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Kidnapping: A Modern Definition

John L. Diamond*

I. INTRODUCTION

Although kidnapping is an infamous crime, perceived by the public with both dread and morbid curiosity, it is also a crime that has eluded meaningful definition. The common law offense is now codified in state penal laws, but the language in these statutes is frequently ambiguous and potentially overbroad.

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1. According to a study by Ernest Alix, the New York Times reported 1,703 cases of kidnapping occurring entirely or in part in the United States between 1874 and 1974, including 236 “classic kidnapping[s] for ransom.” E.K. ALIX, RANSOM KIDNAPPING IN AMERICA, 1874-1974 166-67 (1978). It has been suggested that the development of the automobile and organized crime during the prohibition years led to an increase in ransom kidnapping in the late 1920's and 1930's. Id. at 43-49, 67-77; see also, Kanter, Kidnapping, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 993-94 (1983); Note, A Rationale of the Law of Kidnapping, 53 COLUM. L. REV. 540 (1953).

One of the most infamous kidnappings of this century took place on March 1, 1932, when the infant son of Charles Lindberg was abducted from his home and eventually killed. State v. Hauptmann, 115 N.J.L. 412, 180 A. 809 (1935). However, the alleged kidnapper, Bruno Richard Hauptmann, was not prosecuted for kidnapping. At that time, in New Jersey, kidnapping was only a high misdemeanor and therefore the statutory felony murder rule could only be invoked if the prosecutor could find some other crime that would supply the necessary felony. Since the stealing of a child could not sustain a burglary conviction at common law, the prosecutor chose to allege that Hauptmann had intended to steal the child’s sleeping suit. The prosecutor was successful and Hauptmann was executed. Id.; see also Kanter, supra, at 993, 994-95.

2. See, e.g., R.L. STEVENSON, KIDNAPPED (1886).


4. For example, the New York Court of Appeals could at one point do no better than to merely “explain” that the New York statute was intended to cover “kidnapping in the conventional sense in which that term has now come to have acquired meaning.” People v. Levy, 15
The original concept of kidnapping was clear. As Perkins defines it, "[a]t common law kidnapping was ... the forcible abduction or stealing away of a man, woman or child from his own country and sending him into another."\(^5\) Kidnapping was originally a misdemeanor punishable with a fine, short imprisonment and pillory.\(^6\) It developed out of the related misdemeanor of false imprisonment\(^7\) and has been described as the "most aggravated form of false imprisonment."\(^8\)

The term kidnapping emerged in English case law towards the

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The general requirement of interstate or foreign transportation substantially limits the occasions when federal kidnapping charges can be applied for abductions involving short amounts of asportation. See also related federal provisions on hostage taking for the purpose of compelling a third person or a governmental organization from doing or abstaining from doing any act (18 U.S.C. § 1203 (1976 & Supp. 1985)), enticement into slavery (18 U.S.C. § 1583 (1976 & Supp. 1985)), and abductions associated with attempting to avoid apprehension for bank robbery and related crimes (18 U.S.C. § 2113 (1976 & Supp. 1985)).

5. R. Perkins & R. Boyce, Criminal Law 229 (3d ed. 1982). The term "kidnapping" according to the Oxford English Dictionary was originally used to refer to stealing or "carrying off (children or others) in order to provide servants or labourers for the American plantations." 5 Oxford English Dictionary 691 (1933).

The word is a compound of "nap" (related etymologically to the word of "nab"), meaning snatch, and "kid," which probably originally meant any indentured servant brought to the American colonies, including but not limited to children. Napier, Detention Offenses at Common Law, in Reshaping the Criminal Law 190, 194-96 (1978); See Model Penal Code § 212.1 comment at 210-20; See also Note, From Blackstone to Inni: A Judicial Search for a Definition of Kidnapping, 16 Suffolk U.L. Rev. 367, 368-74 (1982).


7. Perkins defines false imprisonment as "the unlawful confinement of a person." Perkins & Boyce, supra note 5, at 224. The common law crime of false imprisonment can be traced back to the Magna Carta. Lambert, Kidnapping and Imprisonment at Common Law, 10 Cambria L. Rev. 20, 21 (1978-79).

8. East, supra note 6, at 429, 430. See Perkins & Boyce, supra note 5, at 229 n.2 (and accompanying text, concurring with East). Perkins also argues that an infant can be a victim of false imprisonment. Id., at 224. But see Williams, The Kidnapping of Children, New L.J. 278 (1984), suggesting that:

whereas false imprisonment involves an issue of the victim's consent (so that it is virtually impossible to imprison a baby falsely), a charge of kidnapping a young child involves an inquiry into the consent of the parent or guardians. If this is so, East's description of kidnapping as an aggravated false imprisonment is true only for persons beyond the age of (presumably) 14.
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end of the 17th century. It was used to describe the forced recruitment of labor for the American colonies. Contemporary statutes have changed the original common law crime in key ways. Kidnapping is now a felony punishable in some states by life imprisonment. In addition, the requirement that the victim must be transported out of the country has been abandoned.

Although state laws still define kidnapping in terms of movement of the victim, there is much uncertainty regarding the amount of movement necessary to elevate what might simply be an assault with brief confinement to the serious crime of kidnapping. This confusion exists even in states where numerous appellate decisions have purported to clarify the crime.

9. Napier reports “the earliest occurrence of the word” in the English law reports appeared in Baily, (1686) comb. 10, although Dessigny, (1682) T. Raym 474, decided four years earlier, used the term “spirited away” and probably is “also an instance of the offense.” Napier, supra note 5, at 194-95. While the facts in Baily were not reported, in Dessigny a student at Merchant Taylor’s School was transported to Jamaica and the defendant was fined 500 pounds. Id.

The practice of forced recruitment of labor for the American colonies ended as colonial independence approached and by the 1770’s, according to Napier, the crime of kidnapping “enter[ed] a long period of legal oblivion in England.” Id. at 195-96. Although the term continued to enjoy popular usage in England, it was not until the twentieth century that kidnapping reemerged in English Criminal Law reports. Id. While a New Hampshire decision as early as 1837 (State v. Rollins, 8 N.H. 550 (1837)) held that transportation out of the country was not a prerequisite to the crime, it was not until 1937 that the Court of Criminal Appeal in Nodder (unreported) held foreign asportation was no longer required to sustain a kidnapping conviction in England. Id. Note, supra note 5, at 368-74; see, MODEL PENAL CODE § 212.1 comment at 210-20 (1980). See also, Kanter, supra note 1, at 993-96; Lambert, supra note 7, at 21-23.

10. Statutory variations and potential ambiguity also exist in comparative crimes in foreign penal codes. Germany, for example, makes it unlawful to seize a human being “for the purpose of putting him into a helpless situation, or for the purpose of placing him in slavery, servitude, or a foreign military or naval service.” GERMAN CRIMINAL CODE § 234, reprinted in The German Penal Code of 1871, 4 THE AMERICAN SERIES OF FOREIGN PENAL CODES 121 (1961). France, Poland, and Greece look to the length of time that the victim is confined to establish aggravated offenses for unlawful imprisonment. The Polish statute increases the penalty if the perpetrator “deprives a human being of liberty” for longer than 14 days. Polish Criminal Code art. 165 §§ 1-2, reprinted in The Penal Code of the Polish People’s Republic, 19 THE AMERICAN SERIES OF FOREIGN PENAL CODES 81 (1973). The French statute imposes additional punishment if the “unlawful imprisonment of detention” lasts longer than one month. FRENCH CRIMINAL CODE §§ 341-44, reprinted in The French Penal Code, 1 THE AMERICAN SERIES OF FOREIGN PENAL CODES 117 (1960). The French Penal Code also makes it unlawful to kidnap a minor (article 354), and the penalty is aggravated if the minor is under 15 years of age (article 355). There is also a special provision which applies to custody disputes (article 357). Id. §§ 354, 355, 357, at 120-21. Greek law punishes “one who by means of fraud or force seized another so that he is deprived of protection of the state . . . especially if reduced into slavery or into some similar condition.” GREEK PENAL CODE, Ch. 18, art. 322, reprinted in The Greek Penal Code, 154-56, 18 THE AMERICAN SERIES OF FOREIGN PENAL CODES (1973). Greece also aggravates punishment for unlawful detention “if the detention is continued for a long period of time”. Id. Ch. 18, art. 325, at 154-56. The Criminal Code of the Soviet Union imposes punishment for “deprivation

The purpose of this Article is to analyze the serious efforts of several states to define kidnapping and the proposals advanced in the Model Penal Code.

Four states (California, New York, Michigan, and Kansas) and the Model Penal Code were chosen for analysis in this article because each represents a distinct approach to the problem of kidnapping.

In California, very minimal movement of the victim is required. New York, on the other hand, has developed a merger doctrine to limit kidnapping to what courts have labeled “conventional kidnapping.” In Michigan, the Supreme Court has formulated factors to measure asportation incidental to kidnapping. Kansas has rejected all three of the foregoing tests and instead has chosen to focus on whether the asportation substantially facilitates another crime. Finally, the Model Penal Code’s approach suggests that the quintessential issue is whether the victim is kept in substantial isolation from his normal environment; a requirement which the Code indicates can be satisfied by either substantial time or asportation.11

The Criminal Code of the RSFSR, Art. 126, reprinted in THE SOVIET CODES OF LAW 107 (W.B. Simons ed., 1980). The Criminal Code of the Soviet Union also prohibits “[t]he abduction of another's infant or the substitution of an infant, committed for mercenary purposes or for other base motives.” Id. Article 125, at 107. Italy punishes for false imprisonment and aggravates the offense if it is “(1) to the detriment of an ascendant, or a descendant or a spouse; or (2) by a public officer, through abuse of the powers pertaining to his office.” ITALIAN PENAL CODE, Sec. II, art. 605, reprinted in The Italian Penal Code, 23 THE AMERICAN SERIES OF FOREIGN PENAL CODES 204 (1978). The ITALIAN PENAL CODE also has provisions against slavery and subjugation. Id. at 203.

Confusion over the common law concept of kidnapping, “the stealing and carrying away or secreting of some person,” prompted the Criminal Law Revision Commission in England to propose that kidnapping be restricted to when a person is detained “to ransom, as a hostage or to cause the victim to be sent out of the realm” or when the perpetrator “uses drugs or the threat of injury to detain a person.” The majority of the Commission would also apply the crime whenever force is used to detain another. It was proposed that other forms of imprisonment be punished less significantly. CRIMINAL LAW REVISIONS COMMITTEE, WORKING PAPER ON OFFENSES AGAINST THE PERSON 56-61 (1976). The parameters of kidnapping and false imprisonment in England are not free from controversy or uncertainty. See, e.g., id.; see also Napier, supra note 5, at 190.

11. The commentary to the adopted draft of the MODEL PENAL CODE states that: Although the core of the contemplated offense is substantial “isolation” of the victim, difficulty was encountered in attempting to draft the provisions expressly in those terms. A draft debated by the Council of the Institute would have declared a person guilty of kidnapping “if he removes another to a place where he is isolated from the protection of law or the aid of others . . . .” Although this language captures the crux of the offense, objection was raised on the ground that it might require proof that the victim had actually reached the isolated place where the kidnapper meant to hold him. The prevailing view was that the crime should be complete where the victim has been forced to leave the security of his house or place of business and enter the kidnapper’s car. Accordingly, the section was recast in terms of removing the victim “from” such locations rather than transporting him “to” a place of isolation.
This Article contends that current approaches inevitably will falter and continue to generate confusion through their use of the concept of asportation. The Article urges that kidnapping ought to be viewed as a distinct social harm most appropriately measured primarily by the duration and condition of the victim's confinement. Only when demands for ransom or the equivalent are made should even the slightest duration of confinement automatically constitute kidnapping.

II. THE CALIFORNIA APPROACH: REQUIRING MINIMAL MOVEMENT OF THE VICTIM

California has struggled to define how much movement of a victim should be required to constitute the crime of kidnapping. In Cotton v. Superior Court, the California Supreme Court held that Penal Code section 207, providing "that any person who forcibly steals, takes or arrests another and carries him from one part of the county to another is guilty of kidnapping," should not apply "where the movement [of the victim] is incidental to [an] alleged assault." Cotton involved prosecutions arising from a labor dispute in which the AFL-CIO was attempting to induce Mexican contract workers to join a strike for union contracts and higher hourly wages. The kidnapping indictment was based mainly on an individual's allegation that he had been dragged from a toilet "some fifteen feet, thrown to the ground and kicked in the back and on his legs."

Noting that prior to a 1905 amendment to section 207 of the Penal Code kidnapping did not include movement of a victim "into another part of the same county," the court expressed its concern that every defendant to an assault charge could also be subject to a kidnapping prosecution "as long as the slightest movement [is] involved."

Eight years later in People v. Daniels, the California Supreme Court construed the state's aggravated kidnapping statute, Penal Code section 209, in light of its interpretation of simple kidnapping under section 207 in Cotton. The aggravated kidnapping statute subjects the defendant to more severe penalties, but requires proof that the kidnap-
ping was "for . . . ransom, reward or to commit extortion or to exact from another person any money or valuable thing.""19

Earlier California Supreme Court decisions had construed section 209 as encompassing, in one case, movement of only twenty-two feet20 and, in another case, movement from a few feet to just over fifty feet.21 Rejecting these decisions, a unanimous court found the reasoning in Cotton regarding movement incidental to an assault applicable. The California Supreme Court repudiated its earlier pronouncement that "it is the fact, not the distance of forcible removal which constitutes kidnapping in this state."22 The court held in Daniels that section 209 excluded "from its reach not only 'stand-still' robberies . . . but also those in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself."23

Thus, in order to uphold an aggravated kidnapping charge, Daniels would require satisfaction of a two-prong test: (1) the movement of the victim must be more than merely incidental to the robbery and (2) the risk of harm must be substantially increased over that necessarily present in a robbery.

The California Supreme Court applied this standard to conclude


Under the California statutory law, the most significant difference between aggravated and simple kidnapping, from the point of view of the defendant, is the large disparity in potential sentences. If the defendant is convicted of simple kidnapping, he may be punished by "imprisonment in the State Prison for three, five, or seven years." Id. at § 208. However, a conviction for aggravated kidnapping is punishable by "imprisonment in the State Prison for life . . . ." Id. at § 209.


In Chessman, the California Supreme Court upheld Caryl Chessman's kidnapping conviction and sentenced him to death. Chessman had robbed a couple at gunpoint and then forced the woman to move 22 feet away to his car. Once there, Chessman forced the woman to submit to his sexual demands. The court ruled that the 22 foot movement was sufficient asportation to constitute kidnapping under California law. The ruling was quite significant since the robbery and sexual violations would not have permitted the court to impose capital punishment on Chessman. However, at that time kidnapping was a capital offense and after numerous stays and appeals, Caryl Chessman was finally executed in 1960, twelve years after his crimes. Id. See Kanter, supra note 1, at 993, 995: "[A]s reprehensible as the defendant's conduct in these cases was, its seriousness lay in the sexual and assaultive nature of the underlying crimes rather than in some independent harm that arose from any 'kidnapping'."


22. Daniels, 71 Cal. 2d at 1139, 459 P.2d at 238, 80 Cal. Rptr. at 910 (quoting Chessman, 38 Cal. 2d at 192, 238 P.2d at 1017).

23. Id.
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when, as in Daniels, the defendant in the course of a robbery "does no more than move his victim around inside the premises in which he finds him," 24 his conduct would not generally constitute aggravated kidnapping. Despite this particular application, what would generally constitute merely "incidental" asportation under the Daniels standard remained ambiguous.

People v. Timmons 25 addressed the question whether the Daniels aggravated kidnapping test was satisfied when the defendant compelled two victims to drive approximately five city blocks, in their own car, during the course of robbing them. Although force was threatened, no weapon was displayed. The California Supreme Court held that the victim's movement was only "incidental to the commission of the robbery." 26 The decision concluded that "'incidental'...within the meaning of Daniels" included a "reasonably brief movement for the purpose of facilitating the commission of a robbery." 27 Timmons characterized the car as merely the "moving situs" of the robbery which (1) facilitated the crime by allowing "less danger of detection" than a stationary situs such as a busy parking lot, and (2)

24. Id. at 1140, 459 P.2d at 238, 80 Cal. Rptr. at 910.

Although Daniels and Cotton clearly established that both simple and aggravated kidnapping in California required some minimal asportation, the Daniels decision acknowledged in two footnotes the extent of the ambiguity that remained as to what would constitute either simple or aggravated kidnapping. The Daniels court, in one footnote, declined to rule on whether the facts of Cotton would be sufficient to constitute aggravated kidnapping if an intent to commit robbery had been established. Daniels, 71 Cal. 2d at 1139 n.5, 459 P.2d at 232 n.5, 80 Cal. Rptr. at 904 n.5. Presumably, what constitutes "incidental movement" for the crime of assault might not constitute "incidental movement" for the crime of robbery which, unlike the crime of assault, constitutes a basis for liability under California's aggravated kidnapping statute. In another footnote, the court refused to decide how the new Daniels standard would be applied in the factual context of People v. Chessman. Daniels, 71 Cal. 2d at 1140 n.14, 459 P.2d at 238 n.14, 80 Cal. Rptr. at 910 n.14 (discussing Chessman, 38 Cal. 2d at 166, 238 P.2d at 1001 (1951)). In Chessman, the California Supreme Court upheld an aggravated kidnapping conviction based on the pre-Daniels rule that the distance of the forcible removal was irrelevant to the crime. The victim in Chessman was forced to move only 22 feet to facilitate the planned robbery (as well as six other crimes), but the movement entailed removal from the victim's escort's car to the defendant's car. Thus, the court in Daniels did not determine whether asportation amounting to 22 feet from one vehicle to another satisfied the new Daniels test for aggravated kidnapping.

25. 4 Cal. 3d 411, 482 P.2d 648, 93 Cal. Rptr. 736 (1971).

Earlier, in People v. Williams, 2 Cal. 3d 894, 471 P.2d 1008, 1013, 88 Cal. Rptr. 208, 213 (1970), the California Supreme Court applied the Daniels test to a victim who was seized from his place of business. In Williams, the defendant forced a gas station attendant first into the station's office and later into the "lube room," where the defendant took the victim's wallet. The attendant was brought back to the station's office and then required, along with a customer, to walk down the street. The California Supreme Court concluded that the movements were "brief and...solely to facilitate the commission of the crime of robbery" and consequently reversed the aggravated kidnapping conviction. Id.

26. Timmons, 4 Cal. 3d at 414, 482 P.2d at 650, 93 Cal. Rptr. at 738.
27. Id.
which aided the defendant's escape by transporting the eyewitnesses to a location where it was more difficult to cause an alarm.\(^{28}\)

The *Timmons* decision also concluded the second branch of the *Daniels* test, requiring that the asportation "substantially increase the risk of harm," was not satisfied because the movement of the car increased only the risk of robbery.\(^{29}\) *Timmons* interpreted the *Daniels* test to require the increased risk from asportation to refer to the danger of "significant physical injuries over and above those to which a victim of the underlying crime is normally exposed."\(^{30}\) In *Timmons*, the court concluded that forcing the victims to drive their own car five blocks down city streets in broad daylight did not "substantially increase the risk of harm" beyond that inherent in the crime of robbery.\(^{31}\) The court also observed that the defendant was not armed, the police were not in hot pursuit, and there was no high speed chase or other reckless driving. The court noted, however, that under different circumstances a "movement of five city blocks might well 'substantially' increase the risk and thereby expose the robber to a prosecution for kidnapping."\(^{32}\)

In *People v. Stanworth*,\(^{33}\) the California Supreme Court reaffirmed

\(^{28}\) Id.

\(^{29}\) Id. (quoting *Daniels*, 71 Cal. 2d 1119, 1140, 459 P.2d 225, 238, 80 Cal. Rptr. 897, 910 (1969)).

\(^{30}\) *People v. Timmons*, 4 Cal. 3d 411, 414, 482 P.2d 648, 650, 93 Cal. Rptr. 736, 738 (1971).

\(^{31}\) Id. at 415-16, 482 P.2d at 651, 93 Cal. Rptr. at 739.

\(^{32}\) Id. at 416 n.2, 482 P.2d at 651 n.2, 93 Cal. Rptr. at 739 n.2. The California Supreme Court expressly distinguished *People v. Ramirez*, 2 Cal. App. 3d 345, 82 Cal. Rptr. 665 (1969), an earlier appellate court decision upholding a kidnapping charge. In *Ramirez*, the defendants forced an intended rape victim into their car and subsequently became involved in a high speed chase which resulted in a fatal accident. The court in *Timmons* also emphasized that the *Daniels* test did not preclude liability for kidnapping when a robber merely moves his victim around inside the premises where he finds him. *Daniels* had indicated that such conduct would "generally" not constitute aggravated kidnapping. However, the *Timmons* court noted that there may be circumstances where such movement would substantially increase the risk to a victim, permitting liability for aggravated kidnapping under section 209 of the *CALIFORNIA PENAL CODE*. *Timmons*, 4 Cal. 3d. at 415, 482 P.2d at 650, 93 Cal. Rptr. at 738 (1971).


Prior to *Stanworth*, in *In re Crompton*, 9 Cal. 3d 463, 507 P.2d 74, 106 Cal. Rptr. 770 (1973), the California Supreme Court attempted to clarify the requirements imposed by the second prong of the *Daniels* test. In *Crompton*, the defendant pointed a pistol at a service station attendant and forced him from the service island to the station office and then behind a truck parked on the premises 20 to 30 feet away. After searching the pockets of the victim and taking a set of keys to the station, the defendant's companion shot and wounded the victim. The court concluded the victim's compelled asportation was merely "incidental" to the robbery and consequently failed the first prong of the *Daniels* test. *Id.* at 466, 507 P.2d at 76, 106 Cal. Rptr. at 772.

As an independent ground for its decision, the court concluded that the second prong of the *Daniels* test was also not satisfied because "the act of forcing the attendant to move behind the
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the two-pronged Daniels test for determining the minimum asportation required for an aggravated kidnapping prosecution under section 209. However, the court rejected the test as inappropriate for the determination of the minimum asportation required under section 207 for simple kidnapping.

Stanworth involved convictions for both simple and aggravated kidnapping. The aggravated kidnapping charge was brought against the defendant who dragged one of his victims approximately twenty-five feet from a road to an open field. He then bound the victim’s hands with wire, forcibly raped her, and stole approximately fifteen dollars from her purse. The Stanworth court held that the Daniels asportation requirement invalidated the aggravated kidnapping conviction. The court concluded that the movement of twenty-five feet was “merely incidental” to the accompanying crimes, since it was “accomplished for the specific purpose of raping and robbing” the victim. In analyzing the second prong of Daniels, the court found no evidence that the movement of the victim substantially increased the risk of physical harm beyond that risk inherent in the underlying crime.

In upholding four simple kidnapping convictions, however, the Stanworth court rejected any implication that the Daniels test for minimum asportation also applied to prosecutions for simple kidnapping under section 207. In Stanworth, two of the defendant’s victims had been ordered at gunpoint to walk to a small hill approximately one-quarter of a mile away from the car in which they had hitched a ride. After ordering the two women victims to disrobe, the defendant fatally shot both of them and then proceeded to have sexual intercourse with one of the victims. A third victim was forcibly driven in a car five to ten miles and the fourth was forced to travel on a freeway from one city to another.

The court reviewed People v. Cotton, which was at the time the leading “simple kidnapping” case. Cotton had invalidated a simple truck did not substantially increase the risk of harm over and above that normally present in the crimes of robbery and assault.” Id. at 466, 467, 507 P.2d at 76, 106 Cal. Rptr. at 772. The court expressly rejected the argument that “the risk was aggravated by diminishing the likelihood of public observation of the infliction of physical harm on the attendant.” Id. at 467, 507 P.2d at 76, 106 Cal. Rptr. at 772. Reviewing several earlier cases, the court held that “such acts of removing the victim from public view do not in themselves substantially increase the risk of harm within” the Daniels rule. Id.

34. Stanworth, 11 Cal. 3d at 598, 522 P.2d at 1065, 114 Cal. Rptr. at 257.
35. Id.
36. Id.
kidnapping conviction for movements that were "only incidental" to the defendant's other offenses. Nevertheless, the Stanworth majority rejected the inference from the phrase in Cotton that in order to constitute simple kidnapping the movement of a victim must be "more than incidental" to an underlying offense. Instead, the court focused on the statement in Cotton that "the legislature did not intend to apply criminal sanctions where the 'slightest movement' is involved." From this language, the court developed a new standard: for simple kidnapping, movement of the victim may not be "slight" or "insubstantial." In relation to the movements of all four victims discussed above, the court found that the asportations were neither "insubstantial" nor "slight" and that the defendants would be liable for simple kidnapping. The court noted 700 yards was found sufficiently substantial movement in an earlier lower appellate decision upholding a simple kidnapping conviction.

By deciding not to judge simple kidnapping asportation on whether or not the movement is merely incidental to another offense, the Stanworth decision departed from the first branch of the Daniels test. The second branch of the Daniels test, which required a substantial increase in the risk of harm over and above that necessarily present in the underlying crimes, was also found inappropriate to simple kidnapping, because simple kidnapping need not occur in connection with another offense.

Stanworth thus established that for simple kidnapping, the victim's forced movement should not be "slight" or "insubstantial," and endorsed a decision holding that 700 yards was not insubstantial. The court left unspecified what constitutes slight or insubstantial asportation.

Two post-Stanworth California Supreme Court decisions reduced the apparent differences between the asportation requirements for simple and aggravated kidnapping. In People v. Thornton, the defend-

37. Id. at 600, 522 P.2d at 1067, 114 Cal. Rptr. at 259 (quoting Cotton v. Superior Court, 56 Cal. 2d 459, 464, 364 P.2d 241, 244, 15 Cal. Rptr. 65, 68 (1961)).
38. Id.
39. Id. at 603, 522 P.2d at 1069, 114 Cal. Rptr. at 261.
40. Id.
41. People v. Apo, 25 Cal. App. 3d 790, 794, 102 Cal. Rptr. 242, 245 (1972). In Apo, a large crowd of students motivated by allegations of racial discrimination, surrounded three college officials and forced them to march some 700 yards from the Physical Education Building to the Administration Building.
42. Stanworth, 11 Cal. 3d at 601, 522 P.2d at 1068, 114 Cal. Rptr. at 260.
43. Id.
44. Id. at 603, 522 P.2d at 1068-69, 114 Cal. Rptr. at 261.
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ant forced his way into the victim's car and drove the victim "some four blocks" keeping her pinned to the seat with his arm around her throat. The defendant parked the car, then robbed and sexually assaulted the victim. In another incident, the same defendant approached a different victim who was standing outside a tavern. With a pistol to her back, he ordered the victim to walk about a block to a parked car. There he robbed and then sexually assaulted her for several hours. The California Supreme Court, applying the Daniels test, upheld the aggravated kidnapping conviction for both of these incidents.

Evaluating the facts under the Daniels two prong test, the court held that:

[t]he fact that in each case defendant chose to consummate the robbery at a location remote from the place of initial contact does not render the subsequent asportation 'merely incidental' to the crime, for it is the very fact that defendant utilized substantial asportation in the commission of the crime which renders him liable to the increased penalty of section 209 if that asportation was such that the victim's risk of harm was substantially increased thereby.

The Thornton court, therefore, seemed to construe Daniels' first requirement of more than "incidental" asportation to mean simply "substantial" movement. The facts in Thornton suggest even a movement of one block would be "substantial".

The court in Thornton concluded that the second prong of Daniels, which requires additional danger to the victim, was satisfied since "any substantial asportation which involves forcible control of the robbery victim ... exposes her to grave risks of harm to which she would not have been subject had the robbery occurred at the point of initial contact."

After Thornton, the Daniels test would appear satisfied by asportation of at least a block in distance, so long as the victim is compelled to move with the threat of bodily harm.

Thornton appeared inconsistent with the California Supreme Court's earlier decision in Timmons which reversed an aggravated kidnapping conviction for the more substantial asportation of five city blocks. In In re Earley, the California Supreme Court directly addressed the inconsistency between Thornton and Timmons and reinter-

46. Id. at 747, 523 P.2d at 272, 114 Cal. Rptr. at 472.
47. Id. at 768, 523 P.2d at 287, 114 Cal. Rptr. at 487. A more substantial movement of the victim occurred after the robbery in the latter incident but this court and a subsequent court ignored it. See infra note 58.
48. Thornton, 11 Cal 3d at 768, 523 P.2d at 287, 114 Cal. Rptr. at 487.
interpreted the Daniels test. In Earley, the defendant used a "gun-like" derringer-styled cigarette lighter to enter the victim's car while it was stopped at a light.\textsuperscript{50} The defendant drove the car, with the victim next to him, a distance of 10 to 13 blocks. During the drive, the defendant waved the "gun" threateningly at the victim. After stopping, the defendant robbed the victim of his wallet and watch and fled on foot without physically injuring the victim.

The Earley court expressly endorsed the Daniels test for aggravated kidnapping and affirmed that both prongs need to be satisfied to uphold a conviction.\textsuperscript{51} Nevertheless, in construing the first prong of Daniels, which requires movement to be more than "merely incidental to the commission of the robbery," the court acknowledged that Thornton implicitly overruled the holding in Timmons, which had found a five block car ride to be "brief and incidental" movement to the robbery, failing the first prong of Daniels.\textsuperscript{52} The Earley court repudiated language in previous decisions suggesting that "movement is not 'merely incidental' to a robbery where the movement is 'necessary' or 'essential' to the commission of the robbery or an important part of [the defendant's] criminal objective."\textsuperscript{53} Rather, Earley reinterpreted "incidental" under Daniels to mean "brief" movements which facilitate robbery, or robbery and rape, as contrasted with movements of a "substantial" distance that facilitate the underlying crimes.\textsuperscript{54} Citing earlier cases, the court characterized as "brief" and consequently "incidental", movements of twenty-five feet from a road to a field,\textsuperscript{55} thirty to forty feet from one room to another in a business establishment,\textsuperscript{56} five to thirty feet within the victim's home, and movement around a gas station's premises.\textsuperscript{57} In contrast, Earley held that asportation of ten to thirteen blocks was clearly "substantial" within the meaning of the first prong of Daniels.\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{50} Id. at 126, 534 P.2d at 724, 120 Cal. Rptr. at 884.
\item \textsuperscript{51} See id. at 129, 534 P.2d at 726, 120 Cal. Rptr. at 886.
\item \textsuperscript{52} Id. at 131, 534 P.2d at 727, 120 Cal. Rptr. at 887 (which found a five block car ride to be sufficient movement).
\item \textsuperscript{53} Id. at n.11. The Earley decision also acknowledged that one definition of "incidental" according to WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed.) is "non-essential," but asserted that it manifestly was not the sense in which the word was used in Daniels. Id.
\item \textsuperscript{54} Id. at 129-30, 534 P.2d at 726, 120 Cal. Rptr. at 886.
\item \textsuperscript{55} See, e.g., Stanworth, 11 Cal. 3d at 588, 522 P.2d at 1058, 114 Cal. Rptr. at 250 (1974).
\item \textsuperscript{56} See, e.g., People v. Mutch, 4 Cal. 3d 389, 397-99, 482 P.2d 633, 638-39, 93 Cal. Rptr. 721, 726-27 (1971).
\item \textsuperscript{57} See, e.g., Williams, 2 Cal. 3d at 902, 471 P.2d at 1013, 88 Cal. Rptr. at 213.
\item \textsuperscript{58} In re Earley, 14 Cal. 3d at 130, 534 P.2d at 721, 120 Cal. Rptr. at 886. To support its holding, the court cited Thornton, 11 Cal. 3d at 747, 750, 767-68, 523 P.2d at 267, 114 Cal. Rptr. 467 (movements of victims one and four blocks are sufficient); Stanworth, 11 Cal. 3d at 603, 522
\end{itemize}
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_Earley_, therefore, rejected the definition of "incidental" advanced by the California Supreme Court earlier in _Timmons_. The court's new decision interpreted _Daniels'_ first prong to preclude prosecution for aggravated kidnapping only if the victim's asportation is very brief. This appears consistent with the asportation requirement of more than slight or insubstantial movement for simple kidnapping, which was imposed by _Stansworth_ when the court held the _Daniels_ test inapplicable to simple kidnapping. 59

_Earley_ also reinterpreted the second prong of the _Daniels_ test which requires that the asportation in cases of aggravated kidnapping substantially increase the risk of harm over and above that necessarily present in the underlying crime. The court made clear how easily the "risk of harm" test is satisfied by stating that whenever the victim is forced to travel under the threat of imminent injury by a deadly weapon there is the requisite "risk of harm." The court also held that the "risk of harm" test could be satisfied in the absence of a deadly weapon under certain circumstances, such as those in _Earley_. The court found that in _Earley_, the forced asportation in the automobile "gave rise to dangers, not inherent in robbery, that an auto accident might occur or that the victim might attempt to escape from the moving car or be pushed therefrom by _Earley._"60

Unlike its analysis of _Daniels'_ first prong, the court did not repudiate _Timmons_, but attempted to distinguish the facts in _Earley_ from _Timmons_, by noting that in _Earley_ the increased risk of an accident was greater since the asportation was ten to thirteen blocks rather than just five blocks as in _Timmons_.61 Furthermore, in _Timmons_ it was the victim rather than the defendant who was driving. The _Earley_ court reasoned, therefore, that the defendant's attention to driving was distracted by his need to watch the victim.62 The court also noted the defendant in _Earley_ was driving at night while wearing sunglasses, rather than in the day as in _Timmons_, and proceeded from a lighted intersection to a dark side street.63 In addition, the _Earley_ court observed that, unlike in _Timmons_, the victim was unaccompanied and believed a gun was being pointed at him, presumably increasing the

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59. See supra notes 48-57 and accompanying text.
60. In re _Earley_, 14 Cal. 3d at 131-32, 534 P.2d at 727-28, 120 Cal. Rptr. at 887-88.
61. _Id._ at 133, 531 P.2d at 728, 120 Cal. Rptr. at 888.
62. _Id._
63. _Id._
risk of a dangerous escape attempt by the victim.64

Consequently, these factual distinctions between Timmons and Earley justified to the plurality of three justices a finding of "increased risk" under the second prong of Daniels.65 Two concurring justices in Earley were unimpressed by the factual distinctions and would have overruled Timmons entirely.66

The Daniels two prong test remains the law in California for aggravated kidnapping. However, after Earley, it is satisfied by minimal asportation so long as there is increased risk associated with the asportation. An unarmed robbery conducted after a forced ride around the block may, therefore, constitute aggravated kidnapping, if the driver is sufficiently distracted or impaired so as to increase the risk of an automobile accident, or there is sufficient risk of an imprudent escape attempt by the victim. The Earley court did, however, reaffirm an earlier holding67 that "acts of removing the victim from public view do not in themselves substantially increase the risk of harm within our rule in Daniels," but added "such acts or similar ones remain a circumstance to be considered in determining whether the risk of harm was substantially increased."68

For simple kidnapping, asportation is sufficient so long as it is neither "slight [nor] insubstantial."69 Furthermore, California court decisions have held movements as short as 700 yards on a college campus,70 and in another instance movement of one block, to be "substan-

64. Id.
65. Id. at 132-33, 531 P.2d at 728, 120 Cal. Rptr. at 888.
66. Id. at 133, 531 P.2d at 729, 120 Cal. Rptr. at 889 (Clark, J. and McComb, J., concurring).
68. In re Earley, 14 Cal. 3d at 122 n. 15, 534 P.2d at 729 n.15, 120 Cal. Rptr. at 881 n.15 (quoting In re Crompton, 9 Cal. 3d at 467, 507 P.2d at 76, 106 Cal. Rptr. at 772). See supra note 42.
69. See supra notes 39-40 and accompanying text.
70. See Apo, 25 Cal. App. 3d at 794, 102 Cal. Rptr. at 245. See supra note 41.
While California has not gone entirely full circle since Cotton first overruled decisions that any asporation could constitute kidnapping, the court now holds that any asporation exceeding brief movement is sufficient for simple kidnapping. Furthermore, the "increased risk" requirement for aggravated kidnapping can be met relatively easily by statistical risks of automobile accidents or escape attempts far short of situations constituting reckless driving.

In light of the minimal asporation imposed as a precondition to a finding of simple or aggravated kidnapping in California, it is doubtful the California courts have accomplished what they have sought since Cotton: to define kidnapping in a manner which avoids having it co-exist almost inevitably with many conventional assaults or robberies.

IV. NEW YORK APPROACH: LIMITING KIDNAPPING THROUGH THE DEVELOPMENT OF A MERGER DOCTRINE

Through its case law, New York has developed a merger doctrine to limit the kidnapping offense to what the courts have labeled "conventional kidnapping."

In People v. Levy, a husband and wife were accosted in New York City as they stopped their car in front of their residence. The two victims were forced to ride in their own car while they were robbed of jewelry and cash. The victims' ordeal lasted twenty minutes and covered a distance of twenty-seven city blocks. The defendants were convicted of two counts of kidnapping, two counts of robbery, and of criminally possessing a pistol. In Levy, the New York Court of Appeals viewed the essence of kidnapping as "asporation of a person under restraint and compulsion."

Acknowledging that the then current New York kidnapping statute had been broadly drafted to literally encompass any type of restraint, the court noted the statutory definition could "overrun" other crimes commonly accompanied by involuntary restraint—rape, robbery, and assault. The court concluded the state legislature did not intend to include as kidnapping those restraints incidental to other crimes, even though under a literal statutory interpretation they would constitute kidnapping.

71. Thorston, 11 Cal. 3d at 747, 767-768, 523 P.2d at 267, 114 Cal. Rptr. at 467.
73. Id. at 164, 204 N.E.2d at 843, 256 N.Y.S.2d at 795.
74. Id. The court quoted the New York statute as providing "that one who 'confines' another with intent to 'cause him... to be confined' against his will is guilty of kidnapping." See N.Y. PENAL LAW § 1250 (McKinney 1967). This statute was later replaced by N.Y. PENAL LAW §§ 135.20-25 (McKinney 1975), discussed infra in text accompanying notes 90-92.
75. Levy, 15 N.Y.2d at 164, 204 N.E.2d at 844, 256 N.Y.S.2d at 796.
The Court of Appeals in Levy expressly overruled an earlier decision in People v. Florio, which upheld a kidnapping conviction in which the victim was forcibly detained in an automobile and driven from Manhattan to Queens where she was raped and assaulted. The court in Levy limited the application of the New York kidnapping statute to "kidnapping in the conventional sense in which that term has now come to have acquired meaning." It concluded that although the kidnapping statutory language might literally apply, the moving automobile was merely the situs of the robbery; therefore, the crime was merely robbery and not kidnapping. The Levy court, however, did not explain what was meant by kidnapping "in the conventional sense."

In People v. Lombardi, the defendant was accused of transporting three young women from Manhattan to Queens, after he deceived them into taking a drug that inhibited their ability to resist his subsequent sexual assaults. The defendant was convicted of kidnapping, attempted rape, assault, and attempted assault.

As in Levy, the New York Court of Appeals acknowledged that the asportation of the three young women fell literally within the kidnapping statute. Nevertheless, the court observed that the asporation from one city borough to another played "no significant role in the crime." The court then reversed the conviction for kidnapping and ordered the kidnapping indictment dismissed.

In People v. Miles, the defendants attempted to kill the victim with an injection of lye solution. The defendants then transported the victim in the trunk of their car, first to another location in New Jersey and then to New York, with the apparent intent to dispose of the victim's remains.

The Court of Appeals rejected the defendants' argument that the "Levy-Lombardi" rule precluded conviction for kidnapping, since the

76. Id. (citing People v. Florio, 301 N.Y. 46, 92 N.E.2d 881 (1950)).
77. Id. at 164-65, 204 N.E.2d at 844, 256 N.Y.S.2d at 796.
78. Id. at 165, 204 N.E.2d at 844, 256 N.Y.S.2d at 796.
80. Id. at 270, 229 N.E.2d at 206, 282 N.Y.S.2d 521-22.
81. Id. The court noted that the defendant could have drugged the victims and attempted to rape them behind his store and indeed speculated that bringing his victims to a public motel in daylight, "thus inviting the possible risk of inquiry," was a less certain way of achieving his purpose. Id. at 271, 229 N.E.2d at 208, 282 N.Y.S.2d at 522.
83. The Court of Appeals determined that the jury could have found that, during the transport of the victim, the defendant believed the victim was alive. Id. at 538, 245 N.E.2d at 694, 297 N.Y.S.2d at 921.
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asporation was simply ancillary to the attempted murder. The court concluded without explanation that in the Levy and Lombardi cases, unlike in Miles, the “restraint and asporation” were necessary parts of the robbery or rape ultimately committed.

The Court of Appeals added the Levy-Lombardi rule “has no purpose of ignoring as independent crimes alternative or optional means used in committing another crime which, by the gravity and even horrendousness of the means used, constitute and should constitute a separately cognizable offense.” The court failed, however, to explain why the asporation, particularly in Lombardi, from one borough to another, was necessary to the attempted rape while the transportation in Miles was not necessary to the attempted murder.

The Miles decision also concluded that the Levy-Lombardi rule was not designed to “exclude from ‘traditional’ or ‘conventional’ kidnapping, abduction designed to effect extortions or accomplish murder.” Rather, the concern in Levy was to avoid “elevating ordinary robberies, rapes, and assaults into the much more serious crime of kidnapping . . . .”

Since in Miles the abduction and asporation was designed to facilitate murder, the Court of Appeals found that the Levy-Lombardi rule did not apply. In light of this reasoning in Miles, it remains uncertain whether the New York court would invalidate, under any circumstances, any kidnapping convictions accompanying murder or extortion provided the technical requirements of some seizure and asporation occurred.

In 1967, New York revised its kidnapping laws dividing kidnapping into first and second degree offenses. The new statute severely limited first degree kidnapping. The offense was restricted to “the classic crime of kidnapping for ransom and its equivalents” and other specified instances when the abduction lasts more than 12 hours or the victim dies during the abduction. The statute allowed second degree kidnapping to exist wherever a person “abducts another person.”

84. Id. at 539, 245 N.E.2d at 694, 297 N.Y.S.2d at 921.
85. Id.
86. Id. at 539, 245 N.E.2d at 694, 297 N.Y.S.2d at 922.
87. Id.
88. Id. at 540, 245 N.E.2d at 694, 297 N.Y.S.2d at 922. Indeed, the New York Court of Appeals observed that “it is the rare kidnapping that is an end in itself; almost invariably there is another ultimate crime.” Id. at 540, 245 N.E.2d at 695, 297 N.Y.S.2d at 922.
89. Id. at 540, 245 N.E.2d at 695, 297 N.Y.S.2d at 922-23.
91. N.Y. PENAL LAW § 135.25 (McKinney 1975).
The breadth of this second degree statute continued to raise what the New York court characterized as a "merger" issue—would an abduction perpetrated during the commission of another offense (e.g., rape or robbery) separately constitute the kidnapping offense?

The New York Court of Appeals addressed this question in *People v. Cassidy.* In *Cassidy,* the defendant grabbed a woman and dragged her at knifepoint 70 feet into a garage, where he sexually assaulted her. After the victim lost consciousness, the defendant departed. He was convicted of assault, attempted sexual abuse, and kidnapping in the second degree.

In *Cassidy,* the court explained its kidnapping merger doctrine:

The merger doctrine . . . [is] based on an aversion to prosecuting a defendant on a kidnapping charge in order to expose him to the heavier penalty thereby made available, where the period of abduction was brief, the criminal enterprise in its entirety appeared as no more than an offense of robbery or rape and there was lacking a genuine "kidnapping" flavor . . . True it is that the 12-hour durational requirement of [first degree kidnapping] effectively renders the merger doctrine unnecessary with respect to prosecution [for that offense]. We find nothing . . . however, which compels the conclusion that the legislature [intended] . . . to eliminate [the merger doctrine] with respect to prosecutions for kidnapping in the second degree . . .

The *Cassidy* court held the defendant's abduction of his victim was "incidental" to the commission of the crimes of assault and attempted sexual abuse. As a result, the merger doctrine precluded the defendant's conviction for second degree kidnapping. The court observed that the merger doctrine was intended "to preclude conviction for kidnapping based on acts which are so much the part of another substantive crime that the substantive crime could not have been committed without such acts and that independent criminal responsibility may not be fairly attributed to them."

Based on *Cassidy,* the New York Supreme Court Appellate Division, in *People v. Spinks,* reversed a second degree kidnapping conviction under New York's new kidnapping statute, holding that "the 'kidnapping' was merely an element of a burglary designed to prevent

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94. Id. at 765-66, 358 N.E.2d at 872, 390 N.Y.S.2d at 47.
95. Id. at 768, 358 N.E.2d at 873, 390 N.Y.S.2d at 48.
96. Id.
97. Id. at 767, 358 N.E.2d at 873, 390 N.Y.S.2d at 47.
the victims from notifying the police, thereby thwarting the burglary." The failure to sustain the kidnapping conviction in *Spinks* is particularly interesting in light of the significant asportation and confinement of the victims. The defendants not only confined the victims in the course of robbing their home and store, but also ordered them at gunpoint to travel in the victims' own car to a wooded area. After they arrived, the victims were tied to a tree and their car was taken by the gunman. Although these facts were not sufficient to sustain a kidnapping conviction in New York, such facts clearly would be sufficient asportation to constitute both simple and aggravated kidnapping under California's current requirements.100

Nevertheless, in New York after *Cassidy* and *Spinks*, what constitutes sufficient asportation for second degree kidnapping to exist in conjunction with a robbery, assault or rape charge remains a question. There is also a question whether, in light of *Miles*, a kidnapping charge could ever be dismissed when connected with a murder or extortion charge. Although the New York decisions provide some guidance on the direction of the New York kidnapping statute through the adoption of a merger doctrine, the ultimate definitional direction remains unclear. It is evident, however, that New York and California approaches will yield different results from the same fact setting.

V. THE MICHIGAN APPROACH: FORMULATING FACTORS TO MEASURE ASPORTATION INCIDENTAL TO KIDNAPPING

If California can be faulted for formulating definitions of kidnapping which have evolved almost full circle to the original asportation requirement of only very minimal linear movement, Michigan's fault lies in the development of a standard which almost defies comprehension. In *People v. Adams*,101 the victim, a prison official, was seized inside a state prison by inmates. These inmates, including the defendant, moved the victim from one part of the prison to another. The Michigan Court of Appeals noted that prison guards knew the exact location of both the defendant and the victim at all times.102 There was no attempt to effect an escape and the court characterized the events as neither "the usual hostage pattern," nor "the usual kidnap-

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99. *Id.* at 660, 395 N.Y.S.2d at 711.
100. *Id.* Clearly, California requires only minimal movement of the victim and, in addition, some increased risk for aggravated kidnapping. See *supra* notes 49-71.
102. 34 Mich. App. at 551, 192 N.W.2d at 21.
The prison official was compelled to accompany the defendants and other inmates to the hospital within the prison compound. After five and one half hours, the defendant and his cohorts agreed to surrender.

The Michigan Court of Appeals quoted the "relevant" portion of the state's kidnapping statute which makes it "unlawful to 'willfully, maliciously and without lawful authority . . . forcibly or secretly confine or imprison any other person within this state against his will." The Court of Appeals noted Michigan's kidnapping statute, like most other states, would be too "all-encompassing" in its "literal breadth" unless it were confined "by objective standards." Although "carrying away" of the victim was not specified by the statute, the Michigan court concluded asportation or, alternatively, confinement in a secret location, should be required for a kidnapping conviction under this statute.

In contrast to the approach taken by the California courts, the Michigan Court of Appeals rejected efforts to calculate the "requisite asportation in terms of linear measurement." The court concluded the actual distance the victim is moved does not "correspond" with the invasion of his physical interest. The Court of Appeals held:

[U]nder the kidnapping statute a movement of the victim does not constitute an asportation unless it has significance independent of the assault. And unless the victim is removed from the environment where he is found, the consequences of the movement itself to the victim are not independently significant from the assault—the movement does not manifest the commission of a separate crime—and punishment for injury to the victim must be founded upon

103. Id. at 552, 192 N.W.2d at 21. During this time, prison officials visited the defendant and other inmates, while a reporter recorded grievances.

104. The Michigan kidnapping statute provides:

[a]ny person who willfully, maliciously and without lawful authority shall forcibly or secretly confine or imprison any other person within this state against his will, or shall forcibly carry or send such person out of this state, or shall forcibly seize or confine, or shall inveigle or kidnap any other person with intent to extort money or other valuable thing thereby or with intent either to cause such person to be secretly confined or imprisoned in this state against his will, or in any way held to service against his will, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

MICH. COMP. LAWS § 750.349 (1968).


106. Id. at 550, 192 N.W.2d at 21.

107. Id.

108. Id. at 568, 192 N.W.2d at 30.

109. Id.
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...crimes other than kidnapping.\textsuperscript{110}

The Court of Appeals explained that by the term “environment,” it did not mean “mere geographic location [which] would be to return to the ‘any movement’ concept,” but “the totality of the surroundings, animate and inanimate.”\textsuperscript{111} The vagueness of the Michigan Court of Appeals’s change of environment rule was underscored by the court’s own stated uncertainty of what would constitute kidnapping under its new test in the context of street assaults and robberies.\textsuperscript{112}

Applying its change of environment test to the facts in \textit{Adams}, the Michigan Court of Appeals concluded that the crime of kidnapping had not been committed and the conviction should be reversed. As the victim’s duties required him to move through the entire prison environment, the asportation to the fifth floor prison hospital was held not to be independently significant.\textsuperscript{113} The court found the purpose of the movement was not to avoid detection or expose the victim to an increased risk of harm, nor was it to make a rescue more difficult. The victims, the court noted, had suggested moving to the gymnasium away from the fracas to discuss the prison disorder, but were instead compelled to move to the hospital. Consequently, the court concluded that the movement had “[no] significance adverse” to the victim “independent of the continuing assault.”\textsuperscript{114}

The Michigan Supreme Court reversed the Court of Appeals in \textit{Adams} and rejected the lower court’s proposed “change of environment” test for kidnapping.\textsuperscript{115} Instead, the Michigan Supreme Court articulated six factors to determine whether the kidnapping statute would be applicable:

(1) Since the language of the first part of the kidnapping statute by itself is so general as to be susceptible of defining minor crimes as well as kidnapping, where appropriate, asportation must be interpolated to achieve the Legislature’s intention to define the major crime of kidnapping. (2) The movement element is not sufficient if it is “merely incidental” to the commission of another underlying \textit{lesser} crime. (3) If the underlying crime involves murder, extortion or tak-

\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.} at 569, 192 N.W.2d at 30.
\textsuperscript{112} \textit{Id.} at 571 n.39, 192 N.W.2d at 31-32 n.39.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.} at 571, 192 N.W.2d at 31.
\textsuperscript{115} People v. Adams, 389 Mich. 222, 239-42, 205 N.W.2d 415, 423-24. The Michigan Supreme Court also criticized the California requirement imposed by \textit{Daniels} that “the asportation must substantially increase the risk that the victim may suffer significant physical injuries over and above those to which a victim of the underlying crime is normally exposed.” \textit{Id.} at 235, 205 N.W.2d at 421. \textit{See Daniels}, 71 Cal. 2d at 119, 59 P.2d at 225, 80 Cal. Rptr. at 897.
ing a hostage, movement incidental thereto is generally sufficient to establish a valid statutory kidnapping. (4) If the movement adds either a greater danger or threat thereof, that is a factor in considering whether the movement adequately constitutes the necessary legal asportation, but there could be asportation without this element of additional danger so long as the movement was incidental to a kidnapping and not a lesser crime. (5) Where appropriate, secret confinement or some other non-movement factor may supply a necessary alternative to asportation to complete statutory kidnapping. (6) Whether or not a particular movement constitutes statutory asportation or whether there is an appropriate alternative element must be determined from all the circumstances under the standards set out above and is a question of fact for the jury.\textsuperscript{116}

The Michigan Supreme Court rejected the Appellate Court’s assumption that the asportation in \textit{Adams} was not independent of the lesser crime of assault.\textsuperscript{117} The court speculated that the asportation could have related to the crime of false imprisonment, the crime of kidnapping, or as the lower court concluded, only the crime of assault. The Michigan Supreme Court noted “it might be difficult for the jury to find that the assault element constituted the real crime as there was no apparent motive for the assault in the sense of acting to harm [the victim].”\textsuperscript{118}

The Michigan Supreme Court suggested it would be more difficult to determine if the movement was related to the crime of false imprisonment or kidnapping since both crimes shared “essentially common elements.”\textsuperscript{119} The Michigan Supreme Court referred, however, to the concept advanced by the New York Court of Appeals that “traditional or ‘conventional’ kidnapping focus[es] on extortion, murder or taking hostage[s].”\textsuperscript{120} Consequently, in determining the nature of the confinement, the court concluded the jury must be permitted to weigh the evidence to determine whether the confinement relates “more to confinement for the sake of confinement,” suggesting the crime of false imprisonment; or confinement “for the sake of assault,” suggesting the crime of assault; or confinement for the sake of “extortion, murder or taking a hostage,” which would indicate the crime of kidnapping under the Michigan Supreme Court’s standard.\textsuperscript{121}

\textsuperscript{116} \textit{Adams}, 389 Mich. at 238, 205 N.W.2d at 422-23 (emphasis added).
\textsuperscript{117} \textit{Id.} at 239, 205 N.W.2d at 423.
\textsuperscript{118} \textit{Id.} at 240, 205 N.W.2d at 423.
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Id.} at 240-41, 205 N.W.2d at 424.
\textsuperscript{121} \textit{Id.} at 241, 205 N.W.2d at 424.
In the *Adams* case, the Michigan Supreme Court reversed the Court of Appeals, holding it was possible for the jury to have concluded that the confinement and asportation of the victim was for the purpose of extorting redress for grievances. This constitutes kidnapping under factor three of the Michigan Supreme Court standard, since “if the underlying crime involves murder, extortion or taking hostages, movement incidental thereto is generally sufficient to establish a valid statutory kidnapping.”

In *People v. Barker*, the Michigan Supreme Court reviewed a trial court’s charge that “the asportation element of kidnapping would be satisfied if the jury found the movement of the victim to be incidental to the commission of the underlying coequal offense of first-degree criminal sexual conduct.” The Michigan Supreme Court noted that in *Adams*, it had expressly held in factor two of its standard that the asportation element in kidnapping “must not be merely incidental to the commission of a lesser underlying crime, i.e. it must be incidental to the commission of the kidnapping.”

The court in *Barker* clarified the new Michigan standard by holding that “to find guilt of kidnapping, it must be shown to be movement having significance independent of any accompanying offense.” The court, therefore, found reversible error in jury instructions permitting the jury to find kidnapping when there was “movement either for the purpose of kidnapping the victim or to commit the crime of criminal sexual conduct. . . .”

The Michigan kidnapping standard, as enunciated in *Adams* and *Barker*, fails to define adequately what constitutes asportation for the purpose of kidnapping. In light of factor three in *Adams*, it is possible to conclude that when extortion, murder, or hostage taking are involved, kidnapping is automatically established whenever the slightest

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122. *Id.*
124. *Id.* at 295, 307 N.W.2d at 62 (emphasis added). “Coequal” is in reference to the length of punishment mandated by the Michigan legislature for the offense. *Id.* n.1.
125. *Id.* at 299, 307 N.W.2d at 63 (emphasis added) (quoting *People v. Adams*, 389 Mich. at 236, 205 N.W.2d at 422).
126. *Id.* at 300, 307 N.W.2d at 64.
127. *Id.* at 301, 307 N.W.2d at 64. Justice Kavanagh, who concurred in *Adams*, announced in a concurring decision that he now felt *Adams* had been wrongly decided. *Adams* read in the element of asportation to save the Michigan kidnapping statute from overbreadth. Justice Kavanagh argued no element of asportation should be read into the statute. Instead, he believed the second portion of the Michigan kidnapping statute should be read with the first portion to require for non-interstate asportation an intent to extort, to secretly confine, or to cause the victim to be held to service against his will.
asportation occurs.128 Yet, making kidnapping an automatic accompanying crime in virtually every murder would appear particularly problematic in establishing a useful identity to the crime. Furthermore, although the Michigan Supreme Court in Barker did not expressly address factor three in Adams, its discussion of factor two in Adams indicates an unwillingness to find kidnapping where the asportation was “incidental” to another crime and not incidental to the kidnapping itself. Thus, what constitutes kidnapping in Michigan remains very uncertain in light of a circular standard which defines “kidnapping” by requiring aspor
tation “incidental to kidnapping.”129

VI. THE KANSAS APPROACH: REQUIRING ASPORTATION WHICH SUBSTANTIALLY FACILITATES ANOTHER CRIME

The Kansas Supreme Court, in State v. Buggs,130 has expressly rejected the current California, New York, and Michigan approaches to defining kidnapping. Instead, it has rested its approach on the particular language of the Kansas penal code.131

The Kansas Supreme Court noted that while much of the state’s statutory language is borrowed from the Model Penal Code, the kidnapping statute, unlike the Model Penal Code, does not require that the victim be removed “from his place of residence or business or a substantial distance,”132 but merely requires a “taking” or a “confining.”133 In light of this statutory language, the Kansas court construed its kidnapping statute as “requiring no particular distance of

128. The third factor in Adams states that “if the underlying crime involves murder, extortion, or taking a hostage, movement incidental thereto is generally sufficient to establish a valid statutory kidnapping.” 389 Mich. at 238, 205 N.W.2d at 422. See supra note 116 and accompanying text.
129. Adams, 389 Mich. at 236, 205 N.W.2d at 422.
131. The Kansas kidnapping statute, KAN. STAT. ANN. § 21-3420 (1981), provides:
Kidnapping is the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person:
(a) For ransom, or as a shield or hostage; or
(b) To facilitate flight or the commission of any crime; or
(c) To inflict bodily injury or to terrorize the victim or another; or
(d) To interfere with the performance of any governmental or political function.
133. Buggs, 219 Kan. at 213, 547 P.2d at 730. The court observed that the “unembellished” language of the Kansas statute is borrowed from the New Mexico kidnapping statute. Id. The New Mexico kidnapping statute, § 40A-4-1 provides:
Kidnapping is the unlawful taking, restraining, or confining of a person, by force or deception, with intent that the victim: (1) be held for ransom; or (2) as a hostage, confined against his will; or (3) be held to service against the victim’s will.
The statute is presently set forth in N.M. STAT. ANN. § 30-4-1 (1978).
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removal, nor any particular time or place of confinement.”

Nevertheless, the court felt compelled to qualify this broad conclusion, because “a kidnapping statute is not reasonably intended to cover movements and confinements which are slight and merely incidental to the commission of an underlying lesser crime.” The court noted the Kansas statute required the possible taking or confinement to be executed with the specific intent to accomplish one of four enumerated objectives. The court characterized the first enumerated objective, that of holding a victim for ransom or as a shield or hostage, as the recognized “classic” or “pure” form of kidnapping and confinement for such purposes “supplies a necessary alternative” to asportation in much the same way that the commission of a felony supplies a necessary alternative to premeditation in a first degree murder charge.

The Kansas Supreme Court did, however, express “concern” with the second type of intent where the victim is seized “to facilitate ... the commission of any crime.” Relying on dictionary definitions of “facilitate” meaning “to make easier or less difficult ... ” the court concluded that the word suggests more than “just to make more convenient,” but instead requires that the taking or confining must have “some significant bearing on making the commission of the crime ‘easier,’ as, for example, by lessening the risk of detection.”

The court, therefore, mandated a distinction between a taking which is “merely incidental” to another crime and one which “substantially facilitates it” and which would therefore constitute kidnapping. The court held that in order for a kidnapping defendant to be properly charged, the taking or confinement done to facilitate the commission of another crime:

(a) Must not be slight, inconsequential and merely incidental to the other crime;
(b) Must not be of the kind inherent in the nature of the other crime; and
(c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

135. Id. at 215, 547 P.2d at 730.
136. Id. at 214, 547 P.2d at 730.
137. Id.
138. Id. (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (4th ed. 1976)).
139. Id.
140. Id. at 216, 547 P.2d at 731. The Kansas Supreme Court offered examples as to what would constitute kidnapping. Included under the court’s standard would be the forced removal
Applying its standard to the facts in *Buggs*, the Kansas court held that the conduct of the defendants constituted kidnapping under the statute. In *Buggs*, the victims were accosted in the parking lot of the store where they worked. Although one of the victims had the day’s receipts with her and could have been robbed immediately, both victims were forced to return to the store. The court, therefore, concluded:

The movement, slight though it was, substantially reduced the risk of detection not only of the robbery but of [the subsequent] rape [of one of the two victims]. Except in the matter of distance, which we are holding to be irrelevant, it was as if the defendant had seized the [victims] at home and forced them to return to the store before the robbery and rape.

Thus, the Kansas Supreme Court required that to find kidnapping the asportation or confinement must be intended to significantly facilitate a crime by substantially limiting the possibility of detection or apprehension. In contrast, since California expressly rejected movement to avoid detection as the sole basis to find the increased risk of harm required by its aggravated kidnapping statute under *Daniels*’ second prong, the facts in *Buggs* would probably fail the California standard for aggravated kidnapping. The facts in *Buggs* would only satisfy California’s simple kidnapping standard if the actual linear asportation exceeded what the California courts would characterize as more than “slight” or “insubstantial,” with a distance of thirty feet labeled “brief,” but a block as sufficient to constitute kidnapping under California case law.

In Kansas, the distance in *Buggs*, which was less than a block but possibly more than thirty feet, is criminologically insignificant. In contrast, under California’s simple kidnapping statute linear distance appears to be the only factor. Under New York’s standard, it is highly unlikely in light of *Cassidy* and *Spinks* that such asportation accompanying a robbery or rape, as opposed to murder, would be suffi-

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141. Id.
142. Id.
143. See supra note 37.
144. 40 N.Y.2d at 763, 358 N.E.2d at 870, 390 N.Y.S.2d at 45. See supra notes 93-97 and accompanying text.
145. 58 A.D.2d at 659, 359 N.Y.S.2d at 709. See supra notes 98-100 and accompanying text.
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cient to constitute kidnapping.146

Indeed, the facts in Buggs, movement from outside to inside a store, underscore how readily the Kansas court is prepared to characterize routine robberies as kidnapping. Potentially, any movement from one side of a street to another to reduce detection during the course of an assault or robbery can constitute asporation justifying prosecution under Kansas’ kidnapping statute. Although the Kansas court labels such movement more than merely “incidental,” to many it would appear to be just that.147

VII. THE MODEL PENAL CODE APPROACH

The Model Penal Code, adopted by the American Law Institute, formulated its definition of kidnapping “to effect a major restructuring of the law of kidnapping as it existed at the time the Model Code was drafted.”148 The introductory note to the provision observes that “many prior kidnapping statutes combined severe sanctions with extraordinarily broad coverage, to the effect that relatively trivial restraints carried sanctions of death or life imprisonment.”149

Section 212.1 defines kidnapping as follows:

A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes: (a) to hold for ransom or reward, or as a shield or hostage; or (b) to facilitate commission of any felony or flight thereafter; or (c) to inflict bodily injury on or to terrorize the victim or another; or (d) to interfere with the performance of any gov-

146. See supra notes 93-97 and accompanying text. See also Spinks, supra notes 98-99, where the defendants moved the victims a significant distance by car to a wooded area and then tied them to a tree.

147. Florida, which has adopted the Buggs kidnapping test, has been very liberal in its application of the factors. In one Florida Supreme Court case, the movement of an assault victim from a kitchen to a bedroom was found to meet the test. See Faison v. State, 426 So. 2d 963, 966 (1983).

Another jurisdiction, Rhode Island, has gone a step beyond Kansas’ facilitation requirement holding that to constitute kidnapping, “any movement of a victim during the course of a crime” must exceed that “necessary to facilitate the crimes at hand.” State v. Innes, 433 A.2d 646, 655 (1981). In application, however, the Rhode Island approach approximates the Kansas requirement, since unlike Kansas, Rhode Island conceives “facilitating” conduct to be synonymous with “incidental” conduct. See State v. Lambert, 463 A.2d 1333, 1340 (1983), State v. Ballard, 439 A.2d 1375, 1386-87 (1982), State v. Innes, 433 A.2d 646, 655 (1981).


149. Id.
The introductory note characterizes the standard as confining kidnapping to "the most serious offenses [of] instances of substantial removal or confinement."151

While the comment to the Model Penal Code notes "numerous instances of abusive prosecution under expansive kidnapping statutes for conduct that a rational and mature penal law would have treated as another crime," the Institute nevertheless concluded that a valid justification exists for retaining kidnapping as a distinct crime.152 The Model Rule's commentary notes "[i]f the offense is confined to cases of substantial isolation of the victim from his normal environment, it punishes a frightening and dangerous form of aggression not adequately dealt with elsewhere."153

Ironically, the Model Penal Code's specific responses fail to adequately limit kidnapping to substantial isolation. The crime is retained as "an aggravated felony," but the code's definition for kidnapping, unlike the Institute's articulated intent, is insufficient to "restrict its scope to cases of substantial removal or confinement for specified purposes."154

The Institute acknowledged difficulty in attempting to draft appropriate standards. A draft defining the offense in terms of "substantial isolation" by "declaring a person guilty of kidnapping if he removes another to a place where he is isolated from the protection of law or the aid of others . . ." was apparently revised "on the ground that it might require proof that the victim had actually reached the isolated place where the kidnapper meant to hold him."155 Consequently, while the Model Penal Code commentary recognizes that the "core of the . . . offense is substantial 'isolation' of the victim," the language of the Code was altered to define the offense "in terms of removing the victim 'from' . . . locations rather than transporting him . . ."

150. Id. at § 212.1. The provision continues:
Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a felony of the second degree. A removal or confinement is unlawful within the meaning of this Section if it is accomplished by force, threat or deception, or, in the case of a person who is under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare.

The standard was initially presented and approved at the ALI proceedings in May 1960 and approved as part of the proposed official draft in May 1962.
151. Id. at art. 212 introductory note at 208.
152. Id. at § 212.1 comment at 221-22.
153. Id. at § 212.1 comment at 222.
154. See id. at § 212.1 comment at 222-23 and discussion infra.
155. See id. at § 212.1 comment at 223.
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to a place of isolation.”¹⁵⁶

The commentary to the Code asserts that its “phrasing of the asportation requirement eliminates the absurdity of liability for kidnapping where a robber forces his victim into his own home or into the back of a store in order to retrieve valuables located there.”¹⁵⁷ The commentary’s observation is based on the Code’s language requiring removal of the victim “a substantial distance from the vicinity where he is found” or “from his residence or place of business.”¹⁵⁸

Consequently, any asportation from inside to outside a house or business would be sufficient, so long as asportation was done with one of the requisite purposes. These include “to facilitate commission of any felony or flight thereafter,”¹⁵⁹ no matter how slight the distance involved. This appears inconsistent with the commentary’s recognition that the core of the offense is “substantial isolation”¹⁶⁰ of the victim. Furthermore, the Code offers little guidance as to what constitutes “substantial distance from the vicinity” when removal is not from the victim’s residence or place of business.¹⁶¹ The difficulties faced by the courts, in the jurisdictions discussed above, demonstrate a failure to articulate meaningful distinctions based on distances or even a consensus on what “substantial distance” should mean.

In a more productive vein and underscoring the questionable utility of the Code’s use of asportation, is the Code’s alternative requirement of confinement “for a substantial period in a place of isolation.”¹⁶² The commentary to the Code recognizes that kidnapping should exist as a crime, even when there is no asportation “where the victim is held in the place where he is found for a substantial period of time.”¹⁶³ It is recognition of these non-asportational factors that provides the best possibility for coherently defining kidnapping.

The Code’s strong reliance on asportation as an alternative to time of confinement to establish kidnapping does little, however, to resolve the complications faced by different jurisdictions that rely on asportation to define kidnapping. Questions remain regarding the na-

¹⁵⁶. Id.
¹⁵⁷. Id.
¹⁵⁸. Id.
¹⁵⁹. Id. at § 212.1.
¹⁶⁰. Id. at § 212.1 comment at 223.
¹⁶¹. See id.
¹⁶². The Code addresses kidnapping in light of the following purposes of the unlawful detention: holding for ransom, facilitating a felony, inflicting bodily harm, or interfering with a governmental function. MODEL PENAL CODE § 212.1. Such isolation, as with asportation, must be in conjunction with one of the requisite purposes enumerated in the Code.
¹⁶³. Id. at § 212.1 comment at 224.
ture of the asportation necessary to transform one crime into the additional and, in many instances, far more serious crime of kidnapping.

VIII. TOWARD A MODERN DEFINITION OF KIDNAPPING

The New York Court of Appeals has observed: "It is the rare kidnapping that is an end in itself, almost inevitably there is another ultimate crime."\textsuperscript{164} The courts' task in defining kidnapping as a separate crime is identifying significant behavior or intent that warrants additional and specific criminal sanction. While establishing different standards and tests, none of the state courts have successfully utilized the concept of asportation to determine when confinement should constitute kidnapping.\textsuperscript{165} In contrast, the Model Penal Code utilizes asportation only as an alternative basis to time for defining kidnapping, recognizing that the "core of the . . . offense is substantial 'isolation' of the victim."\textsuperscript{166} Substantial isolation, as the Model Penal Code\textsuperscript{167} and several of the state codes\textsuperscript{168} acknowledge, does not require any asportation; consequently, time is considered an alternate basis for imposing liability. Despite this progressive movement away from the asportation as the sole focus, courts continue to flounder in their efforts to determine just how much asportation constitutes a sufficient harm to justify prosecutions for kidnapping as an independent crime.

In its new first degree kidnapping statute, New York restricts liability to (1) "the classic crime of kidnapping for ransom and its equivalents" and (2) other specified instances when the abduction lasts for more than twelve hours or the victim dies during the abduction.\textsuperscript{169} However, because New York recognizes a second degree kidnapping without these requirements,\textsuperscript{170} the New York courts confront the same problems of defining the crime as other state courts face.\textsuperscript{171}

Nevertheless, New York's recognition of time as a critical factor in its first degree kidnapping statute constitutes the best solution for reestablishing a workable and equitable definition for all forms of kidnapping. Substantial isolation becomes a significant harm in itself, as the length of detention continues and the harm of the false imprison-

\textsuperscript{164} Miles, 23 N.Y.2d at 540, 245 N.E.2d at 694, 297 N.Y.S.2d at 922.
\textsuperscript{165} See generally supra notes 13-147 and accompanying text (discussing the approaches to kidnapping in California, Oregon, New York, Michigan, Kansas, Rhode Island, and Florida).
\textsuperscript{166} See MODEL PENAL CODE at § 212.1 and commentary at 223.
\textsuperscript{167} See id. at § 212.1.
\textsuperscript{169} See N.Y. PENAL LAW § 135.25 (McKinney 1975).
\textsuperscript{170} See N.Y. PENAL LAW § 135.20 (McKinney 1975).
\textsuperscript{171} See supra notes 87-94 and accompanying text.
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ment grows more severe. Thus, while almost every robbery, assault, murder, and rape contains false imprisonment (in some, but not all, jurisdictions a distinct but not severely punished crime\textsuperscript{172}), it is inappropriate to define kidnapping, a serious felony, as a coextensive crime. While the harm of these independent crimes can range from comparatively minor assault\textsuperscript{173} to rape\textsuperscript{174} and murder,\textsuperscript{175} it is the pain of confinement that creates a distinct harm worthy of the independent punishment for kidnapping. Once the injury being inflicted by any accompanying crime is excluded, the length and condition of the confinement become the principle determinant in measuring the harm which forms the basis for the kidnapping charge.

The initial common law element of carrying a victim out of the country in the context of 17th century transportation and communication (when the crime of kidnapping emerged in English case law)\textsuperscript{176} emphasized that the victim would almost inevitably suffer a very lengthy, if not permanent, isolation from his or her normal society. From this perspective, kidnapping was an extreme form of false imprisonment because the isolation was often for the duration of the victim’s life.

Given that the isolation is the evil at which the crime of kidnapping is aimed, it is proposed that kidnapping be determined by the duration and quality of the confinement.\textsuperscript{177} While consideration of the

\textsuperscript{172} For example, in California false imprisonment is “the unlawful violation of the personal liberty of another.” The maximum penalty for the basic offense is a $1000 fine and a one year jail sentence. \textit{CAL. PENAL CODE} § 208 (West 1970 & Supp. 1984). In contrast, the maximum penalty for second degree kidnapping in California is seven years. \textit{See CAL. PENAL CODE} § 208 (West Supp. 1984). \textit{See also MODEL PENAL CODE} § 212.3 and \textit{PERKINS & BOYCE, supra} note 5, at 224-229, which characterize false imprisonment as a very minor offense. \textit{But see CRIMINAL LAW REVISION COMMITTEE, supra} note 10, noting a sentence of life in prison was permitted in England for commission of the offense of false imprisonment.

\textsuperscript{173} \textit{See, e.g., Cotton}, 56 Cal. 2d at 459, 364 P.2d at 241, 15 Cal. Rptr. at 65.

\textsuperscript{174} \textit{See, e.g., Stanworth}, 9 Cal. 3d at 463, 507 P.2d at 74, 106 Cal. Rptr. at 770.

\textsuperscript{175} \textit{See, e.g., People v. Alcala}, 36 Cal. 3d 604, 685 P.2d 1126, 205 Cal. Rptr. 775 (1984).

\textsuperscript{176} \textit{See supra} note 9.

\textsuperscript{177} \textit{See, e.g.} comparable penal provisions in the \textit{FRENCH PENAL CODE}, \textit{POLISH PENAL CODE}, and \textit{GREEK PENAL CODE}, \textit{supra} note 10. The emphasis on time is appropriate in measuring isolation both from the perspective of the detained victim and the family and friends of the victim. Consequently, this temporal approach measures harm directed at cognizant victims as well as infants who are unaware of the criminal event. The \textit{MODEL PENAL CODE}'s definition of kidnapping states that “a removal or confinement is unlawful within the meaning of this section if it is accomplished by force, threat or deception, or, in the case of a person who is under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare.” \textit{MODEL PENAL CODE} § 212.1 (1980).

Some states have special child stealing statutes to complement the kidnapping laws. \textit{See PERKINS & BOYCE, supra} note 5, at 234-36.

Thwarted efforts of confinements which could have been long enough to constitute kidnap-
harshness of the surroundings, independent of inflicted crimes, is appropriate when the charge is kidnapping, asportation for its own sake should be unimportant. Similarly, the severity of any other crime being inflicted against the victim during the period of confinement may make the same amount of time more or less painful and thus would be an appropriate factor to consider.

Consequently, less time may be required to constitute kidnapping when the time of confinement accompanies more serious offenses, such as murder and rape. Also, less time may be required, if the environment of the confinement is otherwise particularly distressing. The emphasis must be on the length and quality of isolation because this is the distinct harm that is being independently punished through the crime of kidnapping.

A. Violent Crimes and Kidnappings

Under the proposed approach, the perpetrators of most robberies, rapes, and murders could not be charged with the additional crime of kidnapping. If however, the confinement significantly exceeded the amount of time normally needed to complete such crimes, the experience of the confinement itself would be substantially aggravated beyond the false imprisonment that is necessary for the crime to be committed. The confinement would no longer be the unfortunate byproduct of another crime or a minor infringement, but a serious imposition of isolation from ordinary social interaction. Even short periods of imprisonment, that do not exceed the normal confinement associated with an accompanying crime, may still be particularly tortious and go beyond the ordinary victimization of the other crimes being perpetrated against the detained individual.

Aggravating factors, such as a particularly distressful location or physical or psychological torture not ordinarily inherent in the accomplishing under this article's proposal would, of course, be punished as “attempted” kidnapping. For a discussion of attempt, see W.R. LaFave, Criminal Law §§ 59-60 (1972).

178. See supra note 177. If kidnapping is viewed as an aggravated form of false imprisonment, it can be observed that the severity of judicially ordered imprisonment as punishment for criminal convictions is measured by primarily the length of the sentence and secondarily by the conditions at the confining penal institution. See generally, Kadish, Criminal Law and Its Processes 210-30, 1039-46, 1047-126 (4th ed. 1983); R. Hood & R. Sparks, Key Issues in Criminology 141-170 (1970).

In a more extended analogy, the stealing of property requires an intent to permanently deprive, and while asportation exists as a traditional element of larceny as well, it has been justified merely as a basis to substantiate that intent. See Model Penal Code §§ 223.0-223.9 (1980). Likewise, under the proposed approach to kidnapping, asportation would serve only as a potentially aggravating factor of the quality of confinement or indicator of the defendant's intent to confine the victim.
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panying crimes, should be considered sufficient to justify elevating or-
dinary false imprisonment into kidnapping because of the additional
pain and terror of the imprisonment. Undoubtedly, asportation in
some instances affects the quality of confinement and thus bears on
whether there is "substantial isolation," but it would not be a determi-
native factor.

It is understandable that the current New York and Michigan
approaches to kidnapping appear much more ready to characterize the
perpetrator's behavior as kidnapping in the context of a murder.179
Confinement which subjects the victim to great violence can make
even short periods of imprisonment unbearable. In this sense, the
New York and Michigan tendencies to find kidnapping far more readily in the context of murder are consistent within limits to the pro-
posed approach.

Since smaller incremental detention in intensely violent crimes
can quickly magnify the terror of the confinement, the aggravating
factors may more easily justify a finding of kidnapping in shorter peri-
ods than would be required in the context of other crimes. Neverthe-
less, it would be inappropriate to transform virtually any murder
automatically into kidnapping without an additional identifiable harm.
By limiting kidnapping to extended periods of isolation that at the
very least involve a quality or duration of imprisonment beyond that
inherent in other crimes, kidnapping can begin to regain its unique
identity.

B. Ransom and Hostage Kidnapping

Threats to third parties to continue to confine, injure, or kill a
detained victim constitute what New York calls the "classic" kidnap-
ning scenario. This combination of false imprisonment180 and extor-
tion181 creates special terror and apprehension to individuals beyond
the immediate victim of imprisonment. Consequently, this particular
combination of crimes should constitute kidnapping without any mini-
mal time of confinement. Instead, the threat not to return the impris-
oned victim safely automatically aggravates the potential conse-
quences of the false imprisonment and imposes at once the fear of per-
manent isolation.182 The combination of this form of extortion with
false imprisonment constitutes a distinct harm, which differs from

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179. See Adams' third factor, supra notes 122, 128 and accompanying text; see also Miles,
supra notes 182-84 and accompanying text.
180. See supra note 7.
181. See PERKINS & BOYCE, supra note 5 at 442-452; LAFAYE, supra note 178, at 704-707.
182. Napier, supra note 5.
mere extortion, much like the combination of assault and larceny constitutes the distinct harm of robbery.\textsuperscript{183} Confinement combined with either assault, robbery, rape or murder, on the other hand, does not alone constitute a distinct harm, since confinement and some asportation is almost inevitably entailed in the commission of these crimes.

Indeed, it is the classic ransom form of kidnapping that arguably revitalized awareness of the crime, since it clearly constitutes an aggravated form of false imprisonment in need of severe penalties and condemnation.\textsuperscript{184} While it has been argued that kidnapping be restricted to this criminal scenario,\textsuperscript{185} the need for an aggravated crime where the false imprisonment results in severe isolation exists in other contexts. The threats in a “ransom” type kidnapping immediately aggravate the injury of the isolation, however brief, but other situations require a longer period of confinement to justify treating them as kidnappings.

\textbf{IX. Conclusion}

The proposed approach to kidnapping does not eliminate ambiguity in the definition of kidnapping. It does, however, argue against the use of asportation as a basis for the definition of kidnapping. Instead, courts should focus on whether the time and quality of the victim’s imprisonment justifies characterizing the confinement as kidnapping.

Ideally, kidnapping statutes should be amended to require that either the duration of the victim’s confinement or the harsh conditions of the imprisonment exceed that normally inherent in any accompanying crime. The perpetrators of assaults, robberies, rapes, and murders should be punished appropriately for these crimes. The additional characterization of such behavior as kidnapping, however, should be limited to instances where the confinement of the victim, which is almost inevitably a part of these other crimes, imposes a significant additional harm.

Lengthy confinement beyond that normally associated with other crimes should constitute kidnapping.\textsuperscript{186} In these instances, the dura-

\begin{footnotesize}
\begin{enumerate}
\item See Perkins & Boyce, supra note 5, at 245, 343; LaFave, supra note 178.
\item See Canter, supra note 1, at 993; see generally, E.K. Alix, supra note 1; Model Penal Code § 212.1 (1980).
\item See Note, supra note 5, at 554-558.
\item I decline to propose a specific minimum duration of confinement, such as two hours, to elevate ordinary false imprisonment into the more serious crime of kidnapping. Even relatively short confinements can warrant the label of kidnapping if the conditions of confinement are sufficiently harsh. The proposal does not preclude different degrees of kidnapping based on duration of confinement.
\end{enumerate}
\end{footnotesize}
Kidnapping imposition of the imprisonment imposes an additional harm beyond the assault or other crime directed against the victim. Kidnapping statutes should also specify aggravating factors that will elevate relatively short confinements to the crime of kidnapping. These factors should include unusually harsh conditions of confinement or the infliction of physical or psychological torture beyond that inherent in accompanying crimes. The classic ransom demand constitutes an additional aggravating factor, which immediately threatens permanent isolation and therefore justifies automatically classifying the imprisonment as kidnapping.

In the absence of legislative change, it is desirable that courts construe current statutes, which are usually quite general in nature, as focusing on the time and quality of confinement rather than the sufficiency of asportation. This approach is especially appropriate where the asportation requirement is the result of judicial interpretation of the penal code.

The persistent use of asportation in many jurisdictions as the central aggravating factor for elevating an imprisonment to the crime of kidnapping is understandable, especially in light of the original purpose at common law of punishing the unlawful carrying away of victims out of the country to obtain labor for American colonization. In the era of modern transportation, however, kidnapping cannot be viewed in terms of asportation. Although asportation can be a factor in determining the quality and length of confinement, in many cases the movement is simply irrelevant. California’s effort to measure the minimum number of feet required for kidnapping and New York’s attempt to determine how much movement no longer results in its merger into another crime are just two examples of a court’s faltering because of its focus on asportation. The result is inevitable inconsistency and confusion, since the focus of the inquiry, asportation, is not the critical factor.

The Model Penal Code, with its emphasis on substantial isolation, significantly contributes to a meaningful concept of the harm kidnapping is intended to punish. Nevertheless, the final adopted draft, while recognizing time as an alternative basis as some states do, declined to eliminate the emphasis on asportation as a basis to define kidnapping. Kidnapping has a notorious reputation in fiction and popular images. A modern legal definition, focusing on the harm kidnapping generates by the time and quality of isolation and de-emphasizing the metaphys-

187. See supra notes 13, 19, 39, 75, 97-99, 131, 168-70, 179 and accompanying text.
188. Id.
ics of asportation, can properly be the basis for a crime that punishes a specific harm that still flourishes in a world very different from the one in which it was conceived.