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Asportation or Carrying Away Is a Necessary Element of the Offense of Kidnapping.

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law and criticized HEW's reasoning.[60] The facts differ since California uses a statutory maximum standard of payment, while Texas uses a ratable reduction standard of payment.[61] Furthermore, the California suit was based upon § 602(a)(7)[62] of the Social Security Act, while the Texas suit was based upon § 602(a)(23)[63] and the fourteenth amendment. The court in *Villa* disagreed with HEW's contention that the example given by the Supreme Court in a footnote in *Rosado*, which subtracted additional income from the standard of need rather than the level of benefit,[64] was mere dictum. It characterized the example as "necessary to the [Supreme] [C]ourt's interpretation of the 1967 amendment which requires standards of need and statutory maximums to be increased. . . ."[65]

While HEW approval of a plan which subtracts income from the standard of need rather than the level of benefit is significant, it is not necessarily binding. The courts have not hesitated to overrule that agency when it deems a ruling contrary to a statute or congressional policy.

The instant case held that there was a conflict in the Social Security Act and the budgeting procedure of subtracting an AFDC family's income from its statutory maximum grant rather than its standard of need when computing the amount of the grant. The court's interpretation was based in part on its interpretation of legislative intent and in part on permissive statements in HEW's rules and regulations.

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CRIMINAL LAW—KIDNAPPING—ASPORTATION OR CARRYING AWAY IS A NECESSARY ELEMENT OF THE OFFENSE OF KIDNAPPING. *People v. Adams*, 192 N.W.2d 19 (Mich. Ct. App. 1971).

On October 18, 1965, several inmates of Jackson State Prison, including Adams, were engaged in a conversation concerning their grievances against the administration. A mixture of alcohol and barbiturates had

60 Villa v. Hall, 490 P.2d 1148, 1151 (Cal. 1971).

61 Under the Texas plan, the Department of Public Welfare determines a family's standard of need according to its statewide guidelines. An adult is allowed $65 per month for food, clothing and other essentials; each child under 18 is allowed $25 per month; the maximum rent allowed is $50; and utilities are budgeted at $13. The standard of need for a family of four children would be $228. The state provides a level of benefit of 75% of need (as of March, 1972). The maximum grant for a family of four would be $171. (The same percentage level is applied to all AFDC families no matter what their size.)

62 Social Security Act, 42 U.S.C. § 602(a)(7) (1971).

63 Social Security Act, 42 U.S.C. § 602(a)(23) (1971). This section requires states to adjust their standards of need to reflect changes in the cost of living.

64 Rosado v. Wyman, 397 U.S. 397, 409 n.13, 90 S. Ct. 1207, 1216 n.13, 25 L. Ed.2d 442, 454 n.13 (1970).

65 Villa v. Hall, 490 P.2d 1148, 1152 (Cal. 1971).

been consumed and the mood of the prisoners became rebellious. A disturbance arose in one of the cellblocks during the lunch hour while all the prisoners were out of their cells. When a prison official appeared on the scene to help restore order, he was seized at knife point. Since the danger of a full scale riot was increasing, the official suggested that he and the prisoners " '. . . go somewhere and talk. . . .' "[1] The armed inmates then insisted that the official accompany them fifteen hundred feet to the prison hospital where more guards were seized. For five and one-half hours these hostages were held in a barricaded section of the hospital while the prisoners demanded the right to air their grievances to the warden and an outside observer from the press. The prison by this time was surrounded by law enforcement officers and there was never any attempt manifested by the prisoners to escape. The official was later released unharmed and the inmates voluntarily surrendered their weapons. The defendant was tried and convicted of kidnapping. Adams appealed. Held—*Reversed.* To constitute kidnapping the element of asportation, or carrying away, is essential. This movement of the victim must be independent of an assault and of such an extent as to remove him from the environment where he is found.

Under the common law, the crimes of false imprisonment and kidnapping were both considered misdemeanors.[2] In order to differentiate between the two offenses, kidnapping required asportation of the victim out of the country.[3] This removal was the element which aggravated simple false imprisonment.[4]

In the United States prior to 1932, each state was responsible for formulating its own kidnap statutes.[5] There was no federal statute, therefore no nationwide jurisdiction over this crime.[6] As a result organized kidnapping was widespread.[7] When a victim was taken across a state line, he was outside the jurisdiction where the crime had been committed. This made pursuit, arrest and prosecution extremely difficult.[8] To combat this situation the Federal Kidnapping Act was passed.[9] In this Act, the common law element of asportation was retained and movement of a victim across a state line became essential for conviction.[10] A major difference between the statute as it stands today[11]

1 People v. Adams, 192 N.W.2d 19, 22 (Mich. App. 1971).
2 4 W. BLACKSTONE, COMMENTARIES* 218.
3 *Id.*
4 *See generally* R. PERKINS, CRIMINAL LAW 176 (2d ed. 1969).
5 It is interesting to note that at this time only six of the forty-eight states had statutes which made kidnapping a capital offense. 75 CONG. REC. 13284 (1932).
6 75 CONG. REC. 13284 (1932).
7 *See generally* 75 CONG. REC. 13282-13304 (1932).
8 *Id. See also* Chatwin v. United States, 326 U.S. 455, 66 S. Ct. 233, 90 L. Ed. 198 (1946).
9 Act of June 22, 1932, ch. 271, 47 Stat. 326. This Act is popularly known as the "Lindberg Law." *See* 75 CONG. REC. 5076 (1932).
10 Act of June 22, 1932, ch. 271, 47 Stat. 326.
11 18 U.S.C. § 1201(a) (1970).

and its earlier versions is that the original death penalty provision has been ruled unconstitutional.[12] In addition the law stipulates that:

> [F]ailure to release the victim within twenty-four hours after he shall have been unlawfully seized . . . shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.[13]

The common law element of asportation has been preserved in the United States Code as both a part of the offense and as a jurisdictional necessity.[14]

Each state statute defining kidnapping is worded differently; therefore, it is extremely difficult to formulate a general definition of the crime that would apply to all jurisdictions.[15] Some states have followed the common law very closely while others have attempted to broaden the scope of the offense by allowing almost any movement of the victim to suffice for the element of asportation.[16] Early American cases show a trend toward updating the definition of the crime and away from the strict common law view.[17]

An excellent example of this trend toward a more liberal construction and interpretation of the crime is the present California kidnap statute.[18] It reads in part:

> Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or *county, or into another part of the same county* . . . is guilty of kidnapping.[19]

The breadth of this statute has produced an abundance of case law attempting to define the limits of the asportation element. In the 1950's and 1960's, the California courts consistently held that any movement, regardless of distance, would support a conviction.[20] In *People v. Chessman,* movement of the victim twenty-two feet was held sufficient to constitute the crime.[21] In *People v. Monk* the court ruled that

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12 United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed.2d 138 (1968).

13 18 U.S.C. § 1201(b) (1970).

14 Hess v. United States, 254 F.2d 578 (8th Cir. 1958). However, it is not necessary that the kidnapper know that a state line has been crossed. United States v. Powell, 24 F. Supp. 160 (E.D. Tenn. 1938).

15 1 AM. JUR. 2d *Abduction and Kidnapping* § 2 (1962).

16 *See* R. PERKINS, CRIMINAL LAW 176 (2d ed. 1969).

17 *See* State v. Rollins, 8 N.H. 550 (1837). Hadden v. People, 25 N.Y. 373 (1862). In this latter case intent alone without movement was sufficient to support conviction. *Cf.* State v. Buckarow, 38 La. Ann. 316 (1886). In this civil law jurisdiction, movement within a county or city was enough to sustain the offense.

18 CAL. PENAL CODE ANN. § 207 (Deering 1971).

19 *Id.* (emphasis added).

20 *E.g.,* People v. Monk, 363 P.2d 865 (Cal. 1961); People v. Wein, 326 P.2d 457 (Cal. 1958), *cert. denied,* 359 U.S. 992, 79 S. Ct. 1122, 3 L. Ed.2d 980 (1959); People v. Chessman, 238 P.2d 1001 (Cal. 1951).

21 People v. Chessman, 238 P.2d 1001, 1017 (Cal. 1951).

forcing the victim to walk six to eight feet completed the offense of kidnapping.[22]

The danger inherent in this approach was pointed out in the New York Court of Appeals decision of *People v. Levy*.[23] In this case the armed defendants forced their way into the victims' car, took control and drove around on city streets for a distance of twenty-seven blocks. During the trip, jewelry and cash were taken. Subsequently the three defendants were tried, convicted of kidnapping and sentenced to a term of twenty years to life. On appeal the court overturned the kidnap convictions. The court reasoned that a broad definition of the crime includes restraint or force and movement.[24] However, these two elements are present in many other offenses as well as kidnapping.[25] Although the elements are similar the penalties can be vastly different; i.e., under some circumstances kidnapping is punishable by death.[26] Therefore, the court contended that the distinction between kidnapping and other relatively minor crimes could be obliterated by a liberal use of the kidnap law beyond legislative intent.[27] As the court stated:

> This definition could literally overrun several other crimes, notably robbery and rape and in some circumstances assault . . . .[28]

In 1969, the California Supreme Court, heeding the warning contained in *Levy*, modified the "any movement" rule in *People v. Daniels*.[29] In this case two defendants were convicted on several counts, including kidnapping, rape, and robbery. In each instance, the victim was moved from room to room in an apartment at gunpoint while the felonies were being perpetrated. The court reversed the kidnapping convictions and held:

> The rule of construction declared in People v. Chessman . . . is no longer to be followed. Rather, we hold that the intent of the Legislature . . . [in amending the kidnap for ransom statute] . . . was to exclude from its reach not only "standstill" robberies . . . but also those in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present. . . .[30]

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22 People v. Monk, 363 P.2d 865, 867 (Cal. 1961).
23 People v. Levy, 204 N.E.2d 842 (N.Y. 1965), *cert. denied*, 381 U.S. 938, 85 S. Ct. 1770, 14 L. Ed.2d 701 (1966).
24 *Id.* at 843.
25 *Id.* at 844.
26 *Id.* at 843.
27 *Id.* at 844.
28 *Id.* at 844. For an excellent historical treatment of the New York position on the merger of other crimes with kidnapping, *see* Parker, *Aspects of Merger in the Law of Kidnapping*, 55 CORNELL L. REV. 527 (1970).
29 People v. Daniels, 459 P.2d 225 (Cal. 1969).
30 *Id.* at 238.

Thus the California view is, if the movement of a victim is incidental to the commission of another crime, it will not constitute an element of kidnapping.[31] In addition, the degree of asportation required is now defined as that which increases the risk of harm to the victim.[32]

In the instant case, the court construed the breadth of the Michigan kidnap statute[33] as requiring either carrying away or secret confinement of the victim as an essential element to support the charge.[34] Since there was a flaw in the indictment against Adams, the court was never given an opportunity to rule on the issue of secret confinement.[35]

> In this case the people do not charge that the victim was secretly confined. The information charged the defendant Otis Adams with 'forcibly confining and imprisoning' his victim—the word 'secretly' in the statutory phrase . . . was omitted when the charge was drawn.[36]

Unless asportation was found the conviction would not stand. Thus the court was forced not only to define the offense but also to rule on the degree of movement required to complete the crime. Mindful of the dangers outlined in *Levy*,[37] the majority adopted the California view[38] in part and held:

> [The] movement of the victim does not constitute asportation unless it has significance independent of the assault. And, unless the victim is removed from the environment where he is found, the consequences of the movement itself to the victim are not independently significant from the assault—the movement does not manifest the commission of a separate crime—and punishment for injury to the victim must be founded on crimes other than kidnapping.[39]

There are two distinct requirements in the adopted rule: (1) The movement must be independent of other crimes committed, and (2) the victim must be removed from the environment where he is found. "Environment" replaces the "substantial increase in risk" section of the

31 *Id.* at 238. People v. Dacy, 85 Cal. Rptr. 57 (Cal. Ct. App. 1970). It will be noted that convictions under federal law reject this rule and hold that even if movement of the victim across a state line is incidental to the commission of another crime it will support kidnapping. *See* United States v. DeLaMotte, 434 F.2d 289 (2d Cir. 1970), *cert. denied*, 401 U.S. 921, 91 S. Ct. 910, 27 L. Ed.2d 825 (1971).

32 People v. Daniels, 459 P.2d 225 (Cal. 1969).

33 MICH. COMP. LAWS ANN. § 28.581 (1954). "Any person who willfully, maliciously and without lawful authority shall forcibly or secretly confine or imprison any other person within this state against his will, or shall forcibly carry or send such person out of this state . . . shall be guilty of a felony . . . ."

34 People v. Adams, 192 N.W.2d 19, 29 (Mich. Ct. App. 1971).

35 *Id.* at 21.

36 *Id.* at 21 (footnote omitted).

37 People v. Levy, 204 N.E.2d 842 (N.Y. 1965), *cert. denied*, 381 U.S. 938, 85 S. Ct. 1770, 14 L. Ed.2d 701 (1966).

38 *E.g.*, People v. Daniels, 459 P.2d 225 (Cal. 1969).

39 People v. Adams, 192 N.W.2d 19, 30 (Mich. Ct. App. 1971).

California rule and is defined by the majority as "the totality of the surroundings, animate and inanimate."[40] The court found that movement of the prison official to the hospital did nothing to change his situation after the assault.[41] Since the prison was an enclosed "environment," any movement was considered comparable to movement of the victims from room to room in the *Daniels* case.[42]

The dissent viewed the resulting decision as "absurd" and would limit the use of the *Levy-Daniels* line of cases only to those situations where the ultimate purpose of the movement is a crime other than kidnapping.[43] The minority opinion also cited two out-of-state cases with similar fact situations in which the convictions for kidnapping within a prison were upheld.[44] In *State v. Randall*, a prison warden, several guards and civilian employees were taken hostage by knife-wielding inmates in a Montana prison. For two days the hostages were moved from cell to cell in order that their exact location would be unknown to law enforcement and national guard troops outside. The Montana court upheld the kidnapping conviction of Randall.[45] However, the controlling factor was a definition of "secretly confined" and the element of asportation was not considered.[46] One year later the same Montana court affirmed the kidnapping conviction of another prisoner arising out of the same incident.[47] The court simply cited *Randall* as controlling and again did not consider the scope of asportation.[48]

Neither of these cases relate directly to the problem of movement raised in *Adams*. If the indictment had been drawn to charge a "secret confinement" then perhaps a conviction would have been upheld under *Randall*. The advantage of the majority opinion is that it places the burden of extending the penal statute on the legislature rather than the courts.[49]

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40 *Id.* at 30.

41 *Id.* at 31.

42 *Id.* at 31.

43 *Id.* at 34. Several other jurisdictions, in agreement with the dissent in *Adams*, have shown a marked reluctance to modernize the definition of kidnapping through a use of the *Levy-Daniels* cases. State v. Padilla, 474 P.2d 821 (Ariz. 1970); State v. Goham, 187 N.W.2d 305 (Neb. 1971). State v. Ginardi, 268 A.2d 534, 537 (N.J. Super. 1970), where the court noted that the Supreme Courts of Delaware, Minnesota and Kansas (citations omitted) have found the California/New York rule "unpersuasive."

44 State v. Frodsham, 362 P.2d 413 (Mont. 1961); State v. Randall, 353 P.2d 1054 (Mont. 1960).

45 State v. Randall, 353 P.2d 1054 (Mont. 1960). The Montana kidnap statute under which Randall was convicted is similar to the Michigan statute in that either asportation or secret confinement must be shown as an element of the offense. MONT. REV. CODES § 94-2601 (1969).

46 State v. Randall, 353 P.2d 1054, 1056 (Mont. 1960). The court stated: "To 'secretly' confine within the meaning of our statute means confinement against the will of the person confined which deprives him of the friendly assistance of the law to redeem himself from captivity."

47 State v. Frodsham, 362 P.2d 413 (Mont. 1961).

48 *Id.* at 419.

49 People v. Adams, 192 N.W.2d 19, 33 (Mich. Ct. App. 1971).

The problem of defining asportation and its scope has never arisen in Texas. This is due in part to the fact that the Texas kidnap statute exemplifies a more conservative, common law approach to the crime.[50] Kidnapping is defined as aggravated false imprisonment and closely resembles the Federal Kidnap Act in the asportation requirement.[51] The Texas law reads:

> When any person is falsely imprisoned for the purpose of being removed from the State . . . such false imprisonment is 'kidnap-[p]ing.'[52]

It is not necessary under this statute that a person actually be removed from the state since the crossing of a state line is covered by another statutory offense.[53] Texas cases, closely following the common law, show a need for asportation both before[54] and after the adoption of the kidnap statute.[55] It would seem from the wording of the law that movement manifesting an intent to leave the state is required.[56]

If the same fact situation as in the *Adams* case had arisen in Texas, it is doubtful that a conviction under the general kidnap statute could be supported without some form of escape attempt. However, under another statute, the separate, distinct crime of kidnapping for extortion could be charged.[57] Although many cases prosecuted under this latter statute show asportation of varying degrees, the crime has been held to be complete when: (1) A person is unlawfully detained or confined, and (2) there is an intent on the part of the one confining to extort anything of value from another.[58] The object of the extortion need not be money.[59]

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[50] TEX. PENAL CODE ANN. art. 1177 (1961). Texas presently has three separate and distinct kidnapping statutes. Article 1177 deals with simple kidnapping; article 1177(a) defines kidnapping for extortion and article 1178 is directed at kidnapping to remove from the state. In addition, article 1177 is further subdivided with special provisions which apply if the victim is a minor. These three statutes do not include the crimes of false imprisonment or abduction which are covered elsewhere.

[51] TEX. PENAL CODE ANN. art. 1177 (1961).

[52] *Id.*

[53] TEX. PENAL CODE ANN. art. 1178 (1961).

[54] *See* Click v. State, 3 Tex. 282 (1848).

[55] *E.g.*, Hardie v. State, 140 Tex. Crim. 368, 144 S.W.2d 571 (1941).

[56] TEX. PENAL CODE ANN. art. 1177 (1961). *See* Hardie v. State, 140 Tex. Crim. 368, 372, 144 S.W.2d 571, 573 (1941). In this case the defendants seized a hostage at gunpoint and set out toward the Louisiana state line. The hostage was released and the fugitives caught while still in Texas. The court upheld the kidnapping convictions and stated: "We think that there was direct testimony to show that these boys *intended to take Mr. Kirby out of the State* . . . ." (emphasis added).

[57] TEX. PENAL CODE ANN. art. 1177(a) (1961). Under this law anyone ". . . who forcibly detains . . . takes . . . confines, or . . . conceals . . . for the purpose or with the intent of taking or receiving or demanding or extorting . . . any money or valuable thing . . . is guilty of a capital felony . . . ." "The . . . penalty applies in every case regardless of whether the offense originated within or without the state . . . ."

[58] Tyler v. State, 163 Tex. Crim. 46, 288 S.W.2d 517 (1956).

[59] *See* Crumm v. State, 131 Tex. Crim. 631, 101 S.W.2d 270 (1937), where the signature on a deed was held to be a valuable thing sufficient to support the crime; Oden v. State, 401