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## Hines 57: The Catchall Case to the Texas Kidnapping Statute.

Karen Bartlett

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## RECENT DEVELOPMENT

### HINES 57: THE CATCHALL CASE TO THE TEXAS KIDNAPPING STATUTE

KAREN BARTLETT\*

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\* J.D., St. Mary’s University. B.A., Southern Methodist University. I would like to take this opportunity to thank my family for their love, support, and encouragement. I would like to extend a special thank you to Jim and Victoria, my guardian angels.

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"Although kidnapping is an infamous crime, perceived by the public with both dread and morbid curiosity, and the subject of fine literature, it is also a crime that has eluded meaningful definition."<sup>1</sup>

## I. INTRODUCTION

As a teller at the Klein Bank was attempting to open the bank for the day's business, two men dressed in black and wearing ski masks emerged from some nearby bushes with a shotgun.<sup>2</sup> The teller attempted to enter the bank and lock the men outside, but the gunman managed to pry the door open with the shotgun and grabbed the teller by the throat.<sup>3</sup> After instructing the teller to disarm the alarm, the gunman instructed the teller to proceed to the vault.<sup>4</sup> Once at the vault, the teller noticed her co-worker Darlene Standlee arriving for work.<sup>5</sup> The teller mouthed words of warning to her colleague, who began to run.<sup>6</sup> When both men left

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1. John L. Diamond, *Kidnapping: A Modern Definition*, 13 AM. J. CRIM. L. 1, 1 (1985). *The New York Times* reported 1,703 cases of kidnapping in the United States between 1874 and 1974, including 236 "classic kidnapping[s] for ransom." *Id.* at n.1. It has been suggested that in the late 1920s and 1930s, the development of the automobile and organized crime during the prohibition years led to an increase in ransom kidnapping. *Id.* Perhaps the most infamous kidnapping of this century took place on March 1, 1932, when the infant son of aviator Charles Lindberg was abducted from his home and eventually killed. *State v. Hauptmann*, 180 A. 809, 813 (N.J. 1935). The alleged kidnapper Bruno Richard Hauptmann was not prosecuted for kidnapping. *Id.* In order for the felony murder rule to apply, the prosecutor had to find some other crime that would supply the necessary felony. *Id.* The prosecutor chose to charge Hauptmann with stealing the child's sleeping suit. *Id.* at 818. The prosecutor was successful and Hauptmann received the death penalty. *Id.* at 813.

2. *Hines v. State*, 40 S.W.3d 705, 707 (Tex. App.—Houston [14th Dist.] 2001), *rev'd*, 75 S.W.3d 444 (Tex. Crim. App. 2002).

3. *Id.*

4. *Id.* While the gunman was attempting to disarm the alarm, his accomplice stood lookout. *Id.* The gunman threatened to shoot the nervous teller when she was unable to disarm the alarm with ease. *Id.*

5. *Id.*

6. *Id.* The men squatted down while holding the teller by the arm. *Id.* Even though they instructed the teller to signal Darlene Standlee to enter the bank, she mouthed for her to run. *Id.* Ms. Standlee would later testify that when she approached the bank, she saw the teller "and an individual who was completely covered." *Id.*

the bank in pursuit of Darlene Standlee, the teller fled and called police.<sup>7</sup> The teller testified that while in the bank, she “was not free to leave and that her presence in the bank was neither consensual nor voluntary.”<sup>8</sup> Following his arrest, the defendant confessed to participating in the robbery as the non-gunman.<sup>9</sup> The defendant was convicted of aggravated kidnapping.<sup>10</sup>

An actor commits the offense of aggravated kidnapping “if he intentionally or knowingly abducts another person” with deadly force or with the intent to hold that person for ransom or reward, use as a shield or hostage, “facilitate the commission of a felony or the flight” thereafter, inflict sexual or physical abuse, terrorize, or interfere with a governmental function.<sup>11</sup> The Texas Penal Code defines “abduct” as intentional restraint of a person’s liberty by secreting the person in a place where he is unlikely to be found or threatening to use or using deadly force.<sup>12</sup> “Restrain” is defined in the Texas Penal Code as restricting a person’s movements without consent, “so as to interfere substantially with the person’s liberty, by moving the person from one place to another or by confining the person.”<sup>13</sup>

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7. *Hines*, 40 S.W.3d at 707. As Standlee was fleeing the bank, the men ordered her to stop, and she was escorted back into the bank. *Id.* The three proceeded to the vault and the men fled the bank with \$33,000. *Id.* Hines “was subsequently charged with the aggravated robbery of Standlee.” *Id.* at n.1.

8. *Id.* at 707.

9. *Id.* at 708. The defendant’s statement related that the complainant “parked in front of the bank and walked towards the” bank. *Id.* Both the defendant and the gunman approached the complainant, but she panicked and ran inside the bank. *Id.* Both men forced their way inside and forced the teller “into the back of the bank where the vault was” located. *Id.*

10. See TEX. PEN. CODE ANN. § 20.04 (Vernon 2003) (enumerating the elements of the offense of aggravated kidnapping). An offense under this Section is a first-degree felony. *Id.* § 20.04(c). However, during the punishment phase, the defendant may raise whether he voluntarily released the victim in a safe place. *Id.* § 20.04(d). If proven by a preponderance of the evidence, the offense is reduced to a second-degree felony. *Id.*

11. *Id.* § 20.04. Compare TEX. PEN. CODE ANN. § 20.04(a) (Vernon 2003) (distinguishing the elements of aggravated kidnapping), with TEX. PEN. CODE ANN. § 20.03(a) (Vernon 2003) (defining a crime as regular kidnapping if one intentionally or knowingly abducts a person). Regular kidnapping is a third-degree felony. *Id.* § 20.03(c). It is an affirmative defense if the abduction is not coupled with the use of deadly force, the actor is related to the victim, and the actor’s sole intent is to attain lawful control of the victim. *Id.* § 20.03(b).

12. TEX. PEN. CODE ANN. § 20.01(2)(A)-(B) (Vernon 2003).

13. *Id.* § 20.01(1).

Restraint is “without consent” if it is accomplished by:

In *Hines v. State*,<sup>14</sup> the court of appeals attempted to clarify the ambiguous term “substantial interference.”<sup>15</sup> Noting that the Court of Criminal Appeals has not imposed a minimum requirement for restraint other than that the interference with the person’s liberty must be substantial, the court attempted to resolve the level of conduct necessary to constitute substantial interference.<sup>16</sup> Even though case law has never defined substantial interference, the court of appeals cited several cases in which interference was found to be substantial where a defendant had taken and transported a victim by way of a vehicle.<sup>17</sup> However, the court in *Hines*

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(A) force, intimidation, or deception; or

(B) any means, including acquiescence of the victim, if:

(i) the victim is a child who is less than 14 years of age or an incompetent person and the parent, guardian, or person or institution acting in loco parentis has not acquiesced in the movement or confinement; or

(ii) the victim is a child who is 14 years of age or older and younger than 17 years of age, the victim is taken outside of the state and outside a 120-mile radius from the victim’s residence, and the parent, guardian, or person or institution acting in loco parentis has not acquiesced in the movement.

*Id.*

14. 40 S.W.3d 705 (Tex. App.—Houston [14th Dist.] 2001), *rev'd*, 75 S.W.3d 444 (Tex. Crim. App. 2002).

15. *See Hines v. State*, 40 S.W.3d 705, 709 (Tex. App.—Houston [14th Dist.] 2001) (averring that to resolve this point, the level of conduct necessary to constitute substantial interference must be ascertained). *rev'd*, 75 S.W.3d 444 (Tex. Crim. App. 2002). The appellant argued that the evidence was insufficient to support the element of abduction. *Id.* More specifically, the appellant’s argument hinged on the word “restrain,” which is operative in the “abduct” definition. *Id.*

16. *Id.* (citing *Rogers v. State*, 687 S.W.2d 337, 342 (Tex. Crim. App. 1985)).

17. *See id.* (forcing victim into car and driving around city (citing *Fann v. State*, 696 S.W.2d 575, 575 (Tex. Crim. App. 1985))); *see also Sanders v. State*, 605 S.W.2d 612, 613-14 (Tex. Crim. App. 1980) (stealing vehicle containing young child and driving around for an hour before apprehended); *Phillips v. State*, 597 S.W.2d 929, 930-31 (Tex. Crim. App. 1980) (giving two hitchhikers a ride, holding them at gunpoint, and sexually abusing them before releasing them); *Megas v. State*, 68 S.W.3d 234, 237 (Tex. App.—Houston [1st Dist.] 2002, *pet. ref'd*) (preventing the victim from escaping by forcing her into his car and driving away); *Gaffney v. State*, 937 S.W.2d 540, 542-43 (Tex. App.—Texarkana 1996, *pet. ref'd*) (claiming to be armed, forcing the victim to drive around for forty-five minutes before robbing him after the victim offered defendant a ride); *Polk v. State*, 865 S.W.2d 627, 629 (Tex. App.—Fort Worth 1993, *pet. ref'd*) (grabbing the victim, placing her in a car, and driving away); *Linder v. State*, 734 S.W.2d 168, 172 (Tex. App.—Waco 1987, *pet. ref'd*) (involving a bail bondsman pulling a shotgun on the defendant and placing him in a car, and transporting him to the sheriff’s office).

contended that case law has not addressed the meaning of substantial interference in relation to the scope of the kidnapping statute.<sup>18</sup>

The Court of Criminal Appeals later reversed the court of appeals and concluded that nothing in the Texas kidnapping statute requires the State to prove that a defendant moved a victim a certain distance or held him for a specific length of time before he can be found guilty of kidnapping.<sup>19</sup> The court further held that there is “no per se bar to a kidnapping prosecution for conduct that occurs during the commission of another offense.”<sup>20</sup> Rather, the court emphasized that the fact-finder should look at all of the circumstances surrounding an offense in order to determine whether it meets the statutory definition of a kidnapping.<sup>21</sup>

Virtually every assault, sexual assault, robbery, and murder involves a slight degree of confinement or movement. Since temporary confinement or slight movement is part and parcel of certain crimes, the court of appeals in *Hines* argued that “substantial interference” requires more than temporary confinement or slight movement.<sup>22</sup> The Court of Criminal Appeals has refused to define the term. Instead, as stated, the court maintains that whether a situation involves substantial or slight interference with a victim’s liberty is a question of fact.<sup>23</sup> This Recent Development contends that the Court of Criminal Appeals’s refusal to define “substantial interference” opens up the floodgates for every act of confinement or movement committed in the course of another substantive offense to constitute kidnapping. Furthermore, such logic would in

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18. *Hines*, 40 S.W.3d at 709. The court argued that when interpreting statutes, appellate courts should first look to the statute’s plain language. *Id.* (citing *Boykin v. State*, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991)).

19. *Hines v. State*, 75 S.W.3d 444, 447 (Tex. Crim. App. 2002).

20. *Id.* at 448.

21. *See id.* (clarifying that the legislature did not intend for every crime that involves a victim whose liberty has been hindered to turn into kidnapping).

22. *See Hines*, 40 S.W.3d at 713-14 (arguing that the defendant’s conduct of following the teller into the bank, not allowing the teller to leave the bank, and following her to the vault constituted temporary confinement and slight movement which was part and parcel of the attempted aggravated robbery).

23. *See Hines*, 75 S.W.3d at 448 (reasoning that a jury could distinguish between slight and substantial interference by looking at all of the circumstances surrounding the offense).

effect bootstrap murder into capital murder.<sup>24</sup> This is precisely what has happened in *Herrin v. State*.<sup>25</sup>

In *Herrin*, the defendant moved the victim during the course of committing murder.<sup>26</sup> The jury charge allowed the jury to convict the defendant of capital murder if it found that he “committed murder in the course of committing or attempting to commit kidnapping.”<sup>27</sup> The jury returned a guilty verdict.<sup>28</sup> The Court of Criminal Appeals held that the evidence was legally insufficient to support the verdict for murder committed in the course of kidnapping or attempted kidnapping.<sup>29</sup>

The reversal in *Herrin* is indicative of the backlash resulting from the refusal of the Court of Criminal Appeals to define “substantial interference.” This Recent Development proposes that “substantial interference” must be defined in relation to acts of confinement or movement committed in the course of another substantive offense to also constitute kidnapping. Otherwise, every assault, sexual assault, robbery, and murder could erroneously be tantamount to kidnapping. Substantial restraint or movement during an offense must be present in order to constitute the underlying offense plus the offense of kidnapping.

In order for the offense of kidnapping to exist in addition to another substantive offense, the states that adhere to the Model Penal Code’s definition of kidnapping must find that the movement or restraint: (1) was not incidental to the underlying offense; and (2) substantially increased the risk of harm inherent in the substantive offense.<sup>30</sup> Kidnapping indictments should be dismissed unless

24. *Hines*, 40 S.W.3d at 714 n.7.

25. No. 73-987, 2002 WL 31839153 (Tex. Crim. App. Dec. 18, 2002).

26. *Herrin v. State*, No. 73-987, slip op. at 2, 2002 WL 31839153, at \*2 (Tex. Crim. App. Dec. 18, 2002). Defendant approached the driver’s side of the victim’s truck. *Id.* at \*1. The victim raised his hands and told the defendant to “hold on.” *Id.* Defendant said, “I’ve got you now, you son of a b——,” and shot Kenneth Wayne Martin in the torso. *Id.* The defendant then proceeded to drag the victim to the back of his truck. *Id.* It was later discovered that the defendant had dragged the victim’s body behind his four-wheeler. *Id.* at \*2.

27. *Id.* at \*3; see also TEX. PEN. CODE ANN. § 19.03 (Vernon 2003) (listing the enumerated circumstances that elevate murder to capital murder).

28. *Herrin*, 2002 WL 31839153, at \*3. Capital murder is punishable by life imprisonment or by death. TEX. PEN. CODE ANN. § 12.31 (Vernon 2003).

29. *Herrin*, 2002 WL 31839153, at \*3.

30. See *People v. Daniels*, 459 P.2d 225, 232 (Cal. 1969) (prescribing a two-part test used in determining kidnapping as an additional offense under the Model Penal Code).

the movement or detention is substantial to the underlying crime<sup>31</sup> and the movement or “detention which occurs during the course of the commission of another crime ‘significantly increases the dangerousness or undesirability of the defendant’s behavior.’”<sup>32</sup> This objective can be achieved if the State of Texas adopts the Model Penal Code’s definition of kidnapping.

## II. DEFINING THE TERM “KIDNAPPING”

### A. *Common Law Definition of Kidnapping*

At common law, the offense of kidnapping had a narrow scope. Kidnapping was defined as the forcible abduction of a person and sending that person into another country.<sup>33</sup> Kidnapping was merely an aggravated form of false imprisonment.<sup>34</sup> Kidnapping was originally a misdemeanor punishable with a short imprisonment, fine, and pillory.<sup>35</sup> Toward the end of the seventeenth century, the term kidnapping began to emerge in case law.<sup>36</sup> Today, kidnapping is punishable by statute, and all states have progressively extended the scope of the offense. It is a crime of far broader definition and carries major felony sanctions. In addition, the requirement that the victim must be transported out of the country has been abandoned.<sup>37</sup>

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31. *State v. Masino*, 466 A.2d 955, 961 (N.J. 1983).

32. *People v. Smith*, 414 N.E.2d 1117, 1121 (Ill. App. Ct. 1980) (quoting *People v. Timmons*, 482 P.2d 648, 651 (Cal. 1971)).

33. MODEL PENAL CODE § 212.1 cmt. 1 (1980); 2 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 210 (14th ed. 1979); *see also* John L. Diamond, *Kidnapping: A Modern Definition*, 13 AM. J. CRIM. L. 1, 1 (1985) (acknowledging that, although the common law is now codified, the statutory language “is frequently ambiguous and potentially overbroad”).

34. MODEL PENAL CODE § 212.1 cmt. 1 (1980); 2 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 210 (14th ed. 1979).

35. John L. Diamond, *Kidnapping: A Modern Definition*, 13 AM. J. CRIM. L. 1, 2 (1985).

36. *See id.* at 2-3 (indicating the term was used to describe “slave” labor for American colonies). Blackstone defined kidnapping as the “forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another.” *State v. Masino*, 466 A.2d 955, 957 (N.J. 1983) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*291).

37. *See* 18 U.S.C.A. § 1201(a)(1) (2000) (requiring generally under federal law that the victim be “willfully transported in interstate or foreign commerce”). Even though these Sections do not require interstate or foreign transportation of the victim, it covers persons kidnapped within special maritime, territorial, and aircraft jurisdictions of the United States as well as certain foreign and governmental officials. *Id.* §§ 1201(a)(2),



There are two basic kidnapping patterns. In one, the criminal seizes the victim and removes him or her to another place. In the other, the criminal confines the victim in a place of isolation. The criminal might safely isolate a victim in the victim's "summer home in the mountains" and demand ransom.<sup>38</sup> Courts have held that in order to avoid application of kidnapping laws to detentions merely incidental to violent crimes, confinement in a place of isolation must be for a substantial period.<sup>39</sup> Although state laws still define kidnapping in terms of movement and detention, there is much uncertainty regarding the amount of movement and time of detention necessary to elevate a simple assault or robbery to the serious crime of kidnapping. This is precisely the dilemma regarding the Texas kidnapping statute.

### B. *Texas Penal Code Definition of Kidnapping*

Under the Texas Penal Code, a person commits the offense of kidnapping if he or she intentionally or knowingly abducts another person.<sup>40</sup> Kidnapping is a complete offense when the restraint is accomplished and the actor has the specific intent to prevent the person's liberty by holding the person in secret or by using or

(a)(3), (a)(4), 351(b), 1751(b). The statute also provides a rebuttable presumption that a victim detained for twenty-four hours has been transported in interstate or foreign commerce. *Id.* § 1201(b); *cf.* *State v. Ross*, 646 A.2d 1318, 1318 (Conn. 1994) (upholding a conviction of murder in the course of kidnapping where there was evidence that the victims were kidnapped in Connecticut with the intent to kill them, though the killings took place in Rhode Island). *But see* *United States v. Moore*, 571 F.2d 76, 76 (2d Cir. 1978) (holding the rebuttable presumption unconstitutional).

38. *See* *Commonwealth v. Hook*, 512 A.2d 718, 719 (Pa. Super. Ct. 1986) (illustrating that the kidnapping definition could include cases where the victim is not moved at all, but rather held in a place of isolation for a substantial period). Conceivably, one's own apartment could be regarded as a place of isolation. *Id.*; *see also* *People v. Martinez*, 973 P.2d 512, 515 (Cal. 1999) (holding that isolating the victim in a locked bathroom while repeatedly trying to break in and shattering a window constituted kidnapping).

39. *Hook*, 512 A.2d at 719. In this case, the perpetrator forced his way into the victim's apartment declaring his intent to rape her. *Id.* After a brief struggle, the victim escaped to a neighbor's apartment. *Id.* The assailant followed her into the other apartment and threw both women on the neighbor's bed. *Id.* The assailant repeated his earlier claims of rape, then began to disrobe, fondle, and kiss the victim. *Id.* Before the assailant could proceed further, he passed out. *Id.* The court rejected the defendant's claim that one hour was insufficient to amount to confinement for a substantial period. *Id.* at 720. On one hand, the court held that what constitutes "substantial period" was a question of fact. *Id.* On the other hand, the court held that the evidence was insufficient to find that the defendant confined the victims in a place of isolation. *Id.*

40. TEX. PEN. CODE ANN § 20.03(a) (Vernon 2003).

threatening to use deadly force.<sup>41</sup> The requirement of intentionally secreting a kidnapping victim where the victim will not likely be found is a part of the mens rea of the offense of kidnapping, and thus, if the perpetrator intends at any time during detention to secrete or hold the victim in a place where the victim is unlikely to be found, the kidnapping is complete, and it is not essential that the victim be held for any specific length of time.<sup>42</sup> Furthermore, the law of criminal attempt does not require that every act short of actual commission of an offense be accomplished.<sup>43</sup>

### C. *Model Penal Code Definition of Kidnapping*

The Model Penal Code requires more than incidental restraint or movement for a substantive offense to also include the offense of kidnapping.<sup>44</sup> The Model Penal Code defines kidnapping as the unlawful removal of a person from his or her “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” for any of the following purposes: (1) “to hold for ransom or reward, or as a shield or hostage”; (2) “to facilitate commission of any felony or flight thereafter”; (3) “to inflict bodily injury on or to terrorize the victim or another”; or (4) “to interfere with the performance of any governmental or political function.”<sup>45</sup> The removal or confinement of a person is unlawful when carried out by force, deception, threat, or if the person is under fourteen years of age or incompetent and it is achieved without consent of a parent or guardian.<sup>46</sup>

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41. *Santellan v. State*, 939 S.W.2d 155, 162 (Tex. Crim. App. 1997) (en banc) (citing *Mason v. State*, 905 S.W.2d 570, 574-75 (Tex. Crim. App. 1995)); see also *Brimage v. State*, 918 S.W.2d 466, 475-76 (Tex. Crim. App. 1994) (affirming the elements of a completed kidnapping offense).

42. *Clark v. State*, 24 S.W.3d 473, 476-77 (Tex. App.—Texarkana 2000, no pet.).

43. See *Santellan*, 939 S.W.2d at 156 (holding that placing the victim’s body in a car and driving away constituted a sufficient act of restraint to amount to more than mere preparation for kidnapping).

44. See MODEL PENAL CODE § 212.1 (1980) (delineating specific instances when the kidnapping statute is applicable).

45. See *id.* (defining kidnapping as “a felony of the first degree unless the [perpetrator] voluntarily releases the victim alive and in a safe place prior to trial” thereby reducing it to a second-degree felony).

46. *Id.*

The Model Penal Code's commentary notes that if the offense is confined to cases of substantial isolation of the victim from his or her normal environment, it punishes a frightening and dangerous form of aggression not adequately dealt with elsewhere.<sup>47</sup> The commentary to the Code asserts that the element of asportation<sup>48</sup> alleviates the absurdity of kidnapping liability where a robber forces a victim into the back of a store or his own home in order to take valuables located there.<sup>49</sup> The commentary's observation is based on the Code's language requiring removal of the victim "a substantial distance from the vicinity where he is found" or from his residence or place of business.<sup>50</sup>

### III. MODEL PENAL CODE KEY TERMS

Not every movement or confinement of a victim is a kidnapping. The easiest illustrations are situations in which the burglar puts the resident in a closet while he fills a bag with silver<sup>51</sup> or in which the robber forces the victim to open his safe in the home or is forced to the back of the store.<sup>52</sup> Because courts sense that these crimes should not be considered kidnapping, the problem becomes one of definition. In the absence of more precise statutes, courts supplied the necessary content. A large volume of case law interprets the Model Penal Code's definition of kidnapping.<sup>53</sup>

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47. *Id.* § 212.1 cmt. at 222-23.

48. See BLACK'S LAW DICTIONARY 87 (7th ed. 2000) (defining "asportation" as "[t]he act of carrying away or removing (property or a person)").

49. MODEL PENAL CODE § 212.1 cmt. at 223 (1980).

50. *Id.*

51. *State v. Estes*, 418 A.2d 1108, 1113 (Me. 1980).

52. *State v. Dix*, 193 S.E.2d 897, 902 (N.C. 1973).

53. See generally *State v. Bunker*, 436 A.2d 413, 416 (Me. 1981) (pointing out the similarities between Maine's kidnapping statute and the Model Penal Code); *State v. Brent*, 644 A.2d 583, 589-90 (N.J. 1994) (discussing that the state statute is modeled after the Model Penal Code); *State v. La France*, 569 A.2d 1308, 1309-12 (N.J. 1990) (comparing the Model Penal Code with the state statute); *State v. Federico*, 510 A.2d 1147, 1150 (N.J. 1986) (noting concern regarding abusive prosecutions under kidnapping); *State v. Arp*, 644 A.2d 149, 150-51 (N.J. Super. Ct. App. Div. 1994) (applying the kidnapping statute); *State v. Deutsch*, 551 A.2d 991, 994-98 (N.J. Super. Ct. App. Div. 1988) (reviewing a jury charge related to the kidnapping statute); *State v. Tronchin*, 539 A.2d 330, 332 (N.J. Super. Ct. App. Div. 1988) (defining kidnapping); *State v. Bryant*, 524 A.2d 1291, 1295-96 (N.J. Super. Ct. App. Div. 1987) (applying the facts to the kidnapping statute); *Commonwealth v. Jenkins*, 687 A.2d 836, 838 (Pa. Super. Ct. 1996) (discussing the concept of isolation as related to the kidnapping definition); *Commonwealth v. Dehoniesto*, 624 A.2d 156, 160 (Pa. Super. Ct. 1993) (defining kidnapping); *Commonwealth v. Campbell*, 509 A.2d 394,

### A. *Asportation Essential Element of Kidnapping*

To qualify as kidnapping, the asportation must be more than merely incidental to the underlying offense.<sup>54</sup> In *State v. Masino*,<sup>55</sup> the New Jersey Supreme Court held that determining whether the asportation requirement has been met is made by referencing the distance traveled as well as the enhanced risk of harm resulting from the transportation and isolation of the victim.<sup>56</sup> The court emphasized that the enhanced risk must not be trivial<sup>57</sup> and concluded that the State does not meet the asportation element of kidnapping by merely proving that the victim was moved incidental to the commission of an underlying crime.<sup>58</sup> Kidnapping, as interpreted under the Model Penal Code, requires that movement or detention significantly enhance the risk of harm to the victim.<sup>59</sup>

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396 (Pa. Super. Ct. 1986) (providing the definition of kidnapping); *Commonwealth v. Hook*, 512 A.2d 718, 719-20 (Pa. Super. Ct. 1986) (discussing the movement element of kidnapping); *Commonwealth v. Mease*, 516 A.2d 24, 25-26 (Pa. Super. Ct. 1986) (spelling out the kidnapping definition); *Commonwealth v. Hughes*, 399 A.2d 694, 696 (Pa. Super. Ct. 1979) (explaining the definition of kidnapping).

54. *State v. Masino*, 466 A.2d 955, 961 (N.J. 1983).

55. 466 A.2d 955 (N.J. 1983).

56. *State v. Masino*, 466 A.2d 955, 961 (N.J. 1983).

57. *Id.* In the case, the court held that the jury properly determined that the defendant moved the victim a substantial distance. *Id.* The defendant dragged the victim from the roadside to a pond's edge behind a row of trees isolating the victim. *Id.* "After assaulting and threatening to drown [the victim], [the] defendant stripped" the victim of her clothes, thereby exposing her to the elements and hiding her from potential aid. *Id.*

58. *Id.* at 961; *see also State v. Federico*, 510 A.2d 1147, 1150 (N.J. 1986) (quoting the New Jersey Criminal Law Revision Commission as stating that kidnapping should be defined to exclude "[t]he criminologically non-significant circumstance that the victim was detained or moved incident to the crime"). The *Federico* court echoed the drafters' concern regarding the potential for abuse in prosecuting kidnapping cases. *Federico*, 510 A.2d at 1150. In *Federico*, an admitted prostitute accompanied the defendant to his residence for the purpose of engaging in sexual conduct for money. *Id.* at 1148. The defendant terrorized the prostitute by placing a shotgun to her head, "running a knife across her body, albeit without cutting her," and swinging a hatchet overhead before she was able to escape. *Id.* The court held that the State failed to meet the asportation element of kidnapping. *Id.* at 1150.

59. *State v. Buhl*, 635 A.2d 562, 574 (N.J. Super. Ct. App. Div. 1994).

B. *Defining "Substantial Distance" and "Confinement for Substantial Period"*

Substantial movement and confinement are defined through case law.<sup>60</sup> In *Commonwealth v. Hughes*,<sup>61</sup> the court held that substantial distance and unlawful confinement for a substantial period cannot be limited to a given linear distance nor a certain period of time.<sup>62</sup> Furthermore, the court argued that the legislative intent was to exclude from kidnapping the incidental movement of a victim during the commission of an underlying crime.<sup>63</sup> The element of substantial distance is also satisfied if the actor isolates the victim and exposes him or her to an increased risk of harm.<sup>64</sup> In *Hughes*, the court found that the victim's movement was not incidental to the other crimes charged.<sup>65</sup> Although the victim was only moved two miles, the court reasoned that the mileage was a sufficient "distance to place the victim in a completely different environmental setting removed from the security of familiar surroundings."<sup>66</sup> The court further reasoned that the movement increased the risk of harm to the victim as she was subject to a knife

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60. See generally *People v. Daniels*, 459 P.2d 225, 238 (Cal. 1969) (clarifying the requirement of movement); *People v. Casiano*, 571 N.E.2d 743, 746-47 (Ill. App. Ct. 1991) (rejecting the defendant's argument regarding a lack of movement); *State v. Bunker*, 436 A.2d 413, 415-17 (Me. 1981) (applying the confinement element to the facts of case); *State v. Brent*, 644 A.2d 583, 589-90 (N.J. 1994) (analyzing substantial distance); *State v. La France*, 569 A.2d 1308, 1311-12 (N.J. 1990) (reviewing the substantial distance and confinement elements); *Masino*, 466 A.2d at 960-61 (interpreting substantial distance); *Commonwealth v. Dehonesto*, 624 A.2d 156, 160-61 (Pa. Super. Ct. 1993) (addressing the substantial distance requirement); *Commonwealth v. Campbell*, 509 A.2d 394, 396-97 (Pa. Super. Ct. 1986) (discussing substantial distance); *Commonwealth v. Hook*, 512 A.2d 718, 720 (Pa. Super. Ct. 1986) (agreeing with the defendant's claim that there was insufficient evidence to prove confinement); *Commonwealth v. Hughes*, 399 A.2d 694, 696 (Pa. Super. Ct. 1979) (attempting to clarify the meaning of substantial distance).

61. 399 A.2d 694 (Pa. Super. Ct. 1979).

62. *Commonwealth v. Hughes*, 399 A.2d 694, 696 (Pa. Super. Ct. 1979). The court supported its contention by pointing to "the most obvious evil at which the statute is aimed": abduction for ransom. *Id.*

63. *Id.* at 697-98. The drafters of the Model Penal Code made explicit their purpose to preclude kidnapping convictions based on trivial changes of location having no bearing on the evil at hand. *Id.* at 698 (citing MODEL PENAL CODE § 212.1, Comment (Tentative Draft No. 11, 1960)).

64. *Masino*, 466 A.2d at 960.

65. *Hughes*, 399 A.2d at 698.

66. *Id.* The court held that the victim was brought to a wooded, isolated area beyond the aid of police and friends. *Id.*

pointed at her throat and the defendant's reckless driving.<sup>67</sup> Once the victim was isolated, the court argued that her attacker was free to deal with his victim at will.<sup>68</sup> The court concluded that the jury had adequate grounds for finding that the victim was moved a "substantial distance."<sup>69</sup>

In *Commonwealth v. Dehoniesto*,<sup>70</sup> the defendant forced the victim into his car while holding a gun to the victim's head.<sup>71</sup> The victim was driven to a nearby park where she was forced to remove her clothes.<sup>72</sup> The defendant proceeded to beat the victim and cut her back and chest.<sup>73</sup> The defendant returned the victim to her home approximately an hour and a half after she was forced into the car.<sup>74</sup> The defendant argued that the removal of the victim from her home to the nearby park was merely incidental to assault and not enough to comprise a substantial distance.<sup>75</sup> The court reasoned that the victim was taken from her home at gunpoint and taken to an isolated area where she was terrorized and beaten.<sup>76</sup>

67. *Id.* Defendant drove down a one-way street in the wrong direction. *Id.*

68. *Id.* The court held that the fact that the defendant "returned his victim after raping her" did not diminish the victim's terrifying and desperate reaction to the movement. *Id.*

69. *Id.* Since the court found that the two miles amounted to a "substantial distance," it declined to decide whether the thirty minutes involved constituted a substantial period under the Model Penal Code. *Id.* In *State v. Brent*, the court held that seizing a thirteen-year-old girl on her way to school and carrying her across the street to a densely wooded lot where she was raped constituted a substantial distance. *See State v. Brent*, 644 A.2d 583, 589-90 (N.J. 1994) (establishing substantial distance by referencing the distance traveled and the enhanced risk of harm resulting from the asportation and isolation of the victim); *see also State v. Bunker*, 436 A.2d 413, 414 (Me. 1981) (holding that removing a child-victim from a school playground and transporting her to an isolated wooded area thirteen miles away where she was raped satisfied the asportation element not merely incidental to commission of the offense of rape).

70. 624 A.2d 156 (Pa. Super. Ct. 1993).

71. *Commonwealth v. Dehoniesto*, 624 A.2d 156, 158 (Pa. Super. Ct. 1993). Thereafter, the defendant drove to a bus stop and picked up a friend. *Id.* The defendant, friend, and the victim then drove to a nearby park. *Id.*

72. *Id.*

73. *Id.* "Thereafter, the victim was taken back to the car where she was again beaten." *Id.*

74. *Id.* Once she was returned to her home, the victim asked her sister to contact the police. *Id.*

75. *See id.* at 160 (objecting on the grounds that the defendant's conduct was only to persuade the victim, through a violent assault, to comply with his demands for money). The court held that the defendant's argument was meritless. *Id.*

76. *Dehoniesto*, 624 A.2d at 160. According to testimony of the investigating officer, the victim was taken a distance of six miles. *Id.* The court compared this distance to the

Therefore, the victim was exposed to an increased risk of harm.<sup>77</sup> The court concluded that the defendant's forced removal of the victim was not simply incidental to the defendant's assault.<sup>78</sup>

In *State v. LaFrance*,<sup>79</sup> the New Jersey Supreme Court addressed the term "substantial period of time."<sup>80</sup> The detention of the victim for nearly one-half hour in his home while the defendant raped his wife constituted confinement for a substantial period, warranting conviction of first-degree kidnapping.<sup>81</sup> The court reiterated the Pennsylvania, New Jersey, New York, and California<sup>82</sup> concept that kidnapping does not occur when the movement or detention is "merely incidental to" the commission of the underlying offense and "does not substantially increase the risk of harm beyond that . . . present in the [substantive] crime itself."<sup>83</sup> The court summarized four factors that are critical in assessing the two-part test of duration and distance, and the enhanced risk of harm: (1) duration of detention; (2) whether asportation occurred during commission of the separate offense; (3) whether detention that occurred is inherent in the separate offense; and (4) whether the asportation cre-

two miles that was held sufficient in *Hughes* to establish "substantial distance." *Id.*; see also *Commonwealth v. Campbell*, 509 A.2d 394, 397 (Pa. Super. Ct. 1986) (satisfying the substantial distance element when the defendant drove several blocks in the victim's car).

77. *Dehoniesto*, 624 A.2d at 160.

78. See *id.* at 160-61 (affirming the kidnapping conviction).

79. 569 A.2d 1308 (N.J. 1990).

80. *State v. La France*, 569 A.2d 1308, 1313 (N.J. 1990). The court cited a leading American case that arose in the Virgin Islands, a jurisdiction that imposed a mandatory life sentence "for kidnapping for ransom, extortion, or robbery." *Id.* at 1310 (citing *Virgin Islands v. Berry*, 604 F.2d 221, 224 (3d Cir. 1979)). In *Berry*, the court noted that the modern approach of interpreting kidnapping statutes is "to prevent gross distortion of lesser crimes into a much more serious crime by excess of prosecutorial zeal." *Berry*, 604 F.2d at 226-27.

81. *La France*, 569 A.2d at 1312-13; see also *Commonwealth v. Hook*, 512 A.2d 718, 720 (Pa. Super. Ct. 1986) (rejecting the defendant's argument that the one-hour detention was not a "substantial period").

82. See *State v. Masino*, 466 A.2d 955, 958-60 (N.J. 1983) (outlining various jurisdictions' adherence to the two-part test of substantial movement/detention and increased risk to the victim); see also *People v. Daniels*, 459 P.2d 225, 238 (Cal. 1969) (affirming that brief movements which the assailants compelled the victims to perform inside the premises where the assailants found the victims and in furtherance of the robbery, were purely incidental to the crime of robbery and did not substantially increase the risk of harm otherwise present). In *Daniels*, the defendant raped several women. *Daniels*, 459 P.2d at 225-28. The defendant raped each victim in the area where the attack commenced, which was either a car or place of residence. *Id.*

83. *La France*, 569 A.2d at 1310. The court in *Berry* summarized the criteria in a two-part test of duration/distance and danger requirement. *Id.* (citing *Berry*, 604 F.2d at 221).

ated a substantial danger to the victim independent of that posed by the separate offense.<sup>84</sup> In applying these factors, the *La France* court concluded that the defendant entered the victim's home in the early morning hours with the intent to take money.<sup>85</sup> Once confronted by the couple, the defendant tied up the husband and, while inside their home for almost an hour, he decided to rape the wife.<sup>86</sup> The court affirmed that the defendant unlawfully confined the victim for a substantial period with the intent to inflict harm on the wife.<sup>87</sup>

### C. Defining "Place of Isolation"

The Pennsylvania kidnapping statute defines a "place of isolation" not as a geographic isolation, but rather "isolation from the usual protections of society."<sup>88</sup> One's own urban apartment can be a place of isolation for purposes of kidnapping if the "detention is under circumstances which make discovery or rescue unlikely."<sup>89</sup> In *Commonwealth v. Mease*,<sup>90</sup> the court found that the defendant's basement met the test for a "place of isolation" because the victim confined there had been isolated from the usual protections of society where police, friends, family, or anyone who might have been able to rescue him from the defendant's assaults could not reach him.<sup>91</sup> Similarly, the court in *Commonwealth v. Jenkins*<sup>92</sup> affirmed that the defendant's actions created a place of isolation within the

84. *Id.* at 1313; *People v. Casiano*, 571 N.E.2d 742, 747 (Ill. App. Ct. 1991).

85. *La France*, 569 A.2d. at 1312.

86. *Id.* The rape and robbery were the defendant's primary goals. *Id.*

87. *Id.* "[The] defendant forced the wife to tie up her husband in the bedroom." *Id.* He "then dragged the wife out into the hallway" where he raped her. *Id.* The husband was bound for at least thirty minutes. *Id.* Eventually, the husband freed himself and accosted the defendant with a vase. *Id.* The court upheld the jury's reasoning for the kidnapping conviction because "the thirty-minute confinement of the husband was a 'substantial period' when coupled with the vulnerability and harm brought to his wife as a result of his confinement." *Id.* at 1312-13.

88. *Commonwealth v. Mease*, 516 A.2d 24, 26 (Pa. Super. Ct. 1986) (citing MODEL PENAL CODE § 212.1, cmt. 3).

89. *Commonwealth v. Jenkins*, 687 A.2d 836, 838 (Pa. Super. Ct. 1996) (quoting *Commonwealth v. Hook*, 512 A.2d 718, 719 (Pa. Super. Ct. 1986)).

90. 516 A.2d 24 (Pa. Super. Ct. 1986).

91. *See Commonwealth v. Mease*, 516 A.2d 24, 26 (Pa. Super. Ct. 1986) (emphasizing that the fact that friends of the defendant were present from time to time did not negate the victim's isolation from the usual protections of society).

92. 687 A.2d 836 (Pa. Super. Ct. 1996).



victim's home.<sup>93</sup> The defendant held a seventy-year-old woman and her four-year-old great-grandson at knifepoint for four hours.<sup>94</sup> The court reasoned that no one was able to reach the victims throughout the entire ordeal.<sup>95</sup>

Conversely, in *Commonwealth v. Hook*,<sup>96</sup> there was insufficient evidence to permit a jury to decide whether the "place of isolation" element of kidnapping was satisfied.<sup>97</sup> The victim, who resided in an apartment located above a clothing store, opened her door to the defendant.<sup>98</sup> The victim was able to escape, and she entered a neighbor's apartment.<sup>99</sup> The assailant followed her into the other apartment, threw both women onto the bed, and verbalized his intent to rape the victim.<sup>100</sup> Fortunately, the defendant passed out before he was able to carry out his threat.<sup>101</sup> The court determined that the evidence was insufficient to warrant a jury instruction on confinement in a place of isolation.<sup>102</sup> One victim was expecting a dry cleaning employee, the victims' apartments were frequented by business associates and relatives, and an open business was located beneath the apartments.<sup>103</sup> The court therefore held that the mode of confinement did not render discovery or rescue unlikely.<sup>104</sup> Further, the confinement was incidental to the underlying offense of attempted rape.<sup>105</sup> In summation, a "place of isolation" is not de-

93. *Commonwealth v. Jenkins*, 687 A.2d 836, 838 (Pa. Super. Ct. 1996). The perpetrator forced his way into seventy-year-old Gertrude Davis's home, knocking her to the ground, and fracturing her shoulder. *Id.* at 837. Present were Ms. Davis's granddaughter, Wanda Davis, and Wanda's two children who were four and eighteen months old. *Id.* Jenkins then grabbed the eldest child and pointed a knife into his back. *Id.* Jenkins sent Wanda to buy cigarettes; she left with her daughter and summoned the police. *Id.* at 838.

94. *Id.*

95. *Id.* The ordeal ended only when Jenkins surrendered. *Id.* Up to the point when Jenkins surrendered, the fate of the victims was entirely within his control. *Id.*

96. 512 A.2d 718 (Pa. Super. Ct. 1986).

97. *Commonwealth v. Hook*, 512 A.2d 718, 720 (Pa. Super. Ct. 1986). Although the court found that the place of isolation element was not present, the court held that the evidence was sufficient to warrant a jury instruction on the "substantial period" element of kidnapping. *Id.* The events lasted about an hour. *Id.* at 719.

98. *Id.* at 719.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Hook*, 512 A.2d at 720.

103. *Id.*

104. *Id.*

105. *Id.*

fined through geographic remoteness, but rather the remoteness of discovery.<sup>106</sup>

#### IV. APPLICATION OF THE MODEL PENAL CODE'S DEFINITION OF KIDNAPPING

##### A. *California and New Jersey Adopt the Model Penal Code's Kidnapping Definition*

The states of California and New Jersey have adopted the Model Penal Code's definition of kidnapping.<sup>107</sup> In *People v. Daniels*,<sup>108</sup> the California Supreme Court defined a two-part test used in determining when the offense of kidnapping has occurred.<sup>109</sup> The court held that kidnapping does not occur when asportation or detention is merely "incidental to" the commission of another substantive crime and "do[es] not substantially increase the risk of harm over and above [the present crime]."<sup>110</sup> "Although in many instances the movement accompanying a sexual assault may be incidental to the assault and therefore not within the ambit of the kidnapping statute . . . movement can constitute a separate danger that substantially increases the risk of harm to the victim."<sup>111</sup> The court acknowledged that a jury determines, after considering the scope and nature of the movement, whether the movement is merely incidental to the substantive crime.<sup>112</sup> The court also noted

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106. *Commonwealth v. Jenkins*, 687 A.2d 836, 838 (Pa. Super. Ct. 1996); *Commonwealth v. Mease*, 516 A.2d 24, 26 (Pa. Super. Ct. 1986).

107. *See People v. Daniels*, 459 P.2d 225, 238 (Cal. 1969) (interpreting the kidnapping offense through a two-part test); *State v. Hampton*, 294 A.2d 23, 36-37 (N.J. 1972) (sanctioning the *Daniels* test).

108. 459 P.2d 225 (Cal. 1969).

109. *See People v. Daniels*, 459 P.2d 225, 258 (Cal. 1969) (recognizing that these two elements are not mutually exclusive, but interrelated); *see also People v. Martinez*, 973 P.2d 512, 517 (Cal. 1999) (affirming the *Daniels* two-part test: (1) movement of the victim is not purely incidental to the underlying crime; and (2) increased risk of harm above and beyond that present in the principal crime itself).

110. *Daniels*, 459 P.2d at 238; *see also People v. Hoard*, 126 Cal. Rptr. 2d 855, 860 (Cal. Ct. App. 2002) (holding that forcing employees to move fifty feet to the back office of a jewelry store during a robbery only served to facilitate the robbery with no other apparent purpose).

111. *See State v. Brent*, 644 A.2d 583, 592 (N.J. 1994) (recognizing that, although kidnapping does not include conduct that is simply incidental to the underlying crime, it is not a "free crime" merely because it accompanies other violent crimes such as robbery or rape).

112. *See Daniels*, 459 P.2d at 233 (stating this includes the actual distance a victim is moved).

that there is no minimum distance an assailant must move a victim in order to satisfy the first prong.<sup>113</sup> In evaluating increased risk of harm above that inherent in the substantive crime, such factors may be considered as the decreased likelihood of detection, the innate danger in the victim's foreseeable escape attempts, and the assailant's enhanced opportunity to commit additional crimes.<sup>114</sup>

In *re Earley*,<sup>115</sup> a robbery case, followed the *Daniels* decision.<sup>116</sup> The *Earley* court pronounced that “[b]rief movements to facilitate either robbery or robbery and rape are incidental thereto within the meaning of *Daniels*.”<sup>117</sup> On the other hand, the court confirmed that “movements to facilitate the foregoing crime or crimes that are for a substantial distance . . . are not incidental thereto within the meaning of *Daniels*.”<sup>118</sup> Moreover, in *State v. Hamp-*

113. *Id.*

114. *Id.*; see also *State v. Arp*, 644 A.2d 149, 151 (N.J. Super. Ct. Law Div. 1994) (holding that confining the victim in a car provided the defendant with a greater opportunity to force the victim to perform sexual acts because the victim was trapped alone with the defendant for two hours during which the defendant could threaten her and use force); *State v. Bryant*, 524 A.2d 1291, 1296 (N.J. Super. Ct. App. Div. 1987) (finding that leaving elderly robbery victims bound and gagged to facilitate flight increased the risk of harm to the victims because there was no one to help them if they were unable to breathe or if they suffered heart attacks). See generally *State v. Tronchin*, 539 A.2d 330 (N.J. Super. Ct. App. Div. 1988) (holding that enticing the victim into a car by deception, transporting the victim to a remote place without opportunity for escape, and committing sexual assault, satisfies all elements of kidnapping).

115. 534 P.2d 721 (Cal. 1975).

116. See *In re Earley*, 534 P.2d 721, 725 (Cal. 1975) (upholding the two-part *Daniels* test that movement of a victim during a robbery can constitute kidnapping “only if the movement [ ] (1) [is] not merely incidental to the commission of the robbery and (2) substantially increase[s] the risk of harm [to the victim] beyond that inherent in the crime of robbery”).

117. *Id.* at 726; see, e.g., *People v. Stanworth*, 522 P.2d 1058, 1065 (Cal. 1974) (holding that moving the victim twenty-five feet from a road to a nearby field was incidental), *abrogated on other grounds*, *People v. Martinez*, 973 P.2d 512 (Cal. 1999); *People v. Mutch*, 482 P.2d 633, 638-39 (Cal. 1971) (finding that movement from one room to another in a business establishment was incidental to the underlying crime); *People v. Williams*, 471 P.2d 1008, 1013 (Cal. 1970) (holding the movement on the premises of a gas station was incidental to the underlying robbery).

118. *Earley*, 534 P.2d at 726. The *Earley* court held that movement of ten to thirteen blocks to commit robbery was substantial and not merely incidental “even though it may have been solely to facilitate the commission of the robbery.” *Id.* at 726-27; see also *People v. Stephenson*, 517 P.2d 820, 825 (Cal. 1974) (reiterating that moving the victim several blocks was substantial); *People v. Thornton*, 523 P.2d 267, 286-87 (Cal. 1974) (concluding that the movements of the victims within blocks of the initial location was substantial), *abrogated on other grounds*, *People v. Martinez*, 973 P.2d 512 (Cal. 1999).

ton,<sup>119</sup> the New Jersey Supreme Court squarely addressed the elements of kidnapping.<sup>120</sup> The court upheld the two-part test articulated in *Daniels*: “The asportation and detention were not incidental to the underlying crime, and they substantially increased the risk of harm to the victim beyond that normally inherent in” the substantive offense.<sup>121</sup>

### B. *New York’s Merger Doctrine*

New York cases have adopted a “merger” doctrine, which bars conviction for kidnapping when the “ultimate” crime, such as robbery or rape, “could not be committed in the forms planned without the limited asportations” inherent in the crime.<sup>122</sup> Ultimately, New York case law has held that kidnapping indictments should be dismissed unless the detention, which occurs during the course of the commission of another crime, significantly increases the dangerousness or undesirability of the defendant’s behavior.<sup>123</sup> In *Peo-*

119. 294 A.2d 23 (N.J. 1972).

120. *See* State v. Hampton, 294 A.2d 23, 37 (N.J. 1972) (holding that forcing the victim at gunpoint to leave her apartment and drive around for an hour where she risked death to escape was forcible detention not incidental to the crime of breaking and entering and warranted separate prosecution).

121. *Id.* The victim had just entered her apartment when the defendant crept up behind her, forced her to leave her apartment and to drive him around town and its environs for about an hour. *Id.* at 26. When she tried to escape, he shot her. *Id.* at 27. The court upheld defendant’s kidnapping conviction. *Id.* at 37; *see also* State v. Deutsch, 551 A.2d 991, 999 (N.J. Super. Ct. App. Div. 1988) (assessing “confinement for a ‘substantial period’ is more than incidental to the underlying crime and substantially increases the risk of harm to the victim”).

122. *People v. Miles*, 245 N.E.2d 688, 694 (N.Y. 1969); *see also* *People v. Usher*, 375 N.Y.S.2d 881, 887 (N.Y. App. Div. 1975) (reversing the kidnapping conviction because asportation and detention were merely incidental to robbery). In *Usher*, the defendant accosted the victim at knifepoint as she walked home from work. *Id.* at 882. She was taken to an abandoned building a distance of a minute’s walk away, where she was robbed. *Id.* The court held that the asportation was not significant in the robbery. *Id.* at 887.

123. *See Miles*, 245 N.E.2d at 694-95 (attempting to thwart over-zealous prosecutors); *see also* *People v. Timmons*, 482 P.2d 648, 651 (Cal. 1971) (differentiating that simply having victims drive their own car for five blocks in order for the defendant to rob them and proceed to his rendezvous did not constitute “substantial harm”). The *Timmons* court reasoned that “[t]he police were not in hot pursuit, and there was no high-speed chase and consequent reckless driving.” *Id.* In fact, it was to the defendant’s advantage that the car was driven as inoffensively as possible to not attract attention. *Id.* Neither victim saw any weapon nor suffered any harm. *Id.*; *see also* *Wright v. State*, 581 P.2d 442, 444 (Nev. 1978) (reversing the kidnapping conviction on the grounds that moving the victims to a back office in a hotel, a distance of twenty to forty feet, was incidental to the underlying offense of robbery).

*ple v. Levy*,<sup>124</sup> the New York Court of Appeals strictly construed the asportation requirement in reversing kidnapping convictions of defendants who accosted a couple, forced them into a car, and drove them twenty-seven blocks in a twenty-minute span while robbing them.<sup>125</sup> The court noted that the breadth of kidnapping “could literally 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.”<sup>126</sup> The court further noted that “[i]t is a common occurrence in robbery, for example, that the victim be confined briefly at gunpoint or bound and detained, or moved into and left in another room or place.”<sup>127</sup>

In *People v. Miles*,<sup>128</sup> the New York Court of Appeals elucidated its *Levy* decision:

In short, the *Levy-Lombardi* rule 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.* Moreover, it is the rare kidnapping that is an end in itself; almost invariably there is another ultimate crime.<sup>129</sup>

## V. APPLYING THE MODEL PENAL CODE TO THE TEXAS STATUTE

### A. *Applying the Two-Part Test to Herrin*

In *Herrin*, the reversal by the Court of Criminal Appeals of the defendant’s kidnapping conviction hinged on the issue of intent.<sup>130</sup>

124. 204 N.E.2d 842 (N.Y. 1969).

125. *People v. Levy*, 204 N.E.2d 842, 844 (N.Y. 1969).

126. *Id.*

127. *Id.*: *see also* *People v. Smith*, 414 N.E.2d 1117, 1122 (Ill. App. Ct. 1980) (reversing an aggravated kidnapping charge where it was clear that the gist of the offense was robbery as the “victim was driven for a short distance . . . from where he first encountered [his assailants, and,] [d]uring that time, [assailants] took control of his car and personal property while threatening the use of force”). The *Smith* court held that the asportation was temporary and offered no enhanced danger independent of the danger posed by the robbery. *Smith*, 414 N.E.2d at 1122.

128. 245 N.E.2d 688 (N.Y. 1969).

129. *People v. Miles*, 245 N.E.2d 688, 695 (N.Y. 1969) (emphasis added).

130. *See Herrin v. State*, No. 73-987, slip op. at 3-4, 2002 WL 31839153, at \*3 (Tex. Crim. App. Dec. 18, 2002) (surmising that “[t]he critical question [was] whether the mur-

The court ascertained that the defendant intended to kill the victim.<sup>131</sup> The court concluded that the defendant's movement of the body, following the shooting in which the defendant intended to kill the victim, did not constitute the offense of kidnapping or attempted kidnapping.<sup>132</sup> The dissent in *Herrin* pointed to some of the defendant's actions after shooting the victim as evidence of his intent to kidnap the victim.<sup>133</sup> Justice Keller contended that a rational jury could have found that the defendant intended to drive away with the victim in his own truck, but was stopped only because the defendant's father and a friend interfered.<sup>134</sup> If the State of Texas amended its kidnapping statute to adhere to the Model Penal Code, this debate would be resolved.

Under the Model Penal Code, the movement or detention must be more than merely incidental to the underlying offense.<sup>135</sup> Determining the sufficiency of the movement or detention depends upon the distance traveled and the time of detention, as well as the enhanced risk of harm resulting from the transportation and the isolation of the victim.<sup>136</sup> Under this standard, the defendant in *Herrin* would not have been convicted of kidnapping. Moving or attempting to move the victim from the cab of the truck to the

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der was committed in the course of the kidnapping or attempted kidnapping, not the other way around").

131. *Id.* The State seemed "to view the evidence as a kidnapping committed in the course of a murder." *Id.* at n.7. The court stressed that this is contrary to both the plain language of Section 19.03(a)(2) and the principle that a dead body cannot be kidnapped. *Id.* (citing *Gribble v. State*, 808 S.W.2d 65, 72 (Tex. Crim. App. 1990)); see also TEX. PEN. CODE ANN. § 19.03(a)(2) (Vernon 2003) (clarifying capital murder as "intentionally or knowingly caus[ing] the death of an individual" and "the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, or obstruction or retaliation").

132. *Herrin*, 2002 WL 31839153, at \*3.

133. *Id.* at \*7-8 (Keller, J., dissenting).

134. *Id.* Justice Keller's argument is supported by the evidence that:

- (1) [defendant] opened the tailgate of the victim's truck,
- (2) [defendant] grabbed [the victim] under the arms and began dragging him to the back of the truck,
- (3) when [his friend] told [defendant] to stop, [defendant] pointed his fingers at him in the shape of a pistol and stated, "I've got something for you, too,"
- (4) [defendant] relented after [his father] told him to go home or [he] would kill him,
- (5) [defendant] later came back and dragged [the victim's] body with [defendant's] four-wheeled vehicle.

*Id.*

135. *People v. Daniels*, 459 P.2d 225, 238 (Cal. 1969).

136. *Id.*

truck bed was a trivial movement that did not enhance the risk of harm to the victim. The asportation was merely incidental to the underlying offense of murder.

B. *Applying the Model Penal Code's Terms "Substantial Distance" and "Confinement for Substantial Period"*

In *Santellan v. State*,<sup>137</sup> when the victim left work, her ex-boyfriend, the defendant, confronted her in the parking lot and shot her.<sup>138</sup> The victim did not say a word or move<sup>139</sup> as the defendant loaded the victim into his car and took her to a hotel "to get away and be with her and spend some time together."<sup>140</sup> The defendant was subsequently apprehended.<sup>141</sup> The medical examiner testified that the shot to the head was the cause of death and that the victim died almost immediately.<sup>142</sup> The jury convicted the defendant of capital murder and the Court of Criminal Appeals upheld the verdict.<sup>143</sup> In order to sustain a capital murder conviction, "the State is required to prove that [the defendant] developed the requisite specific intent for attempted kidnapping at the time of the victim's death or before. . . ."<sup>144</sup> The defendant argued that he had not developed the specific intent to kidnap before or concurrent with the death of the victim.<sup>145</sup>

By adopting the Model Penal Code's definition of kidnapping, the same result would occur and the pitfalls of *Hines* would be

137. 939 S.W.2d 155 (Tex. Crim. App. 1997) (en banc).

138. *Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997) (en banc). The defendant had returned to Texas to see the victim. *Id.* at 160. In July of 1993, the couple had a "big fight." *Id.* On August 19, 1993, *id.* the defendant told the victim he wanted a fresh start, but "on the same day, he wrote a letter to his family (discovered by the police after the murder) requesting forgiveness for the contemplated killing of the victim." *Id.* The murder occurred on August 22, 1993, and the defendant was captured on August 24, 1993. *Id.* at 160-61.

139. *Id.*

140. *Id.* Once at the hotel, the defendant disrobed, then cleaned up the victim because her uniform was covered in blood. *Id.* Throughout the night, the defendant had vaginal, anal, and oral sex with the victim. *Id.*

141. *Id.* After a two-hour stand off at the hotel, the defendant surrendered peacefully. *Id.*

142. *Id.* at 162.

143. *Santellan*, 939 S.W.2d at 173; see also TEX. PEN. CODE ANN. § 19.03 (Vernon 2003) (defining capital murder as murder plus "intentionally commit[ting] the murder in the course of committing or attempting to commit kidnapping").

144. *Santellan*, 939 S.W.2d at 162.

145. *Id.*

eliminated, along with the inherently subjective element of intent. A jury could have found the elements of “substantial distance” and “confinement for a substantial period” present in *Santellan* when the defendant took the victim to the hotel. Moving the victim to a hotel increased the risk of future harm to her beyond the inherent risk of the gunshot wound. The victim could have been, and was, subjected to another offense such as sexual assault. Thus, the asportation would not be merely incidental to the aggravated assault/murder and would qualify as kidnapping.

C. *Applying the Model Penal Code’s Term “Place of Isolation”*

If the Model Penal Code’s definition of the term “place of isolation” is applied to a Texas case where the defendant was convicted of kidnapping, a similar outcome is highly probable. In *Price v. State*,<sup>146</sup> the court of appeals confirmed the defendant’s kidnapping conviction.<sup>147</sup> The court stated that the prosecution must prove the following to establish kidnapping: (1) restraint; and (2) with intent to prevent liberation by secretion or deadly force.<sup>148</sup> The court determined that the evidence was factually and legally sufficient to prove that the defendant intended to take the minor victim to a place he was unlikely to be found.<sup>149</sup> When Price lured the young boy from the highly visible swimming pool to his motel room, the court rationalized that the defendant “actively secreted [the boy] when two different people came looking for him.”<sup>150</sup> The court concluded that a jury could have inferred the defendant’s intent to secrete the minor in a place he was not likely to be found.<sup>151</sup>

The same result could be achieved under the Model Penal Code definition of kidnapping. The “place of isolation” element under the Model Penal Code is satisfied if the victim is isolated from the

146. 35 S.W.3d 136 (Tex. App.—Waco 2000, pet. ref’d).

147. See *Price v. State*, 35 S.W.3d 136, 139-40 (Tex. App.—Waco 2000, pet. ref’d) (justifying evidence to show that the defendant confined the victim without consent).

148. *Id.* at 139 (citing *Brimage v. State*, 918 S.W.2d 466, 475 (Tex. Crim. App. 1994)).

149. *Id.* at 140.

150. *Id.* at 141. The defendant held the twelve-year-old boy imprisoned in his hotel room when the bystander and the victim’s mother knocked on the hotel door, and the defendant shoved the boy into the bathroom and later threw him to the floor behind the bed. *Id.* at 140.

151. *Id.* at 141. “[I]ntent is a subjective element, a mental operation.” *People v. Miles*, 245 N.E.2d 688, 693 (N.Y. 1969).



protection of society.<sup>152</sup> The hotel room in *Price* met the test for “place of isolation” because the victim was isolated from the police, the bystander, and his mother or anyone else who might have been able to rescue him.

## VI. CONCLUSION

The Texas Court of Criminal Appeals has consistently refused to narrowly define the term “substantial interference” as it applies to the Texas kidnapping statute. Instead, the court maintains that it is up to the jury to define the term. If the Texas Legislature does not narrowly define the kidnapping statute, the floodgates will open and virtually every assault, robbery, sexual assault, and some murders will constitute both the substantive offense plus kidnapping. Since *Hines* was overturned, *Herrin* is the first backlash case. The court overturned *Herrin*'s capital murder conviction on the premise that he only intended to murder, not kidnap. The element of intent should be eliminated because it is a poor method of avoiding the repercussions of *Hines*. Texas should adopt the Model Penal Code's kidnapping definition, interpreted by case law as occurring when movement or detention is not merely incidental to the commission of another substantive crime and such movement or detention substantially increases the risk of harm over and above the underlying crime.<sup>153</sup> By doing so, the *Hines* floodgates will be closed.

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152. *Commonwealth v. Jenkins*, 687 A.2d 836, 838 (Pa. Super. Ct. 1996).

153. *People v. Daniels*, 459 P.2d 225, 238 (Cal. 1969); *see also* MODEL PENAL CODE § 212.1 (1980) (defining kidnapping). The Model Penal Code specifically defines kidnapping as the unlawful removal of a person

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, [for] 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. . . . A removal or confinement is unlawful . . . if it is accomplished by force, threat or deception, or, in the case of a person who is under the age of 14 or incompetent if it is accomplished without the consent of a parent [or] guardian . . . .

*Id.*