parents, a successful mediation promotes the mental and emotional health of the child.<sup>151</sup> Thus, proponents of court-sponsored mediation argue that it deters parental kidnapping "by reducing the number of its potential victims: children whose parents either anticipate bitter custody litigation or who refuse to abide by the result of such a battle."<sup>152</sup>

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<sup>144</sup> *Id.*; see *Guardianship of MS.W.*, 136 Cal. App. 3d 708, 712 (Cal. Ct. App. 1982) (explaining that the purpose of the mediation statute's mandatory language is to reduce conflict between parents).

<sup>145</sup> *Id.*; CAL. CIV. CODE § 4607

<sup>146</sup> See *id.*; CAL. CIV. CODE § 4609 (West 1985).

<sup>147</sup> See, e.g., ALASKA STAT. § 25.20.080 (1983) (holding that "the court may order the parties to submit to mediation"); IOWA. CODE ANN. § 598.41(2)(d) (West 1985) (holding that "unless the court determines that direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result, the court may require the parties to participate in custody mediation to determine whether joint custody is in the best interest of the child"); MONT. CODE ANN. § 40-3-124 (1985) (giving courts the power to appoint a "conciliation counselor" who is qualified by training and experience in personal counseling to hold "conciliation conferences" with parties to settle custody disputes).

<sup>148</sup> Bentch, *supra* note 42, at 389-90.

<sup>149</sup> *Id.* at 389.

<sup>150</sup> *Id.* at 389-90.

<sup>151</sup> *Id.* at 390.

<sup>152</sup> *Id.* at 391. Since adopting court-sponsored mediation, Los Angeles county courts have experienced a 75% reduction in the number of custody cases adjudicated. *Id.* at 388 n.153.

Although mediation sounds like an ideal solution, it may prove unworkable in some custody disputes and invariably lead to litigation.<sup>153</sup> Some ex-spouses may be unable to successfully mediate due to vindictiveness and deceitfulness.<sup>154</sup> Similarly, feelings of mistrust and hostility between former couples may be too strong for a productive mediation session, despite a good faith attempt to work out their issues.<sup>155</sup> Ultimately, although mandatory custody mediation may be helpful in preventing parental kidnapping in some cases, it is an incomplete solution. In situations where mediation is insufficient and a parent resorts to kidnapping, criminal contempt sanctions and state criminal statutes are still necessary to punish and deter parental kidnapping.

### III. THE PROBLEM OF THE DOUBLE JEOPARDY RULE

This section lays out the history of the double jeopardy rule in American jurisprudence, followed by an analysis of how the double jeopardy rule affects the interaction between criminal contempt sanctions and prosecutions for parental kidnapping.

#### A. HISTORY OF THE DOUBLE JEOPARDY RULE

The double jeopardy rule finds its roots in the Fifth Amendment of the United States Constitution. The Double Jeopardy Clause provides that no person shall be “subject for the same offence to be twice put in jeopardy of life or limb.”<sup>156</sup> Under the double jeopardy rule, an individual is protected from successive prosecutions and punishments for the same crime.<sup>157</sup>

The history of double jeopardy jurisprudence can be traced back to the U.S. Supreme Court’s establishment of the “same elements” test in *Blockburger v. United States*.<sup>158</sup> The *Blockburger* test holds that where “the

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<sup>153</sup> *Id.* (citing King, *Handling Custody and Visitation Disputes Under the New Mandatory Mediation Law*, 2 CAL. LAW. 40, 41 (1982) (concluding that mediation does not resolve all custody disputes)).

<sup>154</sup> *Id.* at 391 (citing JOAN BLADES, *FAMILY MEDIATION: COOPERATIVE DIVORCE SETTLEMENT* 4 (1985)).

<sup>155</sup> *Id.* (citing DONALD T. SAPOSNEK, *MEDIATING CHILD CUSTODY DISPUTES* 217 (1983)).

<sup>156</sup> U.S. CONST. amend. V.

<sup>157</sup> *North Carolina v. Pearce*, 395 U.S. 711, 729 (1969) (“By forbidding that no person shall be subject for the same offense to be twice put in jeopardy of life or limb, the safeguard of the Fifth Amendment against double punishment guarded against the repetition of history by punishing a man for an offense when he had already suffered the punishment for it”) (quoting *Roberts v. United States*, 320 U.S. 264, 276 (1943) (Frankfurter, J., dissenting)).

<sup>158</sup> 284 U.S. 299; see 1932 Harvard Law Review Association, *Double Jeopardy—Substantive Criminal Charges Following a Finding of Criminal Contempt*, 107 HARV. L. REV. 144, 144 (1993).

same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”<sup>159</sup> Subsequently, in *Grady v. Corbin*,<sup>160</sup> the Court held that in addition to passing the “same elements” test of *Blockburger*, the subsequent prosecutions must also satisfy the “same conduct” test: the government must attempt to prove conduct that constitutes an offense for which the defendant has already been prosecuted.<sup>161</sup>

However, a mere three years later in *United States v. Dixon*,<sup>162</sup> the U.S. Supreme Court overruled the *Grady* “same conduct” test and announced a return to the *Blockburger* “same elements” test.<sup>163</sup> In *Dixon*, the Court held that double jeopardy prevented the state from prosecuting the defendant for assaulting his wife because he had already been held in criminal contempt of court for violating a civil protection order prohibiting simple assault.<sup>164</sup> However, the Court also held that several other counts brought by the state against the defendant were not barred under the double jeopardy rule, because the other counts required different elements of proof.<sup>165</sup> For example, “assault with intent to kill” requires proof of specific intent to kill, whereas the crime of simple assault does not.<sup>166</sup> Thus, the Court held that the defendant could still be prosecuted for assault with intent to kill without violating the double jeopardy rule.<sup>167</sup> Today, the *Blockburger* same elements test still governs the application of the double jeopardy rule.<sup>168</sup>

#### B. THE DOUBLE JEOPARDY OF CRIMINAL CONTEMPT OF COURT AND PARENTAL KIDNAPPING

Domestic violence activists celebrated the U.S. Supreme Court’s decision in *Dixon* for refusing to protect violators of civil protection orders

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<sup>159</sup> *Blockburger*, 284 U.S. at 304 (citing *Gavieres v. United States*, 220 U.S. 338, 342 (1911)).

<sup>160</sup> 495 U.S. 508 (1990).

<sup>161</sup> *Id.* at 522.

<sup>162</sup> 509 U.S. 688 (1993).

<sup>163</sup> *Id.* at 701–04 (determining that the “subsequent prosecution for assault fails the *Blockburger* test, and is barred” under the double jeopardy rule).

<sup>164</sup> *Id.* at 700.

<sup>165</sup> *Id.* at 700–01.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 703.

<sup>168</sup> *Boyd v. Boughton*, 798 F.3d 490, 500–01 (7th Cir. 2015) (applying *Dixon* and the *Blockburger* “same elements” test to a defendant’s double jeopardy claim).



from subsequent criminal prosecution for assault or domestic violence.<sup>169</sup> However, the Court has yet to address whether *Dixon* similarly applies to child custody orders and criminal prosecution for parental kidnapping.

Recall that the double jeopardy rule prohibits multiple prosecutions for the same criminal offense.<sup>170</sup> Both criminal contempt of court and parental kidnapping are crimes in all fifty states.<sup>171</sup> A child custody order that may be enforced by criminal contempt and criminal prosecution raises a constitutional question: when a parent is guilty of criminal contempt of court for violating a child custody order, does the Double Jeopardy Clause of the Fifth Amendment prohibit the state from subsequently prosecuting that parent for parental kidnapping?<sup>172</sup>

Some states, such as Illinois, have applied the double jeopardy rule to protect a criminal contemnor from subsequent prosecution for parental kidnapping.<sup>173</sup> For example, in *In re Marriage of D'Attomo*, the court held that violating a child custody order constitutes the same offense as child abduction under the *Blockburger* same elements test: “[S]ince the child abduction statute is defined in such a way as to criminalize the violation of a custody order by the removal or concealment of a child, such offense is the same as the indirect criminal contempt charge in the pending case.”<sup>174</sup> As applied to the defendant’s specific situation, the court held that the defendant’s violation of the custody order stemmed from the same act of removing the child from the jurisdiction, such that he only committed “one, continuing act of contempt and not several, distinct acts.”<sup>175</sup>

Other states like Ohio have rejected defendants’ double jeopardy arguments.<sup>176</sup> For example, in *State v. Kimbler*,<sup>177</sup> the Ohio appellate court applied the *Blockburger* same elements test and concluded that the double jeopardy rule should not apply.<sup>178</sup>

The *Kimbler* court first explained that under the Ohio parental

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<sup>169</sup> See Jennifer Black, *The Double Jeopardy Dilemma in Combating Domestic Violence: A Solution in United States v. Dixon*, 33 U. LOUISVILLE J. FAM. L. 911, 926 (1995).

<sup>170</sup> *North Carolina v. Pearce*, 395 U.S. 711, 733 (1969).

<sup>171</sup> *Bentch*, *supra* note 42, at 378; *Bloom v. Illinois*, 391 U.S. 194, 201 (1968).

<sup>172</sup> See *Zitter*, *supra* note 8, at 950.

<sup>173</sup> See *In re Marriage of D'Attomo*, 570 N.E.2d 796, 796 (Ill. App. Ct. 1991); *People v. Rodriguez*, 514 N.E.2d 1033, 1037–38 (Ill. App. Ct. 1987); *People v. Howard*, 686 P.2d 644, 649 (Cal. 1984); *State v. Hope*, 449 So.2d 633, 636 (La. Ct. App. 1984).

<sup>174</sup> *In re Marriage of D'Attomo*, 570 N.E.2d at 802.

<sup>175</sup> *Id.*

<sup>176</sup> *Eva J. Klain, Judges' Guide to Criminal Parental Kidnapping Cases*, 48 JUV. & FAM. CT. J. 49, 2-15 (1997).

<sup>177</sup> 509 N.E.2d 99 (Ohio Ct. App. 1986).

<sup>178</sup> *Id.* at 104.

kidnapping statute, the prosecution need only show that the defendant, “by any means and with purpose to withhold a minor from the legal custody of his parent,” removed the child “from the place where he is found.”<sup>179</sup> The prosecution does not need to prove the *violation* of a court order for a conviction under state parental kidnapping laws, only the *existence* of a court order:

“While [proof of a violation of a court order] might tend to prove the purpose of the taking of the children so as to supply that element of the crime of child stealing, in connection with that offense it is unnecessary to prove violation of a court order. Rather, the existence of the court order will be relevant only to prove who had legal custody of the child.”<sup>180</sup>

In contrast, the court held that the prosecution did not need to prove *any* of the elements of child stealing for a charge of criminal contempt for violating a court order involving custody.<sup>181</sup> Under Ohio’s criminal contempt of court statute, the court may punish any person “guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice.”<sup>182</sup> Ohio’s criminal contempt statute further provides a list of examples of acts that may be punished for contempt, including “disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court.”<sup>183</sup> In the event of a parental kidnapping, the defendant must violate a court-issued custody order to be held in criminal contempt of court.<sup>184</sup> Accordingly, the *Kimble* court concluded:

[A]lthough the same conduct may result both in criminal contempt and a violation of [the state criminal statute], they do not constitute the same offense for double jeopardy purposes since conviction for violation of the statute requires proof of facts not

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<sup>179</sup> *Id.* at 103–04 (quoting OHIO REV. CODE ANN. § 2905.04 (West 2015)).

<sup>180</sup> *Id.* at 104.

<sup>181</sup> *Id.* at 103–04. Ohio’s statute criminalizing parental kidnapping reads: “No person, by any means and with purpose to withhold a minor from the legal custody of his parent, guardian, or custodian, shall remove the minor from the place where he is found.” OHIO REV. CODE ANN. § 2905.04 (West 2015). The court concluded, “None of the elements of this offense need be proved in connection with a charge of criminal contempt for violating a court order involving custody, such as herein involved.” *Kimble*, 509 N.E.2d at 104. The Ohio state legislature later repealed § 2905.04; however, OHIO REV. CODE ANN. § 2919.23 (West 2016) criminalizes interference with custody as a misdemeanor or a felony, depending on whether the child is removed from the state and whether the child suffers physical harm as a result of the kidnapping: “No person, knowing the person is without privilege to do so or being reckless in that regard, shall entice, take, keep, or harbor . . . from the parent, guardian, or custodian of . . . [a] child under the age of eighteen.” *Id.* at § 2919.23(A)(1).

<sup>182</sup> *Id.* at 103 (quoting OHIO REV. CODE ANN. § 2705.01 (West 2015)).

<sup>183</sup> *Id.* (quoting OHIO REV. CODE ANN. § 2705.01 (West 2015)).

<sup>184</sup> *Id.*

required to be proven for a conviction of criminal contempt and conviction of criminal contempt requires proof of facts not required to prove a violation of the statute.<sup>185</sup>

Therefore, the court held that parental kidnapping and criminal contempt of court do not share the same elements and therefore should not be considered the same crime for double jeopardy purposes.

Furthermore, the court pointed out that criminalizing contempt of court serves a different purpose than criminalizing parental kidnapping:

“the criminal statute involved . . . is not concerned with preventing or punishing obstructions of the administration of justice but, instead, is designed to prevent child stealing, that is, the taking of a child from the person having legal custody of the child, whether taken by a noncustodial parent or a third person.”<sup>186</sup>

Therefore, the court held that the defendant’s prior conviction of criminal contempt does not bar the state’s ability to prosecute him for kidnapping.<sup>187</sup>

For the reasons outlined below, courts should follow Ohio’s example rather than Illinois’s, and hold that the Double Jeopardy Clause does not protect criminal contemnors from subsequent criminal prosecution under state parental kidnapping laws.

#### IV. THE DOUBLE JEOPARDY RULE SHOULD NOT PROTECT CRIMINAL CONTEMNORS FROM CRIMINAL PROSECUTION FOR PARENTAL KIDNAPPING

The double jeopardy rule should not protect criminal contemnors from subsequent criminal prosecution for parental kidnapping under applicable state court laws for three reasons. First, criminal contempt of court does not contain the same elements as parental kidnapping, so the Double Jeopardy Clause does not apply. Second, allowing a conviction for criminal contempt of court to prevent prosecution under state criminal laws can lead to inconsistent results. Finally, sanctions for criminal contempt of court do not adequately punish parental kidnappers, considering the serious and harmful consequences of the crime. Therefore, courts should allow the state to prosecute defendants for parental kidnapping, regardless of any prior proceedings for criminal contempt of court.

##### A. CRIMINAL CONTEMPT OF COURT DOES NOT CONTAIN THE SAME ELEMENTS AS PARENTAL KIDNAPPING

Criminal contempt of court for violating a child custody order does not contain the same elements as child kidnapping for the purposes of double jeopardy.

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 104.

As mentioned above, the combination of parental kidnapping and criminal contempt fails the *Blockburger* same elements test. Criminal contempt of court contains an element requiring the existence of a court order. The contempt offense disrespects state family courts by disobeying their decrees and interfering with their ability to regulate parenting behavior in the child's best interests. At common law, criminal contempt was used by courts to sanction conduct that "interfered with the orderly administration of judicial proceedings."<sup>188</sup> This common law power is now codified in the United States Code as the "power to punish by fine or imprisonment, or both, at its discretion . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command."<sup>189</sup> Accordingly, a prosecution for criminal contempt requires the state to prove that the parent violated a court order.

In contrast, the parental kidnapping offense does not always require proof of a court-issued custody order as an element of the crime.<sup>190</sup> Parental kidnapping punishes any actor who kidnaps a child and deprives a parent of her legal right to custody of her child.<sup>191</sup> Criminal statutes on kidnapping make it unlawful for a person to (1) take a child (2) with the intent to detain or conceal the child from her lawful custodian.<sup>192</sup> In

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<sup>188</sup> United States v. Dixon, 509 U.S. 688, 694 (1992).

<sup>189</sup> 18 U.S.C. § 401 (2002). While contempt powers under § 401 also authorizes the court to punish "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice" and "[m]isbehavior of any of its officers in their official transactions," parental kidnapping does not fall under either of these categories. Instead, criminal contempt sanctions against parental kidnappers fall under the court's power to punish "disobedience." For examples of misbehavior that obstructs the administration of justice, *see, e.g.*, United States v. Landes, 97 F.2d 378, 379–81 (2d Cir. 1938) (holding that an attorney who refused to take his seat although ordered to do so by judge was properly found guilty of contempt of court); *see also* United States v. Griffin, 84 F.3d 820, 820 (7th Cir. 1996) (holding that an attorney who attempted three times to ask question of witness that judge had prohibited was properly found guilty of contempt of court).

<sup>190</sup> *See, e.g.*, Strother v. State, 1 P.2d 214, 217–18 (Alaska Ct. App. 1995); State v. Donahue, 680 P.2d 191, 192 (Ariz. Ct. App. 1984).

<sup>191</sup> Klain, *supra* note 176, at 1-2.

<sup>192</sup> Johnson, *supra* note 2, at 823 ("Criminal statutes on kidnapping, or related crimes, generally make it unlawful for a person to take a child with the intent to detain and conceal such child from a parent or other lawful custodian."); *see, e.g.*, State v. Kracker, 599 P.2d 250, 252 (Ariz. Ct. App. 1979) (affirming a conviction for child stealing where mother had admitted she had taken and concealed son from father who had legal custody of the child by decree of court in divorce proceedings); People v. Hyatt, 18 Cal. App. 3d 618, 622–23 (Cal. Ct. App. 1971) (affirming a conviction for child stealing where father used his visitation privileges to take children from mother in whose charge they had been placed by interlocutory decree in divorce proceedings and left the state with the children, not to be found for over two years); People v. Harrison, 402 N.E.2d 822, 824 (Ill. App. Ct. 1980) (affirming a conviction for child abduction where father picked up children while exercising

contrast, the court may hold a parent in criminal contempt as long as they disobeyed a court order, even if he had no such intent to detain and conceal the child.<sup>193</sup> Likewise, a parent may be charged with parental kidnapping even without the existence of a court order.<sup>194</sup>

For example, in *Strother v. State*,<sup>195</sup> the Court of Appeals of Alaska explained that to prove the crime of custodial interference, the State had to establish three elements: (1) that the defendant—here, the child’s father—took, enticed, or kept the child from a lawful custodian, (2) that the defendant intended to hold the child for a protracted period of time, and (3) that the father knew he had no legal right to take the child.<sup>196</sup> The court then explained even in the absence of a custody order, the defendant could be convicted for custodial interference because his actions of “secretly removing and hiding his daughter, keeping the child from his wife and refusing to disclose the child’s location, epitomize[d] the conduct that the custodial interference statutes prohibit.”<sup>197</sup> Based on the defendant’s actions, his knowledge that he had no legal right to engage in these actions, and his intent to hold the child for a protracted period, the *Strother* court held that “persons of ordinary understanding would have no trouble concluding that the [defendant] has committed the crime of custodial interference.”<sup>198</sup>

The Arizona Court of Appeals came to a similar conclusion in *State v. Donahue*,<sup>199</sup> holding that even in the absence of a court decree defining the respective custody rights of the two parents, the state can still convict a defendant for custodial interference.<sup>200</sup> A Delaware court has similarly held

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visitation rights then took the children away in the nighttime to another state without disclosing his destination to mother, not to be found for over one month).

<sup>193</sup> *State v. Kimbler*, 509 N.E.2d 99, 103–04 (Ohio Ct. App. 1986).

<sup>194</sup> *Id.*; see also *Strother*, 1 P.2d at 217–18.

<sup>195</sup> 1 P.2d 214 (Alaska Ct. App. 1995).

<sup>196</sup> *Id.* at 217.

<sup>197</sup> *Id.* at 226.

<sup>198</sup> *Id.*

<sup>199</sup> 680 P.2d 191 (Ariz. Ct. App. 1984).

<sup>200</sup> *Id.* at 193 (finding the defendant, an unwed father who had abducted the child from the mother, guilty of custodial interference even though no official custody order existed between the unwed father and mother of the child because “his right was at most a right to co-equal custody with the child’s natural mother [and he] did not have the right to custody of the child to the exclusion of the mother”); see also *State v. Wood*, 8 P.3d 1189, 1191–92 (Ariz. Ct. App. 2000) (finding that father who took son to another state without mother’s knowledge or consent could be charged with custodial interference, even though mother had not yet filed her petition for dissolution of marriage and for temporary custody of son prior to father taking son out of state).

in *State v. Todd*<sup>201</sup> that a child's natural father could be convicted of custodial interference, even though no valid custody order existed.<sup>202</sup> Ultimately, because the state must prove different elements to prosecute a parent for criminal contempt of court compared to parental kidnapping, the double jeopardy rule does not apply under the *Blockburger* same elements test.

#### B. CRIMINAL CONTEMPT OF COURT DIFFERS SIGNIFICANTLY FROM THE CRIME OF PARENTAL KIDNAPPING

In *Albernaz v. United States*,<sup>203</sup> the U.S. Supreme Court stated that the *Blockburger* same elements test is a "rule of statutory construction, and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent."<sup>204</sup> In addition to containing different elements, criminal contempt of court contains other significant differences compared to the crime of parental kidnapping. Accordingly, if a state court is convinced that the legislature intended for criminal contempt and parental kidnapping to constitute two different offenses to which double jeopardy should not apply, the court may authorize multiple punishment for a single act.<sup>205</sup> The numerous and significant differences between criminal contempt and parental kidnapping demonstrate that many state legislatures may have intended to punish parental kidnappers for both contempt and the crime of parental kidnapping. Accordingly, state courts should not apply the Double Jeopardy Clause to protect criminal contemnors from a subsequent prosecution for criminal contempt.

First, criminalizing contempt of court serves a fundamentally different purpose than criminalizing parental kidnapping. Although both criminal contempt and ordinary criminal laws serve to protect the institutions of government and the enforcement of governmental mandates, contempt is a unique crime because the judge is so personally affected.<sup>206</sup> As the U.S.

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<sup>201</sup> 509 A.2d 1112 (Del. Super. Ct. 1986).

<sup>202</sup> *Id.* at 1113–14 (finding the defendant, an unwed father who had abducted the child from the mother, guilty of custodial interference because Delaware law delineates rights and responsibilities between natural parents even where no valid custody order exists).

<sup>203</sup> 450 U.S. 333 (1981).

<sup>204</sup> *Id.* at 340.

<sup>205</sup> McAninch, *supra* note 18, at 448 ("The Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. The *Blockburger* test is a guide, and no more than that, to ascertaining whether the legislature intended to authorize multiple punishment for a single act.").

<sup>206</sup> *Bloom v. Illinois*, 391 U.S. 194, 201–02 (1968) (expressing that contempt "strikes at the most vulnerable and human qualities of a judge's temperament.").

Supreme Court held in *Bloom v. Illinois*, “[e]ven when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court.”<sup>207</sup>

In contrast, legislatures criminalize parental kidnapping in order to punish and deter such conduct, which in turn protects potential child victims and keeps families intact.<sup>208</sup> For example, California titled its 2002 statute criminalizing parental kidnapping the Synclair-Cannon Act after its author, Larry Synclair.<sup>209</sup> Synclair, whose son was a victim of parental kidnapping on three separate occasions, drafted the bill to alert California courts to the “red flags of child abduction” and protect the “left-behind parent’s fundamental and constitutional right to the care, custody and control of the child.”<sup>210</sup> When the court protects a contemnor from prosecution for child kidnapping, the judicial system sends the wrong message that parental kidnapping is nothing more than a crime of disrespect against the court. Because criminal contempt of court serves a different purpose than the crime of parental kidnapping, the two are not the same crime.

In addition, criminal contempt of court is categorized differently than parental kidnapping. Criminal contempt under 18 U.S.C. § 401 is a *sui generis* offense, not classifiable as a felony or a misdemeanor for sentencing purposes.<sup>211</sup> As the Eleventh Circuit held in *Cohn*, this separateness “appropriately reflects the differences between criminal

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<sup>207</sup> *Id.* at 202.

<sup>208</sup> See State Dep’t of Human Res. ex rel Johnson v. Bail, 938 P.2d 209, 213 (Or. 1997) (“Punishment of a parent’s past misconduct and deterrence of potential misconduct by others in the future are functions of the criminal law, which prohibits custodial interference.”); Hicks v. State, 12 S.W.2d 385, 386 (Tenn. 1928) (“[Tennessee’s statute criminalizing parental kidnapping] was intended to protect parental and other lawful custody of children against the greed and malice of the kidnapper.”); Foster-Zahid v. Virginia, 477 S.E.2d 759, 762 (Va. Ct. App. 1996) (“The underlying policy for [Virginia’s statute criminalizing parental kidnapping] is to deter, if not prevent, child snatching.”); Patricia M. Hoff, *Parental Kidnapping: Prevention and Remedies*, A.B.A. CENTER ON CHILDREN AND THE LAW, (Dec. 2000), <http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/pkprevrem.authcheckdam.pdf> (“All fifty states, the District of Columbia, and Congress have enacted civil and criminal laws to address parental kidnapping.”).

<sup>209</sup> SYNCLAIR-CANNON CHILD ABDUCTION PREVENTION ACT, 2002 CAL. STATS. 856 (2002).

<sup>210</sup> *The Synclair-Cannon Child Abduction Prevention Act of 2002*, LARRY SYNCLAIR JR. ABDUCTED TO RUSSIA OVER TEN YEARS AGO, <http://abducted-larrysynclairjr.weebly.com/synclair-cannon-act.html>.

<sup>211</sup> United States v. Cohn, 586 F.3d 844, 848–49 (11th Cir. 2009) (citing Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966)).

contempt and the traditional crimes. . . .”<sup>212</sup> In contrast, state criminal statutes punish parental kidnapping as a misdemeanor or a felony.<sup>213</sup> Most states, including Texas, Illinois, and Michigan, immediately label such criminal conduct as a felony,<sup>214</sup> while other states, such as Alaska and Nebraska, punish parental kidnapping as a misdemeanor.<sup>215</sup> There are also some states, such as Missouri and Pennsylvania, where parental kidnapping within the state is a misdemeanor, while removal of the child out of state constitutes a felony.<sup>216</sup> Regardless of the state, the crime of parental kidnapping is treated as either a misdemeanor or a felony, unlike criminal contempt.<sup>217</sup>

Furthermore, the procedure of prosecuting criminal contempt is different than that of prosecuting parental kidnapping. For example, the U.S. Supreme Court has consistently held that criminal contempt does not always require the right to a jury trial. In *Taylor v. Hayes*,<sup>218</sup> the Court held that where the contemnor’s punishment amounts to less than six months of imprisonment, he has only been convicted of “petty contempt” and has no right to a jury trial.<sup>219</sup> The Court further stated that courts are permitted, after conviction, to reduce a contemnor’s sentence to less than six months to avoid a jury trial: “a State may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months.”<sup>220</sup> In contrast, the jury plays an integral role in the prosecution of child kidnapping in several states, such as Oklahoma and Nevada.<sup>221</sup>

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<sup>212</sup> *Id.* at 849.

<sup>213</sup> See generally NDAA Parental Kidnapping Compilation, *supra* note 60.

<sup>214</sup> TEX. PENAL CODE ANN. § 25.10 (West 2010) (“An offense under this section is a state jail felony”); 720 ILL. COMP. STAT. 5/10-5 (2010) (“A person convicted of child abduction under this Section is guilty of a Class 4 felony”); MICH. COMP. LAWS ANN. § 750.350(a) (West 2004) (“A parent who violates [this section] is guilty of a felony.”). See generally NDAA Parental Kidnapping Compilation, *supra* note 60.

<sup>215</sup> ALASKA STAT. ANN. § 11.41.330 (West 2010); NEB. REV. STAT. ANN. § 28-316 (West 2010). Alaska state law punishes kidnapping less severely where the actor is the parent of the victim, compared to where the actor is unrelated to the victim. Although the former is only a class A misdemeanor, the latter is a class C felony. Compare ALASKA STAT. § 11.41.330 with ALASKA STAT. ANN. § 11.41.320.

<sup>216</sup> MO. ANN. STAT. § 565.150 (West 2010); 18 PA. STAT. AND CONS. STAT. ANN. § 2904 (West 2010).

<sup>217</sup> See generally NDAA Parental Kidnapping Compilation, *supra* note 60.

<sup>218</sup> 418 U.S. 488 (1974).

<sup>219</sup> *Id.* at 495; see also *Baldwin v. New York*, 399 U.S. 66, 68 (1970); *Frank v. United States*, 395 U.S. 147, 148–50 (1969).

<sup>220</sup> *Taylor*, 418 U.S. at 496.

<sup>221</sup> See OKLA. STAT. ANN. TIT. 21 § 891 (West 2010) (“Except for persons sentenced to life or life without parole, any person sentenced to imprisonment for two (2) years or more for a violation of this section [titled Child Stealing] . . . shall be required to serve a term of



Ultimately, the many significant differences between criminal contempt of court and parental kidnapping suggest that state legislatures did not intend for the Double Jeopardy Clause to protect criminal contemnors from subsequent prosecution under state parental kidnapping statutes. Therefore, state courts should uphold the intent of the legislature in treating criminal contempt and parental kidnapping as separate offenses for double jeopardy purposes.

### C. CRIMINAL CONTEMPT OF COURT DOES NOT CONSISTENTLY PUNISH PARENTAL KIDNAPPING

Courts should hold that the double jeopardy rule does apply to protect criminal contemnors from subsequent prosecution for parental kidnapping because sanctions for criminal contempt do not consistently punish parental kidnapping. Holding a parent in criminal contempt fails to communicate the seriousness of his crime; instead, state criminal statutes, which classify parental kidnapping as a misdemeanor or even a felony, serve as a more effective punishment and deterrent. Furthermore, although sanctions for criminal contempt of court remain unregulated and virtually limitless, state criminal statutes provide guidelines to ensure consistent and adequate punishments.<sup>222</sup> Ultimately, if criminal contemnors are protected by the Double Jeopardy Clause from subsequent prosecution under state parental kidnapping statutes, they will not receive an adequate punishment.

Little regulation exists to ensure consistent sanctions for criminal contempt. The court has a great deal of discretion when determining sanctions for criminal contempt, based on how much the judge believes the parent should be punished for his or her act of disrespect.<sup>223</sup> Although the typical sanction for contempt is fine or jail time, alternative sanctions include suspending the violating parent's driver's license, ordering that makeup parenting time be provided for the non-violating parent, or modifying the custody order.<sup>224</sup> Furthermore, there is often no minimum or maximum limit on the sanctions a judge can impose for contempt of

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post-imprisonment supervision False The jury shall be advised that the mandatory post-imprisonment supervision shall be in addition to the actual imprisonment"); NEV. REV. STAT. ANN. § 200.350 (West 2009) ("Upon the trial for violation of [this statute outlawing child kidnapping the consent thereto of the person kidnaped or confined shall not be a defense unless it appears satisfactorily to the jury that such person was above the age of 18 years and that the person's consent was not extorted by threats, duress or fraud.").

<sup>222</sup> See generally NDAA Parental Kidnapping Compilation, *supra* note 60.

<sup>223</sup> See *United States v. Cohn*, 586 F.3d 844, 849 (11th Cir. 2009) (describing "the scope of § 401 and the wide range of sentences that may be imposed for its violation").

<sup>224</sup> Mahoney, *supra* note 1, at 856–57. The list of remedies usually does not include an outright denial of custody rights to the violating parent. *Id.*

court.<sup>225</sup> As a result, the potential for abuse of the contempt power is readily apparent. Justice Black criticizes the contempt power as *too* discretionary in *Green v. United States*:

[Contempt is] an anomaly in the law . . . perhaps, nearest akin to the despotic power of any power existing under our form of government . . . a drastic and pervasive mode of administering criminal justice usurping our regular constitutional methods of trying those charged with offenses against society.<sup>226</sup>

In contrast, state statutes criminalizing parental kidnapping provide sentencing guidelines to ensure consistency, predictability, and adequacy in punishments across all courts within the same jurisdiction.<sup>227</sup> For example, Maryland's statute sets specific tiers of punishment, based on the gravity of the parental kidnapping incident.<sup>228</sup> If the child is out of the custody of the lawful custodian for thirty or fewer days but not removed from the state, the punishment is a felony conviction and a fine not exceeding \$1,000 or imprisonment not exceeding one year, or both.<sup>229</sup> If the child is out of the custody of the lawful custodian for *more* than thirty days but not removed from the state, the punishment is a felony conviction and a fine not exceeding \$2,500 or imprisonment not exceeding three years, or both.<sup>230</sup> However, if the child is taken out of the state in a parental kidnapping incident, the punishment is a felony conviction and a fine not exceeding \$5,000 or imprisonment not exceeding five years, or both.<sup>231</sup> Unlike the wide variety of sanctions a judge could impose as punishment for criminal contempt,<sup>232</sup> state criminal laws provide guidance to ensure consistent punishments for parental kidnapping.

Furthermore, several states severely restrict the sanctions that a judge may impose for criminal contempt so that criminal contemnors always

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<sup>225</sup> Grote, *supra* note 108, at 1248 (citing Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1026–28 (1993) (describing the power of contempt as both “vast and unlimited” and any judge using the contempt power “suffer[s] from an obvious and ineradicable conflict of interest”). For example, in Illinois, there is no maximum penalty for criminal contempt of court. *Bloom v. Illinois*, 391 U.S. 194, 211 (1968) (citing *People v. Stollar*, 201 N.E.2d 97, 99 (1964)).

<sup>226</sup> 356 U.S. 165, 193–94 (1957) (citing *State ex rel. Ashbaugh v. Circuit Court*, 72 N.W. 193, 194–95) (Black, J., dissenting).

<sup>227</sup> See generally NDAA Parental Kidnapping Compilation, *supra* note 60.

<sup>228</sup> MD. CODE ANN., FAM. LAW § 9-307 (West 2010).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Some states, such as Massachusetts and Nebraska, have no limits on criminal contempt penalties. Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 407 at n.379 (2000).

receive a lesser punishment than they would if they were prosecuted for the crime of parental kidnapping.<sup>233</sup> For example, in Arkansas, criminal contempt is a class C misdemeanor, which has a maximum sanction of 30 days imprisonment.<sup>234</sup> However, if a parent is prosecuted under Arkansas criminal laws for parental kidnapping, he will be charged with a class A misdemeanor, which is punishable by up to one year in prison.<sup>235</sup> Similarly, Pennsylvania's statutes limit sanctions for criminal contempt of court to a fine of up to \$100 or imprisonment for up to thirty days.<sup>236</sup> In contrast, a parent convicted of parental kidnapping in Pennsylvania faces imprisonment for up to seven years.<sup>237</sup> Finally, under California statutes, the maximum penalty for criminal contempt is five days of imprisonment and a \$1,000 fine, but the maximum penalty for parental kidnapping is four years in prison.<sup>238</sup>

*Fierro v. State*<sup>239</sup> provides another example of the disparity between a sentence for criminal contempt of court and a sentence under a state parental kidnapping law. In *Fierro*, although the parents' divorce proceedings were still pending, the court had issued a temporary custody order providing for shared parental custody and set forth a schedule for the parents to follow.<sup>240</sup> The temporary order also prohibited the parents from taking the child outside of the Second Judicial Circuit of the State of Florida without obtaining the written consent of the other party.<sup>241</sup> However, the father violated the temporary order by failing to return the three-year-old son to the mother as required by the order.<sup>242</sup> Fourteen months later, the child was found living with the father in South Carolina.<sup>243</sup> The court held the father in criminal contempt and sentenced him to six months in jail.<sup>244</sup>

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<sup>233</sup> See, e.g., ARK. CODE ANN. § 16–10–108 (West 1987) (limiting sanctions for criminal contempt of court to a \$50 fine or imprisonment for no more than ten days); CAL. CIV. PROC. CODE § 1218(a) (West 1982) (limiting sanctions for criminal contempt of court to a \$1,000 fine or imprisonment for no more than five days, or both); 42 PA. STAT. AND CONS. STAT. ANN. § 4137(c) (West 1995) (limiting sanctions for criminal contempt of court to a \$100 fine or imprisonment for no more than thirty days, or both).

<sup>234</sup> ARK. CODE ANN. § 16–10–108 (West 1987).

<sup>235</sup> ARK. CODE ANN. § 5–26–502(a) (West 2016); ARK. CODE ANN. § 5–4–401(a)(3) (West 2016).

<sup>236</sup> 42 PA. CONS. STAT. ANN. § 4137(c) (West 2016).

<sup>237</sup> 18 PA. CONS. STAT. ANN. § 1103(3) (West 2016).

<sup>238</sup> CAL. CIV. PROC. CODE § 1218(a) (West 2007); CAL. PENAL CODE § 278 (West 4).

<sup>239</sup> 653 So. 2d 447 (Fla. Dist. Ct. App. 1995).

<sup>240</sup> *Id.* at 448–49.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

Subsequently, the state of Florida attempted to charge the father for violating section 787.04 of the Florida Statutes, which prohibits the concealing or removing of a minor child contrary to a court order.<sup>245</sup> Even though the jury found the father guilty and sentenced him to five years of probation, the Florida appellate court found that double jeopardy protected the father from sanctions under the state criminal statute because he had already served a sentence for criminal contempt.<sup>246</sup>

*Carlson* similarly demonstrates the potential disparity between sanctions for criminal contempt and the sentencing guidelines of the applicable state criminal statute.<sup>247</sup> In *Carlson*, the judge held a parent in criminal contempt for violation of a child custody order and decided that the sanction would be incarceration for five hours, “until 5:00 p.m. that day.”<sup>248</sup> Compare this punishment with the one suggested by Georgia’s state criminal statute outlawing parental kidnapping, which holds that a person convicted of the misdemeanor of interference with custody shall be fined not less than \$200.00 and not more than \$500.00, or shall be imprisoned for not less than one month and not more than five months, or both.<sup>249</sup> Thus, another parent in Georgia who effectively commits the same crime as Carlson could face a much harsher punishment: if the government prosecuted him under Georgia’s criminal statute, the result would be at least a \$200 fine or a month of imprisonment.

These examples demonstrate that applying the double jeopardy rule to parental kidnapping cases can lead to senselessly disparate results. Although the wide discretion judges have in punishing criminal contempt may allow harsher punishments for parental kidnapping, the reduced discretion of state parental kidnapping statutes fosters consistency in sentencing, which leads to greater deterrence.<sup>250</sup> Therefore, courts should hold that the Double Jeopardy Clause does not protect criminal contemnors from subsequent prosecution under state criminal statutes for parental kidnapping.

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<sup>245</sup> *Id.* at 447–48 (citing FLA. STAT. ANN. § 787.04 (West 2016)).

<sup>246</sup> *Id.* at 447.

<sup>247</sup> 748 S.E.2d 304, 304 (Ga. Ct. App. 2013).

<sup>248</sup> *Id.* at 306.

<sup>249</sup> GA. CODE ANN. § 16-5-45(2)(A) (West 2016).

<sup>250</sup> See Mirko Bagaric, *Consistency and Fairness in Sentencing—The Splendor of Fixed Penalties*, 2 CAL. CRIM. L. REV. 1, 11 (2000) (explaining the empirical flaws in the argument that disproportionate punishments reduce the crime rate through deterrence).

#### D. CRIMINAL CONTEMPT OF COURT DOES NOT ADEQUATELY PUNISH PARENTAL KIDNAPPING

Finally, courts should not allow the double jeopardy rule to protect criminal contemnors from subsequent prosecution for parental kidnapping because contempt is not an adequate punishment considering the gravity of their crime. Parental kidnapping leads to significant harms for both the custodial parent and the child, and such conduct should be punished accordingly.<sup>251</sup>

First, parental kidnapping results in harm to the child. The child suffers emotional and psychological damage from being suddenly uprooted and forcibly taken from their custodial parent.<sup>252</sup> This damage may increase after the child is found and uprooted once again, in order to be returned to the original custodial parent.<sup>253</sup> In addition, the kidnapping parent may force the child to continually move from place to place to evade the other parent or law enforcement officials looking for the missing child.<sup>254</sup> As a result, many kidnapped children fail to receive adequate education or adequate medical care and live in substandard housing.<sup>255</sup>

Furthermore, 75% of victims of parental kidnapping are six years old or younger.<sup>256</sup> Most child development experts agree that personality is formed prior to the age of six.<sup>257</sup> Therefore, the abduction of a young child has a significant influence on whom he or she becomes.<sup>258</sup> In an interview with the International Centre for Family Law, Policy, and Practice, one victim of parental kidnapping said, "I feel that the core of me has been shattered . . . I have an internal conflict between my natural . . . personality and the personality that has been formed as a consequence of these experiences."<sup>259</sup> Other victims expressed feelings of isolation and low self-

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<sup>251</sup> See Greif, *supra* note 20 ("[R]eactions to abduction include: nightmares, fears of doors and windows, bedwetting (depending on age), fear of authority and strangers, anger at abductor and left-behind parent, depression, anxiety, and school and peer problems. Problems for many adults persist into their 20s, 30s, 40s, and 50s.").

<sup>252</sup> *Id.*

<sup>253</sup> WASHINGTON COURTS, *supra* note 20 ("If the child is very young when abducted and is returned as an older child, the child may suffer serious negative emotional effects because the child feels as if he or she is returned to a stranger, and therefore the return to the parent who was originally left behind seems like an abduction itself.").

<sup>254</sup> Georgia K. Hilgeman, *Impact of Family Child Abduction*, CALIFORNIA CHILD ABDUCTION TASK FORCE, (Aug. 27, 2001), <http://www.childabductions.org/impact2.html>.

<sup>255</sup> WASHINGTON COURTS, *supra* note 20.

<sup>256</sup> Hilgeman, *supra* note 254.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> Marilyn Freeman, *Parental Child Abduction: The Long-Term Effects*,

worth, problems with attachment, security, and mistrust, and lack of emotion.<sup>260</sup> Finally, abducted children may be told by the kidnapping parent that the left-behind parent did not want them or that the left-behind parent is dead, resulting in feelings of loss and grief, as well as long-term emotional scars.<sup>261</sup>

Also, during a parental kidnapping incident, the custodial parent suffers a violation of her legal right to custody and the resulting absence of the child.<sup>262</sup> The custodial parent's anguish over her missing child can lead to long-term emotional and physical problems.<sup>263</sup> Also, custodial parents spend an average of \$20,000 trying to locate and regain custody of their kidnapped children.<sup>264</sup> Furthermore, along with the stress of worrying about their missing child, many parents must deal with the possibility that their missing child may never be located.<sup>265</sup> At least 20% of children kidnapped by the other parent are never found.<sup>266</sup> Thus, the custodial parent may suffer emotional, physical, and financial harm as a result of the other parent's choice to kidnap his child.<sup>267</sup>

Considering the severe and numerous harms experienced by parents and children as a result of parental kidnapping, parents guilty of such conduct should not be able to escape criminal liability under state laws simply because a judge has sanctioned them with criminal contempt of court. The district court in *United States v. Mirra*<sup>268</sup> warned against this very outcome, when it declined to apply the double jeopardy rule to protect a criminal contemnor.<sup>269</sup> In *Mirra*, the court allowed the state to prosecute a defendant for criminal assault even though he had already been held in contempt of court for throwing a chair at the Assistant United States

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INTERNATIONAL CENTRE FOR FAMILY LAW, POLICY, AND PRACTICE, (Dec. 5, 2014), [http://childcentre.info/public/PROTECT/Research\\_report\\_web\\_1.12.14\\_R.pdf](http://childcentre.info/public/PROTECT/Research_report_web_1.12.14_R.pdf).

<sup>260</sup> *Id.*

<sup>261</sup> Hilgeman, *supra* note 254; WASHINGTON COURTS, *supra* note 20.

<sup>262</sup> Mahoney, *supra* note 1, at 836.

<sup>263</sup> *Psychological Impact of Abduction*, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, <https://www.ncjrs.gov/html/ojjdp/190074/page6.html>. Studies showed that the left-behind parent harbored feelings of loss, rage, loneliness, and fear, and d impaired sleep, loss of appetite, or severe depression. Furthermore, these negative feelings and effects did not automatically cease upon the return of the abducted child; on the contrary, many parents expressed that their psychological distress actually increased after reuniting with their child, due to the stress of reunion and lingering concerns about re-abduction. *Id.*

<sup>264</sup> Campbell, *supra* note 52, at 232.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> 220 F. Supp. 361 (S.D.N.Y. 1963).

<sup>269</sup> *Id.* at 366–67.

Attorney during trial.<sup>270</sup> The court reasoned:

Let us consider by way of illustration the consequences of upholding Mirra's claim in the context of an extreme but not wholly improbable case that could have arisen after, and out of, Mirra's contempt conviction. Assume that Mirra's projectile had received more accurate a propulsion and had scored on its intended target—the Assistant United States Attorney. And assume further the grisly and morbid fact that the Assistant United States Attorney had sustained an injury which ultimately proved fatal. To sustain Mirra's [double jeopardy] claim would, in effect, grant a summary contemnor immunity from a homicide prosecution—an unconscionable result.<sup>271</sup>

In the same way, to sustain a double jeopardy claim to protect a parental kidnapper simply because a judge has already held her in criminal contempt leads to inadequate punishment and an unconscionable result.

Furthermore, contempt sanctions are often relatively mild.<sup>272</sup> In light of the enduring emotional and psychological damage that parental kidnapping causes, a maximum punishment of five days imprisonment or a fine of \$50 seems hardly sufficient to punish and deter a parent from kidnapping his own child.<sup>273</sup> As Joy M. Feinberg<sup>274</sup> observes, contempt sanctions are often “inadequate and do not serve as a deterrent to custody or visitation interference.”<sup>275</sup> Allowing the state to prosecute parental kidnappers under state criminal laws leads to increased punishments for this serious crime, better protecting custodial parents and children from future abductions.<sup>276</sup> Furthermore, sanctions for criminal contempt do not compel the violating parent to return his child to the custodial parent.<sup>277</sup> In contrast, state criminal law provisions often include instructions requiring the child

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<sup>270</sup> *Id.* at 366.

<sup>271</sup> *Id.*

<sup>272</sup> See, e.g., ARK. CODE ANN. § 16–10–108 (West 2016); CAL. CIV. PROC. CODE § 1218(a) (West 2007); 42 PA. CONS. STAT. ANN § 4137(c) (West 1995).

<sup>273</sup> See e.g., ARK. CODE ANN. § 16–10–108 (West 2016) (limiting sanctions for criminal contempt of court to 30 days' imprisonment); CAL. CIV. PROC. CODE § 1218(a) (West 2007) (limiting sanctions for criminal contempt of court to a \$1,000 fine or five days' imprisonment); 42 PA. CONS. STAT. ANN § 4137(c) (West 1995) (limiting sanctions for criminal contempt of court to a \$100 fine or imprisonment for no more than 30 days).

<sup>274</sup> Partner in the Chicago matrimonial law firm of Boyle & Feinberg, P.C.

<sup>275</sup> Joy M. Feinberg & Lori S. Loeb, *Custody and Visitation Interference: Alternative Remedies*, 12 J. AM. ACAD. MATRIM. LAW. 271, 276 (1994) (citing Lawrence A. Goldman, *Tortious Interference with Visitation Rights: A New and Important Remedy for Non-Custodial Parents*, 20 J. MARSHALL L. REV. 307, 313 (1986)).

<sup>276</sup> See, e.g., ARK. CODE ANN. § 5–26–502(a) (2010); ARK. CODE ANN. § 5–4–401(a)(3) (West 2015); CAL. PENAL CODE § 278 (West 2011); 18 PA. CONS. STAT. ANN § 1103(3) (West 2016); § 1103(3) (West 2015).

<sup>277</sup> Bentch, *supra* note 42, at 380 (citing Katz, *Legal Remedies for Child Snatching*, 15 FAM. L.Q. 103, 113 (1981) (criminal sanctions do not themselves guarantee child's return or pr[o]vide remedy to wronged parent)).

to be returned to the custodial parent or lawful custodial from whom the child was taken.<sup>278</sup>

Therefore, in order to adequately punish and deter parental kidnapping—a crime that causes serious, long-term harm—courts should not allow the double jeopardy rule to protect criminal contemnors from subsequent prosecution under state criminal laws for parental kidnapping.

#### CONCLUSION

For the aforementioned reasons, courts should not treat criminal contempt and parental kidnapping as the same offense under the double jeopardy rule. Due to the material differences between the crimes of parental kidnapping and contempt of court, giving the state power to prosecute under its parental kidnapping statutes would not cause any person to “be subject for the same offence to be twice put in jeopardy of life or limb.”<sup>279</sup> Thus, the Double Jeopardy Clause should not bar prosecution for parental kidnapping based on a prior conviction for criminal contempt of court. Furthermore, criminal prosecution under state statutes is a more consistent and adequate form of punishment for parental kidnapping than criminal contempt of court. Therefore, all courts should hold that the state may prosecute contemnors for parental kidnapping, regardless of whether they have already received criminal sanctions for contempt of court.

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<sup>278</sup> See, e.g., 720 ILL. COMP. STAT. 5/10–5(h)(i) (2010) (“If during the course of an investigation under this Section the child is found in the physical custody of the defendant or another, the law enforcement officer shall return the child to the parent or lawful custodial from whom the child was concealed, detained, or removed, unless there is good cause for the law enforcement officer or the Department of Children and Family Services to retain temporary protective custody of the child pursuant to the Abused and Neglected Child Reporting Act.”); MINN. STAT. § 609.26 (2009) (“A child who has been concealed, obtained, or retained in violation of this section shall be returned to the person having lawful custody of the child.”).

<sup>279</sup> U.S. CONST. amend. V.



