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Kidnapping Reconsidered: Courts Merger Tests Inadequately Remedy the Inequities Which Developed from Kidnapping's Sensationalized and Racialized History

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KIDNAPPING RECONSIDERED: COURTS MERGER TESTS INADEQUATELY REMEDY THE INEQUITIES WHICH DEVELOPED FROM KIDNAPPING'S SENSATIONALIZED AND RACIALIZED HISTORY

Samuel P. Newton*

INTRODUCTION

After a late-night party, Percy Wilder, a black man, tried to convince Danielle Peterson, a white woman, to come outside to his car.[1] After some back-and-forth, Peterson somewhat hesitantly left and Wilder persuaded her to get into the car.[2] Wilder then pulled out, Peterson's legs still hanging out the door.[3] As he drove, Wilder asked for oral sex, but Peterson refused.[4] Only a few minutes later, Wilder pulled into an apartment complex and parked near the dumpster.[5] He stopped the car and asked her to undress.[6] He "tried to put his hand up her shirt" then put his head on her breast and bit her.[7] When she still refused, he screamed "get naked" and threatened to cut her if she tried to get out of the car.[8] As Peterson started to remove her shoes, Wilder said he would "count to three, and if you are not naked, I'm going to gut you from head to toe."[9]

At the count of two, Peterson threw open the door and bolted, making it to the apartment complex where she pounded on the doors, screaming for help.[10] Wilder

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1 State v. Wilder, 2018 UT 17, ¶¶ 4–5, 420 P.3d 1064, 1066.
2 *Id.* ¶ 5.
3 *Id.* ¶ 6.
4 *Id.* ¶ 7.
5 *Id.* ¶ 8.
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.* ¶ 10.
10 *Id.* ¶¶ 11–12.

caught her and grabbed her by the hair, but Peterson locked her arms and legs, which kept Wilder from dragging her back.[11] He released her, "punched her in the face, and ran off."[12]

Clearly the State could have charged Wilder with sexual assault, yet it also charged him with and convicted him of kidnapping.[13] How did Wilder commit a kidnapping? At least at first, Peterson willingly got in the car.[14] According to the State, when Wilder grabbed Peterson's hair, that detention, albeit for only a second or two, was enough to commit a separate kidnapping offense.[15] This was not just a sexual assault; it was a sexual assault and an extremely brief kidnap. On appeal, Wilder argued that the kidnapping, if there was one, was not sufficiently independent of the assault and that any detention that happened was merely incidental to the sexual assault which was still in progress.[16] Wilder then asked the court to merge his kidnapping conviction with the sexual assault.[17]

Kidnapping is not the crime most people think it is. When someone mentions a kidnapping, most think of something like taking a child at a bus stop or holding a hostage.[18] We think of its definition: "to steal (a child), to carry off (a person) by illegal force."[19] But kidnapping has never really been about that. Kidnapping was based on rare and sensationalized crimes that led legislatures to impulsively expand it into such an extremely broad offense that it poses serious constitutional problems.[20] I argue that legislatures and courts must redefine kidnapping and abolish their common law merger tests, tests that were created to solve a problem that was entirely of their own making.

In Part I of this Article, I trace kidnapping's history in both English and American common law.[21] Kidnapping did not become an offense when throngs of black people were taken from their homes and forced into slavery, but rather when cash-hungry exploiters stole vulnerable white children, particularly those whose parents

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[11] *Id.* ¶ 12.

[12] *Id.*

[13] *See id.* ¶ 13.

[14] *See id.* ¶ 5.

[15] Brief of Petitioner at 50, State v. Wilder, 2018 UT 17, 420 P.3d 1064 (No. 20160952-SC); Brief of Respondent at 44–45, State v. Wilder, 2018 UT 17, 420 P.3d 1064 (No. 20160952-SC).

[16] *See Wilder*, 2018 UT 17, ¶ 16 n.2.

[17] *See id.* ¶ 14.

[18] One manual lists seven types of kidnapping that fit these generalizations. *See* DIANA M. CONCANNON, KIDNAPPING: AN INVESTIGATOR'S GUIDE 3 (2d ed. 2013).

[19] *Kidnap*, OXFORD ENGLISH DICTIONARY (2019).

[20] *See* Note, *A Rationale of the Law of Kidnapping*, 53 COLUM. L. REV. 540, 540 (1953) [hereinafter *A Rationale of the Law of Kidnapping*].

[21] *See infra* Part I.

had means, and sent them to America as indentured servants.[22] Only then did English courts declare their outrage and act to create a common law offense.[23]

In America, even though black people were regularly kidnapped and sold into slavery, the offense itself remained mostly dormant given that few white children were sent across the ocean.[24] Black people tenaciously fought their own kidnappings in the courts, but found little to no sympathy or success because, to quote Frank Wilderson III, they were "generally dishonored, perpetually open to gratuitous violence, and void of kinship structure."[25] Most whites simply turned a blind eye to kidnappings of a whole race of people in their back yard.[26]

By the late nineteenth century, enterprising criminals started to kidnap the children of rich white people and hold them hostage.[27] These cases generated torrents of publicity and prompted the public and political officials to demand action, which usually involved reactionary legislative expansions of kidnapping's definition or punishment.[28] Conversely, near silence occurred when large numbers of blacks were taken and even lynched.[29] In many of these cases, the perpetrators of violence were part of the very establishment charged with enforcing kidnapping statutes.[30]

Over the next several decades, usually after the publicized kidnapping of a white child, states continued to incrementally broaden the offense.[31] But the floodgates

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[22] *See* PAULA S. FASS, KIDNAPPED: CHILD ABDUCTION IN AMERICA 10 (1997); CAROL WILSON, FREEDOM AT RISK: THE KIDNAPPING OF FREE BLACKS IN AMERICA, 1780–1865, at 2, 7 (1994); B.W. Napier, *Detention Offences at Common Law*, *in* RESHAPING THE CRIMINAL LAW 190, 194 (P.R. Glazebrook ed., 1978). *See generally* JOHN WAREING, INDENTURED MIGRATION AND THE SERVANT TRADE FROM LONDON TO AMERICA, 1618–1718: 'THERE IS GREAT WANT OF SERVANTS' (2016).

[23] ABBOT EMERSON SMITH, COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA 1607–1776, at 71 (1947); Barry M. Coldrey, *'. . . A Place to Which Idle Vagrants May Be Sent*,*'* 13 CHILD. & SOC'Y 32, 41 (1999).

[24] WILSON, *supra* note 22, at 2.

[25] FRANK B. WILDERSON III, RED, WHITE & BLACK: CINEMA AND THE STRUCTURE OF U.S. ANTAGONISMS 11 (2010).

[26] WILSON, *supra* note 22, at 7.

[27] FASS, *supra* note 22, at 17.

[28] Coldrey, *supra* note 23, at 41; *A Rationale of the Law of Kidnapping*, *supra* note 20, at 540.

[29] LYNCHING IN AMERICA: A HISTORY IN DOCUMENTS 229 (Christopher Waldrep ed., 2006) [hereinafter LYNCHING IN AMERICA].

[30] Howard Kester, *The Marianna, Florida Lynching*, *in* LYNCHING IN AMERICA, *supra* note 29, at 230–32 (describing how law enforcement permitted a mob to seize a jailed black man and lynch him).

[31] *See* People v. Knowles, 217 P.2d 1, 13 (Cal. 1950) (following well publicized kidnappings, "the punishment specified by existing statutes defining kidnapping was increased"); Hugh A. Fisher & Matthew F. McGuire, *Kidnapping and the So-Called Lindbergh Law*, 12 N.Y.U. L.Q. REV. 646, 653 (1935); *A Rationale of the Law of Kidnapping*, *supra* note 20, at 540.

opened with the landmark kidnapping of Charles Lindbergh's baby in 1932.[32] The case and its extensive publicity sent federal and state governments on an emotionally charged quest to augment kidnapping's definition to such an extent that it came to encompass "a wide and ill-defined range of behavior" and now "elude[s] meaningful definition."[33]

These legislative overreactions came with significant cost.[34] Once legislatures departed from kidnapping's common law definition—where a person had to be transported a significant distance or held hostage—to one in which a person could commit a kidnapping with little to no movement or hostage taking, a new set of problems appeared.[35]

Many criminal offenses have a detention *inherent* in the crime itself.[36] Defendants who commit rapes, murders, or robberies, for example, often, if not always, detain or forcibly move their victims. They often do not intend to kidnap per se—they intend to commit other crimes—but because kidnapping was now broadly defined, the person, whether intentionally or not, had incidentally committed a kidnapping.[37] Because kidnapping's definition was so expansive and now overlapped with almost any offense involving some sort of detention, it created a host of constitutional problems. Now prosecutors could, for various unsavory motives such as racial discrimination, stack charges and violate double jeopardy or equal protection.

To remedy these issues, courts began to create tests—kidnapping merger tests—to decide when a kidnapping offense should merge with the underlying crime.[38] In essence, courts would examine the facts of a particular case to determine if a kidnapping offense was sufficiently distinct to support a separate conviction. I will detail these tests and courts' rationales in creating them.

Next, I critique the tests, which have not fixed these problems. As one commentator put it, courts' "merger analysis has been, to be charitable, a mess."[39] Courts in every state have produced a voluminous number of cases that make fine-tooth factual distinctions among cases, but produce little consistency in the law.[40] These tests

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[32] Horace L. Bomar, Jr., *The Lindbergh Law*, 1 L. & CONTEMP. PROBS. 435, 435–36 (1934); *A Rationale of the Law of Kidnapping*, *supra* note 20, at 540.

[33] John L. Diamond, *Kidnapping: A Modern Definition*, 13 AM. J. CRIM. L. 1, 1 (1985); *A Rationale of the Law of Kidnapping*, *supra* note 20, at 540.

[34] *See* Fisher & McGuire, *supra* note 31, at 648–49, 653, 655–56 (describing the breadth of legislative changes that followed kidnappings).

[35] *See id.*

[36] Melanie A. Prince, Comment, *Two Crimes for the Price of One: The Problem with Kidnapping Statutes in Tennessee and Beyond*, 76 TENN. L. REV. 789, 792 (2009).

[37] *Id.* at 790, 792.

[38] Diamond, *supra* note 33, at 15; Prince, *supra* note 36, at 811.

[39] Bruce A. Antkowiak, *Picking Up the Pieces of the Gordian Knot: Towards a Sensible Merger Methodology*, 41 NEW ENG. L. REV. 259, 260 (2007).

[40] *See generally* Diamond, *supra* note 33; *A Rationale of the Law of Kidnapping*, *supra* note 20; Prince, *supra* note 36 (all describing various state kidnapping statutes and their inconsistencies).

do not work. Even though they appear logical, in reality, courts do nothing more than guess whether something "feels" like a separate kidnapping. The tests are reminiscent of Justice Potter Stewart's famous line related to pornographic material, "I know it when I see it."[41] The tests have produced little to no logical or factual consistency.

Most problematically, courts' various tests avoid confronting the very real constitutional problems kidnapping's reactionary and expanded definition has worked into the law. State and federal agencies gather little to no information on kidnapping offenses.[42] But the definition of kidnapping is so broad and vague that it enables a prosecutor to continue the well-worn pattern of using kidnapping to treat minorities differently. The prosecutor need only add a kidnapping charge to another criminal charge. When defendants have raised constitutional challenges to kidnapping statutes, the courts have remained sadly silent and have turned a blind eye—like they have in previous centuries—to these real problems.[43] Time and again, courts have largely refused to give these constitutional provisions any remedial power.[44]

To this end, in Part II, I propose two simple solutions.[45] First, legislatures should drastically restrict kidnapping's definition so that it no longer overlaps with so many other criminal offenses, like has been done with the Model Penal Code.[46] The definition should make the offense unique again, requiring things like transportation a significant distance or hostage taking. This is the easiest solution, greatly restricts a prosecutor's ability to discriminate, and would end the need for kidnapping merger tests.

But I acknowledge that state legislatures are not likely to find much political support to substantially contract a kidnapping statute. Consequently, courts should be willing to strike down kidnapping statutes for vagueness, and for violating the Double Jeopardy, Cruel and Unusual Punishment, and Equal Protection Clauses. This too, would spell a welcome end for kidnapping merger tests and would force governmental agencies to only prosecute kidnappings that fit within a much more normative view.

Defendants should be punished for the crimes they commit. But when legislatures draft hundreds of criminal statutes, many of which incorporate inherent detentions, criminal defendants risk serving even more time than they should, as prosecutors have every incentive to simply add an extra kidnapping offense. We know prosecutors often disparately charge minority defendants[47] and we need to gather data to

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[41] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[42] *See* DAVID FINKELHOR & RICHARD ORMROD, DEP'T OF JUST., NCJ181161, KIDNAPPING OF JUVENILES: PATTERNS FROM NIBRS 2–3, 7 (2000).

[43] Williams v. Oklahoma, 358 U.S. 576, 584–87 (1958); State v. Jacobs, 380 P.2d 998, 1001–03 (Ariz. 1963); Prince, *supra* note 36, at 790.

[44] *See Williams*, 358 U.S. at 584–87; *Jacobs*, 380 P.2d at 1001–03.

[45] *See infra* Part II.

[46] Diamond, *supra* note 33, at 27–28.

[47] *See, e.g.*, Timothy Williams, *Black People Charged at a Higher Rate than Whites. What If Prosecutors Didn't Know Their Race?*, N.Y. TIMES (June 12, 2019), https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html [https://nyti.ms/2MJ3j0k].

discover the extent of this problem, but if the past is any indication, it is likely an extensive one.

Because kidnapping has virtually no boundaries, prosecutors can improperly discriminate and defendants could never prove otherwise. Courts should no longer avoid the merger problem. Instead, if the legislature will not fix it, then the courts must force them to redefine kidnapping so that it fits within constitutional norms.

I. KIDNAPPING HAS DISCRIMINATORY ORIGINS

A. Kidnapping at English Common Law

At common law, kidnapping required the defendant to carry a victim out of their country.[48] Kidnapping had roots in the ancient world.[49] The Bible contained a proscription.[50] Prohibitions against selling slaves and freemen appeared in Anglo-Saxon law from as early as the seventh century through the eleventh century in Kentish law, King Ine's dooms, Cnut's laws, and the Law of Æthelberht.[51] The Magna Carta prohibited imprisoning freemen without cause.[52]

Kidnapping became a part of the common law as a white person's offense—usually when a child was taken to serve in the Navy or to populate the colonies—since English common law did little to prevent the forcible kidnapping of millions of Africans and black slaves.[53]

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[48] State v. Rollins, 8 N.H. 550, 566 (1837); State v. Harrison, 59 S.E. 867, 870 (N.C. 1907); Click v. State, 3 Tex. 282, 282 (1848) (reversed on other grounds); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *219; Diamond, *supra* note 33, at 2; Fisher & McGuire, *supra* note 31, at 648 ("As a common law crime, it would seem the crime was looked upon as an aggravated species of false imprisonment so that, in addition to the essential element of false imprisonment, another element was necessary, namely, that of sending away the person against whom the offense was committed from his own country to another."); Prince, *supra* note 36, at 789.

[49] Bruce D. Bickel, Note, *Struggling with California's Kidnapping to Commit Robbery Provision*, 27 HASTINGS L.J. 1335, 1336 (1975).

[50] *Exodus* 21:16 ("And he that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death.").

[51] LAW COMMISSION, SIMPLIFICATION OF CRIMINAL LAW: KIDNAPPING, CONSULTATION PAPER NO. 200, ¶ 2.6 (2011); 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I, at 12 (Boston, Little, Brown & Co. 1895).

[52] No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

Magna Carta, BRIT. LIB. (July 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation [https://perma.cc/R364-7B2U]; *see also* Napier, *supra* note 22, at 191.

[53] ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 117–18 (1982); ADAM ROTHMAN, BEYOND FREEDOM'S REACH: A KIDNAPPING IN THE TWILIGHT OF SLAVERY 8–9 (2015); Markus Vink, *"The World's Oldest Trade": Dutch Slavery and Slave*

In 1622, the Deputy of the Virginia Company warned its stockholders of a troubling trend: "divers old Planters and others did allure and beguile divers young persons and others . . . to serve them upon intollerable and unchristianlike condicons upon promises of such rewards and recompence, as they were no wayes able to performe nor ever meant."[54] The newly bustling Atlantic trade proved too great a temptation: unscrupulous sorts would grab children or tempt them with sweets, induce vagrants with alcohol, or others with elaborate promises, and sell them to captains, who would pay a pound or two per person and ask little to no questions.[55]

In 1645 Parliament tried to step in, passing legislation to curb kidnapping, or "spiriting" as it was called, and creating a servant registry, which compelled searches of vessels for children and required officers and ministers of justice to apprehend people who were stealing, selling, buying, conveying, or receiving "[c]hildren so stolne" and to imprison them.[56]

But the problem continued.[57] Legal recourse was difficult and redress required the intervention of some high authority, which meant parties usually had to have the means to petition the king, the Privy Council, the Lord Mayor, or the Court of Aldermen of London for relief.[58] For example, in 1653, Robert Broome was able to

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Trade in the Indian Ocean in the Seventeenth Century, 14 J. WORLD HIST. 131, 132 (2003); *see also* POLLOCK & MAITLAND, *supra* note 51, at 12; WILSON, *supra* note 22, at 2–5. The African slave trade repeatedly involved forcible and involuntary kidnapping. However, this appears to have had little influence on the development of a common law kidnapping offense, as outrage seemed to relate to the forcible asportation of white children. *See generally* SHARON V. SALINGER, "TO SERVE WELL AND FAITHFULLY": LABOR AND INDENTURED SERVANTS IN PENNSYLVANIA, 1682–1800 (1987); WAREING, *supra* note 22; Emily Blanck, *Seventeen Eighty-Three: The Turning Point in the Law of Slavery and Freedom in Massachusetts*, 75 NEW ENG. Q. 24 (2002); Mildred Campbell, *Social Origins of Some Early Americans*, *in* SEVENTEENTH-CENTURY AMERICA: ESSAYS IN COLONIAL HISTORY 63 (James Smith ed., 1959); Coldrey, *supra* note 23; Audra A. Diptee, *African Children in the British Slave Trade During the Late Eighteenth Century*, 27 SLAVERY & ABOLITION 183 (2006); Russell R. Menard, *British Migration to the Chesapeake Colonies in the Seventeenth Century*, *in* COLONIAL CHESAPEAKE SOCIETY 99 (Lois Green Carr et al. eds., 1988).

[54] SMITH, *supra* note 23, at 67–68. Sir Josiah Child wrote in 1694 that Virginia and Barbados were colonized in part with people who "Merchants and Masters of Ships, by their Agents, or Spirits, as they were called, gathered up about the streets of London, and other Places, clothed and transported, to be employed upon Plantations." SIR JOSIAH CHILD, A NEW DISCOURSE OF TRADE 197 (London, 4th ed. 1745); *see also* JACK P. GREENE, EVALUATING EMPIRE AND CONFRONTING COLONIALISM IN EIGHTEENTH-CENTURY BRITAIN 53–54 (2013).

[55] FASS, *supra* note 22, at 11; SMITH, *supra* note 23, at 68; WILSON, *supra* note 22, at 4. Coldrey, *supra* note 23, at 40–42; David Souden, *'Rogues, Whores and Vagabonds'? Indentured Servant Emigrants to North America, and the Case of Mid-Seventeenth-Century Bristol*, 3 SOC. HIST. 23, 24 (1978) ("People of every age and kind were decoyed, seduced, inveigled, or forcibly kidnapped and carried as servants to the plantations."). Often children and other captives were held for weeks in squalid depots of captives. SMITH, *supra* note 23, at 69–70.

[56] SMITH, *supra* note 23, at 71; Coldrey, *supra* note 23, at 43.

[57] Coldrey, *supra* note 23, at 43.

[58] SMITH, *supra* note 23, at 71–73; Coldrey, *supra* note 23, at 43.

get his eleven-year-old son back by securing a warrant for the ship's master.[59] In 1657, a search of the ship *Conquer*, bound for the West Indies, uncovered nineteen servants, eleven of whom "had been 'taken by the spirits,'" and were removed from the ship.[60]

These efforts did not always go well.[61] The Privy Council soundly rebuked a clerk in 1663 for releasing kidnapped servants from the ship *Reserve* bound for Maryland.[62] And while in the years that followed, Parliament created a registry where ports had to note servants' age, birth location, and residence, the record books did little good, especially since many people were smuggled and it was difficult for emigrant agents to accurately know a person's status.[63] To fix this problem, in 1682 Parliament required servants to appear before a magistrate who would witness the indenture.[64] But even this measure was insufficient.[65]

The first appearance of kidnapping as a separate common law offense appears to have occurred in May 1682, when John Wilmore, a London merchant, was charged by information directly from the King's Bench "for spiriting or kidnapping away a young boy under the age of 13 years, called Richard Sivitor, and sending him to Jamaica" with a ship captain named Jones.[66] Witnesses insisted there was a child kidnapping trade and that some five hundred children alone had been kidnapped and sent away.[67] When Sivitor's parents tried to get the boy back, Wilmore apparently said he would do it if they paid for his return passage.[68]

Wilmore's defense focused on the fact "that the child was very willing to go with him," that the boy cried when asked about going home, and that Wilmore had "done a very good act of charity, having bound [the boy] to a carpenter [in Jamaica], and so provided for him better than the parents could."[69]

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[59] SMITH, *supra* note 23, at 71–72.

[60] *Id.* at 72.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 73; Coldrey, *supra* note 23, at 43; Souden, *supra* note 55, at 26.

[64] SMITH, *supra* note 23, at 78.

[65] *Id.* at 79; James Horn, *Servant Emmigration to the Chesapeake in the Seventeenth Century*, *in* THE CHESAPEAKE IN THE SEVENTEENTH CENTURY: ESSAYS ANGLO-AMERICAN SOCIETY 51, 55 n.17 (Thad W. Tate & David Ammerman eds., 1979).

[66] COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 1347–49 (London, R. Bagshaw 1810) [hereinafter COBBETT'S COMPLETE COLLECTION]; *see also* LAW COMMISSION, *supra* note 51, ¶ 2.6; SMITH, *supra* note 23, at 74–75 (spelling the boy's name "Civiter"). Wilmore allegedly committed the kidnapping in 1679–80. After Wilmore served on a grand jury in 1680 that defied Charles II and indicted the Duke of York and in 1681 refused to indict Stephen College, Wilmore found himself charged with high treason and imprisoned for fifteen weeks in the Tower of London until he paid the £9000 bail. SMITH, *supra* note 23, at 75.

[67] COBBETT'S COMPLETE COLLECTION, *supra* note 66, at 1349.

[68] *Id.*

[69] *Id.*

Lord Chief Justice Pemberton was outraged.[70] He disparaged "the horrid practice of kidnapping children, and left the matter very plain to the jury" such that the jury, without ever leaving the courtroom, rendered a guilty verdict, for which Pemberton openly praised them.[71] Pemberton had led a "savage campaign against kidnappers," by October that same year, in part because the "abuse was rampant," and several other people—mostly "faithful and indispensable adjuncts" among the country's "most respected merchants"—had been prosecuted, fined and committed.[72] By January 1683, Richard Sivitor was returned home.[73] At the same time, the court also found a violation for "secreting another," when Lord Grey seduced a daughter of Lord Berkley and detained her in secret in his house.[74]

But even Pemberton's judicial campaign did not stop people from kidnapping indentures, which were difficult to detect and to enforce and was a greatly overstated problem, at least as to white children.[75] Black or Native slaves were forcibly taken by the millions, both to and from America, with no reaction in the common law courts.[76] Between 1675 and 1700 alone, British ships took over 272,000 slaves,

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[70] *Id.*

[71] *Id.* Wilmore was to be taken as security to ensure the child's return, but he hid and successfully fled to Holland. SMITH, *supra* note 23, at 76.

[72] *See* Designy's Case (1683) 83 Eng. Rep. 247, 247–48; 2 Show. 221 (Designy was a merchant who took a boy from the Merchant-Taylors School to Jamaica and was imprisoned until he could pay the fine); R v. Baily (1724) 90 Eng. Rep. 312, 312; Comb 10; The King & Wilmore (1682) 90 Eng. Rep. 23, 23; Skin 47; COBBETT'S COMPLETE COLLECTION, *supra* note 66, at 1349; SMITH, *supra* note 23, at 74–77 ("Kidnapping nevertheless continued. Cases in the Middlesex court were as frequent as ever, and the series of petitions for individual redress kept on growing."); Napier, *supra* note 22, at 195; *see also* R v. Swimmer (1753) 96 Eng. Rep. 818, 898; Say. 103. In *Swimmer*, the defendant, a parish officer "had bound [and sent] three poor children to serve as apprentices in foreign parts." 96 Eng. Rep. at 898. The court was inclined to "make the rule absolute; the offence being deemed kidnapping," but discharged the case on the defendant's promise "to have the children back by a certain time." *Id.* It appears most prosecutions were related to three types of kidnapping: shady relatives who conspired to send youthful heirs away, commercial kidnapping rackets, or taking another's servant and selling him or her. Coldrey, *supra* note 23, at 42.

[73] COBBETT'S COMPLETE COLLECTION, *supra* note 66, at 1350.

[74] The King against Lord Grey (1683) 89 Eng. Rep. 900, 900; 2 Show. 218; LAW COMMISSION, *supra* note 51, ¶ 2.7.

[75] SMITH, *supra* note 23, at 79–84; Souden, *supra* note 55, at 38 ("[Y]oung emigrants . . . were fundamentally part of the general degree of extra-local mobility within pre-industrial England: they were not the rogues, the whores and the vagabonds that the prevailing mythology might still lead us to believe.").

[76] WENDY WARREN, NEW ENGLAND BOUND: SLAVERY AND COLONIZATION IN EARLY AMERICA 91–92 (2016) (noting that the sale of a Native American man was *ordered* by the local justice system); PETER H. WOOD, STRANGE NEW LAND: AFRICANS IN COLONIAL AMERICA 36 (2003) ("All told, well over twelve million people endured this brutal traffic to the New World, and several million more perished during the so-called Middle Passage.").

making that trade "the linchpin of English overseas activity."[77] The outrage over the relatively few involuntary white indentures paled in comparison to the non-reaction to black slaves.[78] Pemberton and others must not have thought that the two types of kidnapping were equal. As the Barbados assembly stated in 1661, it denounced child indentured kidnappings but clarified its condemnation applied only to "Children of the *English* Nation."[79]

Kidnapping had now entered the common law.[80] In 1755, *Johnson's Dictionary* defined kidnap as "to steal children; to steal human beings" and Blackstone defined it as "the forcible abduction or stealing away of man, woman, or child from their own country, and selling them into another."[81] Because courts mostly restricted kidnapping to the forcible taking of white children overseas, it would "enter[ ] a long period of legal oblivion."[82]

B. Across the Pond: Kidnapping at American Common Law

Across the Atlantic, in American common law, the most highly publicized kidnappings involved white people who claimed to have been taken captives by natives.[83] One notable account came from Peter Williamson, who insisted he was kidnapped in Britain, sold on the indenture market in America, and was eventually abducted by Indians in 1754.[84] They were a kind of "sophisticated, romanticized mythology,"

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[77] L.H. ROPER, ADVANCING EMPIRE: ENGLISH INTERESTS AND OVERSEAS EXPANSION, 1613–1688, at 220 (2017).

[78] *See, e.g.*, *id.* (describing the volume at the slave trade).

[79] WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812, at 86 (2d ed. 2012).

[80] In 1803, Sir Edward East, citing Lord Grey's case, fully recognized kidnapping as a separate offense as a form of false imprisonment. "The most aggravated species of false imprisonment is the stealing and carrying away, or secreting of any person, sometimes called kidnapping, which is an offence at common law, punishable by fine, imprisonment, and pillory." 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 429–30 (London, A. Strahon 1803). East cited examples of people who were taken out of their counties and often held for "great ransoms," observing that the offenses usually required transportation out of the county, to foreign countries, or imprisoning people against their will, making no mention of black slavery. *Id.* at 430–32.

[81] BLACKSTONE, *supra* note 48, at *219; 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE, 1150 (Arno Press 1979) (1755) ("These people lye in wait for our children, and may be considered as a kind of *kidnappers* within the law." (quoting the *Spectator*)).

[82] *Cf.* LAW COMMISSION, *supra* note 51, ¶ 2.7 (noting the definition at kidnapping remained based on three legal cases involving white children); Napier, *supra* note 22, at 195.

[83] *See* FASS, *supra* note 22, at 14.

[84] TIMOTHY J. SHANNON, INDIAN CAPTIVE, INDIAN KING: PETER WILLIAMSON IN AMERICA AND BRITAIN 13–14 (2018); PETER WILLIAMSON, FRENCH AND INDIAN CRUELTY: EXEMPLIFIED IN THE LIFE AND VARIOUS VICISSITUDES OF FORTUNE, OF PETER WILLIAMSON A DISBANDED SOLDIER 3, 5–7, 11, 13 (York, J. Jackson 2d ed. 1758).

as the historian Richard Slotkin has said, based on accounts like Williamson's or Mary Rowlandson's and more than seven hundred to follow.[85] The narratives were massively successful.[86] James Riley's account of his capture by North African "wandering Arabs" went through at least twenty-eight editions and sold over a million copies.[87] John Williams's *Redeemed Captive, Returning to Zion* (1707) sold over one hundred thousand copies through its twentieth edition in 1918.[88]

These accounts depicted people taken from white civilization to a "black wilderness" and served to establish white-Euro identity, social hierarchies, and "Anglo-Christian self-righteousness" at a time where Euro-Americans struggled with their place in a new and foreign land.[89] The narratives "define[d] non-Western peoples as by nature

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[85] Kathryn Zabelle Derounian, *The Publication, Promotion, and Distribution of Mary Rowlandson's Indian Captivity Narrative in the Seventeenth Century*, 23 EARLY AM. LITERATURE 239, 239 (1988); David T. Haberly, *Women and Indians:* The Last of the Mohicans *and the Captivity Tradition*, 28 AM. Q. 431, 431 (1976); Nabil Matar, *Introduction* to DANIEL J. VITKUS, PIRACY, SLAVERY, AND REDEMPTION: BARBARY CAPTIVITY NARRATIVES FROM EARLY MODERN ENGLAND 1, 37 (2001); RICHARD SLOTKIN, REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER, 1600–1860, at 25 (1974); Tiffany Potter, *Writing Indigenous Femininity: Mary Rowlandson's Narrative of Captivity*, 36 EIGHTEENTH-CENTURY STUD. 153–54 (2003) (noting that Rowlandson saw "herself as superior to any woman of difference" and "the naturalness of Puritan cultural dominance in the New World"); Michael Sturma, *Aliens and Indians: A Comparison of Abduction and Captivity Narratives*, 36 J. POPULAR CULTURE 318, 318 (2002); *see* FASS, *supra* note 22, at 14.

[86] Haberly, *supra* note 85, at 431.

[87] *See generally* JAMES RILEY, AN AUTHENTIC NARRATIVE OF THE LOSS OF THE AMERICAN BRIG COMMERCE, WRECKED ON THE WESTERN COAST OF AFRICA, IN THE MONTH OF AUGUST, 1815, WITH AN ACCOUNT OF THE SUFFERINGS OF THE SURVIVING OFFICERS AND CREW, WHO WERE ENSLAVED BY THE WANDERING ARABS, ON THE AFRICAN DESART, OR ZAHAHRAH; AND OBSERVATIONS HISTORICAL, GEOGRAPHICAL, & C. MADE DURING THE TRAVELS OF THE AUTHOR, WHILE A SLAVE TO THE ARABS, AND IN THE EMPIRE OF MOROCCO (Hartford, S. Andras & Son 1846); Paul Baepler, *The Barbary Captivity Narrative in American Culture*, 39 EARLY AM. LITERATURE 217, 217 (2004).

[88] JUNE NAMIAS, WHITE CAPTIVES: GENDER AND ETHNICITY ON THE AMERICAN FRONTIER 9 (1993).

[89] PAUL BAEPLER, WHITE SLAVES, AFRICAN MASTERS: AN ANTHOLOGY OF AMERICAN BARBARY CAPTIVITY NARRATIVES 13 (1999); Matar, *supra* note 85, at 37; *see* Robert J. Denn, *Captivity Narratives of the American Revolution*, 2 J. AM. CULTURE 575, 575 (1980) ("[T]he Indian was the child of Satan, and he was triumphed over, not by the captive, but by the Lord."); David L. Minter, *By Dens of Lions: Notes on Stylization in Early Puritan Captivity Narratives*, 45 AM. LITERATURE 335, 335 (1973) (stating narratives were "instruments of propaganda against Indian 'devils'"). A white person's captivity "was transformed into an agonistic drama of colonial struggle . . . with an opposition between the captive as isolated Western individualist and the captors as representatives of an amorphous, alien, all-encompassing horde." JOE SNADER, CAUGHT BETWEEN WORLDS: BRITISH CAPTIVITY NARRATIVES IN FACT AND FICTION 7 (2000). Teresa Toulouse argues that female captivity narratives help understand shifting and changing conceptions of male authority. *See generally* TERESA A. TOULOUSE, THE CAPTIVE'S POSITION: FEMALE NARRATIVE, MALE IDENTITY, AND ROYAL AUTHORITY IN COLONIAL NEW ENGLAND (2007).

given to despotism and slavery, while the captive's struggle to escape often defined an inborn liberty within the British people."[90] The stories reflected a deep irony: whites derided kidnappings from indigenous or "barbaric" people, while at the same time they turned a blind eye to the massive enslavement and forcible taking of blacks for slave labor.[91]

Kidnapping began to become something different in America. In 1837, a New Hampshire court observed that English law provided for a common law offense of kidnapping, but the court found that neither the use of force or violence, nor transportation to a foreign country were necessary elements of the offense.[92] But even though courts broadened the offense somewhat, it was not enforced equally.[93] The most common kidnappings, which involved whites taking free blacks—including children—from Northern border states and selling them in the South, were not as strongly enforced.[94] Even though kidnapping clearly prohibited the sale of free

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[90] SNADER, *supra* note 89, at 5; *see* Tara Fitzpatrick, *The Figure of Captivity: The Cultural Work of the Puritan Captivity Narrative*, 3 AM. LITERARY HIST. 1, 3 (1991) ("[T]he logic of the captivity figure helped to transform the Puritan colonists' image of the American wilderness from a savage wasteland haunted by demonic adversaries to the 'fresh, green breast' from which European settlers might draw their virtuous sustenance, a virtue so powerful as to restore the virginity of a continent now rid—figuratively and, increasingly, literally—of its native inhabitants.").

[91] BAEPLER, *supra* note 89, at 231.

[92] State v. Rollins, 8 N.H. 550, 550 (1837). To summarize the sentiments of the Supreme Court of Texas from 1848, common law courts saw kidnapping as an aggravated kind of false imprisonment which would require an assault and the carrying away of another into another country against his will. *See* Click v. State, 3 Tex. 282, 282 (1848).

[93] WILSON, *supra* note 22, at 9–18.

[94] *Id.*; WITNESS FOR FREEDOM: AFRICAN AMERICAN VOICES ON RACE, SLAVERY, AND EMANCIPATION 7 (C. Peter Ripley et al. eds., 1993) [hereinafter WITNESS FOR FREEDOM]. It is difficult to quantify the number of people kidnapped, given the sheer lack of documentation and a kidnapped black person's inability to take a case to the courts. As Ulrich Bonnell Phillips put it in 1918, "Kidnappings without pretense of legal claim were done so furtively that they seldom attained record unless the victims had recourse to the courts; and this was made rare by the helplessness of childhood in some cases and in others by the fear of lashes." ULRICH BONNELL PHILLIPS, AMERICAN NEGRO SLAVERY: A SURVEY OF THE SUPPLY, EMPLOYMENT AND CONTROL OF NEGRO LABOR AS DETERMINED BY THE PLANTATION RÉGIME 443 (1918).

> [I]n the majority of cases the poor ignorant blacks, by fraud and deceit, were inveigled into a trip south on a flat boat, or other errand, and at some pre-arranged point on the river they would be turned over to confederates, forcibly and rapidly taken to the interior and there sold into slavery . . . . Another mode was to seize a black and forcibly convey him to a rendezvous either on the Ohio or Mississippi, but not out of the State, where a confederate would appear and carry him beyond.

ALEXANDER DAVIDSON & BERNARD STUVÉ, A COMPLETE HISTORY OF ILLINOIS FROM 1673 TO 1873; EMBRACING THE PHYSICAL FEATURES OF THE COUNTRY; ITS EARLY EXPLORATIONS; ABORIGINAL INHABITANTS; FRENCH AND BRITISH OCCUPATION; CONQUEST BY VIRGINIA;

blacks, once they were taken, blacks made little headway, finding that the "system actually facilitated kidnapping" while most white Americans turned an apathetic (and even supportive) eye.[95] "[T]he parents of enslaved children had few legal rights [available] to them, and whatever rights they did have were seldom if ever enforced."[96] Whites "had the upper hand because they had the law on their side" and blacks had few options.[97]

Blacks and other abolitionists called the practice what it was—kidnapping—and protested the nation's ambivalence to a massive problem.[98] The anti-slave publication, *Liberator*, proclaimed in 1833, "We hold it to be a self-evident truth, that every slave in the United States has been kidnapped."[99] Frederick Douglass said he knew many who would "say that their fathers and mothers were stolen from Africa—forced from their homes, and compelled to serve as slaves."[100] David Walker told the Massachusetts General Colored Association in 1828 that he was sad to see "a gang of villains, who, for the paltry sum of fifty or a hundred dollars, will kidnap and sell into perpetual slavery, their fellow creatures!"[101] "Will they not take our wives and our little ones, more particularly our *little ones*," he pled to the crowd and asked God to "open our eyes on these children of the devil and enemies of all good!"[102]

TERRITORIAL CONDITION AND THE SUBSEQUENT CIVIL, MILITARY AND POLITICAL EVENTS OF THE STATE 319 (Springfield, Illinois Journal Co. 1874).

[95] JORDAN, *supra* note 79, at 404 (discussing that lawmakers added penalties for kidnapping free blacks); WILSON, *supra* note 22, at 2.

[96] ROTHMAN, *supra* note 53, at 6.

[97] *Id.*

[98] "[P]erhaps not a day passes," Thomas Cope wrote in his journal in 1803, where "free blacks are stolen by force or decoyed by the most wicked artifices from the Northern & Middle States & sold for slaves in the Southern." THOMAS P. COPE, PHILADELPHIA MERCHANT: THE DIARY OF THOMAS P. COPE, 1800–1851, at 137 (Eliza Cope Harrison ed., 1978); WILSON, *supra* note 22, at 8. As Pennsylvania abolitionist John Parrish put it in 1806, "We permit six hundred persons to be kidnapped in six months alone because people want to get rid of the free negroes." CAROLE C. MARKS, MOSES AND THE MONSTER AND MISS ANNE 29 (2009); JOHN PARRISH, REMARKS ON THE SLAVERY OF BLACK PEOPLE 9–11 (Philadelphia, Kimber, Corald, & Co. 1806); WILSON, *supra* note 22, at 7.

[99] The Firebrand–Number II, LIBERATOR, April 27, 1833, at 1; *see also* Impudence, LIBERATOR, Feb. 26, 1831, at 34 ("It was thought kidnapping was not practised here. To the sorrow of many of our citizens, the contrary is the fact; and not a season of sickness passes, but that twenty or thirty slaves are carried off by steam boats, up the country, and by vessels to the north. We do not charge this upon masters of boats or vessels, for we cannot believe they would act in this manner, but our opinion leads us to suppose that even they, are made the dupes of a set of canting scoundrels, who under the cloak of humanity rob their fellow creatures of their all."); *see also* WILSON, *supra* note 22, at 5–8.

[100] FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 122–23 (Humanity Books 2002) (1855).

[101] David Walker, *An Address to the Massachusetts General Colored Association (Dec. 19, 1828)*, *reprinted in* WITNESS FOR FREEDOM, *supra* note 94, at 38, 41.

[102] *Id.*

While many blacks attempted to win back their freedom in the courts, they found few successes.[103] A black kidnapping victim had the almost impossible task of convincing the court that she was free.[104] The legal hurdles were large: courts would not let blacks testify or they would require the testimony of a white witness to prove a person's free status.[105]

The courts did, though, recognize that a free person could be kidnapped.[106] In 1836, the circuit court in the District of Columbia accepted kidnapping as an offense much broader than transporting a child to a new country.[107] The court noted an increased activity of persons who, by the court's terms, would kidnap free black people to sell as slaves in the South.[108] That same year, the Supreme Court of Indiana upheld a kidnapping indictment when the defendant took a black woman, Susanna, from Indiana to Kentucky, and in 1841, the Supreme Judicial Court of Massachusetts discussed a kidnapping case where the defendants stole a black boy from Massachusetts and took him to Virginia where he tried to sell the boy as a slave.[109]

The courts sometimes took the cases seriously. Captain John Miller hired a free black, Abram Luomony, to sail from Philadelphia to help him collect wood.[110] As the boat sailed under a bridge, an accomplice jumped on it, where he and Miller beat

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[103] *See* WILSON, *supra* note 22, at 7.

[104] [I]t was much safer to kidnap a free or formerly enslaved person rather than someone who was currently a slave. A free person had a harder time proving they were free than did a person who was known as a slave. Moreover, a local slave owner would report their missing slave as a runaway and would be on the lookout; a free person would be less likely to be missed by neighbors.

Elisabeth McMahon, *Trafficking and Reenslavement: The Social Vulnerability of Women and Children in Nineteenth-Century East Africa*, *in* TRAFFICKING IN SLAVERY'S WAKE: LAW AND THE EXPERIENCE OF WOMEN AND CHILDREN (Benjamin N. Lawrance & Richard L. Roberts eds., 2012).

[105] *See, e.g.*, State v. Jeans, 4 Del. (4 Harr.) 570, 570–72 (1847) (finding kidnapping required evidence beyond the black kidnapped person's testimony); *see also* State v. Harten, 4 Del. (4 Harr.) 582, 582 (1847); State v. Griffin, 3 Del. (3 Harr.) 560, 560 (1842); WILSON, *supra* note 22, at 7, 49. As Solomon Northup wrote in his 1853 memoir, "[H]undreds of free citizens have been kidnapped and sold into slavery, and are at this moment wearing out their lives on plantations in Texas and Louisiana." SOLOMON NORTHUP, TWELVE YEARS A SLAVE: NARRATIVE OF SOLOMON NORTHUP, A CITIZEN OF NEW-YORK, KIDNAPPED IN WASHINGTON CITY IN 1841, AND RESCUED IN 1853, FROM A COTTON PLANTATION NEAR THE RED RIVER, IN LOUISIANA 321 (Auburn, Derby & Miller 1855).

[106] United States v. Henning, (*Henning II*), 26 F.Cas. 267, 268, 4 D.C. (4 Cranch) 645 (D.C. Cir. 1836) (No. 15,349).

[107] United States v. Henning (*Henning I*), 26 F.Cas. 265, 265, 4 D.C. (4 Cranch) 608 (D.C. Cir. 1835) (No. 15,348).

[108] *Henning II*, 26 F. Cas. at 647, 650.

[109] State v. M'Roberts, 4 Blackf. 178, 178 (Ind. 1836); Commonwealth v. Turner, 44 Mass. (3 Met.) 19, 19–21 (1841).

[110] WILSON, *supra* note 22, at 22.

Luomony, robbed him of five dollars and a knife, tied him up, and sold him.[111] Luomony managed to escape three days later and Delaware abolitionists helped him return home.[112] The legal system took action.[113] Philadelphia's mayor issued a warrant and Miller was indicted and convicted of kidnapping.[114] The court sentenced him to one year of hard labor and a one hundred pound fine.[115]

To obtain redress, blacks had to have the means to petition officials to act, a large barrier, especially for one who had been kidnapped. One blacksmith named Charles Covey wrote the governor of Georgia in 1853 that he had been taken and carried to Missouri, whipped "untill my Back was Raw" and sold for fourteen hundred dollars.[116] Covey insisted the warrant was falsified and forged and asked the governor to look for his papers in the county clerk, Bozal Stuler's office or ask "most any man" in Milledgeville, Georgia if he were free.[117] Covey pled that the governor "do any thing for me in the way of Getting me my freedom Back a Gain" and not tell his "Preseant mastear of these things."[118]

Their cases required not only petitioning, but persistence. Sixty-five-year-old Eulalie Oliveau, who had lived as a free black for forty-five years along with her seven children and ten grandchildren, filed a petition in a New Orleans district court complaining they had been "forcibly taken from their homes in said Parish at night by certain armed persons" and sold into slavery.[119] The court dismissed the family's claim one month later, on the defendants' assertions.[120] But Oliveau did not give up.[121] She was one of the few who achieved success when she won a suit for her family's freedom, but only after the case languished for three years in the Louisiana courts.[122]

Legislative and legal efforts were largely symbolic. In 1866, Congress proposed legislation to prevent the kidnapping of free people and asked for a report from President Johnson "in regard to the *alleged* kidnapping of [a] colored person in the

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111 *Id.*
112 *Id.*
113 *Id.*
114 *Id.*
115 *Id.*
116 PHILLIPS, *supra* note 94, at 442.
117 *Id.*
118 *Id.*
119 ROTHMAN, *supra* note 53, at 28. The children's names were Phrosine, Marie, Madeline, Claire, Catherine, Henri, and Desiree. The grandchildren were four from Marie (Georgina, Madeline, Zelina, Theogene), four from Madeline (Polite, Julie, Adelon, Gudora) and two from Phrosine (George and Eleonore). Eulalie v. Long, 9 La. Ann. 9, 9 (1854); *see also* Eulalie v. Long, 11 La. Ann. 463 (1856). The Liberator published an account of the "extensive kidnapping" referring to charges that the two white men had previously "sold five kidnapped colored persons in this city for Texas." *Extensive Kidnapping*, THE LIBERATOR, March 25, 1853, at 3.
120 *Eulalie*, 9 La. Ann. at 11.
121 ROTHMAN, *supra* note 53, at 29.
122 *Id.*

southern States."[123] Johnson provided a report ten days later that grossly minimized what it called "the supposed kidnapping of colored persons," referring only to one specific case.[124] The press "barely noticed" the report and Congress passed the law, which "had no practical effect and was largely a symbolic antislavery gesture."[125]

Blacks soon felt they had little choice to stem the widespread tide of slave-trade kidnappings and began advocating stronger forms of resistance than those adopted by their white abolitionist allies.[126] They formed vigilance committees that offered information about kidnappers, helped captives escape, and provided food, clothing, shelter, and legal services.[127] Many blacks felt this was not enough.[128]

The "moral weapons" had no use, one black leader said, "in defense against a kidnapper or a midnight incendiary with a lighted torch in his hand[.]"[129] When George Jones, a free black man, was taken by "several notorious kidnappers" in New York and the court instantly pronounced him an escaped slave on the kinappers' word alone, David Ruggles, leader of the New York Committee of Vigilance, complained that they "have no protection in law—because the legislators withhold justice."[130] Blacks had to take matters into their own hands. "[W]e must look to our own safety and protection from kidnappers!," he implored, "remembering that 'self-defence is the first law of nature.'"[131] Frederick Douglass echoed the sentiments of many that the time for action was now:

> *A good revolver, a steady hand, and a determination to shoot down any man attempting to kidnap.* Let every colored man

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[123] *Id.* at 181–82 (emphasis added).

[124] *Id.* at 182–83. The case, and the enormous efforts Rose Herera made over three years to recover her kidnapped children, are detailed in the Rothman text.

[125] *Id.*

[126] WITNESS FOR FREEDOM, *supra* note 94, at 15; *see* ROTHMAN, *supra* note 53, at 161–66. "By the 1850s, however, violence seemed a more reasonable strategy" given that white masters could "hunt for slaves in the North" and even "kidnap and enslave free blacks." KORITHA MITCHELL, LIVING WITH LYNCHING: AFRICAN AMERICAN LYNCHING PLAYS, PERFORMANCE, AND CITIZENSHIP, 1890–1930, at 66 (2011). "At this point, new advocates for physical force emerged to demand military training for African Americans. By 1861, more than 8,500 men had joined black militia groups, and they were more than willing to fight when the Civil War presented the opportunity." *Id.* "[B]lacks, free and fugitive slave, fell under the scrutiny of whites in antebellum America. Even when blacks and whites ostensibly worked together in the same abolitionist cause, whites always had the upper hand." Earl F. Mulderink, *"The Whole Town Is Ringing with It": Slave Kidnapping Charges Against Nathan Johnson of New Bedford, Massachusetts, 1839*, 61 NEW ENG. Q. 341, 355 (1988).

[127] WITNESS FOR FREEDOM, *supra* note 94, at 15; Julie Winch, *Philadelphia and the Other Underground Railroad*, 111 PA. MAG. HIST. & BIOGRAPHY 3 (1987).

[128] *See* WITNESS FOR FREEDOM, *supra* note 94, at 15–16.

[129] *Id.* at 162.

[130] David Ruggles, *Kidnapping in the City of New York*, LIBERATOR, Aug. 6, 1836, *reprinted in* WITNESS FOR FREEDOM, *supra* note 94, at 135–37.

[131] *Id.* at 137.

> make up his mind to this, and live by it, and if needs be, die by it. This will put an end to kidnapping and to slaveholding, too.[132]

Even though blacks actively fought their kidnappings in and out of American courts throughout the nineteenth century, it was not until 1866 that the *New York Times* reported its first official American kidnapping, this time of a white child, and the paper averaged reporting a single case a year through the 1860s.[133] Through the 1870s, the number of reported kidnappings increased sharply—to as much as a dozen a year.[134]

The increased publicity given to the kidnapping of white children soon became a "thrill as mass entertainment" where media often sensationalized its racialized aspects.[135] In 1870, for example, after the disappearance of a white Irish girl, Mollie Digby, the state of Louisiana charged two black women with her kidnapping, and massive publicity—indeed the "first kidnapping trial in American history to become sensationalized national news"—created a moral panic that Digby had been used for voodoo sacrifice.[136] Prosecutors used the two defendants "as examples of a black population that was out of control," while newspapers fueled whites' fears that "black criminals had become emboldened and their crimes would go unpunished."[137]

The taking of white children roused lawmakers, particularly the 1874 ransom kidnapping of four-year-old Charley Ross in Philadelphia.[138] Kidnappers lured Charley and his six-year-old brother Walter, who were playing in front of their Germantown mansion, with promises of candy or sweets.[139] Though they returned Walter a few hours later, the kidnappers held Charley hostage for six months, sent at least twenty-three ransom letters to Charley's father Christian, and eventually demanded the elder Ross drop $20,000 from a moving train upon their signal, promising to return Charley within ten hours.[140] Christian Ross made the trip, but never received a signal.[141]

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[132] *The True Remedy for the Fugitive Slave Bill*, FREDERICK DOUGLASS' PAPER, June 9, 1854, *reprinted in* WITNESS FOR FREEDOM, *supra* note 94, at 184.

[133] ERNEST KAHLAR ALIX, RANSOM KIDNAPPING IN AMERICA, 1874–1974: THE CREATION OF A CAPITAL CRIME 3 (1978).

[134] *Id.*

[135] CLAIRE BOND POTTER, WAR ON CRIME: BANDITS, G-MEN, AND THE POLITICS OF MASS CULTURE 110–11 (1998) ("The history of [efforts to pass local antikidnapping statutes], as well as the strong resemblance of kidnapping dramas to early American captivity narratives, underlines the racial subtext of this crime.").

[136] MICHAEL A. ROSS, THE GREAT NEW ORLEANS KIDNAPPING CASE: RACE, LAW, AND JUSTICE IN THE RECONSTRUCTION ERA 4, 211 (2015).

[137] *Id.* at 109, 209.

[138] Thomas Everly, *Searching for Charley Ross*, 67 PA. HIST. 376, 376 (2000); *see also* ALIX, *supra* note 133, at 4. Michael Ross argues that the similarities between the Digby kidnapping and the Charley Ross case "suggest the possibility that the Ross case was a 'copycat' crime." ROSS, *supra* note 136, at 211.

[139] Everly, *supra* note 138, at 378, 381.

[140] *Id.* at 378.

[141] *Id.*

The Ross case consumed the public and was at the time one of the largest manhunts in American history.[142] Sightings poured in from around the nation, from Connecticut, West Virginia, Illinois, and even in Europe.[143] The fervor died down after Joseph Douglass—a petty thief—confessed to the kidnapping, along with his now dead partner, William Mosher, on his deathbed following a failed burglary and a gun battle with police.[144]

The *New York Times* commented, in reference to the Ross case, that kidnapping was "sometimes resorted to in Europe" as "one of the rarest means adopted," but even though "[i]t is extremely unlikely that the child of any reader of this article will be stolen from him," it felt that there was now "evidence" that people would now try to kidnap children from "none but the wealthy" to extort a ransom, apparently oblivious to the cries of black men, women, and children.[145]

The Ross case and other kidnappings of white children created a culture of fear. Charley Ross's father said he was "America's *first* kidnapped child" (a stunning exclusion of thousands of kidnapped black people) and the case left a poignant lesson: children should not take candy from strangers.[146] Now legislators and politicians, and "white people of status themselves" were able to create a sense of "a national community of parents" which created the desire for a public response.[147]

The over-reporting of these offenses created the appearance of a serious problem, and the *Times* changed its tune. "It seems a poor State," the paper said, "that fails to furnish a stray child who answers in every respect the description of Charlie Ross."[148] Six months later, the paper, along with much of the country, sternly demanded tougher kidnapping legislation:

> The abduction of Charlie Ross created some excitement . . . because, perhaps, of the chord of sympathy which was struck in the breast of every parent throughout the land. The excitement too, was kept up by a chain of incidents, real or alleged, which

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[142] *Id.*; s*ee also* ALIX, *supra* note 133, at 6–7; Fisher & McGuire, *supra* note 31 ("[I]n 1874, there occurred in the city of Philadelphia an event which focused the attention of the country and the world upon the satanic atrociousness of this crime, and that was the kidnapping of Charlie Ross.").

[143] ALIX, *supra* note 133, at 6–7; Everly, *supra* note 138, at 378.

[144] Everly, *supra* note 138, at 378–80; *see also* ALIX, *supra* note 133, at 7.

[145] *A New Peril for Children*, N.Y. TIMES, July 14, 1874, at 4.

[146] Everly, *supra* note 138, at 381 (emphasis added). Paula Fass argues that the Ross case set a pattern that others followed in future ransom kidnappings and that it "made clear that the parent-child bond . . . was the most important and resolute of obligations and the most necessary (if vulnerable) source of personal identity." FASS, *supra* note 22, at 52; Everly, *supra* note 138, at 382.

[147] POTTER, *supra* note 135, at 111.

[148] *The Wisconsin Charlie Ross*, N.Y. TIMES, Jan. 4, 1875, at 1.

> occurred with it . . . . Since that event abductions . . . of young children have been frequent . . . .
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> It is time, however, that the people . . . put[ ] a stop to the repetition of crimes of this particular kind. Child-stealing is an offense which should be productive of something more than a little public indignation . . . . [A] severe example should be made of those who indulge in it. If this cannot be done under existing laws, new laws should be enacted for the purpose. Young children cannot be expected to protect themselves against the machinations of bad men and women; but they have a right to all the protection which the law can give . . . . The public cannot afford to treat it with indifference, for it is one of those things about which the exercise of too much patience itself becomes a crime.[149]

Ransom kidnappings of white children continued to occur sporadically throughout the nineteenth and into the twentieth century.[150] The responses were much more acute for the stolen white child. Fifteen-year-old Eddie Cudahy, the son of E.A. Cudahy, a Nebraska millionaire meat packer, was kidnapped in December of 1900.[151] The boy's father paid a $25,000 ransom and insisted that the police not get involved, and his son was returned.[152] Though Cudahy offered a $25,000 reward for the kidnappers' capture, the public demanded more.[153]

The public demanded action.[154] Kidnapping under Nebraska law required transportation out of state and child-stealing required the child to be under the age of ten, neither of which applied in this case.[155] Authorities believed that only a false imprisonment charge could be sustained, but it was only a misdemeanor with a minimal fine and less than a year incarceration.[156] As C.J. Richards wrote the *New York Times*, he learned from the Cudahy case "with some astonishment, that there seems to be no law under which the perpetrators of this dastardly deed could be adequately punished."[157] "There should be a law throughout the United States," Richards insisted,

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[149] *Child-Stealing*, HARRISBURG DAILY TELEGRAPH, June 11, 1875, at 1; *see also* ALIX, *supra* note 133 ("The hundreds of lost children mistakenly thought to be Charles Ross were used by the media and authorities to dramatize the need for sterner measures to curtail the crime of child stealing.").

[150] ALIX, *supra* note 133, at 8–16; Bickel, *supra* note 49, at 1338.

[151] ALIX, *supra* note 133, at 16.

[152] *Id.* at 17.

[153] *Id.* at 17–18; Fisher & McGuire, *supra* note 31, at 650.

[154] *See infra* Section I.B.

[155] ALIX, *supra* note 133, at 17–18.

[156] *Id.* at 18.

[157] C.J. Richards, *Death for Kidnappers*, N.Y. TIMES, Dec. 23, 1900, at 6.

"putting the penalty of capital punishment on the crime of kidnapping," which he felt "will serve to prevent [ ] crime," and give parents the security for their children.[158]

Only a few days later, on December 26, 1900, legislatures in Iowa, Wisconsin, South Dakota, North Dakota, and Wyoming were reported either criminalizing kidnapping or making the existing crime punishable by death.[159] Other state legislatures, including Alabama, Indiana, Oklahoma, Illinois, Missouri, Nebraska, Tennessee, Delaware, and the District of Columbia followed suit in 1901 and 1902, again, directly influenced by the Cudahy case.[160]

No one, however, appeared outraged with the continued kidnapping of black people. In 1901, an Alabama constable took John Davis (along with other black men) before he could make it home from picking cotton to see his sick wife and two children.[161] Ostensibly arresting Davis for obtaining goods under false pretenses, the constable took Davis before a justice of the peace, who summarily found him guilty and sentenced him to pay $75 or to work, "hard labor," for buyers who had "advanced" the fine.[162] Since Davis had no money, he had no choice but to submit for as much as ten years to a forced labor business.[163] His kidnapping went unnoticed until two years later.[164] When a federal grand jury was convened to investigate allegations of slavery in Alabama, Davis's kidnappers suddenly let him go, claiming he was never held involuntarily.[165] Davis testified differently and said they forced him to sign a paper in which he admitted his arrest was proper.[166]

But Davis was a black man. Perhaps the public would be more sympathetic to the taking of a black child. In November 1903, the pastor of a black Baptist church, Rev. L.R. Farmer, wrote the Department of Justice: "[I] [sic] have a little girl that has been kidnapped from me and is now under bondage in Ga."[167] The distraught father wrote, "and [I] cant get her out . . . ."[168] Reverend Farmer had tried everything he could think of: he reached out to local authorities and he tried to serve a writ of habeas corpus on

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158 *Id.*

159 *New Laws on Kidnapping*, N.Y. TIMES, Dec. 26, 1900, at 1.

160 ALIX, *supra* note 133, at 19–20.

161 *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II, at 117–54 (2012) (telling Davis's story throughout the chapter).

162 *Id.* at 126–32.

163 *Id.* at 132, 144. Kidnappers would often concoct a new offense toward the end of the period a person was ordered to work in order to enable perpetual slavery. *See id.* at 137–38, 144. A similar situation happened to Note Turke, who was taken from a public road by Burancas Cosby and a gang of white men, locked in a corncrib, and when he refused to plead guilty to their fabricated charge, was dragged before a justice of the peace and fined $15. *Id.* at 148–51.

164 *Id.* at 182.

165 *Id.*

166 *Id.*

167 *Id.* at 430 n.16

168 *Id.* at 254.

her captors.[169] "[T]his little of mine is begging me to come after," he said, imploring the government to help.[170] He received a terse response: he would have to supply the names of her kidnappers, the place she was held, and witnesses who could prove his claims.[171] The government took no other action.[172]

Again, kidnapping became an outrage when white children were stolen.[173] In 1907, after one four-year-old boy, Horace Marvin, Jr., was taken from his family's Delaware property and never found, the President of the United States stepped in.[174] President Theodore Roosevelt promised the family that "[a]nything that the Government can do to help you will, of course, be done," and soon the Indiana and Alabama legislatures increased their penalties for kidnapping to make them "as severe as possible."[175]

These reactions occurred again and again for white children.[176] After the ransom kidnapping of eight-year-old Willie Whitla and his return after payment of a $10,000 ransom in 1909, the New York legislature passed a bill increasing kidnapping's punishment to fifty years.[177] Commenting on the bill, the Senate chairman said that "[k]idnapping is one of the most serious problems with which we are confronted today. Our present laws, in view of the Whitla and other prominent cases, seem to be insufficient for dealing with that which in all civilized countries is regarded as a most heinous offense."[178] The case also "created much feeling in Congress" leading to federal kidnapping legislation which made it punishable by death.[179]

In the first twenty years of the twentieth century, nineteen states and the District of Columbia had created or modified kidnapping statutes in consequence of rare, though highly publicized kidnappings.[180] As the Supreme Court of Montana reflected on this trend in 1915, it observed that kidnapping "has been much extended by statute" from the English common law.[181]

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169 *Id.*

170 *Id.* at 430 n.16.

171 *Id.* at 254–55.

172 *Id.* at 255.

173 *See* discussion *infra* Section I.B.

174 ALIX, *supra* note 133, at 25.

175 *Id.* at 25–26; POTTER, *supra* note 135, at 111.

176 *See* discussion *infra* Section I.B.

177 ALIX, *supra* note 133, at 27–28.

178 *Penalty Bills Introduced: One Makes Maximum Punishment in New York Life Imprisonment*, N.Y. TIMES, Mar. 25, 1909, at 2; *see* ALIX, *supra* note 133, at 28.

179 *Bill Introduced Providing Death Penalty for Kidnapping*, N.Y. TIMES, Mar. 24, 1909, at 2; *see* ALIX, *supra* note 133, at 28–29.

180 ALIX, *supra* note 133, at 36–37; Nicholas N. Kittrie, *Ransom Kidnapping in America*, 71 J. CRIM. L. & CRIMINOLOGY 654, 655 (1980) (reviewing ALIX, *supra* note 133) ("Despite the periodic outbursts of dramatic cases, the American experience with ransom kidnappings has been numerically small.").

181 *In re McDonald*, 146 P. 942, 943 (Mont. 1915).

Kidnapping changed in America. The offense was expanded and defined by the taking of white children from their social elite parents.[182] The offenses were used to both speak to every white parent's heart (your children, too, could be taken) and to push to expand kidnapping's definition to even the most incidental movements. Even though kidnapping's origins, including its almost complete neglect of an entire race of people, have been long forgotten, the experience is "at the root of our society."[183] From its inception, kidnapping has been used to protect white society, while ignoring the black one. The offense would continue to follow that trend.[184]

C. The Lindbergh Case and Kidnapping's Increasingly Vague Definition

Because whites were so infrequently kidnapped, one 1953 law review observed that "[p]rior to the twentieth century kidnapping was a crime seldom committed."[185] But courts had to face problems from these legislative expansions. For example, in 1965, in *People v. Levy*, when a wealthy couple came home, two men forced them back into their car, took over the vehicle, and made them ride twenty-seven city blocks for twenty minutes while the men stole earrings, rings, and three hundred dollars from them.[186]

The court reversed the kidnapping conviction.[187] "[T]he crime of kidnapping envisages the asportation of a person under restraint and compulsion," the court said, worrying that kidnapping's statutory definition could "overrun several other crimes, notably robbery and rape, and in some circumstances assault, since detention and sometimes confinement, against the will of the victim, frequently accompany these crimes."[188] The court found it unlikely that the legislature intended to make the restraints and asportations incident to other crimes a separate kidnapping offense, observing that "the case now before us is essentially robbery and not kidnapping."[189]

But the legislature had done just that—kidnapping was already an extremely overbroad offense. In *Levy* alone, the court upheld kidnapping convictions in one case where the victim was forced to drive a mile before he pulled into a police booth and in another where the incident lasted only two minutes.[190] This prompted one

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[182] *See* discussion *infra* Section I.C.

[183] FASS, *supra* note 22, at 11.

[184] *See* discussion *infra* Section I.C.

[185] *A Rationale of the Law of Kidnapping*, *supra* note 20, at 540. Professor R. F. V. Heuston argued in 1976 that kidnapping was not even an offense under English law. R.F.V. Heuston, *The English Law of Torts: A Comparative Introduction*, 35 CAMBRIDGE L. J. 341, 342 (1976) (reviewing REGINALD WALTER DIAS & BASIL MARKESINIS, THE ENGLISH LAW OF TORTS: A COMPARATIVE INTRODUCTION (1976)).

[186] 204 N.E.2d 842, 843 (N.Y. 1965).

[187] *Id.* at 845.

[188] *Id.*

[189] *Id.* at 844.

[190] *Id.* (affirming the holdings in People v. Hope, 177 N.E. 402 (N.Y. 1931) and People

commentator at the time to observe that "whether there was a kidnapping cannot be determined from time and distance alone."[191]

Levy was decades late to the game. "[T]he trend toward broadening the crime" had grown so much that *Levy* was now an outlier: a simple detention or a slight movement, without more, supported a kidnapping in most jurisdictions.[192] Sporadic kidnappings of whites occurred through the 1930s, such as the highly publicized trial of Richard Loeb and Nathan Leopold Jr. and gangster-related kidnappings, and renewed calls for stronger legislation came before a somewhat reluctant House Committee on February 26, 1932.[193] But only five days later on March 2, 1932, Charles Lindbergh's baby was kidnapped—a "cultural and political turning point"—prompting state and federal legislatures and courts to overreact and transform kidnapping into the vague law that it is today.[194] The case unleashed an enormous

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v. Small, 10 N.E.2d 546 (N.Y. 1937)); *id.* at 845 (Burke, J. dissenting); *see also* Frank J. Parker, *Aspects of Merger in the Law of Kidnapping*, 55 CORNELL L. REV. 527, 530 (1970).

[191] Parker, *supra* note 190, at 530.

[192] *A Rationale of the Law of Kidnapping*, *supra* note 20, at 541, 545; *see* Parker, *supra* note 190, at 530 ("Since in 1965 a majority of states would have held the events in *Levy* to constitute kidnapping, *Levy* is a clear departure from the traditional notion of the crime."); *see also* Comment, *Room-to-Room Movement: A Risk Rationale for Aggravated Kidnaping*, 11 STAN. L. REV. 554, 555–56 (1959) (demanding a "more explicit legislative formulation" of kidnapping since the statutory language "would encompass virtually all robberies [and extortions], since it is difficult to envisage a robbery [or extortion] without some movement or physical displacement"). *But see Kidnap*, 5 OXFORD ENGLISH DICTIONARY 691 (1933) (defining kidnapping as "steal[ing] or carry[ing] off (children or others) in order to provide servants or labourers for the American plantations"). One scholar identified at least fifteen types of kidnappings: white slavery, hostage, child stealing, domestic relations kidnapping, kidnapping for rape or sexual assault, kidnapping for murder or nonsexual assault, kidnapping for robbery, romantic kidnapping, ransom skyjacking, ransom kidnapping hoax, plot or abortive ransom kidnapping, ransom threat for extortion, classic ransom kidnapping, miscellaneous kidnappings. Collier v. Vaccaro, 51 F.2d 17, 19 (4th Cir. 1931) ("The gist of [kidnapping] is the forcible carrying out of the state . . . ."); State v. Rollins, 8 N.H. 550, 567 (1837) ("It is even questionable whether it is necessary that a transportation to another state or country should be in contemplation . . . ."); ALIX, *supra* note 133, at xvi–xvii; Janet Olsen, Case Note, *From Blackstone to* Innis*: A Judicial Search for a Definition of Kidnapping*, 16 SUFFOLK U. L. REV. 367, 368 & n.11 (1982).

[193] ALIX, *supra* note 133, at 38–67; POTTER, *supra* note 135, at 111; Bickel, *supra* note 49, at 1338–39; Fisher & McGuire, *supra* note 31, at 651.

[194] POTTER, *supra* note 135, at 111–12; Bickel, *supra* note 49, at 1339; Fisher & McGuire, *supra* note 31, at 653–54; Horace L. Bomar, Note, *The Lindbergh Law*, 1 L. CONTEMP. PROBS. 435, 435–36 (1934). Many writers contend "the creation of capital ransom laws in American jurisdictions was primarily, if not exclusively, the result of outraged emotions provoked by the Lindbergh case of March 1932." ALIX, *supra* note 133, at xxv, 67. As one commentator put it, "Had not Charles A. Lindbergh flown the Atlantic . . . a federal kidnaping statute might not yet have been enacted." Robert C. Finley, *The Lindbergh Law*, 28 GEO. L. J. 908, 908 (1940).

> It was the Lindbergh kidnapping that awakened the American people to the fact that they were face to face with a species of crime so revolting

public outcry, in part because of the fame of the boy's father and grandfather, who were paragons of the white race.[195] The public reacted harshly to the kidnapping of the innocent child.[196]

Throughout the country, people demanded action, such as imposing the death penalty or creating harsher legislation, leading legislatures around the nation to convene emergency sessions to dramatically toughen their kidnapping statutes.[197] President Herbert Hoover ordered the largest manhunt in American history, utilizing the Federal Bureau of Investigation, U.S. Post Office, all 563 agents of the U.S. Prohibition Bureau, the Coast Guard, Customs and Immigration Services, and the Washington, D.C. police force.[198] Even Will Rogers weighed in, recalling his visit with the baby Lindbergh only two weeks earlier, telling the *L.A. Times* with clear racial undertones, "Why don't lynching parties widen their scope and take in kidnapings [sic]?"[199]

Congress responded to the outcry.[200] In introducing a bill to make kidnapping a capital offense, Representative John Cochran of Missouri read part of a radio address he had given on the Columbia Broadcasting System on March 3, 1932.[201] Cochran insisted they were "confronted with a situation that the State police are unable to control."[202] "Would you," he asked mothers in particular, "want brave officers stopped at State lines because of red tape . . . ? Do you want ferreted out that lowest of all criminals regardless in what State he or his foul companions seek refuge?"[203] "Never before in the history of our country," he insisted, "have the people been so aroused as they are to-day."[204] The Congress would do whatever it had to, he swore: "I say when the time arrives that mothers fear to send their children to school, then the time has arrived when thoughts of State rights and centralization of power must be forgotten."[205]

> and which had assumed such proportions that it seemed that unless the menace was met fearlessly and with a determination to end it, the very sanction of the criminal law was threatened.

Fisher & McGuire, *supra* note 31, at 646.

[195] Charles Lindbergh Jr.'s grandfather was United States Senator Dwight Morrow who "may have been the most esteemed public servant in the country." ALIX, *supra* note 133, at 67; *see also* THOMAS KESSNER, THE FLIGHT OF THE CENTURY: CHARLES LINDBERGH AND THE RISE OF AMERICAN AVIATION 230 (2010).

[196] *See* discussion *infra* Section I.C.

[197] ALIX, *supra* note 133, at 68, 78; JIM FISHER, THE LINDBERGH CASE: A STORY OF TWO LIVES 22 (1987); ROSS, *supra* note 136, at 224.

[198] ALIX, *supra* note 133, at 68; FISHER, *supra* note 197, at 22; ROSS, *supra* note 136, at 224.

[199] Will Rogers, *Will Rogers Remarks*, L.A. TIMES, Mar. 3, 1932, at 1.

[200] *See infra* Section I.C.

[201] 75 CONG. REC. 5385 (1932).

[202] *Id.*

[203] *Id.* at 5385–86.

[204] *Id.* at 5386.

[205] *Id.*

After the Lindbergh baby was found dead, Congress enacted a new statute, called the Lindbergh Law, on June 22, 1932.[206] The Lindbergh case pushed the nation's legal bodies to action. Throughout the 1930s, Congress and the states continued to broaden and expand definitions of kidnapping, most notably, to remove minimum distances for asportation and to eliminate or minimize the need for a restraint.[207]

The outcry penetrated the courts as well. Not immune itself to public sentiment, the United States Supreme Court observed that "[k]idnaping by that time had become an epidemic in the United States."[208] Other courts specifically commented on the intensity of the public feeling regarding the Lindbergh case and how it led to changes in kidnapping statutes.[209]

Legislatures and courts expanded kidnapping significantly and prosecutors enforced it in such a way to "promote[ ] an act of collective violence" which were used to establish social control and dominance.[210] The Lindbergh Law focused on "attack[ing] a crime that threatened wealthy Americans only—white people."[211] They gave little more than lip service to "not-quite-daily" kidnappings and lynchings of blacks, which Ida B. Wells calculated amounted to more than ten thousand between 1865 to 1895 alone.[212] People hardly saw these as kidnappings. The "wave

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[206] Act of June 22, 1932, ch. 271, 47 Stat. 326, 326 (codified as amended at 18 U.S.C. § 1201); 75 CONG. REC. 13,304 (1932); ALIX, *supra* note 133, at 71–75; FISHER, *supra* note 197, at 166; Finley, *supra* note 194, at 911; Olsen, *supra* note 192, at 369–70; Bomar, *supra* note 194, at 436.

[207] ALIX, *supra* note 133, at 78–124 (discussing federal efforts against kidnapping in the 1930s); Olsen, *supra* note 192, at 370–71, 370 nn.17–20, 371 nn.22–24 (citing state statutes). In the three decades to follow, kidnappings seemed to decline and many assumed it was from the federal government's strong enforcement efforts which "made interstate kidnaping a dangerous activity." Bomar, *supra* note 194, at 435, 438–39; *see also* ALIX, *supra* note 133, at 125–38 (discussing public perception of kidnapping in the early to mid 1940s).

[208] Chatwin v. United States, 326 U.S. 455, 462 (1946).

[209] *E.g.*, State v. Taylor, 312 P.2d 162, 165 (Ariz. 1957) ("[W]e think the date of enactment of our [kidnapping] law is highly significant, for the amendment to the Lindbergh Law in 1934 was followed in Arizona within the year . . . ."). A broader kidnapping statute "is to be construed in the light of its contemporary historical background," which was

> [t]o reach and exterminate, through capital punishment, a predatory class of organized criminals that had excited national attention by seizing persons of wealth, reputation, or means and holding them captive until an exorbitant money demand or pecuniary reward in the form of a ransom had been paid by the victims, his friends or relatives, as a condition precedent to his being released.

Finch v. State, 156 So. 489, 491 (Fla. 1934); Olsen, *supra* note 192, at 372 n.27 (asserting that "[j]udicial decisions have also served to enlarge the scope of already broad statutes" and citing authorities).

[210] ASHRAF H. A. RUSHDY, AMERICAN LYNCHING, at xii (2012); *see* LYNCHING IN AMERICA, *supra* note 29, at 1–2 (2006).

[211] LYNCHING IN AMERICA, *supra* note 29, at 229.

[212] *Id.* at 1–6; IDA B. WELLS, A RED RECORD: TABULATED STATISTICS AND ALLEGED CAUSES OF LYNCHINGS IN THE UNITED STATES, 1892–1893–1894, at 75–81 (Chicago, 1895); *see also*

of kidnappings, including the murder of the [Lindbergh baby] . . . frightened white America a lot more than lynching did."[213]

Two cases illustrate the disparity in priorities. On October 19, 1934, twenty-three-year-old Claude Neal was arrested in Florida for the murder of a nineteen-year-old white woman, Lola Cannidy.[214] Because of the brewing potential for mob violence, the sheriff took him across state lines to an Alabama jail.[215] A mob stormed the Alabama jail, kidnapped Neal and brought him "screaming and crying" to a waiting car, where they drove him two hundred miles to some woods and "subjected [Neal] to the most brutal and savage torture imaginable," Howard Kester wrote to the NAACP.[216]

The group "cut off his penis" and made him eat it, cut off his testicles and made him eat those too and say he "liked it."[217] They sliced his sides, stomach, and would periodically cut off fingers.[218] They burned Neal with hot irons, hung him by a tree to the point of near choking and then dropped him back down.[219] Finally, the mob tied Neal to the back of a car and dragged him to the victim's home, where a woman "drove a butcher knife through his heart" and the crowd of 3,000 to 7,000 proceeded to mutilate the body—even children drove stakes into it.[220] Only the National Guard was able to disperse the mob.[221] No one was charged, even though "Neal's killers definitely carried him across a state line in violation of the Lindberg[h] [sic] Kidnapping Law."[222]

The NAACP believed the Neal lynching and its brutality could help Congress pass anti-lynching legislation, but they could already see the difference in priorities.[223] When Charles Mattson, a ten-year-old boy of a white doctor, was kidnapped on December 27, 1936, the case became another national media sensation.[224] The FBI

MANNING MARABLE, RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945–1990, at 9 (2d ed. 1991) ("Between 1882 and 1903, 2,060 blacks were lynched in the United States."); MARGARET VANDIVER, LETHAL PUNISHMENT: LYNCHINGS AND LEGAL EXECUTIONS IN THE SOUTH 28–49 (2006) (discussing the prolificness of lynching in Tennessee). Wells likely overstated her numbers, though lynchings are difficult to quantify. The Equal Justice Initiative estimates that between 1877 and 1950, there were at least 4,084 lynchings in twelve Southern states. EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR (3d ed. 2017), https://eji.org/wp-content/uploads/2019/10/lynching-in-america-3d-ed-080219.pdf [https://perma.cc/RW4S-EJPU].

[213] LYNCHING IN AMERICA, *supra* note 29, at 229.

[214] Howard Kester, *The Marianna Florida Lynching*, *in* LYNCHING IN AMERICA, *supra* note 29, at 229–30.

[215] *Id.* at 230.

[216] *Id.*

[217] *Id.* at 231.

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.* at 232.

[222] *Id.* For a discussion of the lynching, see JAMES R. MCGOVERN, ANATOMY OF A LYNCHING: THE KILLING OF CLAUDE NEAL (2013).

[223] LYNCHING IN AMERICA, *supra* note 29, at 232.

[224] *Id.*

dispatched at least forty-five agents to Tacoma, Washington, even though the boy's body, when it was discovered, had never crossed state lines.[225] Despite this discovery—one that made the Lindbergh Law inapplicable—both J. Edgar Hoover and President Franklin Roosevelt promised "all the facilities at the disposal of the Department of Justice" to the case.[226]

Walter White, head of the NAACP, wrote Attorney General Homer Cummings on December 29, 1936, that while he commended the Department of Justice for assisting on the Mattson case, he was displeased that Cummings had previously refused to provide the same support or seek to prosecute kidnappers on the Neal case, even though the kidnappers in Neal clearly crossed state lines.[227] White condemned the Department of Justice for its blind disregard of black kidnappings:

> The Action of the Department of Justice in the Mattson case further substantiates the quite obvious conclusion that its agents act on administrative interpretation of the law in white cases and the strict letter of the law in Negro cases. The whole record of the Department of Justice in the enforcement of the kidnapping law indicates that it has established an administrative policy to the effect that the Federal kidnapping law applies only to the kidnapping of wealthy white citizens and white peace officers.[228]

Thus, as had happened again and again, even extremely brutal kidnappings and lynchings of blacks barely registered a response or call to action, while the kidnapping of the children of wealthy whites moved courts and legislatures to ever-expanding kidnapping definitions.[229] Those new definitions created a host of merger problems.[230]

D. Kidnapping's Growing Vagueness Created a Merger Problem

Newly broadened statutes prohibited a kidnapping if there was "some slight constraint of the person"—a taking of some sort—and a detention or an asportation of the most minor sort.[231] Under the statutes, there was no indication of any minimum period of detention; it could be "extremely short" such that "almost any detention suffices—even one of a few minutes duration."[232] Other states did not require a detention at all, so long as one had the intent to do so.[233]

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[225] *Id.*

[226] *Id.*

[227] Letter from Walter White to Homer Cummings, Attorney Gen. (Dec. 29, 1936), *reprinted in* LYNCHING IN AMERICA, *supra* note 29, at 232–33.

[228] *Id.* at 233.

[229] *Id.*

[230] *See infra* Section I.D.

[231] *A Rationale of the Law of Kidnapping*, *supra* note 20, at 542–44.

[232] *Id.* at 544.

[233] *Id.* at 545–47.

Kidnapping's definition became increasingly vague and "varied so widely from jurisdiction to jurisdiction that generalization [was] difficult."[234] Courts all over the nation started to find kidnappings where the movements were slight and inconsequential.[235] Examples included crossing the street,[236] a forced walk of eleven feet[237] or fifty to seventy-five feet,[238] making a person leave or go into a house,[239] driving from a parking lot to an alley,[240] moving around the office or across the room,[241] or restraining a person on the bed with a pillow and hand.[242] The Supreme Court of Arizona even observed that its statute went so far as to penalize "'standstill' kidnaping."[243] As that court later put it, "it is the fact of forcible removal, not the distance involved, that establishes the crime of kidnapping."[244]

And when defendants raised constitutional complaints to this massive overbreadth, courts found few violations.[245] The Supreme Court rejected a claim that kidnapping should merge with murder because the offenses were separate and unique.[246] This forced courts to focus their assessments on "how much [movement] was too much[:] . . . what movement or restraint was necessary to commit the underlying offense and what actions moved beyond that to warrant a kidnapping charge."[247]

This debate is well-illustrated with a California case from 1950, *People v. Knowles*.[248] In that case, the defendant robbed a clothing store at gunpoint and forced employees into a stockroom, where they took the employees' wallets and then made the employees return to open the cash register before they fled with money and items of clothing.[249] The defendant argued his conduct amounted to an armed robbery, but not an additional kidnapping.[250]

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[234] ALIX, *supra* note 133, at xxiv.

[235] *See* Parker, *supra* note 190, at 537–45 (comparing California and New York's approaches to merger); Prince, *supra* note 36, at 789–90.

[236] People v. Raucho, 47 P.2d 1108, 1111–12 (Cal. Dist. Ct. App. 1935).

[237] State v. Ayers, 426 P.2d 21, 24 (Kan. 1967).

[238] People v. Melendrez, 77 P.2d 870, 871 (Cal. Dist. Ct. App. 1938).

[239] People v. Oganesoff, 184 P.2d 953, 953 (Cal. Dist. Ct. App. 1947); People v. Shields, 161 P.2d 475, 476 (Cal. Dist. Ct. App. 1945); People v. Cook, 64 P.2d 449, 449 (Cal. Dist. Ct. App. 1937).

[240] State v. Brown, 312 P.2d 832, 835 (Kan. 1957).

[241] People v. Smith, 482 P.2d 655, 656 (Cal. 1971) (reversing kidnapping conviction).

[242] Miller v. State, 124 So. 3d 395, 396–97 (Fla. Dist. Ct. App. 2013) (reversing kidnapping conviction).

[243] State v. Taylor, 312 P.2d 162, 165 (Ariz. 1957).

[244] State v. Jacobs, 380 P.2d 998, 1002 (Ariz. 1963) (citing People v. Wein, 326 P.2d 457 (Cal. 1958); People v. Chessman, 238 P.2d 1001 (Cal. 1952)).

[245] *See, e.g.*, *Jacobs*, 380 P.2d at 1002–03.

[246] Williams v. Oklahoma, 358 U.S. 576, 584–87 (1959).

[247] Prince, *supra* note 36, at 790.

[248] 217 P.2d 1 (Cal. 1950); *see also* Bickel, *supra* note 49, at 1343–46 (discussing the *Knowles* decision and the impact it had on the legislature).

[249] *Knowles*, 217 P.2d at 2.

[250] *Id.* at 3.

While the defendant conceded that the legislature had deliberately amended the kidnapping statute to abandon "the requirement of movement of the victim" which had traditionally been a part of kidnapping analysis, he argued that kidnapping should only apply to seizures or detentions that were incident to a "traditional act of kidnapping."[251]

Knowles argued that "the wave of public indignation at the widespread kidnapping for ransom during the early nineteen-thirties" improperly motivated the statute.[252] The court agreed that this may have been the case, but observed the legislature could have had numerous other reasons, such as "rampant and terrorizing armed robbery" for amending the statute.[253] Even though Knowles's "seizure and confinement were an inseparable part of the robbery," the court still sustained only a kidnapping conviction.[254]

But Justice Edmonds was not convinced.[255] He saw a "startling innovation in criminal law that an act which constitutes robbery is also kidnaping."[256] "As an act of robbery now will also constitute a kidnaping," and because kidnapping carried a potential death sentence and robbery a sentence of five years to life, Edmonds feared that "many charges of attempted robbery, and every one of robbery, inevitably will be prosecutions for a crime which may be punishable by death."[257]

Justice Edmonds noted that California had two kidnapping statutes, one that followed the more traditional common law definition and another "of comparatively recent origin."[258] But kidnapping, Edmonds noted, is "deeply and inescapably attached to its historical basis" and it behooved the court to thoroughly understand and appreciate that background.[259] Edmonds discussed some of its history and observed that after the Lindbergh kidnapping, in "this nationwide atmosphere of public alarm," California, along with "almost all of the other states," systematically broadened their statutes.[260]

Justice Edmonds found that some courts had taken steps to put "reasonable limitations" on broadly worded kidnapping statutes.[261] Particularly, he noted that the United States Supreme Court had also pushed back on this trend in a case where Mormon fundamentalists were prosecuted under the Federal Kidnaping Act for

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[251] *Id.* at 3–4.
[252] *Id.* at 6.
[253] *Id.*
[254] *Id.* at 7–9.
[255] *Id.* at 9–18 (Edmonds, J., dissenting).
[256] *Id.* at 9–10.
[257] *Id.* at 10.
[258] *Id.* at 11–12. With the addition, not in Blackstone, that the person "carries him into another . . . county, *or into another part of the same county*." *Id.* at 12 (emphasis added).
[259] *Id.* at 12.
[260] *Id.* at 12–14.
[261] *Id.* at 14–15.

transporting a fifteen-year-old girl to Mexico to engage in a polygamous marriage.[262] In that case, the Supreme Court observed that Congress chose "[c]omprehensive language" to "cover every possible variety of kidnaping."[263] "But the broadness of the statutory language does not permit us to tear the words out of their context, using the magic of lexigraphy to apply them to unattractive or immoral situations lacking the involuntariness of seizure and detention which is the very essence of the crime of kidnaping," the Court affirmed.[264] It noted:

> Were we to sanction a careless concept of the crime of kidnaping or were we to disregard the background and setting of the Act the boundaries of potential liability would be lost in infinity . . . . The absurdity of such a result, with its attendant likelihood of unfair punishment and blackmail, is sufficient by itself to foreclose that construction.[265]

Justice Edmonds agreed.[266] This was clearly an armed robbery, but only by "strained construction" of the statute could the court find a "kidnaping for the purpose of robbery."[267] "The dominant act was the robbery" and any movement was incidental and "*not a considered and essential prelude to the robbery*."[268] "[U]ntil now," Edmonds lamented, "the court has not held that the same act may constitute both kidnaping and robbery."[269]

In *Knowles*, Justice Carter wrote a separate dissent adding an additional concern. He observed that a prosecutor now had the ability, "at his whim or caprice" to charge either a robbery, which had a potential minimum sentence of one year, or to charge an additional kidnapping, which faced the death penalty, for the exact same conduct.[270] "All these things could occur on the identical set of facts which establish only robbery," and he lamented that "[i]t is not to be supposed that the Legislature intended to place any such drastic and arbitrary power in the hands of the district attorney."[271] This was a frequent criticism of these statutes.[272]

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[262] *Id.*; *see* Chatwin v. United States, 326 U.S. 455, 457–58 (1946).
[263] *Chatwin*, 326 U.S. at 463.
[264] *Id.* at 464.
[265] *Id.* at 464–65.
[266] *Knowles*, 217 P.2d at 15.
[267] *Id.*
[268] *Id.* (emphasis added)
[269] *Id.* at 17.
[270] *Id.* at 18 (Carter, J., dissenting).
[271] *Id.*
[272] *See* Parker, *supra* note 190, at 543–44 ("It is next to impossible to conceive of a rape, assault, or armed robbery in which physical force is not used or threatened. In each of these instances, the district attorney is now free to press the grand jury for a . . . kidnapping

In 1981, the Utah Supreme Court, reflecting on this massive transition, recognized that kidnapping had changed such that a "literal application" of a kidnapping statute could transform virtually every "host crime"—as it called crimes such as robbery or rape—into a kidnapping as well.[273] The Supreme Court of North Carolina saw it the same: "virtually every false imprisonment, assault, battery, rape, robbery, escape or jail delivery" met kidnapping's definition, and because it "overruns other crimes for which the prescribed punishment is less severe, a prosecutor has the 'naked and arbitrary power' to choose the crime for which he will prosecute."[274]

Despite these concerns, courts did little to restrain the expansion.[275] They demonstrated a "consistent tendency to sustain prosecutions" using a bit of "judicial juggling" and "legalomania" to affirm convictions in what was a "definite departure from the English common law."[276] Courts juggled themselves into tests—common law merger tests—to try to distinguish a kidnapping from the underlying offense.[277] As one court put it:

> The merger doctrine was of judicial origin and was 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.[278]

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indictment."); *cf.* State v. Johnson, 170 A.2d 830, 835 (N.J. Super. Ct. App. Div. 1961) (explaining since the kidnapping statute does nothing to exclude a kidnapping from a rape offense, it "places upon the prosecution the moral obligation not to indict . . . unless the crime warrants such severe punishment").

[273] State v. Couch, 635 P.2d 89, 92 (Utah 1981). As one commentator suggested, courts should consider requiring kidnapping to have more than incidental movement, considering that virtually all offenses at least have some "genuine kidnapping flavor." Parker, *supra* note 190, at 545; *see* People v. Miles, 245 N.E.2d 688, 695 (N.Y. 1969) ("[The kidnapping merger test]was designed to prevent gross distortion of lesser crimes into a much more serious crime by excess of prosecutorial zeal. It was not designed to merge 'true' kidnappings into other crimes merely because the kidnappings were used to accomplish ultimate crimes of lesser or equal or greater gravity.").

[274] State v. Dix, 193 S.E.2d 897, 903–04 (N.C. 1973).

[275] *See* Finley, *supra* note 194, at 916–17.

[276] *Id.* at 916–18, 921, 926.

[277] Moore v. State, 329 A.2d 48, 53 (Md. Ct. Spec. App. 1975); Olsen, *supra* note 192, at 379–80.

[278] People v. Cassidy, 358 N.E.2d 870, 872 (N.Y. 1976). The court continued:

> The merger doctrine is 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 fairly be attributed

But a 1953 law review note saw the problems already.[279] Since "virtually all conduct within the scope of kidnapping law is punishable under some other criminal provision," and the law allowed the charge in any case with a detention, kidnapping was only defensible if the asportation or detention "significantly increases the dangerousness or undesirability of the defendant's behavior."[280]

The note used two cases to illustrate that merger tests were not fixing the difficulties.[281] In *State v. Berry*, the defendant had whipped his wife into confessing to an affair with a man named Baker.[282] Berry and some accomplices kidnapped Baker from his home in front of his wife and children, tied him up, and dragged him to a wood, where they struck him repeatedly in the face with their fists, a flashlight, and a revolver, until he lost consciousness.[283] For one hour, Berry kicked Baker in the groin, mercilessly whipped his bare back, and grabbed a surgeon's knife to castrate him.[284] Berry's accomplices stopped the castration, but Berry cut Baker's pants, exposing his genitals, and holding Baker's testicles in his hand, "stuck [sic] them forcibly several times with the pliers" and "employing the same pliers, tore off Baker's foreskin."[285] They taped Baker's eyes and mouth closed and left him "beaten, bleeding and semi-conscious."[286]

In *People v. Kuntzsch*, by contrast, a defendant forced a woman to accompany him from Manhattan to Brooklyn where he made her join his labor union, stay four hours for a union meeting, and then released her.[287]

The problem was stark. Under courts' kidnapping tests, Kuntzsch's case was the more serious, since the detention was longer and the distance taken greater.[288] This

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> to them. "It is this kind of factual merger with the ultimate crime of the preliminary, preparatory, or concurrent action that the rule is designed to recognize, and thus prevent unnatural elevation of the 'true' crime to be charged. It is a merger suggestive of, but not quite like, the merger of the preparation and attempt with the consummated crime, a familiar concept in the criminal law."

Id. at 873.

279 *See generally A Rationale of the Law of Kidnapping*, *supra* note 20.

280 *Id.* at 556.

281 *Id.* at 557.

282 93 P.2d 782, 785 (Wash. 1939).

283 *Id.* at 786.

284 *Id.*

285 *Id.* at 786–87.

286 *Id.* at 787.

287 64 N.Y.S.2d 116, 118–19 (Kings Cty. Ct. 1946) ("A literal reading of the statute makes a wilful seizure with intent to confine, against the will of the person seized, a kidnapping. Such a literal construction can be carried to absurd extremes. . . . The Court in construing the Statute should keep in mind the penalty imposed for violation of the statute. The crime is most serious.").

288 *A Rationale of the Law of Kidnapping*, *supra* note 20, at 557.

was a major issue, since hinging a kidnapping on detention or asportation had nothing to do with the dangerousness of the act and allowed serious sanctions to be "imposed for conduct of relatively little seriousness."[289] The law review note suggested that other factors were more indicative of a kidnapping: 1) how the victim is controlled; 2) "the duration of that control"; and 3) "the nature of the defendant's purpose."[290] Consequently, it suggested eliminating kidnapping as a separate offense, but to use kidnapping-like conduct to elevate or aggravate a person's sentence, say for assault, robbery, or rape.[291] The coming decades would only make matters worse.

E. Kidnapping Merger Tests Do Not Solve the Real Problems

Courts' merger tests, unfortunately, have been "as vague and broad as the statutes [they were] designed to clarify."[292] If state legislatures and Congress were trying to fix the problem of kidnapping, their statutory definitions amounted to an overreaction to the highly publicized takings of white children and their vagueness makes them unconstitutional and prime vehicles for continued discrimination against minorities or unpopular groups.

As one jurist put it, kidnapping merger has received massively "uneven treatment."[293] Courts have not been able "to establish a coherent approach to the matter."[294] An almost seven-hundred-page article in American Law Reports (ALR) illustrates the tremendous difficulties courts have had articulating and applying a test in this area of the law.[295] I will detail the various approaches, but in the end conclude that none of them remedy the constitution at problems created by legislatures' poor drafting.[296]

1. The *Blockburger* or "Same Elements" Test

In *Blockburger v. United States*,[297] the United States Supreme Court articulated a merger test that has been much of the basis for merger analyses since. Its "same

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[289] *Id.*
[290] *Id.*
[291] *Id.* at 558.
[292] Olsen, *supra* note 192, at 382.
[293] Commonwealth v. Campbell, 505 A.2d 262, 269 (Pa. Super. Ct. 1986) (Wieand, J., concurring).
[294] Antkowiak, *supra* note 39, at 261.
[295] *See generally* Frank J. Wozniak, Annotation, *Seizure or Detention for Purpose of Committing Rape, Robbery, or Other Offense as Constituting Separate Crime of Kidnapping*, 39 A.L.R. 5th 283.
[296] *See infra* Section I.E.
[297] 284 U.S. 299 (1932).

elements test" provides that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[298] But, in trying to fix the problems with this test, the Court reversed itself twice.[299]

The Supreme Court's jurisprudence has been roundly criticized as "flawed guidance" that "has been marked by shifting tests and changes of direction . . . . [M]iring the courts in a swamp of confusion."[300] *Blockburger* is too easy to circumvent: modern statutory provisions often have very minor variations in elements that "allow prosecutors to break a single criminal episode into numerous crimes that are separate offenses."[301]

Because *Blockburger* "rests on assumptions that were made by courts developing double jeopardy protection in the era of common law crimes," its premises "do not necessarily survive in an era of legislatively defined offenses."[302] As has been demonstrated here, legislatures have "exercise[d] little self-restraint, adding statutory provisions targeting conduct that is already criminal and creating overlapping offenses."[303]

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[298] *Id.* at 304.

[299] Grady v. Corbin, 495 U.S. 508, 510 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1993).

[300] Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L. J. 1183, 1187 (2004); *see also* Nancy Ehrenreich, *Attempt, Merger and Transferred Intent*, 82 BROOK. L. REV. 49, 90 (2016) (arguing that the Supreme Court has left a "troubled and byzantine body of double jeopardy jurisprudence"); Jane A. Minerly, Comment, *The Interplay of Double Jeopardy, the Doctrine of Lesser Included Offenses and the Substantive Crimes of Forcible Rape and Statutory Rape*, 82 TEMP. L. REV. 1103, 1122 (2009); Marc E. Nolan, Comment, *Diverging Views on the Merger of Criminal Offenses: Colorado Has Veered Off Course*, 66 U. COLO. L. REV. 523, 547 (1995) (stating that the test has been "increasingly criticized as not coping satisfactorily with the problem it was designed to solve"). The test has also been criticized as "difficult to administer in practice." Texas v. Cobb, 532 U.S. 162, 185 (2001) (Breyer, J., dissenting).

[301] Poulin, *supra* note 300, at 1214 & n.157 (citing *Dixon*, 509 U.S. at 749 (Souter, J., concurring in part and dissenting in part)) (summarizing Justice Souter's opinion as "condemning *Blockburger* [for] offering too little protection"); *see also* State v. Vassos, 579 N.W.2d 35, 41 (Wis. 1998) (Bradley, J., concurring) (criticizing holding as "result[ing] in the hollow protection of a fundamental constitutional right" and arguing that defendant deserves more protection than *Blockburger* provides); State v. Kurzawa, 509 N.W.2d 712, 724 (Wis. 1994) (Abrahamson, J., concurring) (stating that *Blockburger* "is not sufficiently refined to cope with the plethora of criminal statutes now crowding the statute books").

[302] Poulin, *supra* note 300, at 1214; *see also* Whitton v. State, 479 P.2d 302, 306 (Alaska 1970) ("As the separate violations multiply by legislative action, the likelihood increases that a defendant will actually be punished several times for what is really and basically one criminal act.").

[303] Poulin, *supra* note 300, at 1188–89.

Robberies, rapes, or sexual assaults do not require movement or restraint as part of their elements, which kidnapping does, even though these type of detentions or restraints necessarily accompany those crimes.[304] Thus, *Blockburger* will never address the real problem. Legislatures have done little to either make a less duplicative code or to address merger issues and they have little incentive to do so.[305]

As has been shown here, legislatures are pressured by political forces, media sensationalism, or the expediency of a high-profile case to broaden kidnapping and yet they rarely act to repeal an offense.[306] "As a result, criminal codes have developed without sufficient concern for coherence or coordination."[307]

The *Blockburger* test "virtually annuls the constitutional guarantee," Justice Brennan said.[308] The test can be easily circumvented when a prosecutor uses "related statutory provisions that, intentionally or by happenstance, differ in some small but essential element of proof."[309] A single murder, rape, robbery, or assault, for example, can easily carry a kidnapping offense along with it.[310] Because common law crimes are no longer simple and well-delineated, *Blockburger* can no longer control. Case after case demonstrates how a single criminal act can lead to multiple punishments.[311]

The *Blockburger* test substantially weakens the role of the judiciary—it "empowers lawmakers to overrule the Double Jeopardy Clause" and provides absolutely no check on prosecutorial abuse.[312] In other words, *Blockburger* only prevents one kind of abuse: when the State seeks to charge the same exact legislative offense

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[304] *See* Olsen, *supra* note 192, at 384.

[305] *See* State v. Wood, 868 P.2d 70, 90–91 (1993) ("[The *Blockburger* test] is essentially the same as that in Utah Code Ann. § 76-1-402(3)."); Poulin, *supra* note 300, at 1189–90.

[306] *See* Poulin, *supra* note 300, at 1189–90; Teresa L. Welch & Samuel P. Newton, *The History and Problems of Utah's Sex Offender Registry: Why a Move from a Conviction-Based to a Risk-Assessment Approach Better Protects Children*, 47 CRIM. L. BULL. 1105, 1105 (2011) (demonstrating that Utah's expanding sex offender laws were largely motivated by several high profile cases).

[307] Poulin, *supra* note 300, at 1190.

[308] Ashe v. Swenson, 397 U.S. 436, 451 (1970) (Brennan, J., concurring).

[309] Poulin, *supra* note 300, at 1215.

[310] *See id.*; *see also* Barksdale v. State, 788 So. 2d 898, 910 (Ala. Crim. App. 2000) (upholding two convictions for single murder because one was murder during a robbery and the other was murder with a deadly weapon); State v. Whipper, 780 A.2d 53, 91–92 (Conn. 2001) (finding defendant's double jeopardy rights violated by three convictions (murder, felony murder, and manslaughter) for a single death); State v. Thomas, 772 A.2d 611, 618 (Conn. App. Ct. 2001) (holding that double jeopardy protection precluded sentencing defendant to four murder sentences for killing two victims).

[311] *See generally* United States v. Turner, 130 F.3d 815 (8th Cir. 1997); State v. Burns, 877 S.W.2d 111 (Mo. 1994); Poulin, *supra* note 300. *See* Minerly, *supra* note 300, at 1123–24 (observing that a defendant could be charged with statutory rape, forcible rape, and statutory rape by an authority figure if he were a schoolteacher who raped a student).

[312] Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L.J. 351, 371 (2005); *see also* Poulin, *supra* note 300, at 1217.

repeatedly. But it would never prevent a prosecutor from adding a kidnapping charge onto a robbery charge solely on the basis of race. Since kidnapping has different elements, a prosecutor can always charge it without repercussions.

2. Evidence-Based Test

Some courts look beyond the elements to the facts supporting the crimes.[313] Under this test, courts look at the particular facts and see if those same facts could support more than one charge.[314] For example, the New Hampshire Supreme Court merged a robbery while armed with a deadly weapon and felonious use of a firearm conviction because, though each had separate elements, both counts relied on the same factual evidence that the defendant used a gun to commit the robbery.[315]

But a test that focuses entirely on the underlying facts is just as easily circumvented as *Blockburger*. A prosecutor need only point to different or alternative evidence.[316] Of course, courts can engage in fact-intensive inquiries but they are also too variable to create some consistency and are just as equally unlikely to root out discriminatory motives.

3. Kidnapping Tests

Finally, courts have adopted tests more specifically tailored to kidnapping.[317] There are largely three variations.[318] All the tests determine whether a confinement or a movement is sufficient to separate kidnapping from the host crime.[319] The first, and majority, test looks to whether the movement or confinement was "incidental" to the underlying felony or whether it was "significant enough" to be independent.[320] The second test adds to the first the element whether the movement "substantially increased the risk of harm."[321] The third "more formulaic" tests add a host of other factors, such as the nature of the movement, whether it facilitated a crime, prevented the victim from receiving help, lessened the risk of detection, or created a danger or

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313 *See* Poulin, *supra* note 300, at 1229; *see also* Richardson v. State, 717 N.E.2d 32, 54 (Ind. 1999); State v. Ringuette, 697 A.2d 507, 509 (N.H. 1997).

314 Nolan, *supra* note 300, at 552.

315 Heald v. Perrin, 464 A.2d 275, 277–78 (N.H. 1983).

316 Poulin, *supra* note 300, at 1230.

317 Wozniak, *supra* note 295, at 357.

318 *Id.*

319 *Id.*

320 *Id.* at 356–57; *see, e.g.*, Alam v. State, 776 P.2d 345, 349 (Alaska Ct. App. 1989) (stating courts "apply a merger doctrine whereby the kidnapping merges into the other crimes when restraint is merely incidental to their commission").

321 Wozniak, *supra* note 295, at 357.

increased the risk of harm.[322] "Courts have also considered the length of time the victim was held or moved, the distance the victim was moved, and the location and environment of the place the victim was detained."[323]

In one Utah case, Justice Lee articulated the problems with courts' merger tests.[324] "None of [the factors] provide meaningful guidance or means of predictably distinguishing properly merged offenses from those that should not merge; collectively, they render our inquiry into common-law merger unworkable."[325]

To incidental movement, Justice Lee argued that the

> inquiry is hardly an objective one. *Slightness* is in the eye of the beholder. As to *consequentiality*, I would think that any detention that allows a defendant to commit a crime would be a matter of consequence. So how this element may play out in individual cases is anyone's guess.[326]

Justice Lee observed that confinement may not be inherent in any crime.[327] A person may kill or rape a person without any sort of detention.[328] "So this element makes no sense," he argued, and it "compounds the unpredictability of the inquiry."[329]

Justice Lee also critiqued trying to analyze the case with a risk assessment.[330] "This inquiry is puzzling. It will always be substantially easier to commit a murder (or sexual assault) if the perpetrator has confined the victim to the extent required for kidnapping. So the last element again provides no basis for distinguishing properly merged offenses from those that should not merge."[331]

An analysis of the nearly seven-hundred-page article ALR details the numerous cases from all fifty states to interpret kidnapping merger shows there has been absolutely no consistency on any topic or on any prong of any test.[332] The annotation breaks down the offense by two primary categories: robbery and sexual assaults, but

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[322] *Id.*
[323] *Id.* at 358.
[324] Met v. State, 2016 UT 51, ¶ 126, 388 P.3d 447, 476 (Lee, J., concurring).
[325] *Id.* at 478.
[326] *Id.* at 479.
[327] *Id.*
[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *Id.*
[332] *See generally* Wozniak, *supra* note 295. For example, a review of a thirty-page Court of Appeals of Washington opinion reveals the difficulty one state court system has had with applying the merger doctrine. State v. Phuong, 299 P.3d 37, 37 (Wash. Ct. App. 2013); *see also* Thomas J. Crabtree, *Kidnapping in Oregon: Resurrecting the Chessman Rule*, 15 WILLAMETTE L. REV. 23, 23 (1978).

it also considers assaults, burglary, child abuse, escape, ransom, homicide, kidnapping and menacing.[333] For the two major categories, each offense has been broken further down to where it occurred: an office or business, at the victim's or defendant's residence, other buildings, vehicles, and parks, for a total of eighty-one categories.[334] Then, in most every category, the annotation indicates cases where the movement or restraint was found to be a separate kidnapping and a second category where it was not found to merge.[335]

The annotation cites Percy Wilder's case—the case discussed at the first of this Article—for an example of non-merger, but the annotation gives several examples of cases where similar cases merged.[336] For example, one Colorado case is startlingly similar to *Wilder*.[337] There, a schoolteacher left the school late one evening and was walking to her car when the defendant "struck her, tore at her clothes, and dragged her back to the school yard where he took her small backpack."[338] She tried to run and "[h]e caught her and repeatedly hit her head against a retaining wall, saying '[s]ee if you ever run away again.'"[339] "He then dragged her to another part of the well lighted school ground, and sexually assaulted her."[340] In that case, unlike *Wilder*, the court found the kidnapping charge merely incidental to the sexual assault and robbery.[341]

The problem with these tests is clear: courts are all over the map. On the same offense, with the same or similar facts, courts have made inconsistent findings, even

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333 Wozniak, *supra* note 295, at 357.

334 *Id.* at 357 nn.5–6.

335 *Id.* at 358 n.7.

336 *Id.* at 669–71.

337 *See generally* People v. Bridges, 612 P.2d 1110 (Colo. 1980).

338 *Id.* at 1112.

339 *Id.*

340 *Id.*

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> [T]he movement of the victim had no other purpose or effect beyond robbery and sexual assault. This conclusion is supported by the circumstances surrounding the incident: the brief time of detention, movement for short distances only, unchanged environmental factors, simultaneous crimes and movement, and the fact that the defendant's actions were consistent with no independent intent to kidnap the victim.

Id. at 1116–17. Several other cases were strikingly similar to *Wilder*. *See, e.g.*, Messer v. Roberts, 74 F.3d 1009, 1014 (10th Cir. 1996) ("The Court believes, however, that moving the victim 15 feet did not make the crime of aggravated battery 'substantially easier of commission' . . . . This movement, in the Court's view was 'slight, inconsequential and merely incidental' to the crime of aggravated battery."); Weber v. State, 547 A.2d 948, 959 (Del. 1988) (finding that defendant's grabbing of escaping victim by the hair or neck and dragging her back were only incidental to the assault and not sufficient for kidnapping); People v. Cassidy, 358 N.E.2d 870, 873 (N.Y. 1976) (finding merger appropriate where the defendant dragged victim to location to sexually assault her).

in individual states. "[T]he case law demonstrates that courts have an inability to apply the statutes fairly and with appropriate attention to defendants' rights. It makes kidnapping barely more than a legal fiction when the slightest restraint during a robbery can warrant that label."[342]

4. The Problem of Tracking Kidnapping

Not only are there problems with merger tests, but it is difficult to track or demonstrate how frequently kidnapping occurs or is prosecuted in the United States. Because there has been limited research and because the media covers only exceptional cases, there are "misconceptions about the nature of kidnapping in the United States."[343] As two researchers put it, "in the context of fear and hysteria engendered by a few sensational cases, policy makers have hastily enacted a number of 'memorial crime control' policies" that are "out of proportion to the actual frequency" of kidnapping.[344] This amounts to a kind of "crime control theater" in which policy makers can look as if they address the problem, but in reality create "socially constructed 'solution[s]' to a socially constructed problem" which "trump[s] objective reality and result[s] in ill-conceived and sometimes destructive societal responses."[345]

Confusion "about the definition of kidnaping," given its broad applicability, "has been exacerbated by the absence of reliable statistics about the crime."[346] Kidnapping is not tracked in either the FBI's Uniform Crime Reports (UCR) or the National Crime Victimization Survey (NCVS) and "individual States or other jurisdictions have rarely made any independent tally of kidnaping statistics."[347]

Even with what little data we have, researchers have been troubled by its "inability to capture information about multiple crimes in a single case, or co-occurring

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[342] Prince, *supra* note 36, at 818. One commentator suggested courts consider a host of factors in light of the totality of the circumstances. *See* Olsen, *supra* note 192, at 386–87; *see also* People v. Adams, 205 N.W.2d 415, 422–23 (Mich. 1973) (describing a six-factor test to interpret part of Michigan's kidnapping statute). Such an approach would only further complicate an already muddy and unclear area of the law.

[343] Marie Skubak Tillyer et al., *The Nature and Influence of the Victim-Offender Relationship in Kidnapping Incidents*, 43 J. CRIM. JUST. 377, 377 (2015).

[344] Timothy Griffin & Monica K. Miller, *Child Abduction, AMBER Alert, and* Crime Control Theater, 33 CRIM. JUST. REV. 159, 159 (2008).

[345] *Id.* at 161, 172.

[346] FINKELHOR & ORMROD, *supra* note 42, at 1; *see also* Monique C. Boudreaux et al., *Child Abduction: An Overview of Current and Historical Perspectives*, 5 CHILD MALTREATMENT 63, 64–65 (2000).

[347] Tillyer et al., *supra* note 343, at 377; *see also* FINKELHOR & ORMROD, *supra* note 42, at 1.

crimes," and its failure to include information on the offender's or the victim's ethnicity.[348]

Even so, the limited data supports that kidnapping has a coexistence problem with other offenses.[349] For example, one study found that forty-eight percent of rapes involve a concurrent kidnapping because "common attributes" of rape "readily comport with the kidnapping definition."[350]

We know that most kidnappings are familial in nature and are more likely to be perpetrated by females, though males typically perpetrate the much more limited stranger kidnappings involving children.[351] The research supports that an offender's race affects crime rates and police willingness to clear an offense.[352] For example, police are less likely to make an arrest for a white-on-black or black-on-black crime than a black-on-white crime.[353] And, while some of the results have been mixed, scholars

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[348] Tillyer et al., *supra* note 343, at 377; *see* FINKELHOR & ORMROD, *supra* note 42, at 4 ("[N]onfamily kidnaping is generally associated with other offenses, such as robbery or sexual assault, and is in fact a means of facilitating those offenses."); Boudreaux et al., *supra* note 346, at 64.

> [J]urisdictions may vary in how regularly they charge offenders with the crime of kidnaping. The elements of kidnaping exist in a wide range of criminal incidents—sexual assaults, robberies, and physical assaults—yet some jurisdictions, for a variety of possible reasons such as training, tradition, or local statutes, may charge or record the crime of kidnaping more or less frequently than other crimes.

FINKELHOR & ORMROD, *supra* note 42, at 2.

[349] *See* FINKELHOR & ORMROD, *supra* note 42, at 4–5; Tillyer et al., *supra* note 343, at 378 ("There is little systematic research . . . on the extent and correlates of sexual victimization in kidnapping incidents, including the role of the victim-offender relationship.").

[350] Lynn A. Addington & Callie Marie Rennison, *Rape Co-occurrence: Do Additional Crimes Affect Victim Reporting and Police Clearance of Rape?*, 24 J. QUANTITATIVE CRIMINOLOGY 205, 212, 215, 220 (2008); *see also* Scott M. Walfield, *When a Cleared Rape Is Not Cleared: A Multilevel Study of Arrest and Exceptional Clearance*, 31 J. INTERPERSONAL VIOLENCE 1767, 1777 (2016). In England, one study found that 40.7% of kidnapping offenses from 1979 to 2001 had an accompanying sexual or violence conviction, 32.9% had an accompanying acquisitive conviction (theft, burglary, robbery, etc), and 3.4% had another accompanying conviction, totaling 77%. Keith Soothill et al., *Kidnapping: A Criminal Profile of Persons Convicted 1979–2001*, 25 BEHAV. SCI. L. 69, 75 tbl.3 (2007).

[351] *See* Tillyer et al., *supra* note 343, at 378; *see also* FINKELHOR & ORMROD, *supra* note 42, at 2–3 & fig.2.

[352] *See* Brendan Lantz et al., *Stereotypical Hate Crimes and Criminal Justice Processing: A Multi-Dataset Comparison of Bias Crime Arrest Patterns by Offender and Victim Race*, 36 JUST. Q. 16, 22–23 (2017); *see also* Steven Briggs & Tara Opsal, *The Influence of Victim Ethnicity on Arrest in Violent Crimes*, 25 CRIM. JUST. STUD. 177, 178, 182–85 (2012); Michele Stacey et al., *Victim and Suspect Race and the Police Clearance of Sexual Assault*, 7 RACE JUST. 226, 230–31, 240 (2017); Terrance J. Taylor et al., *Racial Bias in Case Processing: Does Victim Race Affect Police Clearance of Violent Crime Incidents?*, 26 JUST. Q. 562, 576 (2009).

[353] *See* Stacey et al., *supra* note 352, at 226.

have found prosecutors tend to charge more serious offenses, provide harsher plea offers, and ask for more severe sentences for black and Hispanic defendants over white ones.[354]

But because federal and state officials gather little to no information regarding the perpetrator's race, policy makers or researchers cannot reliably determine when and where prosecutors enhance or choose to prosecute people for kidnapping.[355] These data collection methods must be done to enable better research and resolution of this issue.

II. PROPOSED SOLUTIONS

While kidnapping merger seemed like a good idea at the time, courts failed to address the serious constitutional problems stemming from the historical reasons that motivated legislatures to greatly expand kidnapping's definition. The offense, as written in most states, is unconstitutional, particularly because, as this Article has demonstrated, it has racist underpinnings and was entirely reactionary.[356] Given that kidnapping merger tests have become hopelessly unworkable and impossible to apply consistently, legislatures and courts must act to remedy the problem.

A. State Legislatures Must Redefine Kidnapping to Prevent Discriminatory Enforcement

The best solution is simple: rewrite kidnapping statutes. Legislatures need to take the responsibility to carefully redefine kidnapping such that it does not overlap with other offenses, particularly to exclude minimal restraints or asportations that would accompany other "host crimes" in order to prevent prosecutors from discriminatorily manipulating the offense.[357]

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[354] *See* Besiki L. Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 CRIMINOLOGY 514, 514–15 (2014); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1320 (2014) ("Across the distribution, blacks receive sentences that are almost 10 percent longer than those of comparable whites arrested for the same crimes. Most of this disparity can be explained by prosecutors' initial charging decisions, particularly the filing of charges carrying mandatory minimum sentences. Ceteris paribus, the odds of black arrestees facing such a charge are 1.75 times higher than those of white arrestees."); John Wooldredge et al., *Is the Impact of Cumulative Disadvantage on Sentencing Greater for Black Defendants?*, 14 CRIMINOLOGY & PUB. POL'Y 187, 189 (2015).

[355] FINKELHOR & ORMROD, *supra* note 42, at 2.

[356] *See id.* at 9; Wooldredge et al., *supra* note 354, at 210 tbl.3.

[357] Olsen, *supra* note 192, at 385; *see also* Napier, *supra* note 22, at 199 (stating that kidnapping must maintain "a distinct and identifiable role in a criminal code, and not using it as a backup provision to supplement other offences").

Kidnapping's modern version has "little in common" with its common law predecessor "except its name" and because of its "chequered history," it falls to state legislatures, who have the first responsibility to carefully spell out a "straightforward and readily comprehensible" definition of kidnapping, especially one that can be equally applied in a non-discriminatory manner.[358] As one court put it, the distinction between kidnapping and other offenses "must be clearly delineated to avoid cumulative penalties."[359]

The easiest way to accomplish this was done by the Model Penal Code's drafters, who decided to "effect a major restructuring of the law of kidnapping," because they recognized the problem as detailed in this Article: "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."[360]

The Code Section 212.1 defines kidnapping much more narrowly, returning closer to its common law form:

> 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 governmental or political function.[361]

The drafters specifically intended to "restrict the scope of kidnapping, as an alternative or cumulative treatment of behavior whose chief significance is robbery or rape, because the broad scope of this overlapping offense has given rise to serious injustice."[362]

This is a much better definition. It avoids the vagueness problem, virtually eliminates a need for kidnapping merger tests, and moves to a definition far from the racist and reactionary definitions of the past. As the Code's drafters were well

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[358] Napier, *supra* note 22, at 200–01.

[359] State v. Finlayson, 2000 UT 10, ¶ 19, 994 P.2d 1243, 1248.

[360] MODEL PENAL CODE Pt. II, art. 212, explanatory note for sections 212.1–.5 (AM. LAW INST.); Olsen, *supra* note 192, at 385.

[361] MODEL PENAL CODE § 212.1.

[362] *Id.* cmt. 1 (AM. LAW INST., Tentative Draft No. 11, 1960). Indeed, one author has proposed limiting kidnapping convictions to the common law forms, which are for ransom or hostage-motivated takings or takings of a long period of time. Diamond, *supra* note 33, at 31–32.

aware, "[e]xamples of abusive prosecution for kidnapping are common" and this definition remedies that problem.[363]

I recognize, however, that legislatures have little incentive to make such a change. Given that kidnapping cases arouse public sentiment, politicians have had little motivation to substantially narrow their kidnapping statutes. That leaves the remaining remedies to the courts.

B. Courts Must Invalidate Kidnapping Statutes for Constitutional Violations

The United States and state constitutions constrain legislatures' ability to vaguely and overbroadly define kidnapping, through, most notably, the Double Jeopardy Clause, the Cruel and Unusual Punishments Clause, and Equal Protection Clause.[364]

1. Vagueness

I have shown how kidnapping, as defined, is not sufficiently unique to prevent discriminatory enforcement.[365] Given its questionable history, courts should invalidate kidnapping statutes as unconstitutionally vague. As the Supreme Court has said, a statute must define a criminal offense "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[366] If the legislature does not do this, a statute, like kidnapping here "allows policemen, prosecutors, and juries to pursue their personal predilections."[367] "Legislatures," the Court earlier affirmed, "may not so abdicate their responsibilities for setting the standards of the criminal law."[368]

The Court did just that in *Chatwin v. United States*, refusing to give the federal kidnapping statute its literal meaning, which it acknowledged was "comprehensive . . . [w]ere we to sanction a careless concept of the crime of kidnapping or were we to disregard the background and setting of the Act the boundaries of potential liability would be lost in infinity."[369]

As the Michigan Court of Appeals put it in 1971, its own statute prohibited an "extraordinary range of conduct" such that it led to absurd results:

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[363] MODEL PENAL CODE § 212.1 cmt.1 (AM. LAW INST., Tentative Draft No. 11, 1960).

[364] *See generally* John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955 (2015).

[365] *See* FINKELHOR & OMROD, *supra* note 42, at 1.

[366] Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[367] *Id.* (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).

[368] *Smith*, 415 U.S. at 575.

[369] 326 U.S. 455, 463–64 (1946).

> The trespasser who momentarily locks a caretaker in his cottage is placed on the same footing as the professional criminal who invades a home, seizes the occupants at gunpoint, transports them to a secret hideout, and holds them for ransom. The robber who orders his victim to stand motionless while his wallet is removed is guilty of the same crime as the robber who forces his victim to drive for miles to a deserted location, where he is terrorized and abandoned. A group of college students who invade a dean's office, wrongfully confining its occupants, commit the same offense as a gang of rapists who seize a woman and remove her from her family to a place of isolation.[370]

The court commented its kidnapping statute provided "unlimited discretion" to prosecutors, judges, and juries.[371] The offense "is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."[372] And here, because kidnapping remains so broad, it improperly "leave[s] room for the play and action of purely personal and arbitrary power."[373] And a particular prosecutor's motivations, even if non-discriminatory, do not solve the problem. "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law."[374]

As the Supreme Court put it over a century ago, courts cannot step aside in the face of vague laws:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.[375]

Courts should void kidnapping statutes to remedy the vagueness violations.

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[370] People v. Adams, 192 N.W.2d 19, 24 (Mich. Ct. App. 1971), *aff'd in part*, *rev'd in part*, 205 N.W.2d 415 (Mich. 1973). *Adams* carefully walks through many of the points made in this section.

[371] *Id.* at 25.

[372] Giaccio v. Pennsylvania, 382 U.S. 399, 402–03 (1966).

[373] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[374] Baggett v. Bullitt, 377 U.S. 360, 373 (1964).

[375] United States v. Reese, 92 U.S. 214, 221 (1875).

2. Double Jeopardy Clause

Kidnapping's overbreadth also implicates the Double Jeopardy Clause, which prohibits "multiple punishments for the same offense."[376] A common theme emerges from double jeopardy jurisprudence: the government violates double jeopardy when it attempts to "charge-stack" and punish defendants with multiple charges out of what was essentially one common, continuous act.[377]

Since a defendant can receive a kidnapping conviction along with any offense that involves a detention or asportation, he in essence receives multiple punishments for a single criminal act.[378] "The motivating principle behind the merger doctrine is to prevent violations of constitutional double jeopardy protection," is a common theme among courts.[379] "Merger and double jeopardy doctrines seek the same end: protecting against punishing one criminal act twice."[380]

A double jeopardy check is needed not only because kidnapping's definition has greatly expanded, but because of the explosion of new legislative offenses. At common law, crimes were a judicial creation, there were few of them, and their elements were simple and non-overlapping.[381] But today, even "small differences in the statutorily defined elements" make many offenses overlap and subject defendants

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[376] Justices of Bos. Mun. Court v. Lydon, 466 U.S. 294, 307 (1984); *see* Ehrenreich, *supra* note 300, at 91.

[377] Stinneford, *supra* note 364, at 1989–90.

[378] *See, e.g.*, State v. Smith, 2005 UT 57 ¶ 7, 122 P.3d 615, 618 ("Merger is a judicially-crafted doctrine available to protect criminal defendants from being twice punished for committing a single act that may violate more than one criminal statute." (internal quotation marks omitted)).

[379] *Id.*; *see also* Brown v. Ohio, 432 U.S. 161, 169 (1977) (noting the Double Jeopardy Clause "forbids . . . cumulative punishment"); State v. McDonald, 872 P.2d 627, 660 (Alaska Ct. App. 1994) (holding trial court did not err in merging kidnapping and murder conviction for implicating double jeopardy principles); State v. Reagan, No. M2002-01472-CCA-R3-CD, 2004 WL 1114588, at *20 (Tenn. Crim. App. May 19, 2004) ("Merger avoids a double jeopardy problem while protecting the jury's findings."); State v. Bond, 2019 UT 88 ¶ 65, 361 P.3d 104, 122; State v. Williams, 2007 UT 98 ¶¶ 6–7, 175 P.3d 1029, 1032; State v. Johnson, 600 P.2d 1249, 1253 (Wash. 1979), *disapproved of by* State v. Sweet, 980 P.2d 1223, 1229–30 (Wash. 1999) (arguing that the court's conclusion of merging kidnapping and rape conviction was "strengthened when it is observed that constitutional double jeopardy provisions forbid double punishment"); State v. Elmore, 228 P.3d 760, 768 (Wash. Ct. App. 2010) ("[T]he nature of the restraint determines whether the kidnapping will merge into a separate crime to avoid double jeopardy violations."); Nolan, *supra* note 300, at 531 ("[T]he Colorado Supreme Court has indicated repeatedly that judicial merger and statutory merger find their roots in double jeopardy principles.").

[380] People v. Henderson, 810 P.2d 1058, 1060 (Colo. 1991).

[381] Poulin, *supra* note 300, at 1200 (citing Honorable Monroe G. McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 WASHBURN L.J. 1, 13–14 (1983); Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 279 (1965)).

to extraordinary amounts of punishment.[382] Second, at common law, prosecutors could not join felonies together—"multiple convictions and punishment could result only from multiple trials."[383]

In 1777, in the case of *Crepps v. Durden*, a baker was convicted of four counts of violating a statute that prohibited a person from "exercising his ordinary trade on the Lord's day" for selling four loaves of bread on a Sunday.[384] The court rejected the claim that the baker committed four violations and reduced it to one, since prosecutors could arbitrarily divide the violation time, say into a "day, hours, or minutes."[385] Lord Mansfield found it absurd that a tailor could be found guilty for "every stitch" sewn on a Sunday, for example.[386] The statute's purpose was to punish one particular act, not an arbitrary division of "repeated offenses."[387]

Nearly a century later, the United States Supreme Court invalidated a punishment as violating double jeopardy where the defendant was given both a fine of $200 *and* jail time of one year where the statute required the court to give one or the other.[388] "If there is anything settled in the jurisprudence of England and America," the Court said, "it is that no man can be twice lawfully punished for the same offence."[389]

In *Ex parte Snow*, a few years later, the Court heard the claim of a Mormon polygamist who was charged and convicted with violating a cohabitation statute for three separate years: 1883, 1884, and 1885.[390] The Court found the charges' year distinction arbitrary: the offense was one continuous act.[391] Of particular concern, the Court focused on the fact that without a check, the government could pursue an endless number of charges for the same act:

> On the same principle there might have been an indictment covering each of the 35 months, with imprisonment for 17 1/2 years and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for 74 years and fines amounting to $44,400; and so on, *ad infinitum*, for smaller periods of time.[392]

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[382] *Id.*

[383] *Id.*; McKay, *supra* note 381, at 14–15; *see* Ashe v. Swenson, 397 U.S. 436, 453 (1970) (Brennan, J., concurring).

[384] (1777) 98 Eng. Rep. 1283, 1283 (K.B.); 2 Coup. 640, *quoted in Ex parte* Snow, 120 U.S. 274, 283–84 (1887).

[385] *Ex parte Snow*, 120 U.S. at 284–85.

[386] *Id.* at 284.

[387] *Id.*

[388] *Ex parte* Lange, 85 U.S. 163, 164, 168 (1873).

[389] *Id.* at 168.

[390] 120 U.S. at 276–77.

[391] *Id.* at 281–82.

[392] *Id.* at 282.

Two years later, the Court again addressed the arbitrary division of time in a Mormon polygamy prosecution and found, citing *Snow*, that trying to arbitrarily divide time to punish a defendant for a continuing offense offended double jeopardy.[393] Numerous other cases support the same principle: that the constitutional prohibition against double jeopardy prohibits multiple charges and punishments for a continuous offense.[394]

Thus, another principle emerges. Double jeopardy protects the defendant from governmental action that takes what is essentially one crime and arbitrarily dividing it into multiple crimes.

Kidnapping now implicates this provision.[395] The legislatively authorized number of offenses in modern statutes are so numerous and so closely related that prosecutors can engage in the same charge-stacking problem. They can discriminate with impunity, using a law that from its inception has been defined and utilized improperly and unfairly. Prosecutors now have at their disposal incredibly broad criminal statutes to which they can simply tack on, whenever they arbitrarily choose, a kidnapping charge.

Because kidnapping is no longer a separate and distinct common-law offense, but occurs in virtually every crime in which some degree of involuntary detention or movement will happen, such as a robbery, rape, sexual assault, or murder, it becomes a wholly indistinct crime. And now prosecutors can take a host offense with some detention and *in every case*, or more problematically, in only those they choose, to enormously elevate the sentence and consequent punishment with a separate kidnapping charge.[396]

Courts must step in. "If the legislature is free to define fragmented offenses," as they do around the nation with kidnapping offenses, "the defendant loses what may be viewed as the central protection of the Double Jeopardy Clause."[397]

Some critics and courts have observed that because double jeopardy violations require overlapping elements—the "same offense" under the Supreme Court's

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[393] *Ex parte* Nielsen, 131 U.S. 176, 185–87 (1889).

[394] *See, e.g.*, Stinneford, *supra* note 364, at 2007–10; *see also, e.g.*, United States v. New York Guar. & Indem. Co., 27 F. Cas. 133, 133 (S.D.N.Y. 1875) (breaking down a refusal to file a tax return into ninty one-month increments) (No. 15,872); Mayor v. Ordrenan, 12 Johns. 122, 922–23, 125 (N.Y. Sup. Ct. 1815) (charging defendant with one count for each hundred pounds of gunpowder); State v. Comm'rs of Fayetteville, 6 N.C. (2 Mur.) 371, 371–72 (1818) (charging defendants, who had a duty to keep streets in good repair, with one count for each street, wondering why division couldn't be for "every hundred yards, (why not every yard?)," and observing that rendering crimes "infinitely divisible" was "repugnant to the spirit and policy of the law and ought not to be countenanced").

[395] *See, e.g.*, State v. McGuire, 795 P.2d 996, 1000 (N.M. 1990).

[396] "Given the statutory definitions, it is possible that nearly every act of criminal sexual penetration also will constitute the act of kidnapping." *Id.*

[397] Anne Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. COLO. L. REV. 595, 609 (2006).

Blockburger jurisprudence—kidnapping and some other offense will *never* violate double jeopardy because they do not carry the same elements.[398] However, this reading of "same offense" is ultimately too narrow to adequately protect defendants from the dangers of multiple prosecutions.

The clause says that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[399] Clearly, it prohibits duplicative charges for the exact same offense, like the polygamists, but this reading prohibits stacking a kidnapping charge on some offense for no additional or separate conduct. Instead, the double jeopardy clauses should be read to mean that a person may not receive multiple punishments for what is the same criminal action—the "same offence," or same factual predicate.[400] Courts should be willing to strike down an overly broad kidnapping statute because it enables a Double Jeopardy Clause violation.

3. Equal Protection

Kidnapping statutes also implicate equal protection, a concept deeply rooted in racial equality.[401] As the Supreme Court has said, "Concern . . . [for] equal protection was part of the fabric of our Constitution even before the Fourteenth Amendment expressed it most directly in applying it to the States."[402] The clause means quite simply that "[a] state may treat persons differently only when it is fair to do so" or "in its concern for equality, that those who are similarly situated be similarly treated."[403]

The Equal Protection Clause had little utility before the 1960s and the Court soon began to limit its power such that most "claims are dismissed out of hand."[404] Justice Oliver Wendell Holmes said that the clause was "last resort of constitutional arguments."[405]

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[398] Met v. State, 2016 UT 51 ¶¶ 932–33, 388 P.3d 447, 477 (Lee, J., concurring) (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)).

[399] U.S. CONST. amend. V.

[400] *See, e.g.*, *Ex parte* Goodbread, 967 S.W.2d 859, 860 (Tex. Crim. App. 1998) ("For Double Jeopardy purposes, the same offense means the identical criminal act, not the same offense by name." (alteration and quotation omitted)).

[401] Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 753 (1985); Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884, 884–85 (1987).

[402] Vance v. Bradley, 440 U.S. 93, 94 n.1 (1979).

[403] Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1215 (1978); Jospeh Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

[404] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8–15 (1972); Sager, *supra* note 403, at 1216.

[405] Buck v. Bell, 274 U.S. 200, 208 (1927).

For a generation, the Supreme Court has diluted the Equal Protection Clause by requiring one to complete the herculean task of showing purposeful discrimination or some sort of conscious intent to discriminate, a nearly impossible task.[406] But while the Court has invalidated laws under the clause when a law had a discriminatory impact, "the equal protection guarantee [has become] all but meaningless when applied to criminal law enforcement," such that minorities can now receive significantly longer prison sentences when prosecutors exercise their discretion to add kidnapping offenses to a host crime.[407]

The Court's selective prosecution test requires a defendant to show a system that has "a discriminatory effect" and that his prosecution was "motivated by a discriminatory purpose."[408] Thus, to sustain an Equal Protection claim, a defendant would need to show "clear evidence to the contrary": the number of kidnappings committed in a jurisdiction, noting the particular fact patterns in each case.[409] He would then have to parse those crimes out by race of the perpetrator.[410] Then, he would have to show that, for similar conduct, "stark" data showing prosecutors declined to charge white people with kidnapping but then charged black people with kidnapping.[411]

This "demanding" standard creates three impossible hurdles.[412] First, almost no jurisdiction keeps factual and race data on all crimes, charged or uncharged.[413] For example, the Seventh Circuit rejected a defendant's claim that he was targeted for a kidnapping charge and was entitled to government charging records, because he provided "no evidence whatsoever that the defendant was singled out for prosecution because of his race."[414] But one has to wonder how the defendant would get the

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[406] *E.g.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (rejecting black plaintiffs' equal protection claim since they "simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision"); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 347 (1987); Robert J. Lotero, Note, *The Village of Arlington Heights: Equal Protection in the Suburban Zone*, 4 HASTINGS CONST. L.Q. 361, 373–74 (1977).

[407] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 6, 8 (2011); *see* Hunter v. Underwood, 471 U.S. 222, 222 (1985) (invalidating Alabama Constitution's disenfranchisement provision for discriminatory intent in its passage and its discriminatory impact).

[408] United States v. Armstrong, 517 U.S. 456, 457 (1996); Wayte v. United States, 470 U.S. 598, 608 (1985); *see also* McCleskey v. Kemp, 481 U.S. 279, 292 (1987); Plyler v. Doe, 457 U.S. 202, 217–18 (1982); Jones v. Helms, 452 U.S. 412, 423–24 (1981); Hernandez v. Texas, 347 U.S. 475, 479–80 (1954).

[409] *Armstrong*, 517 U.S. at 465.

[410] *Id.* at 465–66.

[411] *McCleskey*, 481 U.S. at 293; *see Armstrong*, 517 U.S. at 465–66; *Hernandez*, 347 U.S. at 479–80.

[412] *See* Love v. State, 468 N.E.2d 519, 521 (Ind. 1984); State v. Johnson, 600 P.2d 1249, 1252 (Wash. 1979); STUNTZ, *supra* note 407, at 214.

[413] *Armstrong*, 517 U.S. at 463; STUNTZ, *supra* note 407, at 214.

[414] United States v. Mitchell, 778 F.2d 1271, 1277 (7th Cir. 1985).

information to even support the claim without access to it to begin with, especially if the jurisdiction does not keep these type of records.

Second, and more difficult, because kidnapping can be easily added to a robbery, a rape, a sexual assault, or any number of crimes, the pool of offenses, and the underlying factual predicates which would support a kidnapping charge, is virtually limitless.

Third, a defendant rarely, if ever, can show that a particular prosecutor had a discriminatory motivation absent some sort of smoking gun, such as an email indicating the prosecutor intended to charge a defendant because of his race.

In two Indiana cases, both white and black prisoners engaged in a prison uprising.[415] The prosecutor chose only to charge six black inmates with kidnapping, two of whom raised equal protection arguments on appeal, since only "black[s] . . . classified as 'aggressive' . . . were charged with kidnapping."[416] In one of the cases, the court found that because the defendant was seen "watching over a guard," a jury could infer he intended to take guards hostage, which was enough to sustain his kidnapping conviction.[417] In both cases, the court summarily rejected the equal protection arguments, observing the charging decision "was [entirely] that of the prosecuting attorney."[418]

This is the problem. White and black defendants commit the same offense. The prosecutor charges only blacks. Defendants claim the prosecution was selective, but because they do not have access to charging motivations, and particularly because kidnapping is such an overly broad offense sustainable by almost any evidence in any case, it is exactly the type of mask a prosecutor can hide behind to pursue a private discriminatory motivation. And no defendant, absent an extraordinary discovery, could ever prove otherwise.

Even though those who wrote the clause believed the law should apply equally to all citizens regardless of race, the Court's equal protection jurisprudence allows prosecutors to enforce kidnapping statutes excessively against minorities and its test fails to hold governmental officials accountable to equally enforce the law since the crime is defined in a race-neutral manner.[419]

This does not have to be the case. As the Court put it in *Yick Wo v. Hopkins*, if administration of a law is used against a class of people, it denies equal protection:

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[415] Greene v. State, 515 N.E.2d 1376, 1380 (Ind. 1987); *Love*, 468 N.E.2d at 521.

[416] *Greene*, 515 N.E.2d at 1380; *Love*, 468 N.E.2d at 520.

[417] *Greene*, 515 N.E.2d at 1379–80.

[418] *Id.*; *Love*, 468 N.E.2d at 521; *see* State v. Horn, 610 P.2d 551, 555 (Idaho 1980) (finding that the prosecutor declined to prosecute two other defendants for the same kidnapping, "[t]here is no evidence that the prosecutor based his decision to prosecute them for kidnapping on improper standards or motives").

[419] STUNTZ, *supra* note 407, at 119–21; *see* United States v. Armstrong, 517 U.S. 456, 456 (1996) (finding that even though all crack cases prosecuted involved black defendants, defendant's claim failed because he could not point to white people who were not prosecuted); McCleskey v. Kemp, 487 U.S. 279, 281 (1987) (finding no equal protection violation despite fact that the death penalty was disproportionately used on black defendants).

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[420]

As Ronald Dworkin has put it, we should not "use the Equal Protection Clause to cheat ourselves of equality."[421] Kidnapping has its origins in a form of racism and its disparate impact and the Equal Protection Clause, as Charles Lawrence has put it, "must find a way to come to grips with unconscious racism" because without it, "the Court [has] create[d] an imaginary world where discrimination does not exist unless it was consciously intended."[422]

Courts should give equal protection the teeth it deserves as it relates to kidnapping. Courts should require governmental entities to collect the fact patterns on charged and uncharged offenses so that defendants can utilize the evidence they need support equal protection claims. Without judicial intervention, these violations will continue to occur.

4. Cruel and Unusual Punishments Clause

Because kidnapping statutes are overly broad, they violate the Cruel and Unusual Punishments Clause of the Eighth Amendment.[423] They allow an excessive punishment for a single criminal act. To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to "the evolving standards of decency that mark the progress of a maturing society."[424]

The principle has long backing in the common law.[425] "Writers from Bracton to Blackstone declared that punishment is unjustified unless it is based upon an offender's moral culpability."[426] Early courts frequently struck down fairly ordinary cases as cruel and unusual, such as a Kentucky statute making it a crime for a black person to strike a white person, even in self-defense, or a punishment of twelve years in prison for a crime that involved no harm.[427]

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[420] 118 U.S. 356, 373–74 (1886).

[421] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 287 (2d ed. 1997).

[422] Lawrence, *supra* note 406, at 323, 325.

[423] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[424] Estelle v. Gamble, 429 U.S. 97, 102 (1976) (internal quotations omitted) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

[425] Stinneford, *supra* note 364, at 1987.

[426] *Id.*

[427] *Id.*; *see* Ely v. Thompson, 10 Ky. (3 A.K. Marsh.) 70, 70 (1820); *see also* Weems v. United States, 217 U.S. 349, 381–82 (1910).

Other courts have made similar observations. For example, "[U]nder the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes."[428] Also, "The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'"[429] And courts must compare the "gravity of the offense and the severity of the sentence."[430]

Here, given the proliferation of statutes, prosecutors can stack related charges such that persons receive life sentences for ordinary crimes.[431] In essence, if prosecutors can select from an arsenal of statutes with similar elements for one crime, and can simply add a kidnapping charge to the mix they "will have the power to procure virtually any prison sentence they wish simply by manipulating the number" of those offenses.[432] Courts should invalidate kidnapping statutes that enable this to occur.

5. Rule of Lenity

As a last-ditch option, courts should also use the rule of lenity to prevent prosecutors from using kidnapping convictions to enhance sentences. Consider the following judicial observations: "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[433] "It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."[434] "The rule of lenity requires that we interpret an ambiguous statute in favor of lenity toward the person charged with criminal wrongdoing."[435] "[I]n the absence of a clear indication that the legislature intended multiple punishment for the unitary conduct, the court should apply the rule of lenity to presume that the legislature did not intend multiple punishment."[436]

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[428] Graham v. Florida, 560 U.S. 48, 59 (2010).

[429] *Id.* at 59 (quoting *Weems,* 217 U.S. at 367).

[430] *Id.* at 60.

[431] Solem v. Helm, 463 U.S. 277, 290 (1983) ("[A] criminal sentence must be proportionate to the crime for which the defendant has been convicted."); *see also* Deal v. United States, 508 U.S. 129, 131, 137 (1993) (stacking counts of gun charges). The Supreme Court has admitted that "the precise contours" of its proportionality law "are unclear" "[g]iven the lack of clarity of our precedents" and that "we have not established a clear or consistent path for courts to follow." Lockyer v. Andrade, 538 U.S. 63, 72–73, 74 n.1 (2003).

[432] Stinneford, *supra* note 364, at 1973.

[433] Rewis v. United States, 401 U.S. 808, 812 (1971).

[434] Bell v. United States, 349 U.S. 81, 83 (1955).

[435] State v. Rasabout, 2015 UT 72 ¶ 22, 356 P.3d 1258, 1266.

[436] State v. Landgraf, 913 P.2d 252, 261–62 (N.M. Ct. App. 1996) (quoting State v. Franklin, 865 P.2d 1209, 1213 (N.M. Ct. App. 1993)).

The rule of lenity serves three purposes here.[437] It provides that if the legislature ambiguously fails to delineate a clear offense, then the court must choose the most lenient for a defendant: "a person's behavior should not be criminalized unless the legislature clearly and precisely proscribes the behavior in a criminal code."[438] Second, it would "prevent zealous prosecutors and timorous judges from perceiving two offenses where the legislature intended only one."[439] Third, the rule would allow for "greater predictability and coherence in results."[440]

Thus, the rule operates to allow courts to exercise lenity in a given case to prevent multiple punishments or excessive enforcement.[441]

CONCLUSION

Kidnapping has a troubled history in the law.[442] It was instituted, perpetuated, and expanded almost exclusively after publicized and sensationalized cases where the children of wealthy whites were taken.[443] In the same periods, courts and legislatures largely ignored the cries of minorities, particularly slaves or free blacks, that they too had been kidnapped.[444] In the public hysteria over the relatively few kidnappings of white children, legislatures expanded the offense's definition to the point that it lost all meaning and became unconstitutionally vague. To remedy this problem, courts created kidnapping merger tests.[445] But these tests have had little consistency or coherency, and troublingly, they have done little to solve the issues of discriminatory enforcement that have plagued kidnapping since its inception. Legislatures should reconsider kidnapping and narrow its definition in order to prevent the arbitrary use of police or prosecutorial discretion. If legislatures refuse to act, then courts should strike down their kidnapping statutes as vague and as violations of double jeopardy and equal protection, as well as a cruel and unusual punishment.

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[437] *Id.* at 261 (quoting Peter Westen & Richard Drubel, *Toward a Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 118); Jeffrey M. Chemerinsky, Note, *Counting Offenses*, 58 DUKE L. J. 709, 741–42 (2009).

[438] Chemerinsky, *supra* note 437, at 741 ("[W]hen choosing between 'two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication'" (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952))).

[439] *Landgraf*, 913 P.2d at 261 (quoting Westen & Drubel, *supra* note 437, at 118).

[440] Chemerinksy, *supra* note 437, at 742.

[441] *Id.* at 741–42; *see Landgraf*, 913 P.2d at 261 (quoting Westen & Drubel, *supra* note 437, at 118).

[442] *See* Napier, *supra* note 22, at 200–01.

[443] *See* POTTER, *supra* note 135 and accompanying text.

[444] ROTHMAN, *supra* note 53, at 182–83.

[445] *See* State v. Miles, 245 N.E.2d 688, 695 (N.Y. 1969).

Percy Wilder lost his case.[446] The Utah Supreme Court summarily rejected his constitutional claims, rejected its common law merger test, and opted to leave a statutory merger test in place.[447] It refused to act. In an era of mass incarceration, where minorities overpopulate and fill our prison system, when we continue to see, troublingly, ongoing systemic racism in the criminal justice system, courts must not remain silent.[448] One must wonder how many people serve years for a kidnapping offense that amounted to nothing other than a tack-on for another offense that person committed.

We should redefine kidnapping. We should eliminate prosecutors' ability to overcharge and stack this offense. The courts must put a stop to these constitutional violations and require legislatures to redefine the offense. Unless it changes, people like Mr. Wilder will continue to fill our penitentiaries.

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[446] State v. Wilder, 2018 UT 17 ¶ 38, 420 P.3d 1064, 1072.

[447] *Id.* at ¶ 25 n.7, ¶ 38.

[448] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); SABRINA JONES & MARC MAUER, RACE TO INCARCERATE: A GRAPHIC RETELLING (2013).