The Law Commission
Consultation Paper No 200

SIMPLIFICATION OF CRIMINAL LAW: KIDNAPPING

A Consultation Paper

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission
The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Munby (*Chairman)*, Professor Elizabeth Cooke, David Hertzell, Professor David Ormerod and Frances Patterson QC. The Chief Executive is: Mark Ormerod CB.

Address for correspondence: Steel House, 11 Tothill Street, London SW1H 9LJ.

Topic of this consultation
This consultation paper deals with the offence of kidnapping. A summary of the main points can be found in paras 1.6 to 1.16.

Scope of this consultation
The purpose of this consultation is to generate responses to our provisional proposals.

Geographical scope
The contents of this consultation paper refer to the law of England and Wales.

Impact assessment
An impact assessment is included.

Duration of the consultation
We invite responses from 27 September 2011 to 27 December 2011.

How to respond
Send your responses either –

By email to: kidnapping@lawcommission.gsi.gov.uk OR

By post to: Simon Tabbush at the address above
Tel: 020-3334-0273 / Fax: 020-3334-0201

If you send your comments by post, it would be helpful if, whenever possible, you could send them to us electronically as well (for example, on CD or by email to the above address, in any commonly used format).

After the consultation
In the light of the responses we receive, we will decide our final recommendations and we will present them to Parliament. We hope to publish our report in 2014. It will be for Parliament to decide whether to approve any changes to the law.

Freedom of information: We will treat all responses as public documents. We may attribute comments and publish a list of respondents' names. If you wish to submit a confidential response, it is important to read our Freedom of Information Statement on the next page.

Availability: You can download this consultation paper and the other documents free of charge from our website at: http://www.lawcom.gov.uk.

CODE OF PRACTICE ON CONSULTATION

THE SEVEN CONSULTATION CRITERIA

Criterion 1: When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2: Duration of consultation exercise

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible

Criterion 3: Clarity and scope of impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4: Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5: The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6: Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7: Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

CONSULTATION CO-ORDINATOR

The Law Commission's Consultation Co-ordinator is Phil Hodgson.

- You are invited to send comments to the Consultation Co-ordinator about the extent to which the criteria have been observed and any ways of improving the consultation process.
- **Contact:** Phil Hodgson, Consultation Co-ordinator, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ – Email: phil.hodgson@lawcommission.gsi.gov.uk

Full details of the Government's Code of Practice on Consultation are available on the BIS website at http://www.bis.gov.uk/policies/better-regulation/consultation-guidance.

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THE LAW COMMISSION

SIMPLIFICATION OF CRIMINAL LAW: KIDNAPPING

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PART 1
INTRODUCTION

1.1 In its Tenth Programme the Law Commission embarked on a programme of simplification of the criminal law, criminal evidence and procedure.[1] Simplification involves:

(1) giving the law a clearer structure;

(2) using more modern terminology;

(3) making the law in a given area more consistent with other closely allied areas of law;

(4) making the law readily comprehensible to ordinary people by ensuring that it embodies sound and sensible concepts of fairness.

1.2 The simplification project has now developed into a rolling scheme reviewing several areas of the criminal law over successive Law Commission programmes. The present review of kidnapping is the second instalment of the criminal law simplification project, the first being the review of public nuisance and outraging public decency.[2] Both topics were proposed for review in our Tenth Programme of Law Reform.[3] The Eleventh Programme of Law Reform includes a project to simplify misconduct in public office.[4]

The general aim of the simplification project

1.3 Our simplification project does not primarily aim at codification, although it may involve codification of particular topics or make future codification easier. As explained in the Tenth Programme:

> The Commission continues to support the objective of codifying the law, and will continue to codify where it can, but considers that it needs to redefine its approach to make codification more achievable. This project is an important component of that redefinition. We believe that simplification of the criminal law is a necessary step in furtherance of its codification.[5]

[1] Tenth Programme of Law Reform (Law Com No 311), para 2.24 and following.

[2] "Simplification of Criminal Law: Public Nuisance and Outraging Public Decency", (2010) Law Com Consultation Paper No 193.

[3] Tenth Programme of Law Reform (Law Com No 311), para 2.32 (nuisance) and para 2.33 (kidnapping).

[4] Eleventh Programme of Law Reform (Law Com No 330), paras 2.57 to 2.60.

[5] Tenth Programme of Law Reform (Law Com No 311), para 2.24.

1.4 Simplification might commonly result in seemingly modest legal changes. It may recommend that a common law offence be restated in statutory form, thus achieving partial codification. Otherwise, it will be concerned with removing clear injustices or anomalies. It may even involve recommending the abolition of an offence if it has become redundant. The practical importance of the changes made by simplification should not be underestimated.

1.5 In spite of the fact that a simplification project has quite modest aims, it would not be undertaken unless there was a strong reason for changing the law in the way recommended. We believe that there will almost always be such a reason to introduce a simplified law if it is not only clearer and easier for judges to explain and (where relevant) for juries to understand, but also fairer by targeting only blameworthy behaviour.

Kidnapping

Background

1.6 In our Tenth Programme we stated:

> The lack of a compendious offence to cover ransom kidnappings means that the prosecution is obliged to include a number of separate counts in the indictment, for example, false imprisonment, kidnapping, blackmail and threats to kill. This means that, in summing up to a jury, a judge has to give directions in relation to a range of different offences. In addition, there are particular anomalies in the way that the Firearms Act 1968 and the defence of duress apply to the different substantive offences. Arguably, it would be far better if in ransom kidnapping cases, which are not unusual, the prosecution could proceed by way of a compendious offence. If so, this would be an example of the law being simplified by the creation of a new offence to replace, in a particular context, an array of common law and statutory offences. However, those offences would not be abolished or repealed because they have an important role to play in other contexts.[6]

1.7 Kidnapping, in its widest sense, may involve any of the following offences.

(1) False imprisonment at common law.[7]

(2) Kidnapping at common law.[8]

(3) Child abduction under section 1 or 2 of the Child Abduction Act 1984.[9]

(4) Hostage taking under the Taking of Hostages Act 1982.[10]

[6] Tenth Programme of Law Reform (Law Com No 311), para 2.33.

[7] Paras 2.152 to 2.164 below.

[8] Para 2.6 and following, below.

[9] Paras C.1 to C.5, below.

[10] Para C.6 to C.9, below.

(5) People trafficking under sections 57 to 60 of the Sexual Offences Act 2003 and section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004.[11]

In the case of a kidnapping for ransom, there may also be:

(6) blackmail under section 21 of the Theft Act 1968;

(7) threats to kill under section 16 of the Offences Against the Person Act 1861.

1.8 We have rejected the need for a new offence of ransom kidnapping as tentatively suggested in our Tenth Programme, as there is no distinct pressure for reform of that aspect of the offence and such a reform would not significantly simplify charging decisions. We do not consider that there is a strong case for reform simply because the present kidnapping offence often overlaps with other offences, such as blackmail. It is a fact of life that a given instance of seriously criminal behaviour may involve several different harms or wrongs and therefore justify charges for more than one offence. However, we remain convinced that there are flaws and uncertainties in the common law offence of kidnapping which justify reform.

Definition of the offence

1.9 Kidnapping is defined at common law as the taking or carrying away of one person by another, by force or fraud, without the consent of the person taken or carried away and without lawful excuse. It must involve an attack on or loss of that person's liberty.[12]

1.10 "Taking or carrying away" includes any means of causing one person to accompany another from one place to another. On one view, kidnapping could be conceived as false imprisonment in motion, though the relationship between the two offences is not altogether clear.

Problems

1.11 The problems in definition and application of the offence of kidnapping, as defined, include the following.

(1) The offence is over-inclusive in some respects. It is defined in extremely wide terms with the potential to criminalise very trivial conduct. For example, read literally, it would apply to a case in which D (the alleged kidnapper) tricked V (the victim) into accompanying him on a journey by some trivial deception and in which V was returned safely to their starting point. To a large extent it overlaps with other offences, such as false imprisonment and child abduction. The problems of over-inclusiveness and overlap are only avoided by prosecutorial discretion.

[11] Para C.10 and following, below.

[12] *D* [1984] AC 778.

(2) In one respect, however, the offence is under-inclusive: the cumulative requirements of force or fraud *and* lack of consent exclude some instances that ought to be criminal. The most striking examples would be where D, by some enticement falling short of a fraud, takes or carries away V, who is a child or mentally incapacitated person. Although in such a case there might be a lack of consent because of V's lack of capacity, there is no force or fraud, and the offence is not committed.

(3) The definition lacks precision and has fluctuated through a series of recent cases in the Court of Appeal. In particular, it is not clear whether the conduct of taking or carrying V away must simultaneously constitute the deprivation of liberty of V, or whether it is sufficient that V is deprived of liberty at the conclusion of the journey.[13]

1.12 The second and third problems may coincide, as for example in a case where a young child or a person with a mental incapacity is invited to a house and then detained while ransom demands are made.[14] This is, on any normal view, kidnapping. However, it may not amount to that offence as at present defined, first because no force or fraud was used to take V away, and secondly (on one view) because there was no loss of liberty until after the taking and carrying away has come to an end.[15] This, if correct, is a serious defect, calling into question the usefulness of the offence for the very class of case one would most expect to be covered. We recognise of course that if such a case were to arise the prosecution authorities could meet the occasion by bringing charges of false imprisonment and blackmail, but that is not a satisfactory position with such serious wrongdoing.

1.13 As stated above, the scope of kidnapping includes some fairly minor forms of misbehaviour. Taking kidnapping and false imprisonment together, some 20% of sentences are for 6 months or less. These minor cases could be suitable for trial in a magistrates' court, but at present both offences are triable on indictment only. The prosecution must therefore choose between full Crown Court trial and dropping the case.

Possible reforms

1.14 It would be possible to effect piecemeal reforms to address the particular problems identified and no more. However, these problems also raise wider issues about the basis for the offence. For this reason, and for the sake of possible future codification, we have undertaken a more principled review of the offences of kidnapping and false imprisonment, with a view to replacing them by statute.

1.15 Briefly, we provisionally conclude as follows.

[13] Para 2.123 below.

[14] Para 3.17 and following, below.

[15] A further restriction is that the offence is not committed unless D accompanies V on the journey: para 2.26 and following.

(1) Kidnapping, and probably false imprisonment, should be replaced by statutory offences. There are many forms such statutory offences might take. We offer three possible models for consultation.

(a) A single offence of intentional or reckless deprivation of liberty without consent and without lawful excuse.

(b) Separate offences of unlawful detention and unlawful abduction.

(c) A basic offence of intentional or reckless abduction or detention and an aggravated one of detention or abduction with intent to perpetrate one of a number of specified additional harms (for example inflicting harm, or making ransom demands).

These models are examined in full in Part 4 and set out again in Part 5. Common to these models are the following points of definition:

(2) An absence of consent to the conduct (abduction or detention) should be a core element of the offence. Force or fraud should not constitute separate elements of the offence, but would be relevant as evidence of lack of consent.

(3) Defences such as duress, self-defence, lawful arrest and parental rights should apply as under the present law.

(4) For the required fault elements, we propose that the detention or abduction must be either intentional or reckless, and that recklessness should bear its current subjective definition, namely that the defendant was aware of the risk of his or her actions and unreasonably proceeded with them.

(5) There should be no need for the abductor to accompany the victim, provided that the victim is imprisoned or confined at some stage of the operation or otherwise suffers a loss of liberty.

1.16 The question in paragraph 1.15(1), concerning whether there should be one or two offences and how they should be distinguished, is left open to consultation. We also leave open the question whether an honest but mistaken belief in consent should excuse the accused, or whether there should be a requirement that the belief as to consent should be reasonable. Finally we raise the question whether one or more of the offences created should be made triable either way (at present both kidnapping and false imprisonment can be tried only in the Crown Court).

Structure of this paper

1.17 Part 2 provides a detailed account of the current law of kidnapping and a brief account of the offence of false imprisonment. Part 3 discusses the problems and uncertainties with kidnapping, in particular the difficulties presented by the way the different ingredients in the definition of the offence apply in combination. Part 4 considers the justification of the offences of false imprisonment and kidnapping and discusses the possible solutions, including a reformed offence of kidnapping. Part 5 summarises the proposed models of offence offered for consultation and sets out the further questions for consultation. Appendix A describes previous law reform proposals. Appendix B describes the law in some other countries. Appendix C gives a brief account of the related statutory offences of child abduction, hostage taking and people trafficking. Although a full codification exercise would also involve examination of those offences, that option is not within our narrow terms of reference, which are to simplify the common law offence of kidnapping.

1.18 We are grateful to the members of the Advisory Group,[16] who helped us refine the options for reform and suggested many valuable arguments and examples for this paper.

[16] Peter Burt, Crown Prosecution Service; Antony Edwards, solicitor; Ian Kelsey, solicitor; Dr Tim Moloney QC, Tooks Chambers; Jonathan Rogers, University College London; Professor William Wilson, Queen Mary College London; HH Judge Martyn Zeidman QC, Snaresbrook Crown Court.

PART 2
CURRENT LAW OF KIDNAPPING

INTRODUCTION

Scale and context

2.1 In the leading case on kidnapping, *D*,[1] the House of Lords defined kidnapping as an attack on and infringement of the personal liberty of an individual, consisting of the taking or carrying away of one person by another by force or by fraud, without the consent of the person so taken or carried away and without lawful excuse.[2] It is sometimes described as an aggravated form of false imprisonment.[3] False imprisonment is also a common law offence and includes every wrongful deprivation of a person's liberty. Kidnapping is considered the more serious offence of the two, but both are common law offences carrying unlimited powers of imprisonment, and both are triable only on indictment.

2.2 There are generally 600 to 750 cases per year in which a person charged with kidnapping appears or is brought before a magistrates' court,[4] of which between 100 and 150 result in conviction in the Crown Court.[5] Over the period from 2000 to 2010 inclusive, 10% of those sentenced were given a non-custodial sentence, 5% were given a suspended sentence, 2% were sentenced to immediate imprisonment of 6 months or less, 37% were sentenced to more than 6 months up to 3 years, another 19% were sentenced to over 3 up to 5 years, another 16% to over 6 up to 10 years and the remaining 11% to over 10 years.[6]

2.3 For false imprisonment, the corresponding figures are as follows. 1,100 to 1,200 cases per year reach a magistrates' court,[7] of which between 200 and 250 result in conviction in the Crown Court.[8] Over the period from 2000 to 2010 inclusive, 24% of those sentenced were given a non-custodial sentence, 7% were given a suspended sentence, 3% were sentenced to immediate imprisonment of 6 months or less, 41% were sentenced to more than 6 months up to 3 years, 12% were sentenced to over 3 up to 5 years, 7% to over 6 up to 10 years and the remaining 7% to 10 years or more.[9]

1 [1984] AC 778.

2 The passage is set out in full at para 2.12 below.

3 Para 2.166 and following, below.

4 Figures supplied by Crown Prosecution Service. These figures represent the number of charges brought, rather than the number of individuals charged.

5 Figures supplied by Sentencing Council. These figures represent the number of individuals sentenced, and are therefore not directly comparable with the preceding ones.

6 Figures supplied by Sentencing Council.

7 Figures supplied by Crown Prosecution Service. These figures represent the number of charges brought, rather than the number of individuals charged.

8 Figures supplied by Sentencing Council. These figures represent the number of individuals sentenced, and are therefore not directly comparable with the preceding ones.

9 Figures supplied by Sentencing Council: in the case of false imprisonment there are rounding errors.

2.4 Very roughly, then, sentences for kidnapping tend to be 30% to 40% higher than those for false imprisonment. For the two offences taken together, 21% of all sentences are either non-custodial or for immediate imprisonment of 6 months or less, and would therefore have fallen within the sentencing powers of a magistrates' court if that court had jurisdiction.

The issues in brief

2.5 The scheme of this Part is as follows.

(1) First, we give a brief account of the history of the offence and of the recent cases.

(2) Then we consider in turn each of the ingredients specified in the House of Lords' definition, namely

(a) taking/carrying away,

(b) force or fraud,

(c) lack of consent,

(d) lack of lawful excuse, and

(e) attack on liberty.

For each of these ingredients we consider two fundamental issues: its place and function within the definition (context) and its meaning (content).

(3) Then we consider the fault element of the offence.

(4) Finally we give an account of the offence of false imprisonment and consider the relationship between it and kidnapping.

History

2.6 Kidnapping did not emerge as an offence separate from false imprisonment until the 1680s, when a trio of cases was decided concerning the abduction and shipping of young boys to the New World to work as servants.[10] This appears to have been a prevalent phenomenon at the time,[11] and the offence seems to have been created by the King's Bench in response. One indication of the character of the offence is the fact that two out of the three cases were prosecuted by way of information rather than indictment: as informations were brought directly by the Attorney General rather than by a local grand jury, they were especially suitable for offences of a political or public order character. Selling people beyond the seas was criminal as early as Anglo-Saxon times;[12] but the earlier cases cited in *Dassigney* concerned either false imprisonment or civil proceedings for the liberation of the prisoner, and do not attest the existence of kidnapping as a separate offence.

2.7 For a considerable time the legal definition of kidnapping seems to have been restricted to sending people abroad as in the three cases mentioned.[13] A separate offence appears to have been recognised around the same time, typically involving the abduction and detention of a female minor for sexual purposes: this was also prosecuted by information. The leading case was *Lord Grey*,[14] concerning Lord Grey's abduction of Lady Henrietta Berkeley, his wife's younger sister, who was under 18, by persuading her to leave her father's house and live with Lord Grey in a series of places. The wording of the indictment in that case was very different from that used in false imprisonment cases, and read, as to its essential words, "by force and arms ... without the leave and against the will of [her father] … did take, lead and carry away".

2.8 East, writing in 1803, appears to have been the first to suggest that there is a single offence of "kidnapping" in a wider sense, covering all instances of taking and carrying away or secreting, and that this single offence is an aggravated form of false imprisonment. In his *A Treatise of the Pleas of the Crown*,[15] he gives both the wider and the narrower definition. First he says:

> 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.

[10] *Dassigney* (1683) Raym 474, 83 ER 247 and 2 Show 221, 89 ER 902; *Wilmore* (1682) Skinn 47, 90 ER 23, 8 St Tr 1347; *Bailey* (1685) Comb 10, 90 ER 312.

[11] *Hendy-Freegard* [2007] EWCA Crim 1236, [2008] QB 57 at [32]; D Napier, "Detention Offences at Common Law", in P Glazebrook (ed), *Reshaping the Criminal Law* (1978), pp 194 to 195. See also *Swimmer* (1753) Sayer 103, 96 ER 818, where a parish officer who bound three children to serve as apprentices in foreign parts was accused of kidnapping. The prosecution was dropped on the defendant's undertaking to return the children.

[12] F Pollock and F W Maitland, *The History of English Law before the Time of Edward I* (2nd ed 1898) vol 1, pp 35-36.

[13] Para 2.138 and following, below.

[14] (1683) 2 Show KB 218, 89 ER 900, 9 St Tr 127.

[15] East, *A Treatise of the Pleas of the Crown* (1st ed 1803) p 429; (2nd ed 1806) p 429.

This wide proposition is supported by a marginal note giving a citation for Lord Grey's case. Later in the same passage he says:

> The forcible abduction or stealing away of any person is greatly aggravated by sending them away from their own country into another, properly called kidnapping, though the punishment at common law is no more than fine, imprisonment, and pillory.

2.9 The wide definition is the basis of that given in later textbooks. Some of these,[16] however, add the qualification that, in the case of a child, the taking must be against the will of the parents and guardians rather than the child's own will. This qualification, which appears to be based on *Lord Grey*'s case,[17] has been removed by later cases and does not appear in current editions of those textbooks.[18]

2.10 Writing before the House of Lords provided the definition in *D*, Glanville Williams, in his *Textbook of Criminal Law*,[19] defined the offence in the following terms:

> **What about kidnapping?**
> There is a common law offence going by this name, which is committed by carrying a person away without his consent. It is supposed to be a particularly serious form of false imprisonment, but over the years the courts have, in familiar fashion, attenuated the circumstances of aggravation, so that now the only distinguishing feature is that the imprisonment, to amount to an aggravation, must involve *either the secreting of the victim or carrying him away from the place where he wishes to be*.[20] It may be either by force or by the threat of force. (As was said before,[21] the courts may perhaps extend it to a taking by deception.)
>
> **If an adult takes away a juvenile with his consent but without the consent of his parents, is this kidnapping?**
> No, according to a ruling of Lawson J.[22] But it can be one of a number of statutory offences …

2.11 For Glanville Williams, kidnapping is false imprisonment, aggravated by secreting or carrying away. The current definition, as given by Lord Brandon in *D*, reverses the emphasis, as well as removing the mention of secreting. In *D*, as interpreted

[16] See para 2.93 below.

[17] See n 14 above.

[18] The issue is discussed in full at para 2.89 and following.

[19] G Williams, *Textbook of Criminal Law* (2nd ed 1983) p 219, cited in *Hendy-Freegard* [2007] EWCA Crim 1236, [2008] QB 57 para 33 (which mistakenly gives the year as 1953, presumably confusing Glanville Williams' *Textbook of Criminal Law* with his *General Part*).

[20] Italics in original.

[21] G Williams, *Textbook of Criminal Law* (2nd ed 1983) p 218, see para 2.160 below.

[22] *Hale* [1974] QB 819.

by *Hendy-Freegard*,[23] kidnapping is taking or carrying away, in such a way as to attack or infringe personal liberty.

The principal modern cases

***D*[24]**

> The defendant took the victim, his daughter, out of the custody of her mother, once when she was aged 2 and once when she was aged 5: in both cases the taking was by force, in the sense that the child was physically carried away, in the second instance after being wrenched from her mother's arms.

2.12 The main issue in the case was how the offence of kidnapping applies to the abduction of children, and this will be discussed in full below.[25] In the course of his judgment, however, Lord Brandon gave a full definition of the offence in general, which forms the basis of much of the discussion in this part.

> From this wide body of authority six matters relating to the offence of kidnapping clearly emerge. First, the nature of the offence is an attack on and infringement of the personal liberty of an individual. **Secondly, the offence contains four ingredients as follows: (1) the taking or carrying away of one person by another; (2) by force or by fraud; (3) without the consent of the person so taken or carried away; and (4) without lawful excuse.**[26] Thirdly, until the comparatively recent abolition by statute of the division of criminal offences into the two categories of felonies and misdemeanours, the offence of kidnapping was categorised by the common law as a misdemeanour only. Fourthly, despite that, kidnapping was always regarded, by reason of its nature, as a grave and (to use the language of an earlier age) heinous offence. Fifthly, in earlier days, the offence contained a further ingredient, namely, that the taking or carrying away should be from a place within the jurisdiction to another place outside it; this further ingredient has, however, long been obsolete, and forms no necessary part of the offence to-day.[27] Sixthly, the offence was in former days described not merely as taking or carrying away a person but further or alternatively as secreting him; this element of secretion has, however, also become obsolete, so that, although it may be present in a particular case, it adds nothing to the basic ingredient of taking or carrying away. [28]

[23] Para 2.16 below.

[24] [1984] AC 778.

[25] Para 2.88 and following.

[26] Emphasis ours.

[27] This ingredient is discussed at para 2.138 and following, below.

[28] [1984] AC 778, 800.

***Wellard*[29]**

> The defendant pretended to be a police officer searching for drugs, and persuaded the victim to accompany him 100 yards and get in his car so that he could take her home. In the event the victim's friends arrived and she was not taken anywhere in the car.

2.13 It was held that the element of "taking and carrying away" did not have to involve physically moving the victim. It was enough if the defendant's conduct caused the victim to feel that she was compelled to submit to his instructions and move a comparatively short distance from one place to another: the 100 yard walk, procured by deception, was sufficient to amount to "carrying away" by fraud. This was a kidnapping.

***Greenhalgh*[30]**

> The defendant broke into a cottage with a crossbow and threatened to burn it down. The householder suggested, as the lesser of two evils, that he should drive the defendant to another place. The journey took place, with the defendant still threatening the householder with the crossbow and telling him where to drive.[31]

2.14 The issue in the case was whether the defendant was guilty of kidnapping or whether the fact that the householder had suggested the drive meant that the "taking and carrying away" was voluntary (it was common ground that there was at least false imprisonment). The Court of Appeal held that the jury had been entitled to find that the householder's cooperation did not amount to consent to being taken and carried away.

> In our judgment, although apparently the authorities do not yet expressly say so, where the issue for consideration in a kidnapping case is whether the victim consented, consistently with the general pattern in the criminal law consent induced by fear or force does not amount to true consent. This ingredient of the offence of kidnapping is established if what may loosely be described as consent amounts in reality to no more than submission.[32]

***Cort*[33]**

> The defendant was convicted of kidnapping because he had induced a number of women to accept lifts in his car by falsely representing that there was no bus service on the desired route.

[29] [1978] 1 WLR 921.

[30] [2001] EWCA Crim 1367.

[31] There was in fact a conflict of evidence about who suggested the drive first. The judgment assumed the account more favourable to the defendant in order to hold that, even on that version of events, kidnapping had been committed.

[32] [2001] EWCA Crim 1367 at [34].

[33] [2003] EWCA Crim 2149, [2004] QB 388.

2.15 It was held that the deception he practised on the women itself negated their consent, as they would not have consented to the taking and carrying away but for the deception. The decision was controversial for two reasons. First, this conduct was held to be sufficient to constitute kidnapping even though there was no element of imprisonment: it was accepted that one woman who asked to get out was allowed to, and none of them were taken anywhere except their intended destinations. Secondly, *Cort* held that for kidnapping consent is negated by any deception on any subject, provided that the victim would not have allowed the taking away but for the deception. In contrast, in cases of rape (as then defined), deception only negated consent if it concerned the identity of the perpetrator or the nature of the act.[34] In other words, according to *Cort*, the "consent" in kidnapping has to be to the "taking-away-by-force-or-fraud", not just to the "taking-away"; which is of course a virtual logical impossibility.[35]

Hendy-Freegard[36]

> The defendant pretended to be a secret service agent and induced various people to travel round the country in his absence and stay in places of his choosing.

2.16 It was held that this was not kidnapping, as there was no deprivation of liberty, and the defendant was not with the victims at the time. *Cort* was held to have been wrongly decided because, although in that case the women were induced to enter the car by fraud and without their (informed and valid) consent, they did not feel physically or legally compelled to enter the car, and were not deprived of their liberty once there. The uncertainty of the scope of the offence, as shown by the radical contrast between *Cort* and *Hendy-Freegard*, is in itself a reason for statutory reform. Take the following example, as mentioned in *Hendy-Freegard*: D induces V to enter his car by pretending to be a licensed mini-cab driver. V enters the car and is taken to the destination of her choice and is charged an appropriate fare. According to *Cort* this is kidnapping; according to *Hendy-Freegard* there is no kidnapping.

INGREDIENTS OF THE OFFENCE

2.17 Lord Brandon's definition isolates five ingredients in the offence: taking or carrying away; force or fraud; absence of consent; absence of lawful excuse; attack on or infringement of liberty. A further ingredient, that of sending a person abroad, was relevant to earlier forms of the offence but is now of no special significance.

Taking or carrying away

Role in the offence

2.18 Lord Brandon describes the offence as consisting of "the taking or carrying away of one person by another". The taking or carrying away is the principal conduct element of the offence.

[34] On the then state of the law: the test has since been altered by Sexual Offences Act 2003 ss 74 to 76.

[35] [2003] EWCA Crim 2149, [2004] QB 388 at [19].

[36] [2007] EWCA Crim 1236, [2008] QB 57; discussed [2007] *Criminal Law Review* 986.

Meaning

2.19 The formulation "taking or carrying away" raises two questions of scope.

(1) Is it always necessary that V (the victim) be made to go from one place to another, and if so how far? Or is a stationary "taking" (capture) ever sufficient to constitute kidnapping?

(2) Is every method of causing V to go from one place to another included, or must D (the defendant) "take" V in the sense of compelling V to accompany D there?

IS MOVING NECESSARY?

2.20 This first question arises from Lord Brandon's apparently novel formulation in *D*[37] where his lordship spoke of "taking *or* carrying away". Previous authorities, including the Court of Appeal in *D*[38] and the arguments of counsel in the House of Lords, always spoke of "taking *and* carrying away" or "stealing *and* carrying away". This formula, as used in the older kidnapping cases, appears to use "take" in its old sense of capturing or reducing to possession.[39]

2.21 If we continue to understand "take" in this sense, Lord Brandon's formula represents a radical extension of the offence because it becomes sufficient that there is a stationary "taking". This goes wider even than the old "secreting" form of kidnapping, and becomes hard to distinguish from false imprisonment.

2.22 Despite the language used in *D*, the consensus appears to be, and we agree, that **some degree of movement remains necessary for the offence of kidnapping**. This was Glanville Williams' view in an article written well after *D*.[40] It is also the position taken in the Canadian cases of *Oakley*[41] and *Karpenko, Mayo, George and Mayo*;[42] and while the issue is not raised specifically in the English cases, the facts of every reported case that we have found involved the moving of V.

[37] [1984] AC 778.

[38] [1984] 2 WLR 112.

[39] The description of the offence as taking and carrying away appears to be derived from the form of the offence which concerned the abduction of a minor: it is uncertain whether it was used for the sending abroad form. The same phrase was used in the old common law offence of larceny. In both offences "take" represented Latin *cepit*, which had the unambiguous sense of seize or capture.

[40] G Williams, "Can babies be kidnapped?" [1989] *Criminal Law Review* 472, n 9.

[41] Appendix B para B.26.

[42] Appendix B para B.21.

2.23 The requirement for some movement of V can be reconciled with Lord Brandon's formulation in *D* if it is accepted that his lordship was using "take" in its current sense, in which one speaks of taking a person to a place or taking them away. "Take" and "carry" could then be seen as near-synonyms, with the "or" being used only by way of explanation; or one could interpret "carrying" to mean physically transporting V and "taking" to mean inducing V to move him or herself.[43]

2.24 Accepting that movement is required as part of the offence, the supplementary question arises whether there is any minimum distance through which V must be moved. Glanville Williams, in his *Textbook of Criminal Law*,[44] says:

> *Wellard* shows that carrying the victim away for 100 yards is enough. Lawton LJ seems to have regarded it as for the jury to decide whether the transporting of the victim went sufficiently far to be accounted a carrying away. But surely there must be some rule of law on the subject. In the old law of larceny, the least movement of an article constituted a carrying away, but that can hardly apply to kidnapping.

2.25 We have found no English authority setting a quantitative minimum distance through which V must have moved for the requirement of "carrying away" to be satisfied. In principle there could be a "de minimis" rule excluding the most trivial cases, for example simply carrying V across a room. Such cases will often be excluded for other reasons, for example because V was not deprived of liberty. The de minimis issue has certainly arisen in the United States, where criticisms have been made of the use of kidnapping charges based on V being "moved" a very short distance as part of a fundamentally different crime such as rape or burglary.[45] For this reason, the Model Criminal Code now requires the victim to be moved "from his place of residence or business, or a substantial distance from the vicinity where he is found".[46]

IS UNACCOMPANIED MOVEMENT BY THE VICTIM SUFFICIENT?

2.26 The use of the words "take" (even in its broader modern sense) and "carry", as opposed to other possibilities such as "move" or "send", appears to carry the implication that D accompanies V; or rather, compels[47] V to accompany D.

2.27 *Hendy-Freegard*[48] provides clear recent authority that "taking or carrying away" includes a requirement that the kidnapper accompany the victim. This was one of the grounds on which the court in *Hendy-Freegard* disagreed with *Cort*.[49]

[43] A further possibility is that, though the offence properly requires both taking and carrying away, Lord Brandon's use of "or" is an indication that it is sufficient for either the taking or the carrying to be by force or fraud.

[44] G Williams, *Textbook of Criminal Law* (2nd ed 1983) p 219, footnote.

[45] Appendix B para B.49.

[46] Appendix B para B.48.

[47] The issue of compulsion is addressed under the requirements of force or fraud and of lack of consent below. In describing the existing law, there is therefore no need to consider whether, even were it not for these requirements, compulsion would be implied in the word "take". Such a question may become relevant in the formulation of a new offence.

> The fact that it is difficult on the facts of *Cort* to identify the deprivation of liberty that, on previous authorities, was an essential ingredient of kidnapping does not justify the further extension of the law for which Mr Carey [counsel for the Crown] has contended. He persuaded the judge and sought to persuade us that the offence of kidnapping will be committed if a defendant, by a fraudulent misrepresentation, induces a person to go from one place to another, even if that person is unaccompanied. In such circumstances there is nothing that is capable of constituting a "taking and carrying away". Even less is it possible to identify any deprivation of liberty. Mr Carey accepted that, if his submission was correct, the bigamist who induces a woman to travel to the church for a wedding ceremony might be guilty not merely of bigamy but also of kidnapping. Such a submission transforms the offence of kidnapping in a manner that cannot be justified, even on the basis of the decision in *Cort*.
>
> For these reasons the judge was wrong to rule and to direct the jury that causing a person by a fraudulent misrepresentation, to move from one place to another, unaccompanied by the defendant, of itself sufficed to constitute the element of "taking and carrying away" in the offence of kidnapping. Such a movement cannot of itself constitute either taking and carrying away or deprivation of liberty.[50]

2.28 *Smith and Hogan*[51] restates the requirement that D (the kidnapper) must accompany V (the victim), and defends it on the ground that, otherwise, sending a person on a fool's errand as a practical joke would be kidnapping.[52]

2.29 The requirement that D accompanies V does not appear to have formed part of the original kidnapping offence, of sending people abroad. In *Swimmer*,[53] for example, D simply bound V as an apprentice to serve in the Americas: there is no mention in the report of D or an agent of D accompanying V on any part of the journey to the port, let alone to the Americas. Nor was the loss of liberty during the journey mentioned as the gist of the offence. One should not however attach too much weight to these omissions, as the report is extremely short. The modern cases do not distinguish the sending abroad form of the offence from other forms, and it is doubtful if it now forms an exception to the requirement of accompanying.

[48] [2007] EWCA Crim 1236, [2008] QB 57.

[49] [2003] EWCA Crim 2149, [2004] QB 388.

[50] *Hendy-Freegard* [2007] EWCA Crim 1236, [2008] QB 57 at [57] and [58].

[51] D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2011).

[52] D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2011) para 17.12.2, second paragraph from bottom of page. This argument is discussed below at para 3.25 and following.

[53] (1753) Sayer 103, 96 ER 818.

2.30 In conclusion, a requirement of accompanying clearly forms part of the "carrying away" element of kidnapping in existing law. Whether it serves a useful purpose is discussed below.[54]

Secreting and detaining

2.31 Having established that there must be movement of V accompanied by D, a further question arises because, according to some older authorities, one form of kidnapping existed for cases of "secreting." This meant more than simple detention, as otherwise kidnapping would have been indistinguishable from false imprisonment: the distinguishing factor was that of keeping V in concealment.

2.32 It is clear that this imposes no requirement that the taking or carrying away must be clandestine. Nor is it necessary for the offence of kidnapping for D to secrete and detain V at the conclusion of their travel. In *Reid*[55] it was held that there is no *necessary* element of concealment or secreting of the person kidnapped, as the offence consists of stealing and carrying away, *or* secreting.

2.33 The converse question is whether it is *sufficient* to constitute kidnapping that D has detained V without consent provided that the detention takes the form of "secreting". In *D*,[56] Lord Brandon rejected that interpretation, holding that secreting, even as one form of the offence among others, adds nothing to the definition:

> … the offence was in former days described not merely as taking or carrying away a person but further or alternatively as secreting him; this element of secretion has, however, also become obsolete, so that, although it may be present in a particular case, it adds nothing to the basic ingredient of taking or carrying away.

This gives further support for the view, already argued for,[57] that every kidnapping must involve the moving of V.

2.34 In brief, *Reid*[58] holds that kidnapping is complete as soon as V is moved: there is no necessary requirement to prove moving AND secreting. As we have seen, kidnapping necessarily involves moving V; so it is clear that the offence is not defined in terms of moving OR secreting. It would appear to follow that secreting is simply irrelevant as a definitional element of the offence, although it may, of course, be of evidential significance.

[54] For our views on accompanying, see para 3.25 and following, below.

[55] [1973] QB 299.

[56] [1984] AC 778, 800 (para 2.12 above).

[57] Para 2.55 above.

[58] [1973] 1 QB 299.

2.35 One effect of this is that, in a case where V is taken away to a destination and detained there, the kidnapping ends when the destination is reached. The detention of V, which could formerly have constituted secreting, forms no part of the conduct element of the offence, though, as argued below,[59] it may be relevant as a consequence element.

2.36 Defining kidnapping without reference to secreting produces a much simpler offence, but the courts' justifications for rejecting such an element are not persuasive. Moreover, the result is that the legal definition of kidnapping does not accord with popular understanding.

2.37 The argument for disregarding secreting is that the offence is "complete" as soon as there is taking or carrying away: later confinement (in secret or not) is therefore irrelevant. This however confuses two senses in which an offence can be said to be complete. In one sense, an offence is "complete" as soon as sufficient conduct has occurred for the offence to have been committed so that a prosecution could successfully ensue: in battery, the first touch; in kidnapping, the first step of the journey. Some offences, however, involve a continuing process: battery is committed with the first touch but goes on being committed until the assailant desists. In this sense, then, the offence is not "complete" until it has stopped being committed.

2.38 Following the cases of *Cort*[60] and *Wellard*,[61] the "taking or carrying away" includes the whole continuing process of V moving or being moved from one place to another, and the offence goes on being committed throughout. It would be perfectly coherent to hold that, while every kidnapping must involve (and need only involve) taking or carrying away, it also goes on being committed throughout any period of detention or secreting that follows the taking, even though detention or secreting on their own would not suffice.

2.39 This, as we believe, was the law before *D*,[62] and is in accordance with the popular meaning of the term "kidnapping". If a child is abducted and held at a secret destination for weeks or months while ransom demands are made, we would anticipate that most members of the general public would regard the whole operation as kidnapping: they would be very surprised to learn that the kidnap is over as soon as the destination is reached. Lord Brandon's dismissal of the element of "secreting" may therefore have been over-hasty.

2.40 Nevertheless, since *D* kidnapping is clearly restricted in this way. The offence goes on being committed throughout the taking or carrying of V: it may also include any period of stationary confinement during pauses on the way, but ends as soon as the final destination is reached.

[59] Para 2.113 and following.

[60] [2003] EWCA Crim 2149, [2004] QB 388. *Cort* was overruled in *Hendy-Freegard*, but on other grounds.

[61] [1978] 1 WLR 921.

[62] [1984] AC 778.

2.41 The practical significance is that the remaining elements of the offence (force or fraud, loss of liberty, lack of consent or lawful excuse) are attached to the conduct element, either as ways or circumstances in which it is carried out or as consequences. It seems artificial to require all these elements to relate only to that part of the process during which V is in motion. We explore the implications of this in Part 3.[63]

Force or fraud

Role in the offence

2.42 D's use of force or fraud could form part of the offence of kidnapping in three ways:

(1) it could constitute the means by which D takes or carries V away;

(2) it could represent the means by which V is deprived of liberty;

(3) it could be the reason for V's lack of consent: either V was overborne and therefore did not consent at all, or V's apparent consent was given because of a threat or deception and therefore should not be treated as genuinely given.[64]

2.43 In Lord Brandon's definition, only the first of these ways is a formal ingredient of the offence of kidnapping. Kidnapping is defined as the taking or carrying away of a person *by* force or fraud.[65] This means, not only that force or fraud must be present in every case, but also that one or both of these forms of conduct must be the means by which D effects the taking or carrying away of V.

2.44 According to *Cort*[66] the requirement that the taking away be "by force or fraud" is satisfied by any deception sufficient to cause V to accompany D on a journey. This may be referred to as a "but-for" test: V would not have accompanied D but for the deception. Presumably the same "but-for" test applies where the allegation is that D has caused V to accompany D by force. Any degree of force is sufficient to satisfy this element of the offence if V would not have accompanied D but for that force. As we have seen, taking or carrying away can be a continuing process, and the offence goes on being committed throughout. It is not necessary that D actively applied force or fraud throughout the process, as long as one or more forms of conduct remains a causative factor for V's continued presence. This can be illustrated by two contrasting examples.

[63] Para 3.3 and following.

[64] Para 2.80 and following.

[65] Para 2.12 above.

[66] [2003] EWCA Crim 2149, [2004] QB 388. This aspect of the decision was not disputed in *Hendy-Freegard.*

> Example 1. As on the facts of *Cort*, V enters D's car and undertakes to travel with D because of D's false statement to V that the bus service is cancelled and that D will give V a lift. D uses no subsequent fraud or force. The entire journey constitutes a "taking or carrying away by fraud", as the fraudulent representation causes V to go on the journey with D and continues to operate on V's mind throughout.
>
> Example 2. On similar facts to *Cort,* V enters D's car because of D's false representation about the bus, but part way through the journey, D's car is overtaken by a bus. V realises that D was lying. If on those facts D offers to let V out of the car, but V decides to let D take V to V's destination anyway, there would be no kidnapping from that point on. The reason for V being in the car is no longer D's fraud but the renewed consent V gives freely and in knowledge of the facts.

2.45 As explained above, since *D* it appears that the offence ends when V reaches the destination, however long V is confined there afterwards. For this reason, if D used no force or fraud to "take or carry away" V, that is to say transport V to the destination, he does not commit the offence of kidnapping by subsequent use of force or fraud to detain V at the destination. D's use of force or fraud to deprive V of liberty (otherwise than by carrying or taking V away) does not satisfy the "by force or fraud" requirement of the offence.

> Example. D, who is V's father but is in the process of divorce from V's mother, invites V to his flat for tea. V follows him docilely, but given V's age the court considers that V has not got the capacity to consent to being taken away. He then forcibly detains V there, and as a condition for letting her go demands that V's mother should discontinue her application for a residence order in her favour. This is a taking or carrying away without consent, but is not by force or fraud, as there is no fraud and the force is not used until after their arrival.

2.46 Force or fraud could also be relevant to the question of consent (aspect (3) above), and this will be discussed in full below.[67] However, it is important to emphasise that D's use of force or fraud and V's lack of consent remain separate requirements of the offence. The question whether D's force or fraud caused V to be taken or carried must be kept separate from the question of whether D's conduct was sufficient to negate V's consent.[68]

Meaning: force

2.47 "Force" in this context could be interpreted as meaning either "violence" or "compulsion" (as when we speak of being forced to do something). The first is its normal meaning in law: Jowitt's *Dictionary of English Law*[69] defines force simply as "such violence as was unlawful".

[67] Para 2.80 and following.

[68] D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2011) para 17.12.2.1, first paragraph (page 690).

[69] 3rd ed (2009).

2.48 The modern cases on kidnapping give little guidance on the meaning of force: the main examples of forcible kidnapping concern the abduction of family members, for example *D*[70] and *Rahman*,[71] both of which involved some degree of pushing or pulling, and therefore amounted to battery.

2.49 The requirement of "force" appears to be derived from the old formula "by force and arms", which was used both in false imprisonment and in the early kidnapping cases, but this appears to have been largely a formality of pleading. In the older kidnapping cases there was no suggestion that either the apprentices sent abroad, as in *Swimmer*,[72] or the abducted female minors, as in *Lord Grey*,[73] were subjected to violent treatment or the threat of it.

2.50 The modern case law on false imprisonment makes clear that that offence need not involve an assault or battery.[74] Any means D employs which makes it physically impossible, difficult or dangerous for V to leave a circumscribed area is sufficient. This need not involve physical violence or touching against V's person, as with the obvious example of D locking the door to confine V.[75] So far as there is an implicit requirement of force in false imprisonment it is satisfied by proof of compulsion.

2.51 The question, then, is whether in the current offence of kidnapping "force" is to be interpreted as requiring only compulsion as in false imprisonment, or whether it requires violence in the sense of physical touching or a threat of physical touching.

2.52 We consider that, in the definition of kidnapping, "force" must mean more than simply compulsion. Otherwise, it would only mean that the journey was involuntary and add nothing to the requirement of lack of consent.

2.53 Another argument for interpreting force as violence or the threat of it would be to distinguish kidnapping as a more serious offence than false imprisonment and one properly classified as a crime of violence. Adopting such an interpretation might also be thought to maintain consistency with other offences against the person such as assault and battery. Moreover, that narrower interpretation might be thought not to limit the offence too much since "force" in offences against the person is widely construed. In assault and battery, for example, the slightest unwanted physical contact or threat of it can amount to force.

2.54 However, we consider that a requirement that D uses physical violence or the threat of violence on V would be too restrictive and create anomaly. For example, on this narrow interpretation, it would be sufficient (all other elements aside) if D put out a restraining hand when V appeared to be about to leave D's car, without actually touching V. But it would not be sufficient if D used the central locking to prevent V from getting out.

[70] [1984] AC 778.

[71] (1985) 81 Cr App R 349.

[72] (1753) Sayer 103, 96 ER 818.

[73] (1683) 2 Show KB 218, 89 ER 900, 9 St Tr 127.

[74] Para 2.153 below.

[75] Para 2.162 below.

2.55 We believe that the answer lies between the two. **The element of force is, in our submission, satisfied if there is coercion of V by physical means or the threat of them.**

> Example. V chooses D's car as a place to sleep. Once V is asleep, D drives the car home with the doors locked and shuts it in a garage.[76]

There is compulsion by physical means without touching or the threat of it and, subject to any question of fault, we believe that this is capable of amounting to kidnapping.

Meaning: fraud

2.56 Equivalent questions arise in connection with fraud. Does the requirement that the taking or carrying away be by "fraud" mean that D must tell a positive lie, or is it sufficient that D breaches a promise or fails to disclose relevant information? This has particular significance because it raises the question whether the offence can be committed, all other elements aside, if D entices a child to accompany D without telling any lies, for example by making a genuine promise of sweets.

2.57 We have found no English authority on this point in the context of kidnapping, but analogous questions arise in connection with sexual offences. However, the cases on sexual offences[77] are not particularly helpful since they relate to the question whether D's fraud is sufficient to vitiate V's consent to the relevant sexual act. In the present context, the question is a quite different one: is D's fraud a "but-for" cause of V accompanying D on a journey. (The question of whether fraud vitiates consent can also arise in kidnapping, and is discussed below.[78])

2.58 **We suggest, under the present law, there is no precise rule prescribing in what circumstances D's mere non-disclosure satisfies the requirement of taking "by fraud".** This is a question of fact depending on the relevant circumstances of the case including, crucially, whether V has an expectation that, if a circumstance exists, it will be disclosed. This will often be the case where the circumstance is relevant to a choice that V is being asked to make.

Without consent

2.59 Lord Brandon's definition includes the requirement that D acts "without the consent of the person so taken or carried away." This element is in addition to the requirement that D causes V to be taken or carried away by "by force or fraud".

Role in the offence

2.60 Two questions arise here.

(1) To what must V not consent?

[76] A fictional instance occurs in P G Wodehouse, *Joy in the Morning* (1st ed 1946).

[77] *Linekar* [1995] QB 250; *Dica* [2004] EWCA Crim 1103, [2004] QB 1257.

[78] Para 2.82 and following.

(2) What is the relation between the requirement of lack of consent and the requirement of force or fraud?

CONSENT TO WHAT?

2.61 Since the offence of kidnap comprises more than one possible wrong against or harm to V (being taken or carried away, being subjected to force or fraud, loss of liberty) the question arises whether the offence occurs only when V is not consenting to all of these, or whether it is sufficient that V is not consenting to specific elements. This question is not unique to kidnapping; analogous questions arise in connection with burglary,[79] robbery[80] and aggravated vehicle taking.[81]

2.62 In kidnapping, the offence could be construed so as to require:

(1) an absence of consent to being taken or carried away;

(2) an absence of consent to being taken or carried away by force or fraud;[82]

(3) an absence of consent only to loss of liberty;[83] or

(4) some combination of the above, cumulatively or in the alternative.

2.63 For simplicity, our approach is to address whether it is necessary to prove an absence of consent in relation to each conduct element.

Taking or carrying away?

2.64 Does the office of kidnapping require proof that V has not consented to being taken or carried away? It is clear from the terms of Lord Brandon's definition that it is sufficient that V has not consented to that conduct. His lordship's judgment leaves open the question whether it is *necessary* to prove an absence of consent in relation to the taking or carrying away. The answer to this will emerge as we consider the other elements. For example, if we conclude that lack of consent to loss of liberty is sufficient, it will follow that lack of consent to taking or carrying away is not necessary.

[79] *Crummack, Stell and Campbell* [2007] EWCA Crim 1692, [2008] 1 Cr App R (S) 56.

[80] *Macro* [1969] *Criminal Law Review* 205.

[81] *McGill* [1970] RTR 209, CA; *Peart* [1970] 2 QB 672; *Singh v Rathour* [1988] 1 WLR 422, 429.

[82] Suggested in *Cort* [2003] EWCA Crim 2149, [2004] QB 3 at [19].

[83] Suggested in case comment on *Hendy-Freegard* [2007] *Criminal Law Review* 988.

Force or fraud

2.65 Does the offence require proof that V was not consenting to the use of force or fraud? There are some logical difficulties in the notion of consenting to the use of force or fraud. Clearly, a person can consent to being subjected to force in the sense of violent activity, for example in masochistic games. But in this situation, the question is significantly different: it is whether V has consented to being taken away *by* force.[84] Consent to being taken by force can exist, but only in unusual and unlikely circumstances. One example is where the force was directed against someone else, such as V's parent or carer; another is where a person, such as a compulsive alcoholic in a lucid interval, consents at one time to be forcibly held at another.[85] (Consent to being taken by force must of course be distinguished from apparent consent that is itself extorted by force.)

2.66 Fraud, to be successful, must operate by deceiving a person into allowing themselves to be taken away. It is illogical however to suggest that the agreement to being taken or carried away can include agreement to the very fraud by which the consent was obtained.[86]

2.67 In *Cort*,[87] it was suggested that the offence required proof that V was not consenting to being carried away by force or fraud. Lord Justice Buxton, giving the judgment of the court, said:

> But in our case what is it that the complainants are said to have consented to? On one level they have consented to taking a ride in a motor car. As Mr Gibbs said, that is what they wanted all along; or, at least, what they wanted all along was transport to their ultimate destination. But that is not what the offence consists of and is not in law the offence, or the basic act, with which Mr Cort is discharged. The offence is taking away by fraud. The complainant simply has not consented to that. Indeed, it is difficult to see how one could ever consent to that once fraud was indeed established. The 'nature' of the act here is therefore taking the complainant away by fraud. The complainant did not consent to that event. All that she consented to is a ride in the car, which in itself is irrelevant to the offence and a different thing from that with which Mr Cort is charged.[88]

[84] As mentioned in the case comment to *Hendy-Freegard*, [2007] *Criminal Law Review* 985, 989.

[85] Para 2.102 below.

[86] For detailed discussion see para 2.82 and following, below.

[87] [2003] EWCA Crim 2149, [2004] QB 388.

[88] [2003] EWCA Crim 2149 at [19].

2.68 The Criminal Law Review case comment on *Cort*[89] agrees that the taking away was "by fraud" in the causal sense that, had it not been for the lie, the offer of a lift would not have been accepted. However, it rejects as absurd the suggestion in *Cort* that consent must be to "taking-away-by-force-or-fraud",[90] in our view rightly.[91]

2.69 **We conclude therefore that there is no requirement to prove that V was not consenting to the force or fraud being used to cause V to be taken away.**

Loss of liberty

2.70 Does the offence require proof of a lack of consent to the deprivation of liberty? This raises more complicated issues. If loss of liberty refers not to the bare fact of physical restraint, but to the overall effect of the offence, namely being confined without one's consent,[92] then consent to loss of liberty is a contradiction in terms. Even if loss of liberty is interpreted more narrowly, to mean physical restraint, it is doubtful if consent to this can be treated altogether separately from consent to being moved.

> Example. V asks D if V may sleep in D's caravan, and asks D to lock the caravan while V is there, as there are some dubious characters in the neighbourhood. While V is asleep, D drives the caravan to another site.

If consent to being taken or carried away is the sole test, this consent was lacking. If consent to loss of liberty is the test, V's consent was only to being confined at the original position of the caravan, and does not extend to being confined elsewhere.

2.71 We conclude that a lack of consent to loss of liberty is not a necessary element of kidnapping: if V consents to being restrained but not to being taken away, kidnapping is nevertheless committed. Nor is it sufficient to prove that V did not consent to the loss of liberty: if V consents to being taken away but not to being restrained, D may be guilty not of kidnapping but only of false imprisonment.

> Example. V has agreed to go on a voyage in D's yacht. While V is there, D locks V in V's cabin.

As the locking in does not alter the nature of the taking, it would seem that in this case D is not guilty of kidnapping but is guilty of false imprisonment. D becomes guilty of kidnapping if V demands to be put ashore and D refuses, or if D sails the yacht to a place other than that to which V has agreed to go.

[89] [2004] *Criminal Law Review* 64; partly incorporated into *Smith and Hogan* (11th ed 2005) p 575 and following, which appeared after *Cort* but before *Hendy-Freegard*.

[90] *Cort*, and the case comment thereon, were both mentioned in *Nnamdi* [2005] EWCA Crim 74; but, as the appeal was allowed on the ground that the deception was not in fact causative of the journey, the question whether *Cort* was correct did not need to be decided.

[91] Para 2.66.

[92] Paras 2.135 and following, below.

2.72 **The correct view appears to be that, as concerns consent, the offence requires proof only that V was not consenting to being taken or carried away.** However, this means not consent to being taken or carried away in principle, but consent to the taking or carrying away that actually happened. It is a jury question whether particular features of the taking that happened, such as the use of force or the consequent loss of liberty, mean that the taking that happened was not the taking to which V consented.

> Example. V has agreed to be taken away by a gang as part of a ransom fraud. However, some of the gang members, being unaware of V's consent and believing that V would resist, knock V unconscious and drag V to their vehicle. In this case V has consented to be taken away, but has not consented to the use of force.

We suggest that the correct analysis is that, while V consented to being taken in principle, V did not consent to the taking that actually happened.

2.73 Consent must last throughout the period of taking or carrying away to be a defence. *Lewis*[93] establishes that even if V initially consents, the offence is committed if V later withdraws that consent and force is used to continue to detain V.

CONSENT AND ITS RELATION TO FORCE OR FRAUD

2.74 In Lord Brandon's definition, it is necessary to prove both that D used force or fraud as the means of taking V away and that V was not consenting to being taken away. The elements are separate and cumulative; they are not different ways of saying the same thing. The relationship between the two elements is confusing. It is possible for force or fraud to be present, but not in a degree sufficient to negate consent. It is also possible for a taking to be without consent, but for reasons unconnected with force or fraud. There are four possible interrelationships to consider.

2.75 First, there may be a case where D has used force or fraud, and the effect of the force or fraud is to negate V's consent to being taken away. In this case both requirements are met and kidnapping has been committed: this is in fact the archetypal case.

> Example. D forces V to enter D's car at knife-point and drives V to D's house. This is a taking by force; the force is sufficient to overbear V's freedom of choice, and V's apparent consent is no more than submission.

> Example. D, posing as a police officer, orders V, a prostitute, to enter D's car and drives V away. This is a taking by fraud; and as V does not believe V has the option of resistance, the fraud has the effect that there is no consent to being taken.

2.76 Secondly there may be a case where:

[93] Unreported (22 March 1993); cited in *Blackstone's Criminal Practice* (2010) para B2.84.

(1) D has used force or fraud, sufficient to bring about the taking or carrying away (the "but-for" test);

(2) the force or fraud is not of a kind or degree sufficient to negate consent to being taken away: for example, mild manhandling, or deception on a peripheral matter; or the force or fraud may be against someone other than V (for example, V's carer); but

(3) consent is lacking for an unrelated reason, such as that V is a young child or mentally impaired person who lacks the capacity to consent.

In this case both requirements are met, though for different reasons, and there is kidnapping.

2.77 Thirdly there may be force or fraud, of a kind or degree insufficient to negate consent to being taken away, and V does consent. In this case there is no kidnapping.

> Example. D and V are pupils at the same school. D invites V to come and see D's artwork, V at first refuses, and D tussles with V playfully until V says "Oh all right".
>
> Example. D invites V to travel in D's car for a picnic. V seems unsure, and D promises V champagne if V comes. V agrees to come, but there is no champagne and D never intended to provide any. In this case the deception was sufficient to procure V's participation, on a "but-for" test, but is not of a serious enough nature to mean that V did not genuinely consent to come.

2.78 Finally there may be a case where V does not consent to being taken away, but no force or fraud is used at any stage. This may be because the case involves the enticement of a young child or mentally impaired person, who lacks the capacity to consent. Another possibility is that V is labouring under a mistake so fundamental as to negate consent, but the mistake was not brought about or perpetuated by D. In these cases there is no kidnapping.

> Example. V is expecting a minicab to take V to the station. As D is passing by in D's car, V hails D in the belief that D is the minicab driver. D stops, lets V in and drives off in the opposite direction. D is exploiting V's mistaken belief, but has played no part in bringing it about: the taking is therefore not "by fraud". (It may become forcible if V later asks to be let out and D refuses.)

Meaning of consent

2.79 It having been established that the question of consent is relevant solely to V being taken or carried away, it becomes necessary to define what consent means in that context. Consent may be vitiated by force, fraud, lack of capacity, or mistake not induced by D. The questions arising are:

(1) Is consent automatically vitiated if it was obtained by force or fraud?

(2) Does the consent need to be an informed and intelligent consent; in particular, can a child consent?

(3) Is the consent of a person other than the abductee, for example a parent or carer, ever relevant?

VITIATION OF CONSENT BY FORCE OR FRAUD

2.80 Does the fact that a taking was by force or fraud automatically mean that it was without valid consent, or are there circumstances in which consent and force or fraud can coexist?

2.81 For a taking to be by force can mean two things.

(1) One is that V is physically overpowered. This will usually mean that V was taken without consent: one exception might be the case where V gave consent in advance to the use of force.

> V, a compulsive alcoholic, in a lucid interval asks D to sit with V during the following evening, and to lock V in V's bedroom if V starts asking for drink. D does so, despite V's protests.[94]

(2) The other meaning is that apparent consent was obtained by force, usually in the form of threats. Whether such consent is genuine is a jury question: *Greenhalgh*[95] holds that it is open to a jury to hold that consent induced by fear or force does not amount to true consent but only to submission. The approach is the same as that used in sexual offences.[96]

In short therefore, it is possible, but unlikely, for D to use force to cause V to be taken away, but for V to be validly consenting to being taken.

2.82 The case of fraud is more complicated. Unlike force, fraud always operates by obtaining apparent consent: the question is whether the very fact that the consent was obtained by fraud means that it was not genuine because V had no true choice. There are at least three possible approaches to this question.[97]

(1) One could hold that fraud or mistake invalidates any consent that would not have been given if the fraud or mistake had not been present, what we have described as the "but-for" test.[98]

(2) On a stricter test, consent would only be invalidated by fraud or mistake as to the identity of D or as to the nature of the act to which V consents.[99]

94 Para 2.102 below.

95 [2001] EWCA Crim 1367.

96 D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2011), para 18.2.1.1, pages 719, 727 and 728 and cases cited.

97 Rebecca Williams, "Deception, mistake and vitiation of the victim's consent" [2008] *Law Quarterly Review* 131.

98 Para 2.56 above.

99 Rebecca Williams refers to this as the *non est factum* test, on the analogy for the test for the invalidity of deeds.

(3) A third possibility is to hold that fraud only invalidates consent when it amounts to compulsion, in other words V is led to believe that V has no choice but to do what D asks.

2.83 We believe that test (1) is too wide. It is the appropriate test for determining whether the taking was "by" fraud, but as mentioned above[100] and argued in *Smith and Hogan*[101] that is a separate question. D's deception on some peripheral matter may be sufficient to tip the scale in persuading V to accompany D, without preventing V's decision from being a voluntary one amounting to consent.[102]

2.84 Test (2) was mentioned in *Cort*[103] as being the one that then applied to rape. The test for consent in sexual offences has since been widened, by sections 74 to 76 of the Sexual Offences Act 2003, to include deception as to the purpose of the act and to allow (but not require) lack of consent to be inferred from other deceptions.

2.85 Test (3) is consistent with the facts of *Wellard*,[104] where V believed that she was legally obliged to follow the orders of a police officer. However it does not cover the facts of *Cort*, where the fraud was only the reason for V entering the car; and while *Cort* was disapproved in *Hendy-Freegard*[105] this was on other grounds.

2.86 We consider that consent obtained by fraud must be invalidated if either test (2) or test (3) is satisfied. **In short: consent will be invalidated by fraud or mistake as to the identity of D or as to the nature of the act to which V consents or when it amounts to compulsion, in other words V is led to believe that V has no choice but to do what D asks.**

2.87 Outside these limited circumstances it is a jury question whether the deception was important enough to undermine V's power of autonomous decision.

THE POSITION OF CHILDREN

2.88 On the question of whether a child can consent, Lord Brandon in *D* stated:

[100] Para 2.46.

[101] D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2011) para 17.12.2.1.

[102] As in the case of the champagne, para 2.77 above.

[103] [2003] EWCA Crim 2149, [2004] QB 388.

[104] [1978] 1 WLR 921.

[105] [2007] EWCA Crim 1236, [2008] QB 57.

> That third ingredient, as I formulated it earlier, consists of the absence of consent on the part of the person taken or carried away. I see no good reason why, in relation to the kidnapping of a child, it should not in all cases be the absence of the child's consent which is material, whatever its age may be. In the case of a very young child, it would not have the understanding or the intelligence to give its consent, so that absence of consent would be a necessary inference from its age. In the case of an older child, however, it must, I think be a question of fact for a jury whether the child concerned has sufficient understanding and intelligence to give its consent; if, but only if, the jury considers that a child has these qualities, it must then go on to consider whether it has been proved that the child did not give its consent. While the matter will always be for the jury alone to decide, I should not expect a jury to find at all frequently that a child under 14 had sufficient understanding and intelligence to give its consent.[106]

2.89 What is meant, then, is an informed and intelligent consent. It is not sufficient that a young child accompanied the abductor without putting up any apparent resistance. The law in this area is clearly far less well developed than in relation to consent and capacity in sexual offences.[107] Accordingly the position of minors is as follows.

(1) A child mature enough to give an informed and intelligent consent[108] is treated exactly like an adult: if there is genuine consent, there is no kidnapping; if not (for example because of force or fraud sufficient to overbear V's power or decision) there is.

(2) At the opposite extreme, where V is a baby or very young child, who can exercise no choice in the matter at all, there is no consent to the taking away and this will, subject to the other elements of the offence, always amount to kidnapping.

(3) However, there is an unresolved middle area, where a child is old enough to accompany the abductor with apparent willingness but not mature enough to understand the implications of what is happening. If a child in this category is enticed to accompany D, it is reasonably certain that the child is not validly consenting to being taken, but it may be hard to establish either force or fraud or loss of liberty.

2.90 The same problem arises in connection with mental illness and learning disability in individuals of any age. *Cooper*[109] established that, in the context of sexual offences, consent brought about by an irrational belief or other disordered mental state that made it impossible for V to resist D's conduct must be treated as invalid. We suggest that this must apply equally to kidnapping.

[106] [1984] AC 778, 806.

[107] For the relationship between consent and capacity in sexual offences, see D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2011) para 18.2.1.1 pp 722 and 723; P Rook and R Ward, *Sexual Offences: Law and Practice* (4th ed 2010), para 1.105.

[108] Within Lord Brandon's test, para 2.88 above.

[109] [2009] UKHL 42, [2009] 4 All ER 1033.

2.91 It is worth emphasising that both in the case of children and in the case of the mentally ill and the learning disabled there is a mismatch between the requirements of force or fraud and of lack of consent. Where a person in any of these categories is enticed to accompany D, there is a lack of consent because of lack of capacity to consent. However, there is not necessarily any force or fraud; so in the absence of identifiable coercion or deception it would appear that kidnapping has not been committed. This is one of the problems with the offence as discussed in Part 3.[110]

2.92 The third question in defining consent is whether the consent of a person other than V can be relevant. This largely concerns the position of children and mental patients. In the oldest relevant case, *Lord Grey*,[111] the taking and carrying away was stated to be without the consent of the father, and this was assumed to be the test in cases involving minors in textbooks until well into the twentieth century. Since then, through a series of three cases, namely *People v Edge*,[112] *Hale*[113] and *D*,[114] it has become clear that only the consent of the abductee, however young, and not that of the parent or guardian, is relevant for kidnapping purposes.

2.93 The two original forms of the offence were the sending of people abroad and the abduction of minors. The first recorded use of the offence for the abduction of minors was *Lord Grey*: in that case the taking and carrying away was stated to be performed unlawfully and without the consent of the abductee's father.[115] The information was not worded as a form of false imprisonment; nor would this have been possible, given that she came willingly.

2.94 There are two possible explanations for the abduction offence in *Lord Grey*. On one view, the offence could have been conceived as committed against the abductee, but she was under a legal incapacity to consent to it, so that her father must consent, or not, on her behalf. On the other view, the offence could have been conceived as being in the nature of a theft committed against the father, whose consent would alone be relevant. The wording of the information suggests the second view, which would make the offence one of child-stealing rather than of kidnapping in the modern sense. This also explains the existence of lack of consent as a requirement additional to force or fraud in the current offence: the reference was originally to the consent of the father.

[110] Paras 3.15 to 3.24.

[111] (1683) 2 Show KB 218, 89 ER 900, 9 St Tr 127.

[112] [1943] IR 115.

[113] [1974] QB 819.

[114] [1984] AC 778.

[115] *Lord Grey* (1683) 2 Show KB 218, 89 ER 900, 9 St Tr 127.

2.95 By the time of East (1803)[116] sending abroad and child abduction were subsumed in a general offence of taking and carrying away ("kidnapping" in the broader sense), and East does not discuss the specific problems arising from the abduction of children. It is perhaps significant that, as early as 1828, a statutory offence was created of unlawfully taking an unmarried girl under 16 out of the possession and against the will of her parents or guardians.[117]

2.96 In the Irish case of *People v Edge*[118] it was held that, in the case of a child who has reached 14 (16 in the case of a girl), it is the child's will and not the will of the parents that is relevant. That is to say, the apparent rule in *Lord Grey*'s case about minors was varied by substituting a defined "age of discretion" for the age of majority. This was in accordance with the view in *Russell on Crimes and Misdemeanours*,[119] and was followed in *Russell on Crime*[120] and early editions of *Archbold*[121] and *Smith and Hogan*.[122] The court also expressed the view that, while kidnapping proper (sending beyond the seas) is a discrete offence, the wider offence is not truly distinct from false imprisonment.[123] For this reason, loss of liberty and lack of consent by the victim, rather than the removal of the victim from guardianship, are the essence of the offence. The lower age of consent follows from this.

2.97 *Hale*[124] accepted the conclusion of *Edge* as concerns a boy over 14, but held that there was no reason to distinguish according to age or sex. Accordingly, even where the kidnapped person is a minor under 14, the indictment must specify either that it is by force or fraud or that it is against the minor's will; a reference to the will of the child's parents or guardians is not sufficient. (There was a separate offence of child stealing under section 56 of the Offences against the Person Act 1861.) This is to rely on the result, and the underlying reasoning, of *Edge* while denying the actual rule it states.[125] Further, the judge in *Hale* observed that, while the statements in the textbooks are based on East, there is nothing in East about the position of minor children or the will of parents or guardians.[126] This is correct as concerns the body of the text, but East does cite *Lord Grey* in the margin.

[116] East, *A Treatise of the Pleas of the Crown* (1st ed 1803).

[117] Offences Against the Person Act 1828 s 20.

[118] [1943] IR 115.

[119] 7th ed (1909) vol 1 p 902.

[120] 12th ed (1964) vol 1 p 692.

[121] Eg 38th ed (1973) p 1036, para 2796.

[122] Eg 3rd ed (1975) p 312.

[123] For the relation between kidnapping and false imprisonment, see para 2.166 and following.

[124] [1974] QB 819.

[125] Lambert, "Kidnapping and False Imprisonment at Common Law", (1979) 10 *Cambrian Law Review* 20.

[126] [1974] QB 819, 820.

2.98 A comprehensive statement of the law was made in *D*.[127] In that case, as previously mentioned,[128] the defendant took the victim, his daughter, out of the custody of her mother, once when she was aged 2 and once when she was aged 5: in both cases the taking was by force, in the sense that the child was physically carried away, in the second instance after being wrenched from her mother's arms. It was common ground that the child did not, and could not in any meaningful sense, exercise any choice as to whether to be taken away or not. The difficulty was the legal effect of this.

2.99 The Court of Appeal interpreted the previous cases of *Edge*[129] and *Hale*[130] as implying that a child under 14 cannot be kidnapped at all.

2.100 In the House of Lords, the main speech in the case was by Lord Brandon[131] who, disagreeing with the Court of Appeal, answered the certified question, namely whether a child under 14 can be kidnapped, in the affirmative. His lordship rejected the two alternative interpretations[132] and observed as follows.[133]

> My Lords, having reached that conclusion about the disposition of the appeal, I must now deal with two matters to which I said that I would return later. One of those matters is whether the doctrine laid down by the Irish Supreme Court in *Edge*'s case[134] that the person the absence of whose consent is an essential ingredient of the common law offence of kidnapping is that of the child if it has reached an age of discretion fixed by law, but that of its father or other guardian if it has not, applies also under English law.
>
> In my opinion, to accept that doctrine as applicable under English law would not be consistent with the formulation of the third ingredient of the common law offence of kidnapping which I made earlier on the basis of the wide body of authority to which your Lordships were referred. That third ingredient, as I formulated it earlier, consists of the absence of consent on the part of the person taken or carried away. I see no good reason why, in relation to the kidnapping of a child, it should not in all cases be the absence of the child's consent which is material, whatever its age may be.

[127] [1984] AC 778.

[128] Para 2.12.

[129] [1943] IR 115.

[130] [1974] QB 819.

[131] The others simply concurred, subject to one reservation by Lord Bridge to be discussed below (para 2.108).

[132] Namely (1) that the taking cannot be said to be with the child's consent: there is therefore necessarily an act of kidnapping. (2) Given that the child could not consent for herself, her will must be taken to be that of her lawful guardian: there was therefore kidnapping if and only if the taking was against the will of the mother.

[133] [1984] AC 778, 806.

[134] [1943] IR 115.

2.101 **In conclusion, kidnapping is an offence against the person kidnapped and no one else, and the consent of the parent or guardian can never be substituted for that of the person kidnapped**. When V is a young child who lacks the capacity to consent, it follows that there is no consent. Whether a child has the capacity to consent is to be found on the facts about the actual child, and not by reference to a supposed "age of discretion" to be fixed by law. It should be noted that many cases where the child is taken with the consent of the parent or guardian will be covered by the defence of lawful excuse.

Consent at what time?

2.102 Having established that there must be consent to being taken away, and what consent means, a final difficulty is to determine at what point in time the consent must be given to be valid. A problem arises where V consents to be taken or confined for a period and later changes his or her mind and demands to be released. We believe that it is an appropriate question for the jury whether the original consent extends to the denial of her later demand. This can be illustrated by two examples.

> Example. V, a compulsive alcoholic, asks in a lucid interval to be taken away and locked in for the evening to prevent access to liquor. Later in the evening, when withdrawal symptoms have set in, V demands to be released. A jury could take the view that at the earlier time V was in V's right mind, that V's consent contained an implied condition "even if I change my mind later", and that V's state of mind later in the evening was within the predictable scope of that condition and is not V's "right mind" compared to earlier, and therefore say there is genuine consent to the later confinement and to any force used.
>
> Example. V agrees to be manacled as part of a bondage game. Later on V decides to stop the game and demands to be released. Here any jury would probably take the view that V genuinely thought better of it and that if D does not agree to release V then V's confinement from the time of the demand, and any force used, is without consent.

Lawful excuse

2.103 The fourth of Lord Brandon's ingredients is "without lawful excuse". This presumably applies to the whole act comprising the use of force or fraud, the taking or carrying away and the deprivation of liberty, since unless they are all present the taking or carrying away is not so apparently unlawful as to need an excuse.

2.104 There are several circumstances in which there is lawful authority for detaining a person or transporting her from one place to another without her consent. The obvious examples are arrest by the police and the performance of their duties by prison officers. Another is the exercise of reasonable parental discipline;[135] or discipline in schools, whether justified by the Education Acts or by parental permission. A further example is orders for deprivation of liberty under the Mental Capacity Act 2005.[136] The emergency services and private individuals may sometimes need to transport a person who is ill or unconscious from one place to another. Their actions may be covered by a defence of necessity even if there is no specific statutory authority.

2.105 Other defences, applicable to offences against the person or offences generally, include self defence, lawful defence of property, defence of another, duress and duress of circumstances.

2.106 Finally there are the cases of mistake, where D believes that circumstances exist which would constitute one of the defences: these may conveniently be referred to as putative defences. In the case of false imprisonment, it is a defence that D had an honest but mistaken belief that D was acting in self-defence or in defence of D's family or property. The test is whether the defence of self-defence etc. would be available if the facts were as D believed them to be.[137] We believe that the same would apply to kidnapping.

2.107 A further question is whether, to establish a defence, D's relevant belief in the facts needs to be held on reasonable grounds. In *Faraj*[138] V was an engineer who called on D to repair a time switch, and D, believing V to be a burglar, forced him into a corner at knifepoint. The court held that the test was whether D held an honest belief rather than reasonable belief. We agree, as the same is true in other offences against the person where the mistake concerns the need for self-defence or defence of others.[139] This will not however always apply to other defences. In the case of duress, and that of necessity, the test generally is whether D reasonably believed that the threat or other danger existed.[140] While there have been no reported cases concerning this issue in relation to kidnapping or false imprisonment, the rule must be the same as in other offences against the person.

[135] Discussed in para 2.108 and following.

[136] As amended by the Mental Health Act 2007.

[137] *Faraj* [2007] EWCA Crim 1033, [2007] 2 Cr App R 25.

[138] Above, and see para 2.164 below.

[139] The question is now governed by Criminal Justice and Immigration Act 2008 s 76: the test is still genuine belief rather than reasonable belief, but the reasonableness of the belief can be relevant to how likely it is that D held it. D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2011) para 12.6.1.1; A P Simester, J R Spencer, G R Sullivan and G J Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th ed 2010) pp 674 to 675. For the same test in the older law, see *Beckford v R* [1988] AC 130.

[140] *Smith and Hogan* (above) para 12.2.1.3; *Simester and Sullivan* pp 735-6.

Parental authority

2.108 The Court of Appeal in *D*[141] held that a parent cannot kidnap his or her own child, if the child is under 18 and unmarried. On appeal to the House of Lords, Lord Brandon held that there was no blanket exemption for abduction by the victim's father:[142] while earlier authorities might appear to presuppose such an exemption, this was because it was then thought that a father had the paramount right to custody. Lord Bridge[143] concurred, basing his decision on the fact that the father had no right of custody and was contravening a court order, and expressed no view on whether it was possible for a father to kidnap his own child in other circumstances.

2.109 In *Rahman*,[144] discussed below,[145] the father was charged with kidnapping as well as false imprisonment. The kidnapping charge was dropped in accordance with the decision of the Court of Appeal in *D*[146] that a parent could not kidnap an unmarried minor child. The trial judge held that the same principle did not apply to false imprisonment, and allowed the trial to proceed: the defendant was convicted. Following the House of Lord's decision in *D*,[147] the defendant appealed, arguing that he could not commit false imprisonment if there was no order restricting his parental rights and he was not infringing the rights of the other parent, and relying on Lord Bridge's partial dissent in *D*. As we saw, the Lord Chief Justice held that, whatever the position might be in kidnapping, it was established law that a parent could commit false imprisonment if he or she exceeded the bounds of reasonable parental discipline.

2.110 The court did not need to answer, and did not answer, the questions:

(1) whether any defence of parental rights must be the same in kidnapping and in false imprisonment;

(2) whether Lord Bridge's partial dissent in *D* was right or wrong, or (assuming it to be right) what were the "other circumstances" in which a parent could kidnap a child.

[141] [1984] 2 WLR 112.

[142] [1984] AC 778, 804.

[143] Above, at 797.

[144] (1985) 81 Cr App R 349.

[145] Para 2.163.

[146] [1984] 2 WLR 112.

[147] [1984] AC 778.

2.111 On the first question, we argue that, though the two offences are different, they share the ingredients of force, lack of consent and deprivation of liberty.[148] It would accordingly seem that the test of reasonable parental discipline should apply in the same way to both offences. On the second question, the defence of parental authority is one form of lawful excuse within Lord Brandon's definition, and therefore cannot apply to an act that is beyond the lawful powers of the parent for whatever reason. Taking by a parent will therefore amount to kidnapping either if there is no right of custody (for example because of a court order) or if there is such a right but the exercise of it exceeds the bounds of reasonable parental discipline.

2.112 Prosecutions against parents for kidnapping are strongly discouraged where other offences or mechanisms are available.[149] In *C (kidnapping: abduction)*[150] a father took his son out of the jurisdiction, intending to keep him permanently without the mother's consent. He was charged with kidnapping and abduction under section 1 of the Child Abduction Act 1984. The case established that kidnapping should not be charged where the charge under section 1(1) encompasses all the elements of the allegation. Lord Justice Watkins[151] reiterated the point made by Lord Brandon in *D* that the actions of parents who take their own children should usually be dealt with as contempt of court and that kidnapping should only be charged in the most serious cases.

Loss of liberty

Role in the offence

2.113 Lord Brandon, in *D*,[152] describes kidnapping as an attack on and infringement of the personal liberty of an individual. There are three possible ways of interpreting this description.

(1) Infringement of liberty refers to D's act of confining V, and is part of the conduct element of the offence.

(2) Infringement of liberty is a consequence element: the taking or carrying away by D must cause V's loss of liberty to occur.

(3) Infringement of personal liberty is not one of the ingredients of the offence at all, but a description of the rationale of the offence, explaining what public interest it exists to protect.

[148] Para 2.173.

[149] The consent of the Director of Public Prosecutions is needed for such a prosecution: Child Abduction Act 1984 s 5, para C.4 below.

[150] [1991] 2 FLR 252.

[151] Above, p 256.

[152] [1984] AC 778.

2.114 Glanville Williams appears to favour the first interpretation, taking loss of liberty as a conduct element. He describes kidnapping as an aggravated form of false imprisonment. This is consistent with the state of the law before *D*, in which secreting could form part of the conduct element of the offence.[153] (Even then, though, perhaps the correct analysis was that, whether the conduct element took the form of taking and carrying away or of secreting, it must have loss of liberty as a consequence.) More importantly, the relevant passage in Lord Brandon's judgment does not provide explicit support for this interpretation. His lordship clearly specifies taking or carrying away by force or fraud as the conduct element of the offence. One could reconcile the wording of that passage with Glanville Williams' view by defining the offence as depriving V of liberty *by* taking/carrying V away, rather than as taking/carrying V away *and* depriving V of liberty. This however would be to treat loss of liberty as a consequence element, as in the second interpretation.

2.115 Lord Brandon's definition in *D*[154] most naturally suggests that the third interpretation is correct - that the deprivation of liberty is not an element of the offence at all. His lordship does not list deprivation of liberty among the specific ingredients of the offence but instead describes it as the "nature" of the offence: the apparent implication is that, once the four listed ingredients are present, infringement of liberty automatically results. However, later cases suggest that this is too broad a view.

2.116 In *Hendy-Freegard*[155] the Court of Appeal appears to prefer the second interpretation: that deprivation of liberty is a consequence element of the offence. The Court in *Hendy-Freegard* distinguished *Cort*[156] from *Wellard*[157] on the ground that, in *Wellard*, the victim was led to believe that she was complying with the instructions of the police, and in that sense genuinely deprived of liberty (at least psychologically), whereas in *Cort* the victims were both physically and psychologically free to get out of the car at any time. This decision in effect adds a rider to *D* by showing that loss of liberty does not automatically follow from the four requirements listed by Lord Brandon. It should be treated either as a fifth requirement or as a gloss showing how the four listed requirements should be interpreted.[158] Either way, the decision in *Hendy-Freegard* most naturally suggests that the taking or carrying must be shown to result in infringement of liberty, or the offence is not made out.

2.117 **We conclude that it is an essential ingredient of the offence of kidnapping that the taking or carrying away has the effect that V undergoes a loss of liberty.**

[153] Para 2.31 and following, above.

[154] [1984] AC 778.

[155] [2007] EWCA Crim 1236, [2008] QB 57; discussed [2007] *Criminal Law Review* 986.

[156] [2003] EWCA Crim 2149, [2004] QB 388.

[157] [1978] 1 WLR 921.

[158] See case comment [2007] *Criminal Law Review* 985, 989.

HOW IS LOSS OF LIBERTY BROUGHT ABOUT?

2.118 Loss of liberty may be brought about by either physical or psychological means. In *Wellard*,[159] for example, V's loss of liberty lay entirely in her belief that she was required to accompany D: she was not physically restrained at any point. As mentioned in *Hendy-Freegard*,[160] it remains debatable whether the loss of liberty occurred during the walk to the car or when V got into it; but on either interpretation, it was sufficient in *Wellard* that V was led to believe that she could not legally leave D's custody.

2.119 It is less clear whether the offence includes a case where V is led to believe that it is physically impossible (or difficult or dangerous) to leave D's company, or the relevant place of subsequent confinement (if any), as the case may be. This would seem to be as effective and as blameworthy a form of imprisonment as physical restraint or purported arrest, and we believe that the offence should cover such a case, but we have found no authority on the point.

2.120 In short, the cases show that loss of liberty may be brought about either by physical restraint or by deception to the effect that it is legally impossible to leave D's company or the place of confinement. There is a possible (and as we believe likely) extension to a third situation, of deception to the effect that it is physically impossible, difficult or dangerous to leave. However, we believe that it cannot be extended further than that, to other forms of deception. Inducing a belief that it is a good idea to stay, rather than impossible to leave, does not contain the necessary flavour of compulsion for an offence as serious as kidnapping.

> Example. D entices V to accompany D to a house by falsely telling V that V's brother is expected there and, once V is in the house, D locks the door on V. This is kidnapping on the *Hendy-Freegard* test.[161]
>
> Example. D entices V into a house by falsely telling V that V's brother is expected there and, once V is in the house, tells V, falsely, that D is a policeman and has the right to detain V. This is kidnapping. In our view it would equally be kidnapping if D told V that there were gunmen outside,[162] or rattled the lock so that V believed V was locked in.
>
> Example. D entices V into a house by falsely telling V that V's brother is expected there and, once V is in the house, keeps V there for the next hour or two by continuing to assure V that the brother is expected any minute. This deception does not amount to compulsion, as it does not cause V to believe that it is necessary to stay or impossible to leave, and it would appear that kidnapping has not been committed.

[159] [1978] 1 WLR 921.

[160] [2007] EWCA Crim 1236, [2008] QB 57.

[161] Subject to the timing question discussed in para 2.121 and following.

[162] Falsely, or indeed truly if D has arranged for them to be there or knew in advance that they would be there.

AT WHAT STAGE DOES THE LOSS OF LIBERTY NEED TO OCCUR?

2.121 We have seen above[163] that since *D*[164] the conduct element of kidnapping is confined to the taking and carrying away of V, and does not extend to the act of confining V at the final destination. The taking or carrying away must however result in a deprivation of V's liberty. A question arises whether the loss of liberty must occur simultaneously with and as part of D's conduct in taking or carrying V (the narrower test), or whether it is sufficient that D's conduct only results in a loss of liberty once the destination is reached (the broader test).[165]

2.122 One situation can be dealt with immediately as it is not contentious. Taking and carrying away constitute a continuing process,[166] and it is clearly sufficient for the loss of liberty to exist during any part of the taking and carrying away. This view is supported by the Court of Appeal's acceptance in *Hendy-Freegard*[167] that, had Cort refused to let a passenger out of his car there would have been a sufficient loss of liberty to make the overall process amount to kidnapping, even though the initial "taking" was consensual (subject to the question of fraud).

2.123 The more difficult question is whether it is sufficient that the deprivation of liberty occurs only at the conclusion of the travel process.

> Example. D fraudulently induces V to accompany D to a destination, but V is free to leave D's company at any time during the journey. D then imprisons V at the destination.

No loss of liberty occurs until the destination is reached. On the narrower test, this case will not amount to kidnapping. On the broader test, it will.

2.124 A more complex example is the case where D simply asks V to accompany D, without using force or fraud at any point of the journey, but V is incapable of giving valid consent because V is a small child or mentally impaired; once more, D imprisons V at the destination. This case is in any case excluded from liability by the requirement that the taking be "by force or fraud", and we identify this as one of the problems with the offence.[168] But were that requirement modified or removed, the same issue would arise as in the previous paragraph.

2.125 The case law provides no clear answer to whether the loss of liberty must be simultaneous with the taking or carrying away.

[163] Para 2.35 above.

[164] [1984] AC 778.

[165] The case comment on *Hendy-Freegard* [2007] *Criminal Law Review* 985 observes: "*Wellard* raises the additional issues of whether the deprivation of liberty must be by the taking or carrying away, or more specifically, whether the deprivation of liberty must be *during* the taking or carrying away".

[166] Para 2.24 above.

[167] [2007] EWCA Crim 1236, [2008] QB 57.

[168] Para 3.15 and following.

2.126 Several arguments favour the broad view, that the offence of kidnap can and should include a case where loss of liberty occurs only at the conclusion of the taking or carrying process. First, Lord Brandon in *D*[169] did not specify loss of liberty as a formal ingredient of the offence: rather, it is the rationale for the existence of the offence. This broad approach implies that it should be sufficient that the sequence of events, taken as a whole, is such as to amount to or involve an attack on the personal liberty of an individual.

2.127 The broad view also derives some slender support from the discussion of *Wellard*[170] in the judgment in *Hendy-Freegard*.[171] In *Wellard*, V was induced by deception to walk 100 yards to a car and get into it, but was released without the car having been driven. The court in *Hendy-Freegard* left open the question whether the true explanation of *Wellard* was that the loss of liberty followed the "carrying" (the walk to the car) and occurred when V got into the car or that it occurred during the walk to the car, given that V believed she was under compulsion; it cited the report of the Criminal Law Revision Committee[172] as favouring the second theory. The better view would seem to be that the offence can be committed in either way, and therefore includes a case in which V is carried away to a stationary place of confinement.

2.128 Thirdly, the broad view also makes better sense in policy terms, as it accords with the popular understanding of kidnapping. In the archetypal form of ransom kidnapping, especially of a child, V is enticed (usually by deception) to a destination and is then imprisoned there while the ransom demand is made. Assuming that there is no loss of liberty during the journey, it would be odd if the characterisation of the offence depended on whether the destination to which V was enticed, and in which loss of liberty occurred, was a house or a moving vehicle.

2.129 Fourthly, there is no inconsistency with adopting the broader view and regarding the loss of liberty as a consequence element as we conclude above. A subsequent confinement does not form part of the conduct element, but is part of the consequence element: the taking and carrying away must result in loss of liberty, whether during or after the carrying.

2.130 Adopting the broader view does not create difficulties in terms of identifying when the offence is complete. It is necessary that the taking and the confinement form part of a single scheme and that there is no break in the chain of events. On this view, the conduct element begins and finishes with the process of taking or carrying away, but D's conduct does not acquire the character of kidnapping until the loss of liberty occurs. In some cases that will be with the act of taking or carrying away, in others, it will be with the subsequent deprivation of liberty. This is not unusual in offences against the person. For example, in murder the conduct element may consist of stabbing or administering poison, but does not acquire the character of murder until the victim dies.

[169] [1984] AC 778.

[170] [1978] 1 WLR 921.

[171] [2007] EWCA Crim 1236, [2008] QB 57 at [47] to [48].

[172] Criminal Law Revision Committee, *Working Paper on Offences Against the Person* (1976), see Appendix A, para A.2.

2.131 While we regard this as the better view, in terms of interpretation of the present law, we acknowledge that it is arguable, following *D*[173] and *Hendy-Freegard*,[174] that the deprivation of liberty must occur simultaneously with the conduct element of the offence. Adopting the narrower view does have further consequences which may be undesirable. For example, the fraud requirement will be stricter because it will be necessary for D's fraud to cause V to be taken or carried away *and* to deprive V of liberty. On the narrow view, only the type of fraud that persuades V that it is legally or physically impossible (or difficult or dangerous) to escape will be relevant.[175] Fraud will, in other words, only be relevant on facts closely similar to *Wellard*.[176] In contrast, on facts similar to those in *Cort*,[177] if D had deceived V into entering the car and then (unlike Cort) refused to stop and let V out, fraud will be present but would not have caused the deprivation of liberty. The offence would, however, still be committed as the refusal to let V out while V is still being "carried away" will amount to force (as we have interpreted it above).

2.132 The uncertainty as to the time at which the deprivation of liberty must occur is in itself a good reason for statutory reform, and is one of the practical problems with the offence discussed in Part 3.[178] We would also argue that, if the narrower view is correct there would be no kidnapping if D has used enticement to cause V to accompany him, there is no loss of liberty during the journey but only at the destination. Arguably, that construction of the offence would omit too many instances of ransom kidnapping to be fit for its purpose although, admittedly, all could be charged as false imprisonment.

Meaning

2.133 The meaning of "deprivation of liberty" has been considered in several cases, mostly in connection with article 5 of the European Convention on Human Rights. Examples are the cases concerning "kettling";[179] others concern the care of children and vulnerable adults.[180] The meaning of liberty given in the human rights jurisprudence is not necessarily decisive of its meaning in domestic law.

2.134 As a matter of ordinary language, liberty is notoriously difficult to define.[181] Broadly speaking, it is the opposite of restraint: the ambiguity is in whether this refers to every kind of restraint, or only to a restraint preventing one from doing something one wants. This may be tested through a series of examples.

[173] [1984] AC 778.

[174] [2007] EWCA Crim 1236, [2008] QB 57.

[175] Para 2.120 above.

[176] [1978] 1 WLR 921.

[177] [2003] EWCA Crim 2149, [2004] QB 388.

[178] Para 3.13 and following.

[179] Eg *Austin v Metropolitan Police Commissioner* [2007] EWCA Civ 989, [2008] QB 660, see para 2.155 below.

[180] Eg *P v Surrey County Council* [2011] EWCA Civ 190, [2011] 1 FCR 559; *MH v Secretary of State for the Department of Health* [2005] UKHL 60; *R (H) v Secretary of State for Health* [2005] UKHL 60; *R (Munjaz) v Ashworth Hospital Authority* [2005] UKHL 58.

[181] See for example Isaiah Berlin, "Two Concepts of Liberty", in *Four Essays on Liberty* (1969).

(1) V is in prison. Since there is no help for it, and for the sake of an easier life, V philosophically adapts V's will to the circumstances and decides that that is where V wants to be; after a while V becomes acclimatised and even regards V's impending release with some anxiety. On a certain definition ("freedom is the power to do what you want"), that means that V is "free"; but this is scarcely in accordance with the normal use of that word, as V would not have the option of leaving if V's state of mind were to change.

(2) V is asleep and D locks the door of V's room. V is not conscious of the frustration of a wish to leave the room; but again on any normal use of words V has been deprived of liberty, as V would not be able to leave the room if V did wish to.[182]

(3) V is handcuffed to a piece of furniture, with V's consent, as part of a game. Here there is a stronger argument for saying that V has not in any real sense been deprived of liberty, as V can at any time decide to stop the game and demand to be released.

2.135 This last example is the most relevant from the point of view of kidnapping. The central question is whether within the offence of kidnapping the requirement that D's conduct caused V's "loss of liberty" refers to:

(1) the bare fact of physical restraint, so that the proper analysis is that V has been deprived of liberty, but has consented to that deprivation; or

(2) the frustration of the right to liberty, meaning that V loses the power to choose: on this view it is logically impossible to consent to loss of liberty, as loss of liberty means being subjected to a physical constraint without consent.

2.136 There is no "right" or "wrong" answer to this question as a matter of language. The question is which is meant in the definition of kidnapping. The question is whether kidnapping comprises a deprivation of liberty by taking or carrying away, to which V does not consent? Or is it a taking or carrying away without consent, amounting to a deprivation of liberty?

2.137 The second interpretation seems more consistent with Lord Brandon's language in *D*.[183] Deprivation of liberty is not one ingredient of the offence among others. It is the overall effect of the offence with all its ingredients, including lack of consent.

[182] For the same question in relation to false imprisonment, see para 2.162 below.

[183] [1984] AC 778.

Sending abroad

2.138 The sending abroad form of the offence was the only one known to Blackstone,[184] who mentions neither the abduction offence in *Lord Grey's* case nor any generalised offence of stealing persons. East, as we have seen,[185] gives both the specific and the general definitions, and this is followed in the eighth edition of Hawkins.[186]

2.139 The unreported case of *Nodder*[187] is generally taken as the deathblow of the theory that sending abroad is a necessary part of the offence. Nevertheless, in *Edge*[188] the Irish Supreme Court still entertained the theory that sending abroad is the proper meaning of kidnapping as a separate offence and that the wider meaning is simply an instance of false imprisonment.

2.140 The present law is clear. There is no requirement for V to be sent abroad. Lord Brandon, in *D*, stated that:

> … in earlier days, the offence contained a further ingredient, namely, that the taking or carrying away should be from a place within the jurisdiction to another place outside it; this further ingredient has, however, long been obsolete, and forms no necessary part of the offence to-day. [189]

The fault element

2.141 Kidnapping, like false imprisonment, requires proof that D's conduct was performed with a state of mind of intention or recklessness.[190] Both kidnapping and false imprisonment are discussed in *Hutchins*.[191] The defendant in that case took drugs at a party and then took a girl together with a neighbour as hostages. It was held that:

(1) false imprisonment is the unlawful and intentional *or reckless* restraint of a victim's freedom of movement from a particular place;

(2) an analogy can be drawn between false imprisonment and kidnapping;

(3) the intent required for kidnapping is intent to take away a person without that person's consent, and can be committed either knowing that the victim does not consent or being reckless as to whether or not the victim consents;

[184] *Commentaries on the Laws of England* (1st ed 1765) iv 219.

[185] East, *A Treatise of the Pleas of the Crown* (1st ed 1803) p 429; 2nd ed (1806) p 429; see para 2.8 above.

[186] *A Treatise of the Pleas of the Crown*, (8th ed 1824), p 119. None of the previous editions, from the first edition (1716) to the seventh edition (1795), mention kidnapping.

[187] 1937: mentioned in Archbold (39th ed 1976) s 2796 (not in current edition) and in later cases. See also W Duke (ed) *Trials of Frederick Nodder* (1950) Notable British Trial Series, Hodge.

[188] [1943] IR 115.

[189] [1984] AC 778, 800 to 801.

[190] For false imprisonment, see para 2.164 below.

[191] [1988] *Criminal Law Review* 379 (CA).

(4) kidnapping, like other offences of recklessness, is a crime of basic intent: that is, a failure to foresee the possible consequences of one's act does not negative liability for the offence if that failure is brought about by voluntary intoxication.[192]

2.142 Once more the elements of intention and recklessness can be considered under the heads of context (what must D intend or be reckless about) and content (what does intention or recklessness mean). Intention or recklessness could in principle relate to any of the external elements of the offence.

Taking or carrying away

2.143 Most cases will involve intentional taking or carrying away. There could in principle be a case of reckless but unintentional abduction, though the facts would be unlikely and unusual.

> Example. D, while drunk, commandeers a bus to drive home in regardless of the presence of V on the upper deck.

In this case, D is also reckless as to the danger of loss of liberty resulting from D's action.

Force or fraud

2.144 In most cases, the requirement of force or fraud more or less ensures that the abduction will be intentional. However, the example already given shows that it is possible for "force" (in the sense of compulsion rather than of violence) to be used recklessly rather than intentionally.

[192] For the effect of intoxication on criminal liability, see "Intoxication and Criminal Liability" (2009) Law Commission No 314, in particular paras 1.15 to 1.20 and Part 2. The leading cases are *DPP v Majewski* [1977] AC 443 and *Richardson and Irwin* [1999] 1 Cr App R 392: see also *Heard* [2007] EWCA Crim 125.

Lack of consent

2.145 In practice, it will be in relation to the element of the victim's consent that recklessness commonly arises. As noted,[193] in *Hutchins*[194] it was accepted that recklessness was a sufficient fault element for kidnapping. One case that might seem to go against this analysis is *Harris (Timothy Gavin)*,[195] in which a taxi driver drove his female passenger to a secluded area and had sexual intercourse with her. It was held that the jury was entitled to convict him of kidnapping and acquit him of rape, as rape involves an extra element, namely D's state of belief as to whether V consented, whereas kidnapping was committed as soon as the taxi departed from the route to her home without her consent. This might seem to indicate that, as concerns V's consent, kidnapping is an offence of strict liability. In the context, however, we read the case as saying no more than that, on the facts, the possibility that D had an honest but mistaken belief that V consented to be abducted did not arise, while the issue of D's belief in V's consent to sex arose in relation to a later time in the order of events and was therefore independent of it. In conclusion the case could be read either way, and is not sufficient to amount to an unambiguous repudiation of *Hutchins*.

Lawful excuse

2.146 D may honestly but mistakenly believe that circumstances exist that constitute a defence; for example, D may believe that V is a burglar, as in *Faraj*.[196] These cases, however, are customarily treated as branches of the particular defence in question, rather than as showing that D was not at fault because D was not aware of a circumstance that would make the act an offence.[197]

The meaning of intention or recklessness

2.147 The cases on kidnapping raise no issue on the meaning of intention, and in general law the meaning of "reckless" is now reasonably well established. In *Cunningham*,[198] where the offence was "maliciously administering a noxious thing",[199] the Court of Criminal Appeal approved the definition in Kenny's *Outlines of Criminal Law*:[200]

[193] Para 2.141.

[194] [1988] *Criminal Law Review* 379 (CA).

[195] [2007] EWCA Crim 3472.

[196] [2007] EWCA Crim 1033, [2007] 2 Cr App R 25; see para 2.164 below and para 2.107 above.

[197] A Ashworth, *Principles of Criminal Law* (6th ed 2009), para 6.5 concerning putative defences in general. See also Simester, "Mistakes in Defence" (1992) 12 *Oxford Journal of Legal Studies* 295.

[198] [1957] 2 QB 396.

[199] Offences Against the Person Act 1861 s 23.

[200] J W Cecil Turner (ed), *Kenny's Outlines of Criminal Law* (16th ed 1952) p 186.

> in any statutory definition of a crime, 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (i) an actual intention to do the particular kind of harm that in fact was done or (ii) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it).

2.148 This test was modified by the House of Lords in *Caldwell v MPC*,[201] which held that recklessness also exists when the defendant has not given any thought to a risk which should have been obvious to a reasonable person. However, in *G*,[202] concerning a definition of criminal damage containing the word "reckless", the House of Lords overruled *Caldwell* and reinstated the *Cunningham* test in more or less its original form. The House explicitly approved the definition of recklessness in the 1989 draft Criminal Code[203] which stated that a person is reckless as to a circumstance or a result if he is aware of the risk and unreasonably (in the circumstances known to him) goes on to take it. (This last requirement, of unreasonableness, was not mentioned in *Cunningham*.)

2.149 The discussion in *G* only set out to define recklessness in the context of the offences of criminal damage and arson,[204] though it did set itself in the context of a general tendency to 'subjectivism' in the interpretation of the fault element of offences, as exemplified by the 1989 draft Code. It is therefore not decisive of the meaning of "reckless" in other statutes, still less of that of any recklessness test existing at common law. Nevertheless *G* has been taken in later cases[205] as representing the current law in other offences where the fault element is described by statute as either malice or recklessness.[206]

2.150 *Hutchins* itself was not fully reported, and the summary in the Criminal Law Review did not address the meaning of recklessness.[207] The case commentary assumed that either the *Cunningham* or the *Caldwell* type or recklessness would be sufficient. This however was written well before *G*.[208] We therefore believe that the subjective test, as in *G*, is the one that would prevail today.

[201] [1982] AC 341.

[202] [2004] 1 AC 1034.

[203] Criminal Law: a Criminal Code for England and Wales (1989) Law Com No 177.

[204] [2004] 1 AC 1034 at [28] by Lord Bingham.

[205] *Barnes* [2005] 1 WLR 910, *Salisu* [2009] EWCA Crim 2702.

[206] For a full discussion, see D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2011) para 5.2.2 (pp 118 to 127) and A P Simester, J R Spencer, G R Sullivan and G J Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th ed 2010) para 5.2 (pp 140 to 147).

[207] [1988] *Criminal Law Review* 379 (CA).

[208] [2004] 1 AC 1034.

KIDNAPPING AND FALSE IMPRISONMENT

2.151 One final question that arises on the scope of the present law is the relation of kidnapping to the older offence of false imprisonment. We conclude that, in substance and historically, the two offences are independent of each other, though they have some common elements. However attempts have been made to explain kidnapping as a form of false imprisonment, and it is possible that the loss of liberty requirement in kidnapping is a relic of these attempts.

False imprisonment

2.152 False imprisonment, like assault and battery,[209] is both a crime and a tort: as torts, all three are instances of trespass against the person. This dual character goes back at least as far as the thirteenth century. Bracton[210] specifies that imprisonment, like all breaches of the peace, may be proceeded against either criminally by way of appeal (an archaic form of private prosecution), so as to incur punishment, or civilly by way of an action for trespass, so as to incur damages.

2.153 The original form of pleading for false imprisonment was to allege assault, battery, wounding and ill treatment, with the fact of imprisonment added as an aggravation.[211] For this reason false imprisonment was treated by the older authorities as a form of assault.[212] However, the mention of assault, battery and so on was a formality of pleading rather than an indication that all these acts are a necessary ingredient of the offence or the tort: it is well established that an act of false imprisonment need not involve an actual assault.[213] Still less need it involve battery or wounding. It has however been held in a civil case[214] that it must involve a positive act: simply omitting to let a prisoner out for an exercise period is not false imprisonment.

[209] Battery literally means "beating" but extends to any application of physical force; assault includes any attack or act putting a person in apprehension of a battery, whether there is physical contact or not.

[210] Bracton, *On the Laws and Customs of England* ed Thorne (1968), vol 2 pp 410-411.

[211] Para 2.171 and n 252 in Part 2 below.

[212] Hawkins, *Pleas of the Crown* (8th ed 1824) ch 60; *Pocock v Moore* (1825) Ry & M 321.

[213] D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2011), para 17.11.1.1 (p 680) and authorities there cited.

[214] *Iqbal v Prison Officers Association* [2009] EWCA Civ 1312, [2010] 2 WLR 1054.

What amounts to a false imprisonment?

2.154 The definition of false imprisonment (leaving aside the fault element for the moment) is identical in tort and in crime, and tort cases may be cited in proceedings for the crime and vice versa. Imprisonment must involve confinement to a limited area: mere restriction on freedom of movement, such as blocking one exit from a house while allowing another, does not qualify.[215] In other words the boundary must be a closed loop of 360°, but there is little if any authority on how large or small the area of confinement need be.[216] Imprisonment exists if it is either impossible to leave the area of confinement, or difficult or dangerous, for example if the only means of escape is by climbing down a drainpipe.[217]

2.155 In *Austin v Metropolitan Police Commissioner* the Court of Appeal[218] held that the police practice of "kettling" demonstrators within a police cordon amounted to imprisonment, though justifiable in the circumstances.[219] (However, it was also held, both by the Court of Appeal and by the House of Lords, that it was a restriction rather than a deprivation of liberty for the purposes of the European Convention on Human Rights.)[220]

2.156 Many cases, both in tort and in crime, involve arrest or imprisonment in purported exercise of a legal duty, for example a police officer arresting a suspect by the wrong procedure or without power to do so or a prison governor detaining a prisoner too long on a mistaken view of the way the sentence should be calculated.[221] The meaning of imprisonment, for the purposes of false imprisonment, is therefore influenced by the meaning of arrest, in the context of police powers.

A need for force or fraud?

2.157 False imprisonment, unlike kidnapping, does not have an explicit requirement of "force or fraud". In one sense, however, some element of force or fraud is implicit in the very fact of imprisonment, but only if one interprets both widely, so that "force" means any act making it impossible, difficult or dangerous to escape and "fraud" means any act bringing about or exploiting a false belief that this is the case. This however is different from the requirement of taking *by* force or fraud as found in kidnapping.

[215] *Bird v Jones* (1845) 7 QB 742; *Clerk and Lindsell on Torts* (20th ed 2010) para 15-23; D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2011), para 17.11.1.1 (p 680).

[216] *Carter & Harrison on Offences of Violence* (2nd ed 1997), para 9-006. But see *Smith and Hogan* (above) para 17.11.1.1 n 531, citing *Winfield and Jolowicz on Torts* (15th ed 1998) p 71: "Napoleon was certainly imprisoned on St Helena".

[217] *Smith and Hogan* (above) para 17.11.1.1 (p 680); *Carter & Harrison* para 9-006.

[218] [2007] EWCA Civ 989, [2008] QB 660 at [12].

[219] The appeal to the House of Lords, [2009] UKHL 5, [2009] 1 AC 564, was on the human rights aspect of the defence of justification, and did not seek to argue that there was no imprisonment.

[220] For a case in which "kettling" was held to be unjustifiable, though without specific discussion of the nature of false imprisonment, see *R (Moos and McClure) v Metropolitan Police Commissioner* [2011] EWHC 957 (Admin).

[221] *R v Governor of Brockhill Prison ex parte Evans (No 1)* [1997] QB 443.

2.158 In *Sandon v Jervis*,[222] it was held that it was sufficient to tap a person on the shoulder and say "You are my prisoner", provided that this conveys conviction to that person that he or she is actually under arrest. On the facts of the case, the conclusion drawn was that, as this was sufficient to effect a valid arrest, false imprisonment had not been committed. However, it would seem to follow that, where no power to arrest exists, the same actions would amount to false imprisonment,[223] at any rate if V believes D and submits to the "arrest". Another case supporting this test is *Simpson v Hill*,[224] in which the defendant gave the plaintiff in charge to a police officer, though on the facts false imprisonment was not committed as no arrest was actually carried out.

2.159 This suggests that there can be imprisonment by non-physical means: in *Bird v Jones*[225] Mr Justice Coleridge said:

> A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only.

This is not decisive of the question whether false imprisonment can be committed by fraud as well as by force. The prison "in the conception only" may refer, not to a case where V is deceived into believing that he or she cannot leave a place, but to a case where D draws a line and threatens to shoot V if he or she steps over it.

2.160 Today it is clear that kidnapping can be committed by fraud, but there is no clear authority on the position in false imprisonment. Glanville Williams[226] wrote:

> There is no clear authority for saying that it is a false imprisonment (or kidnapping – see below) to cause a person by deception to remain in a place or to go to a place. The person who is deceived is caused to behave in a certain way but is not deprived of his liberty. However, it is quite possible that the courts will make this extension if the point arises. There are precedents for saying that an offence of doing something 'against the will' of someone covers the getting of consent by fraud.

[222] (1859) EB & E 942.

[223] D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2010) para 17.11.1.1 (p 679).

[224] (1795) 1 Esp 431.

[225] (1845) 7 QB 742.

[226] G Williams, *Textbook of Criminal Law*, (2nd ed 1983), p 218, cited in *Hendy-Freegard* [2008] QB 57 at [34].

2.161 It is a likely though not conclusive deduction from *Sandon v Jervis*[227] and *Simpson v Hill*[228] that false imprisonment is committed if D impersonates a police officer and purports to arrest V. It would seem, then, that a state of imprisonment can be constituted by V's belief that he or she cannot *legally* leave a place, or a person's custody. A further question that arises is whether false imprisonment can also be committed by leading V to believe that it is *physically* impossible (or difficult or dangerous) to leave. We have found no authority on this point, either for false imprisonment or for kidnapping, but we believe that in principle the two forms of deception are equally culpable and equally capable of amounting to imprisonment by psychological means.[229]

Deprivation of liberty?

2.162 In false imprisonment, to establish the fact of imprisonment, physical or psychological restraint is sufficient, in the sense that V could not leave if he or she wanted to. There is no need to show in addition that V did want to. If V is locked in a room, V is imprisoned there even if V has no wish to go out.[230] There is a defence if V specifically consents to the room being locked: the point being made is that, if V is asleep or otherwise forms no wish one way or the other, it is no excuse that V did not form a specific intention to leave or even that V was not aware of the imprisonment.

Lawful excuse

2.163 A question arose about the potential liability of parents for false imprisonment. In *Rahman*[231] a father forced his 15-year-old daughter, who had been informally fostered out to a local authority, into a car with the intention of taking her with him to Bangladesh. He appealed against his conviction for false imprisonment, relying on an analogy with the offence of kidnapping as it was then understood. He argued that he could not commit false imprisonment if there was no order restricting his parental rights and he was not infringing the rights of the other parent. The judgment of the court, given by the Lord Chief Justice, was that, whatever the position might be in kidnapping,[232] it was established law that false imprisonment, like assault, could be committed by a parent if he or she exceeded the bounds of reasonable parental discipline.

[227] (1859) EB & E 942.

[228] (1795) 1 Esp 431.

[229] For a discussion of this question in relation to kidnapping, see para 2.118 and following, above.

[230] D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2011) para 17.11.1 (pp 680 and 681), citing *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT 44 and other cases.

[231] (1985) 81 Cr App R 349.

[232] For the position in kidnapping, see para 2.109 and following.

2.164 In *Faraj*[233] V was an engineer who called on D to repair a time switch, and D, believing V to be a burglar, forced him into a corner at knifepoint. The main issue in the case was whether unreasonable belief was capable of amounting to an excuse; but it is also authority for saying that, if V had genuinely been a burglar, D would have been justified in detaining him. In other words, all the normal defences such as self-defence and defence of property apply to false imprisonment as they do to kidnapping and assault.

Fault elements?

2.165 The tort of false imprisonment is one of strict liability.[234] The crime, however, "consists in the *unlawful and intentional or reckless* (our italics) restraint of a victim's freedom of movement from a particular place".[235] *Smith and Hogan* argues that recklessness must bear its subjective, or *Cunningham*,[236] sense.[237] That is to say, the offender must have been aware of the risk that his or her proposed actions would result in a loss of liberty, and decided without reasonable justification to proceed with them. In *Hutchins*[238] it was held that the offence, like other offences of recklessness, is one of basic intent, in the sense that that phrase is used in the context of intoxication: that is, a failure to foresee the possible consequences of one's act does not negative liability for the offence if that failure is brought about by voluntary intoxication.[239]

[233] [2007] EWCA Crim 1033, [2007] 2 Cr App R 25.

[234] *R v Governor of Brockhill Prison ex parte Evans*, n 221 above, concerning an error made by a prison governor in good faith.

[235] *Rahman* (1985) 81 Cr App R 349, 353.

[236] [1957] 2 QB 396.

[237] D Ormerod, *Smith and Hogan Criminal Law* (13th ed 2011), para 17.11.2. For a discussion of recklessness, see para 2.141 and following, above.

[238] [1988] *Criminal Law Review* 379, para 2.141 above.

[239] For the effect of intoxication on criminal liability, see "Intoxication and Criminal Liability" (2009) LC No 314, in particular paras 1.15 to 1.20 and Part 2. The leading cases are *DPP v Majewski* [1977] AC 443 and *Richardson and Irwin* [1999] 1 Cr App R 392.

Relationship between kidnapping and false imprisonment

2.166 The view that kidnapping is an aggravated form of false imprisonment was standard doctrine from East (1803)[240] to Glanville Williams (1983). However, this view is not mentioned, except by way of quotation, in the more recent cases and, on the modern authorities, the logic of the two offences is different. The account given by Glanville Williams[241] implies that the conduct element of kidnapping is the same as that of false imprisonment, with taking and carrying away added as an aggravation. The definition in *D*,[242] even as qualified in *Hendy-Freegard*,[243] makes it clear that this is no longer the case. The conduct element of kidnapping is taking or carrying away, and the loss of liberty is best interpreted as a consequence element.[244]

2.167 One difference that follows from this is that it is not certain that Lord Brandon's "force or fraud" requirement applies to false imprisonment, or even whether false imprisonment can be committed by fraud at all.[245] In kidnapping it is the "taking or carrying" that must be by force or fraud, and this is precisely the element that is absent in false imprisonment.

2.168 This part of the definition may be traced to the two passages by Glanville Williams already cited.[246] In one (described in *Hendy-Freegard*[247] as "prescient"), he states that it is not clear that deception causing a person to be in or go to a place where he does not wish to be is false imprisonment ("or kidnapping – see below"), but that the court may quite possibly make the extension if the case arises. In the other, he describes kidnapping and adds "As was said before, the courts may perhaps extend it to a taking by deception". He clearly regarded the issue of force or fraud as common to both offences: whether they can be committed by fraud as opposed to force is uncertain, but the answer must be the same for both.

2.169 Since *Wellard*[248] (in which D "took and carried away" V by pretending to be a police officer and telling her to walk to his car) and *D* it is clear that kidnapping can be committed by either force or fraud.

[240] East, *A Treatise of the Pleas of the Crown* (1st ed 1803) p 429; (2nd ed 1806) p 429; see para 2.8 above.

[241] G Williams, *Textbook of Criminal Law* (2nd ed 1983) p 219; see para 2.10 above.

[242] [1984] AC 778.

[243] [2007] EWCA Crim 1236, [2008] QB 57.

[244] Para 2.113 and following, above.

[245] Para 2.161.

[246] G Williams, *Textbook of Criminal Law* (2nd ed 1983) p 218 to 219, cited at paras 2.10 and 2.160 above.

[247] [2007] EWCA Crim 1236, [2008] QB 57 at [34].

[248] [1978] 1 WLR 921.

2.170 Following Glanville Williams' reasoning, the same should apply to false imprisonment. On the other hand, *Smith and Hogan*, following the case comments on *Cort*[249] and *Hendy-Freegard*,[250] argues that "by force or fraud", in Lord Brandon's definition, is an independent requirement, relating solely to the means of taking or carrying away. It cannot be reduced either to a means of establishing absence of consent or to an aspect of the loss of liberty requirement.[251] If so, it does not follow that the same test must apply to false imprisonment.

2.171 We believe that the supposed connection of the two offences is questionable on historical as well as doctrinal grounds, as their origins are fundamentally different. False imprisonment was an offence against individuals going back to the earliest ages of the common law, and is a tort as well as a crime (specifically, a trespass against the person). Kidnapping was an offence against public welfare devised by the King's Bench in the seventeenth century, and does not have a corresponding tort. This difference was reflected in the traditional forms of pleading: the wording of an indictment for false imprisonment was based on that for assault,[252] while the forms used for sending abroad[253] and the abduction of minors[254] were altogether different, the wording in the last case resembling rather that for common law larceny,[255] though we do not suggest that it was actually a form of that offence.

2.172 Accordingly, kidnapping was not institutionally speaking a form of false imprisonment, and the description of it as such was no more than an analogy. East, like his predecessor Hawkins, was concerned to make a systematic classification of criminal offences by subject matter: within that scheme kidnapping belongs with false imprisonment, as both are offences against the person and more specifically against personal liberty. It does not follow that they must have a common origin or that the ingredients of the offences must be interpreted in the same way.

2.173 In conclusion, false imprisonment may be useful as an analogy in the discussion of force, loss of liberty and lack of consent, as these ingredients are shared by the two offences. Otherwise, it is irrelevant to the conduct element of kidnapping.

2.174 It remains uncertain whether every kidnapping must also amount to false imprisonment, though traditionally it has been held that it does. The answer depends on two issues, discussed elsewhere in this paper.

[249] [2004] *Criminal Law Review* 64; partly incorporated into D Ormerod,*Smith and Hogan Criminal Law* (11th ed 2005) p 575 and following, which appeared after *Cort* but before *Hendy-Freegard*.

[250] [2007] *Criminal Law Review* 988; most of this discussion is incorporated into *Smith and Hogan* (13th ed 2011) para 17.12 (p 687 and following, in particular p 689).

[251] For the relation between force and fraud and lack of consent, see para 2.74 and following, above.

[252] Archbold, *A summary of the law relative to pleading and evidence in criminal cases* (4th ed 1831) p 359. Similar wording was used in civil cases: Fitzherbert's *Natura Brevium* (6th ed 1718) p 192.

[253] *Dassigney* (1683) Raym 474, 83 ER 247 and 2 Show 221, 89 ER 902.

[254] *Lord Grey* (1693) 2 Show KB 218, 89 ER 900, 9 St Tr 127.

[255] For the larceny wording, see East, *Pleas of the Crown* (1806) vol 2 p 778.

(1) Can false imprisonment be committed by fraud and without force?[256] If not, it follows that some kidnappings are not false imprisonment.

(2) Should the "loss of liberty" requirement in kidnapping be interpreted to mean the same thing as the element of imprisonment in false imprisonment?

[256] Para 2.161 above.

PART 3
PROBLEMS IN THE LAW OF KIDNAPPING

SCHEME OF THIS PART

3.1 In this Part we address the central problems arising from the ambiguity of the definition of the various elements of the offence and the interaction between them. In particular, we focus on the following problems concerning the boundaries of the offence.

(1) It is uncertain whether the loss of liberty must take place during the process of taking or carrying away, or whether it can arise subsequently, at the end of the journey. In other words, is the offence of kidnapping committed if V is taken or carried away by force or fraud but without being deprived of liberty until V is confined at the destination?

(2) At present, D does not commit kidnapping by enticing a person, without force or fraud, to accompany D on a journey, even if V does not consent (eg because of lack of capacity), and even if D subsequently confines V by force or fraud.

These two problems are to some extent interrelated.

3.2 We also consider whether the existing requirement that D should accompany V serves a useful purpose.

THE QUESTION OF TIMING: CONFINEMENT FOLLOWING TAKING

3.3 Following *D*,[1] kidnapping is an offence that amounts to an attack on or infringement of personal liberty. It consists of the taking or carrying away of one person by another by force or fraud, without the consent of the person so taken or carried away and without lawful excuse.

3.4 In practice, kidnapping may well occur in stages. There is the initial "taking" in the sense of the capture or other moment at which the process begins by D deceiving or forcing V to accompany D. There is then the carrying (or "taking" in its other sense) including the whole process of moving V from one place to another. There may or may not then be a third stage during which V is confined at the destination, though formally speaking this does not now form part of the conduct element of the offence.

3.5 Having regard to the case law before *D*, we consider that it would have been kidnapping for D to confine V after the taking or carrying away was completed. This was one effect of the part of the definition that referred to "secreting". In *D*, however, the House of Lords held that secreting has no relevance and that the conduct element of the offence is confined to forcible or fraudulent taking or carrying away. By the time the destination is reached, and the detention begins, the offence is over.

3.6 This change has two possible consequences.

[1] [1984] AC 778.

(1) The requirement of force or fraud is relevant only as the means of taking or carrying away: the use of force or fraud to confine V at the destination is neither sufficient nor even relevant.[2]

(2) The same may be true of the loss of liberty requirement. Loss of liberty, to be relevant, must be a consequence of the taking or carrying away; and on one possible view it must occur simultaneously with it.

When must the force or fraud be employed by D?

3.7 In *D*,[3] the conduct element of kidnapping is described as the taking or carrying away of one person by another by force or fraud.

3.8 It is clear from *D* that it is not necessary that V is detained at the conclusion of the journey with the defendant. If D does detain V only at that point it is not necessary that the detention be by force or fraud (though it is hard to conceive of a case in which it is not).

3.9 The focus is therefore solely on the use of force or fraud in relation to the taking or carrying away. This limitation has a rather strange practical result.

> Example. D takes V, a baby, by overpowering the parent or carer, or by snatching V from a pram. This is kidnapping.
>
> Example. D, without force or fraud, invites V, a young child or a mentally ill or learning disabled adult, to accompany D; V comes with apparent willingness while the parent or carer is not looking, and is then forcibly confined at the destination. This is not kidnapping, as there is no force or fraud involved in the taking or carrying, though there is in the loss of liberty.[4]

3.10 This result appears arbitrary, but we believe that it represents the current law.

[2] Para 2.45 above.

[3] [1984] AC 778.

[4] Para 2.45 above.

3.11 Is the offence of kidnapping unduly restricted by this limitation? In many cases, no difficulty will arise because the initial taking of V by D will be by force or fraud. Similarly, it seems that no difficulty will arise if D, without use of force or fraud, induces V to accompany him and in the course of the journey then uses force or fraud to maintain V's presence with D. There is a kidnapping, albeit that it might be less clear to identify the point at which the offence began.[5] However, in some cases, the initial inducement to accompany D could be by pure invitation involving neither force nor fraud, and no force or fraud might be used in the entire taking or carrying away. In such a case, if there is no force or fraud used until the final destination is reached, there would appear to be no kidnap, although it would be false imprisonment.

3.12 Arguably, a logical kidnapping offence should be capable of covering not only the cases of taking by force or fraud, involving or followed by detention without consent,[6] but also the reverse permutation (taking without valid consent,[7] involving or followed by detention by force or fraud). On one view, it should make no difference whether force or fraud is the answer to "How did V come into this situation?" or to "Why can V not leave it?" The ultimate harm to V is similar in each case. There are, however, counter arguments. The harm V suffers is different in a case of being taken by force or fraud as that itself is a set back to V's interests additional to the harm caused by any subsequent detention. There are also perhaps subtle differences in terms of the wrong done – D's use of force or fraud to cause V to accompany D is different from the use of force or fraud to secure V's detention. We consider in Part 4 whether a new offence of kidnapping ought to extend to cases where V is detained by force or fraud following a consensual journey with D.

When must the loss of liberty occur?

3.13 We believe that under the present law the offence is committed if it results in a loss of liberty, whether during the taking or carrying or at another time. The position is not, however, free from doubt.

3.14 There are three possible approaches the law could take.

(1) On the narrow view, loss of liberty must occur in the course of the taking or carrying away. This more or less confines the offence to forcible taking: the only instance of a taking by fraud alone would be a case like *Wellard*,[8] where the fraud amounted to psychological compulsion.[9] If one adopts the narrow view some surprising results follow.

[5] We refer to this situation as "*Cort* plus", meaning what would have happened if Cort had locked the doors of the car and refused to let the passengers out. Jurisdictional issues might arise in some cases as to whether the offence occurred within England and Wales. According to the approach in *Smith (Duncan Wallace) No 4* [2004] EWCA Crim 631, [2004] QB 1418 the courts will have jurisdiction if a substantial measure of the conduct took place in England and Wales unless there are reasons of comity requiring a different approach.

[6] Whether the lack of consent should be referred to the loss of liberty is discussed at paras 2.70, 2.135 and following.

[7] For the meaning of "valid" consent, see paras 2.79 and following, above.

[8] [1978] 1 WLR 921.

[9] Para 2.131 above.

Example. D by use of fraud, invites V, a young child or a mentally ill or learning disabled adult, to accompany him; V comes with apparent willingness while the parent or carer is not looking, and is then forcibly confined at the destination.[10] This will not be kidnapping because there was no loss of liberty during the taking.

Example. D entices V to accompany him to a house by falsely stating that V's brother is expected there and, once V is in the house, D detains V there.[11] On the narrow view this will not be kidnapping even though there is fraud that caused V to accompany D, as the fraud did not cause a loss of liberty or a belief in V that there was a loss of liberty: V could have left D at any time in the journey; the loss of liberty did not begin till V's arrival.

(2) On a broader view, which we believe represents the present state of the law, it is sufficient that there is a deprivation of liberty after the conclusion of the journey in which D has caused V to accompany D by force or fraud. The effect is that, while all the ingredients of the offence except for loss of liberty (force or fraud, the absence of lawful excuse, absence of consent) must coincide with the taking or carrying away forming the conduct element of the offence, the deprivation of liberty can arise then or later.

(3) A third, and perhaps more desirable position, although one that **cannot** be said to represent the present law,[12] is that both the taking or carrying and any period of detention or confinement in the course of or following it form part of the conduct element of the offence. We consider that this is the most desirable result, as it removes any need to consider whether the elements of force or fraud or consent relate only to the taking or carrying or to any subsequent stationary detention. We also believe that it was the law before *D*,[13] as well as coinciding with the popular meaning of the word kidnapping.

The ambiguity in this aspect of the offence is significant and supports the need for reform. For example, in a case of ransom kidnapping, where V may be held for a considerable period after the journey, to conclude that the kidnap is concluded as soon as the journey is ended and that the subsequent conduct is a separate offence of false imprisonment appears counter-intuitive. However, the practical consequences of this are to some extent mitigated if we accept the view that a subsequent period of detention is sufficient to satisfy the loss of liberty requirement, as it is a consequence of the taking even if not occurring simultaneously with it.[14]

[10] This is the same case as in para 3.9 above.

[11] Para 2.120 above.

[12] Para 2.38 and following, above.

[13] [1984] AC 778.

[14] For the existing law on this question, see para 2.121 and following.

FORCE OR FRAUD AND LACK OF CONSENT

3.15 Lord Brandon's definition requires any taking or carrying away to be both by force or fraud and without the consent of the person taken or carried away. At first sight these look like two ways of saying the same thing: one of the two requirements would appear to be redundant. As we have seen in Part 2, however, the interaction between these two requirements is somewhat more complex.

(1) V might consent to force being used against V, and even to being taken by force, though of course as a matter of logic there cannot be consent to the very force or fraud by which the consent was procured.[15]

(2) V might not be consenting to the taking or carrying away even though D has used no force or fraud: for example in the case of a child or mentally impaired person, or where V labours under a fundamental mistake not brought about by D.[16]

(3) Conversely, V might be consenting to the taking and carrying away even though D has used force and fraud. This might occur for example where the degree of force is too mild or the subject matter of the fraud is too marginal to bring about a substantial infringement of V's autonomy, or where the force or fraud is directed at someone else.[17]

3.16 It is the second of these points that is most likely to cause problems in practice. The problems may be exacerbated in some cases by the timing problems that we have already identified.

Children and the mentally incapacitated

3.17 Where a child or person who is too mentally incapacitated to give meaningful consent[18] is invited or enticed to accompany D on a journey, the lack of consent requirement is met but the force or fraud requirement is not, and the enticer is not guilty of kidnapping. This leads to some strange distinctions: examples are as follows.

> D forcibly snatches V, a child, and abducts her. D is guilty of kidnapping.
>
> D invites V to accompany D without using any force or fraud, V acquiesces. D escapes liability because of V's vulnerability.[19]
>
> D entices V to accompany D on a journey by promising sweets.
>
> (a) If D intended from the outset not to give the sweets, there is fraud, and D is guilty of kidnapping (even if D later has a change of mind and gives the sweets).

[15] Para 2.61 and following, above.

[16] Para 2.78, above.

[17] Para 2.80 and following, above.

[18] In the sense discussed at paras 2.81 and 2.89.

[19] Para 2.89(3) above.

(b) If D intended to give the sweets but had a change of mind, or formed no intention one way or the other, there is no kidnapping.

3.18 In many cases any apparent gap in the protection offered by the criminal law is filled by specialised child abduction offences, as described in Appendix C. However, we do not consider that those offences are adequate for cases where the abduction is the prelude to full-scale imprisonment or ransom demands. In these cases D can be charged with false imprisonment or blackmail, but such charges will not always be an adequate alternative, if only for reasons of labelling and public perception.

3.19 There has been some criticism of this omission in academic literature. Lambert, in an article written following *Hale*,[20] concludes "the ability of the common law to deal adequately with the problems presented by the kidnapping of "consenting" minors must be doubted in the light of the ruling in that case", and *D*[21] does nothing to alter that position. Glanville Williams[22] criticises *D* on exactly the same grounds.

3.20 The problem applies to mentally incapacitated adults in the same way as to children, and for the same reasons. However, the practical problem in the case of mentally incapacitated adults is in one respect greater than in the case of children: where V is a child D can be charged with child abduction, but there is no equivalent alternative charge in the case of an adult.

3.21 *HM (Vulnerable Adult: Abduction)*[23] concerned the abduction of a vulnerable adult by her father, who took her out of the jurisdiction and then concealed their whereabouts from others. The question was whether the court had the power to order the freezing and use of funds in his bank account to pay for litigation in the foreign jurisdiction with a view to securing the daughter's return. Lord Justice Munby in his judgment highlighted the deficiency of the criminal law in protecting someone in the victim's position (an adult lacking capacity) since there would often be no force or fraud involved in the taking of such a person. Arguably the Taking of Hostages Act 1982 could apply, but under section 2(1)(a) proceedings can only be instituted by or with the consent of the Attorney General, which would be unlikely to be given in this type of case;[24] and blackmail contrary to section 21 of the Theft Act 1968 could not apply since the defendant had not sought to make any economic gain or cause any economic loss to anyone else. Lord Justice Munby therefore said[25] that "it might be thought that there is a gap here in the criminal law which ought to be investigated with a view to seeing whether it might not appropriately be stopped up".

[20] J Lambert, "Kidnapping and False Imprisonment at Common Law" (1979) 10 *Cambrian Law Review* 20.

[21] [1984] AC 778.

[22] "Can babies be kidnapped?" [1989] *Criminal Law Review* 472.

[23] [2010] EWHC 870 (Fam); [2010] 2 FLR 1057.

[24] The Taking of Hostages Act 1982 was designed to deal with cases of international terrorism rather than purely domestic disputes, and no prosecutions have ever been brought under it.

[25] Above, at [65].

3.22 The same result follows even if the abduction is followed by forcible confinement: in such a case force or fraud is present at the loss of liberty stage but it is not the means by which V was taken or carried away. There is therefore no kidnapping, though of course D is guilty of false imprisonment.

3.23 Given the difficulties that arise from the cumulative requirement of force or fraud and lack of consent[26] we question the merit of the current definition. The essence of kidnapping, in the generally understood sense of the word, is that V is abducted against V's will. For this purpose, provided there was no consent to the taking or carrying away, it should not matter whether there was force or fraud or whether consent was lacking for some other reason, such as that V was asleep or too young or mentally incapacitated to give a meaningful consent. The present requirement of force *or* fraud has no purpose except to provide the necessary flavour of compulsion.

3.24 All these problems could be solved by one of two possible changes.[27]

(1) One possibility is to require merely a lack of consent to being taken and carried away. Force and fraud would be simply two among the possible reasons for consent not being present; lack of mental capacity would be a third. It would be a jury question whether, in any particular case, the force or fraud used, or V's lack of capacity, was sufficient to preclude genuine consent.

(2) An alternative, much more complex solution would be to make the requirements of force or fraud and consent alternative rather than cumulative. It would be sufficient if V was taken without consent or with "consent" obtained by force or fraud. For this purpose, any level of force or fraud would suffice provided that "but for" the force or fraud V would not have accompanied D.[28] This could be reinforced by a rule that a child cannot consent: this could depend either on a fixed age or on the actual mental capacity of the child.[29]

THE REQUIREMENT OF ACCOMPANYING

3.25 As we have seen, it is a requirement of the present law that D (the kidnapper) must accompany V (the victim). This is implicit in the description of the conduct element as "taking or carrying away", as opposed to "sending", "transporting" or the like, and is made explicit in *Hendy-Freegard*.[30] This requirement could be defended on the ground that, otherwise, sending a person on a fool's errand as a practical joke would be kidnapping. This is not entirely convincing, as a case on those facts would be adequately excluded by the other requirement in *Hendy-Freegard*, that there must be deprivation of liberty.

[26] Para 2.42 above.

[27] The issue is discussed further in paras 4.20 to 4.26.

[28] This risks the inclusion of some fairly trivial examples in the offence. This risk could be obviated by incorporating a list of distinguishing factors indicating serious criminal purpose: para 4.92 and following, below.

[29] These proposals coincide with the law in New Zealand: Appendix B para B.41 below.

[30] [2007] EWCA Crim 1236, [2008] QB 57.

3.26 The loss of liberty test could provide an adequate mechanism for excluding the fool's errand cases. As we argue above,[31] V is not deprived of liberty unless V believes that it is impossible, difficult or dangerous to leave the place to which V is taken or sent. Therefore, a fraud by D which constituted an instruction to V "you must go to X" is not *necessarily* a deprivation of liberty, whereas "you must not go anywhere else" *always* is.

> Example. As the result of a fraud by D, V moved to a given house and fixed V's residence there, but was free to go out of it unaccompanied, for example to do the shopping, whenever V liked. (These are more or less the facts of *Hendy-Freegard*.)
>
> Example. D falsely tells V that D represents a national newspaper and that V has won a prize. D tells V to go to a given house and not leave till D comes to take V to the award ceremony.

In these cases there is no loss of liberty, and D should not be guilty of kidnapping, regardless of whether D accompanied V to the destination.

3.27 By contrast, the following case does involve loss of liberty and goes well beyond the "fool's errand" category of case.

> Example. D, posing as a secret service agent, sends V to a house and tells V to wait there for a person to come and collect V, and that under no circumstances should V leave or V will be in danger.

Following *Hendy-Freegard* this is not kidnapping under the current law, as D does not accompany V. We consider that arguments of some force can be made to suggest that this should be kidnapping. There is the same threat or fraud, the same unwanted journey and the same consequential loss of liberty as in "normal" kidnapping cases. Admittedly, since V is not being accompanied it might be easier for V to override the compulsion V feels under from D's threat or fraud and therefore easier for V to escape, but that would depend on the facts of the case. Similarly, if D is not accompanying V, there is no prospect that D will inflict harm on V in the course of the journey, but again, it will not always be the case that D inflicts such harm or even that V fears such harm in the course of an accompanied journey in orthodox kidnap.[32]

3.28 In brief: at present "fool's errand" cases are excluded from kidnapping for two reasons. One is the requirement of loss of liberty (that is, that V is not free to leave the destination). The other is the rule that D must accompany V. We agree that fool's errand cases should be excluded, but submit that the first of these requirements is sufficient for this purpose.

3.29 Apart from the question of how to exclude fool's errand cases, the question arises whether there is any other reason to retain the requirement of accompanying.

[31] Para 2.118 and following.

[32] The importance of harm or the fear of harm, as a factor additional to the basic facts of an unwanted journey and loss of liberty, is discussed below at para 4.16.

Example. V, of V's own free will, is in a railway carriage (at Euston) and intends to get out at Birmingham. D locks V in, and arranges for a confederate to let V out at Crewe.

Example. D sends V a letter saying that V has won a prize and should go to a stated address in order to collect it. At that address D invites V into the house and locks the door on V.

In both cases V has suffered the same basic harms as in any other kidnapping: an unwanted journey, combined with or resulting in loss of liberty. The only practical difference is in the mechanics and the order of events. The main difference that D's presence would have made to V's state of mind is V's added fear of what D might do next, and the reduced chance of rescue. On the other hand, if D is present V has the opportunity to try to persuade D to release V.

3.30 It is worth noting that the anomaly mentioned in *Hendy-Freegard*, that "the consequence of the decision in *Cort*[33] would seem to be that the minicab driver, who obtains a fare by falsely pretending to be an authorised taxi, will be guilty of kidnapping",[34] is not cured by imposing a requirement of accompanying. Nor does a requirement of accompanying cure the problem arising on the facts of *Cort*, as in that case D accompanied V throughout.

3.31 The requirement of accompanying appears to us to place undue emphasis on the experience V has while in motion, as opposed to the overall result of D's course of conduct. In this respect it resembles the narrow view that loss of liberty must occur during the taking or carrying away.[35]

3.32 It may be that the solution to this difficulty lies in rejecting any distinction between kidnapping and false imprisonment and we explore this possibility in Part 4.

SUMMARY OF THE PROBLEMS

Uncertainty

3.33 One criticism of the offence of kidnapping is that there is difficulty in ascertaining its boundaries, which have fluctuated considerably in recent decades. The scope of the offence as described in *Cort* is very different from that in *Hendy-Freegard*, and even accepting *Hendy-Freegard* as decisive there are several remaining uncertainties.

3.34 In this paper we identified several important areas of uncertainty in the scope of the existing offence of kidnapping, in particular the following.

(1) Whether there must always be some element of deprivation of liberty during the process of movement, or whether kidnapping also includes a case where the loss of liberty does not begin until V reaches the destination.[36]

[33] [2003] EWCA Crim 2149, [2004] QB 388.

[34] *Hendy-Freegard* [2007] EWCA Crim 1236, [2008] QB 57 at [55].

[35] Para 2.131 above.

[36] Paras 2.124 to 2.132 above.

(2) Whether the loss of liberty requirement is satisfied if V was led by fraud to believe that it was physically, rather than legally, impossible to leave the custody of the abductor.[37]

Over- and under-inclusiveness

3.35 The offence of kidnapping is arguably too wide in its scope. For example, it follows from *Wellard*[38] that a police arrest made knowingly in excess of the applicable powers becomes kidnapping as soon as the suspect begins to follow the officer. Clearly the officer's conduct is reprehensible and constitutes false imprisonment, but we question whether the fact of movement ought to render the officer liable for kidnap. At present only prosecutorial discretion avoids this result in practice.

3.36 Despite the overall width of the offence, there are some notable omissions.

(1) The requirement of accompanying leads to arbitrary results. In particular, on the view we take of the law the original form of the offence, namely sending abroad, will no longer be caught unless D, or an agent of D, accompanied V at least part of the way.[39]

(2) We have argued, above,[40] that kidnapping includes a case where the loss of liberty does not begin until the end of the process of taking and carrying away but occurs as the intended result of it. However this is not certain, and it is arguable that only loss of liberty during the taking and carrying process qualifies.[41] If so, the offence excludes some instances of ransom kidnapping. In particular those falling within the old "secretion" form of the offence[42] would now not constitute kidnapping.

(3) The position of abducted minors and mentally impaired persons is uncertain and unsatisfactory. Where a child is too young to have the capacity to consent to being taken away, or a person has a learning difficulty which negatives that capacity, but is enticed without force or fraud to a place of confinement, the lack of consent requirement is met, but there is no kidnapping.[43]

3.37 The overall result is strange both practically and historically.

[37] Para 2.119 above.

[38] [1978] 1 WLR 921.

[39] Para 2.29 above.

[40] Para 2.126 above.

[41] Para 2.131 above.

[42] Para 2.131 above.

[43] Para 2.89(3) above.

(1) Practically, a case like *Wellard*,[44] where the harm caused was fairly minor even on the scale of false imprisonment,[45] falls within kidnapping, while *Hendy-Freegard*,[46] involving harm of a much greater duration, falls outside.

(2) Historically, the evolution of the offence is paradoxical.

(a) First there were the two separate offences of sending abroad and child abduction.

(b) Then East[47] or some unknown predecessor devised a broad general formula to cover both, based partly on the child abduction formula (taking and carrying away) and partly on the existing offence of false imprisonment. This formula was general enough to cover ransom kidnapping, both in the form of taking and carrying away and in the form of secreting.

(c) Then, in a marked reversal of direction, the more recent cases refined the definition to exclude, successively, non-violent child abduction (in *Hale*),[48] secreting (in *D*)[49] and, indirectly, sending abroad (as a consequence of the requirement of accompanying in *Hendy-Freegard*).

In other words the offence now excludes, or only doubtfully covers, the very instances it was originally designed to catch. In our view this is a clear sign that something has gone wrong.

[44] [1978] 1 WLR 921.

[45] In the events that actually occurred: we acknowledge there was the possibility of far greater harm if D had not been interrupted.

[46] [2007] EWCA Crim 1236, [2008] QB 57.

[47] East, *A Treatise of the Pleas of the Crown* (1st ed 1803), see para 2.8 above.

[48] [1974] QB 819.

[49] [1984] AC 778.

PART 4
REFORMING THE OFFENCES

INTRODUCTION

4.1 The discussion in the previous parts has identified the following principal problems with the current law of kidnapping:

(1) it is not an offence for D, without force or fraud, to cause V to accompany him, even if loss of liberty supervenes;[1]

(2) it might not be an offence of kidnapping if D uses force or fraud to cause V to accompany him but does not deprive V of his or her liberty until the conclusion of the journey. The loss of liberty does not occur simultaneously with and as part of the taking and carrying away.

4.2 In simplifying the offence, we must address these concerns in particular. In addition, we aim to offer provisional proposals that will use modern language to create a clear and fair offence.

4.3 In this Part we consider the possible ways of reforming the offence of kidnapping and restating it in statute. Given the close relationship between this offence and false imprisonment, and the uncertainty about the boundary between them, we consider it necessary to include reform and restatement of false imprisonment.

4.4 We provisionally propose that the existing common law offences of false imprisonment and kidnapping should be abolished and replaced by one or more statutory offences.

Scheme of this Part

4.5 We first consider the forms of conduct and fault that will form the elements of our proposed models of statutory offence before describing the models themselves, namely:

(1) Model 1: a single offence of non-consensual deprivation of liberty, whether effected by detention or abduction;

(2) Model 2: one offence of non-consensual detention and one of abduction, of equal gravity;

(3) Model 3: a basic offence of non-consensual detention or abduction, and a more serious offence distinguished by listed aggravating factors.

ELEMENTS OF THE OFFENCES

4.6 In devising new offences to replace kidnapping or false imprisonment, the following questions arise.

(1) With what types of conduct should the offences be concerned? Here we discuss the acts of detention and moving.

[1] Para 3.21 above.

(2) What types of harm, resulting from those acts, justify creating an offence? Here we discuss loss of liberty and having to go on an unwanted journey.

(3) What other conditions are required for the act to be wrongful? Here we discuss lack of consent, lawful excuse and fault.

Detention and moving

4.7 Kidnapping and false imprisonment are at present concerned with the following two forms of conduct.

(1) Detention: one person (D) keeps another (V) in a given place and prevents V from leaving it.

(2) Moving: D causes V to go or be taken from one place to another.

Any offences we propose to replace them must also address these forms of conduct. We acknowledge that these actions are not always wrong in themselves, but may become wrong if necessary conditions are satisfied, for example, D's acts are knowingly against V's wishes and without lawful excuse.

The resulting harms

4.8 These types of conduct can cause any or all of the following types of harm.

(1) Loss of liberty: V is not able to go where V wishes to go.

(2) The imposition of an unwanted journey: V is made to go where V does not wish to go.

(3) Additional harms, such as fear, loss of dignity, loss of time, economic loss, distress to one's family and vulnerability to physical or psychological abuse.

4.9 We need to consider whether any of these harms should be a necessary condition of any offence; or a sufficient condition of any offence, provided that the other conditions (such as lack of consent) are satisfied.

Loss of liberty

4.10 Loss of liberty in its narrow sense, namely inability to leave a place of confinement, is the basis of the existing offence of false imprisonment, and can enter into kidnapping as well. Kidnapping can also involve loss of liberty in a different sense, namely that V lacks the power to prevent or discontinue the taking or moving process; this is essentially the same harm, as V is not free to leave D's company and go to a place of V's choosing. Several points of definition are worth noting.

(1) We are not concerned with every limitation on freedom of action but only those that affect V's choice of whereabouts: not freedom what to do, but freedom where to be.

(2) These offences should, we believe, only apply where V's freedom of movement is substantially removed, rather than limited. For example, physically expelling V from the room may be a battery, but should not be a detention or kidnapping offence. In detention, V is not free to go anywhere; in kidnapping, V is not free either to stay put or to go to any place but one.

(3) The definition should leave no room for arguments to the effect that a baby or paralysed person has no freedom of movement to start with, and therefore cannot be deprived of it. Liberty refers only to the absence of external constraints, rather than to overall freedom of action.

4.11 With these clarifications in mind, we believe that loss of liberty in these senses is a fundamental breach of V's autonomy. Where detention or moving results in loss of liberty, this should be *sufficient* to make the detention or moving criminal (subject to questions of consent, excuse and fault).

4.12 Should loss of liberty also be a *necessary* condition of the proposed criminal offences? That is:

(1) should an act resulting in an unwanted journey, but without loss of liberty or other harms occurring, be criminal?

(2) should an act resulting in an unwanted journey be criminal where there is no loss of liberty but other harms, such as fear of the defendant, are inflicted?

4.13 In cases where, as a result of D's action, V takes an unwanted journey without deprivation of liberty there is, we believe, an infringement of personal autonomy which is much less serious than the loss of liberty involved in detention. In detention, V is barred from every place in the world except one; imposing an unwanted journey may leave V with a greater degree of freedom.

4.14 In more detail:

(1) D causes V to go on an unwanted journey and the only harm suffered by V is that V has wasted time and effort by being sent on a fool's errand. We do not believe that this should be a criminal offence of kidnapping or its statutory replacement, even if D's conduct is deliberate. To criminalise fool's errand cases, where the unwanted journey is the only harm suffered, would be an unwarrantable extension of the criminal law.

(2) In contrast, where D's conduct in causing V to move involves D holding V in custody during the journey, subject to proof of fault and lack of consent, D's conduct ought to be criminal. Similarly, if the journey results in V losing liberty after the journey has been completed, there is, we believe, a compelling argument that, subject to fault and excuses, such conduct ought to be criminal.[2]

[2] If the journey is interrupted V should be guilty of attempt. The conduct element was complete in itself, and was such as to bring about the consequence of loss of liberty though this was averted by external factors.

4.15 Our conclusion on the first question is that the imposition of an unwanted journey should not be sufficient for liability in the absence of deprivation of liberty or other harms. The deprivation of liberty requirement is a useful way to exclude from these serious offences those cases in which V is simply sent on a wasted journey but suffers no other harm.

4.16 Should the occurrence of additional harms affect this conclusion?

(1) There is of course no question of the additional harms (fear, loss of dignity, loss of time, economic loss, distress to others and vulnerability to physical or psychological abuse) being sufficient for liability in themselves. Cases of detention or moving, without consent, necessarily involve either loss of liberty, an unwanted journey or both.

(2) It is arguable that, in certain cases, the imposition of an unwanted journey, together with some additional harm, should be criminal even in the absence of loss of liberty. One example might be where V is induced by fraud to move to another country and finds it economically impossible to return. However, these examples will be unusual and the additional harms would have to be carefully chosen and defined. This possibility is explored further under Model 3.[3]

4.17 We conclude that, with the possible exception of the case just mentioned, loss of liberty should be a necessary condition of liability in any new offence replacing false imprisonment or kidnapping.

ISSUES COMMON TO ALL PROVISIONALLY PROPOSED MODELS

Consent

4.18 Consent lies at the heart of the offences. If V gives valid consent to loss of liberty, V's autonomy is not infringed.

4.19 As argued in Part 3,[4] one major flaw of the existing offence of kidnapping is that the requirement of force or fraud is cumulative with that of lack of consent. On a literal interpretation of *D*, if a child or mentally impaired adult is enticed to a place of confinement there will be no kidnapping because the absence of consent was caused not by force or fraud but by a lack of capacity.[5]

4.20 One solution to this problem would be simply to remove the requirement of force or fraud, providing a general definition of consent. Its application in any case would be a matter for the jury having regard to all the circumstances.

[3] Para 4.103 and following.

[4] Para 3.15 and following.

[5] Para 3.21 above.

4.21 In cases involving force, whether the force was sufficient to negate consent is unlikely to be controversial. There would be no consent either where V was physically overpowered, as by being bundled into a van, or where V faced a threat of such gravity that V's acquiescence amounted to no more than submission. These distinctions are left to juries in sexual offence trials in which issues of consent are crucial and on which independent evidence is often lacking. The general definition does not appear to have generated many difficulties in practice: there are very few reported cases on the issue of consent and use of force.

4.22 It is more difficult to specify which frauds by D should vitiate V's consent. The issue is addressed in the Sexual Offences Act 2003. Lack of consent is conclusively presumed where V is deceived as to the identity of D or the nature or purpose of the act, and may be inferred in other cases.[6] It would be possible to use a shortened and simplified form of these provisions in detention and abduction cases, though the identity of D is arguably less crucial in these cases than in the case of sexual contact.[7] We do not believe that a complex regime such as that for fraud as to the nature or purpose of the act in sexual offences is necessary in the replacement offence for kidnapping. We do not propose to adopt a scheme including such conclusive presumptions.

4.23 A claim that fraud "negates consent" in a given case could mean any of the following:

(1) that V was deceived by D about the nature or purpose of the thing to which V was consenting, and therefore did not consent to what actually happened;

(2) that as a result of D's deception, V thought there was no option but to act in that way and was in that sense compelled;

(3) that V would not have consented but for D's deception and was therefore not acting in a free and informed way.

We argue above[8] that, in existing law, the jury *must* find that consent is vitiated in cases (1) and (2), and *may* find this in case (3). We do not propose to alter this approach.

6 Sections 74 to 76.

7 Arguably what may be more important here than in sex cases is whether D has a particular status – eg as a police officer.

8 Paras 2.86 and 2.87.

4.24 Another method of dealing with the definition of consent would be to adopt a model similar to that used in New Zealand,[9] where the taking must be either without consent or with consent obtained by force or fraud. This would avoid ambiguities by explicitly requiring that V would not have consented to D's conduct "but for" the deception and was therefore not acting in a free and informed way. This would make the offence much wider than at present, and arguably wider than is desirable: for example it could criminalise the case mentioned above, where D persuaded V to come on a picnic by a false offer of champagne.[10]

4.25 Further, in existing law fraud is capable of including simple non-disclosure if the fact in question is of sufficient importance.[11] On a "but for" test this would include every fact capable of influencing V's decision. This could trivialise the offence still further: for example it would seem inappropriate to charge D with kidnapping for taking V on a pleasure trip because V would not have agreed to come had V known that D did not intend to stop for lunch till after 2:00 pm. For this reason, we provisionally propose not to adopt a "but for" test.[12]

4.26 **We provisionally propose that:**

(1) lack of consent should be a condition of liability in any new offence that may be created to replace false imprisonment or kidnapping; and

(2) any such offence should contain no separate requirement of force or fraud, but force and fraud should be taken into account in establishing whether or not a person consented to being detained or moved.

4.27 The remaining issues surrounding consent, chiefly the question of what it is to which V must consent, are discussed below in relation to particular models.

Lawful excuse

4.28 As mentioned above,[13] there are several circumstances in which lawful authority may exist for detaining a person or transporting him or her from one place to another, even without consent or a belief in consent: for example the duties of police and prison officers, parental and school discipline and cases in which there is a defence of necessity.

4.29 Whatever form of offence is created, all these defences ought to apply, whether or not they are allowed for in the definition, for example by the use of phrases such as "unlawfully" or "without lawful excuse". The same is true of defences such as self defence, lawful defence of property and defence of another.

9 Crimes Act 1969 s 209, set out in Appendix B para B.41.

10 Paras 2.77 and 2.83 above.

11 Para 2.58 above.

12 For the possibility of a "but-for" test in rape, see Gross, "Rape, Moralism and Human rights" [2007] *Criminal Law Review* 220; Herring, "Human Rights and Rape: a Reply to Hyman Gross", [2007] *Criminal Law Review* 228. The discussion does not extend to other offences against the person.

13 Para 2.103 and following.

4.30 A further category of case is that of putative defences, that is, cases where D mistakenly believes that circumstances exist which would constitute a defence to the act. As explained in Part 2,[14] in some of these cases honest mistake is a defence while in others reasonable mistake is required: this varies from one type of defence to another, but is governed by general principles of law that apply across the spectrum of offences against the person and are not specific to any one offence. We therefore do not believe that a specific provision should be made for general defences, including putative defences, in relation to detention or abduction offences. If those principles need to be reformed, this should be done in relation to offences in general and not to one offence at a time.

4.31 We discuss the related issue of belief in consent under the heading of fault, below.[15]

4.32 We provisionally propose that, in any new offence, detaining or moving a person should only be criminal if done without lawful excuse, and that the question of what is a lawful excuse (including the question of putative defences) should be determined in accordance with the general law applying to defences to offences against the person.

Fault

4.33 In existing law, the fault requirement for both kidnapping and false imprisonment is intention or subjective recklessness, in relation to all features of the offence.[16] A person who detains or moves another will normally do so in a state of direct (ie purposive) intention, both as to the nature of the act and as to its consequences (loss of liberty and being subjected to an unwanted journey): D will act in order to cause these consequences. Examples of reckless detention or moving can be devised, though these are unusual.

> D organises a demonstration outside a Government building, making it impossible for anyone to go in or out. D intends to organise the demonstration, and is reckless as to the possibility that this act causes loss of liberty (and therefore amounts to detention) because staff are unable to leave the building.
>
> D, while drunk, commandeers a bus to drive home in regardless of the presence of V on the upper deck. (The driver has gone for a cup of tea.) D intends to drive the bus, and is reckless as to the possibility that there are people upstairs who will be subjected to an unwanted journey.[17]

[14] Paras 2.106 and 2.107 above.

[15] Para 4.36 and following.

[16] Para 2.141.

[17] Compare also the "Joy in the Morning" example, para 2.55, where D drives a car home and locks it in a garage, not noticing that V is asleep under a blanket in the back seat.

D is a lavatory attendant at the public conveniences in a city centre. D is responsible for locking the entrance at 10 pm. One night D is in a rush and fails to check carefully whether D has detained anyone in any of the cubicles. V, who was drunk, had fallen asleep in a cubicle and is detained overnight. D intended to lock the door, had no intention to deprive anyone of liberty, but was reckless as to that consequence.

4.34 In each of these cases, we believe that there is no strong reason to change the existing rule that subjective recklessness is sufficient to found liability.[18]

4.35 We provisionally propose that the fault element of any new offence should be intention or subjective recklessness, both as to the nature of the act and as to its consequences such as loss of liberty and being required to take an unwanted journey.

Belief in consent

4.36 The remaining issue concerns the fault required as to V's consent.

4.37 The issue here is whether the fault element relating to the circumstance of consent should be subjective or objective. In other words, whether D should escape liability (i) if D genuinely believed that V was consenting, or (ii) only if D reasonably held that belief.

4.38 Both standards are found in the present criminal law. In non-sexual offences against the person such as assault, an honest belief in consent usually suffices to excuse, as the fault requirement as to consent is subjective. A subjective approach was formerly also the rule in rape and most other sexual offences under the Sexual Offences Act 1956, but a test of reasonable belief in consent has been substituted by the Sexual Offences Act 2003.[19]

4.39 The basis for the former rule in relation to sexual offences was that consent is not simply a defence; rather, lack of consent is one of the circumstance elements forming the essence of the offence. It follows that, if D has a genuine belief, however unreasonable, that V consents to sex, he is not intending to perform the act constituting the offence. Similarly, given that he is sure that V consents, he cannot be said to be (subjectively) reckless as to whether she consents or not. This is the reasoning described as "inexorable logic" by Lord Hailsham in *Morgan*,[20] which is the principal authority for the rule in question.

[18] In para 4.91 below we consider, but advise against, a scheme with distinct offences of intentional and reckless deprivation of liberty.

[19] Sexual Offences Act 2003 s 1(1)(c) and (2) and ss 75 and 76.

[20] As described by Lord Hailsham in *DPP v Morgan* [1976] AC 182. The issue is discussed in Ashworth, *Principles of Criminal Law* (6th ed 2009) section 6.4 (pp 215 to 219).

4.40 Following *Morgan*, the same subjective approach was applied to non-sexual offences against the person. In assault, as in rape, lack of consent is of the essence of the offence.[21] In cases where injury is caused, there can be no valid consent outside certain recognised categories such as sport,[22] but within these categories the subjective approach to belief in consent must apply. That is, D is not liable if he caused injury to V and genuinely but mistakenly believes that he had V's consent to the activity that might inflict harm, in circumstances in which V's factual consent would be recognised as valid in law. For example, D is not liable if he mistakenly believes he has V's consent to rough horseplay.[23]

4.41 However, it was thought by many that the rule in *Morgan* was wrong in principle and liable to yield unsatisfactory results in sexual cases, and the Sexual Offences Act 2003 reverses the common law rule.[24] Under that Act, D is liable for non-consensual sexual offences unless he held a reasonable belief in consent. The approach is objective.

4.42 The contrast between subjectivist and objectivist principles of fault has been the subject of extensive academic comment. In this context, one strong critique of the subjectivist approach in *Morgan* was made in an article by Horder.[25] In his view, the choice between the honest belief test and the reasonable belief test should not depend on the distinction between consent and other excusing circumstances. Nor, in the case of belief in consent, should it be determined by whether consent is a defence or lack of consent is an element of the offence. Rather, the choice follows from moral factors that may cut across both these distinctions. In a case like *Williams*,[26] where D assaults V under the mistaken impression that V is attacking a third party, we give credit for the nobility of the motive and excuse an unreasonable mistake made in the heat of the moment. Where D under the influence of sexual excitement forms an unreasonable belief that V consents to sex, we do not feel that the criminal law ought to treat that as a sufficient excuse.

4.43 The legitimacy of comparing mistakes as to consent with mistakes as to defences has been impugned by Simester.[27] The contrast between *Morgan* and *Williams* arguably crosses too many boundaries to be useful in setting any one of them. For example, is the relevant distinction that one case concerns consent while the other concerns defence of others? Or that one concerns sexual offences while the other concerns assault? Or that, in *Williams*, the defendant also had to consider the possible adverse consequences of *failing* to act, so that (unlike in sexual cases) it was reasonable to act in a case of genuine doubt?

[21] *Smith and Hogan* (13th ed 2011) para 17.2.1 pp 626 and 627. As shown there, this view is not undisputed and some prefer to regard consent as a defence.

[22] *Smith and Hogan* (above) para 17.2.1.3 pp 634 to 643.

[23] See *Smith and Hogan* (above) para 17.2.1.3 p 639; *Jones* [1987] Crim LR 123.

[24] For the reasons for this reform, see the Home Office paper "Setting the Boundaries" (2000), para 2.13.

[25] "Cognition, emotion, and criminal culpability" [1990] *Law Quarterly Review* 469.

[26] [1987] 3 All ER 411, (1987) 78 Cr App R 276.

[27] "Mistakes in Defence" (1992) 12 *Oxford Journal of Legal Studies* 295.

4.44 As a matter of policy, the point could be made as follows. If an offence is drafted with a subjective definition of fault generally, and if an element of that offence is the absence of consent, it follows logically that the approach to belief in consent must also be subjective. But that does not answer the prior policy question whether the approach ought to be subjective or not as to all elements of the offence. There is nothing inconsistent in a fault requirement that is objective in relation to belief in consent and subjective in relation to belief in the other ingredients.

4.45 In the case of false imprisonment and kidnapping, and of any offence that may be proposed to replace them, absence of consent is clearly an essential ingredient: consent is not simply a defence. If no special provision is made, the test for belief in consent will therefore be subjective, following the "inexorable logic" element. That does not prevent a reasonable belief test being imposed by statute, just as it was in the case of rape, despite the "inexorable logic" argument. Nor does it cast any light on whether it would be desirable to do so.

4.46 The question here is whether in any offence or offences that may be created to replace false imprisonment or kidnapping, irrespective of the fault element as to conduct and consequences, the fault element as to the circumstance of consent ought to be objective or subjective. In other words, whether D should be excused only on the basis of a reasonable belief in consent or whether it should suffice that D had an honestly held belief in consent.

ARGUMENTS FOR A REASONABLE BELIEF TEST

4.47 Arguments that D should only be excused if D had a reasonable belief in consent can be mounted on the basis that deprivation of liberty, when it occurs, may have very serious effects on others (such as V's family) as well as on the individual detained. D's intentional interference with V's liberty should not be a choice taken lightly.

4.48 There is a further point of resemblance to sexual offences, namely that consent is easily ascertained because D and V are in close physical proximity.[28] There is therefore very little excuse for D failing to take steps to verify consent. On the other hand, in many cases one could argue that V has the opportunity to make the lack of consent known, and that D will find it hard to make a jury believe that there was scope for even an unreasonable mistake. Unlike in rape, lack of consent to detention or taking away may be communicated at any stage: there is less likely to be one crucial moment after which it is too late.

4.49 In mistaken self-defence cases, it can be argued that D ought to be permitted to make unreasonable mistakes because, as noted above, D's decision not to act in a case where D doubts whether D has reasonable grounds for self defence may result in consequences as grave as if D had acted. This is unlikely to be so in a case of mistaken belief in consent.

[28] This may not always be the case if it is decided to omit the requirement that D accompanies V.

ARGUMENTS AGAINST A REASONABLE BELIEF TEST

4.50 The arguments against an objective approach include that it will create incoherence with other offences against the person and that the policy reasons for imposing an objective test in sexual offences are not present in the case of kidnapping.

4.51 A reasonable belief test, if imposed, will apply to all instances of any offence or offences proposed to replace false imprisonment and kidnapping. This will include some fairly trivial instances, such as where one school child detains another on a bus for a few stops after the intended destination. It would be irrational to treat these cases differently from assault. In existing law assault and false imprisonment are closely related, both being based on trespass against the person. In a particular case assault and detention or moving may occur together and may even be constituted by the same physical act, and it would be confusing for a jury to have to apply two different tests.

4.52 Non-consensual sexual offences might be seen as a unique category of offence because the infringement of the autonomy and dignity of the victim is *always* severe, the consequences of a mistaken belief in consent are *always* serious and the consequences of desisting under a mistaken belief that V does not consent are *never* serious. It is therefore reasonable to impose a special duty on D to make sure of his ground. None of these arguments (except perhaps the point about the consequences of desisting) applies to false imprisonment or kidnapping.

4.53 This point may be illustrated by the arguments raised against the subjective test in the "Setting the Boundaries" paper which explored the policy issues informing the Sexual Offences Act.[29] These are:

> It [the subjective test] implicitly authorises the assumption of consent, regardless of the views of the victim, or whatever they say or do.
>
> It encourages people to adhere to myths about sexual behaviour and in particular that all women like to be overborne by a dominant male, and that "no" really means "yes". It undermines the fundamental concept of sexual autonomy.
>
> The mistaken belief arises in a situation where it is easy to seek consent and the cost to the victim of the forced penetration is very high. It is not unfair to any person to make them take care that their partner is consenting and be at risk of a prosecution if they do not do so.
>
> There is no justice in a situation whereby a woman (or a man) who has been raped in fact (because she or he did not consent) sees an assailant go free because of a belief system that society as a whole would find unreasonable – for example that he saw some or all women (or women of certain types) as sexual objects.
>
> It is easy to raise the defence but hard to disprove it.

[29] See n 24 above.

> The Youth Justice and Criminal Evidence Act 1999 limits the use of a complainant's sexual history in court. One of the exceptional cases where it may be introduced is when the defence of honest belief in consent is raised and sexual history is relevant to that belief. The concern is that this provision will significantly increase the use of the honest belief defence because that would open the door to introducing the element of previous sexual history as part of the defence, allowing cross-examination of the complainant on this issue.

With the possible exception of the arguments about the ease of seeking consent and about the defence being easy to raise but hard to disprove, none of these arguments has any application to detention or kidnapping.

4.54 Furthermore, the type of objective test to be applied would be open to debate. The definition of the fault element as to consent in section 1(1)(b) of the Sexual Offences Act 2003, which is the model most likely to be adopted if any, has given rise to controversy and has yet to be defined with clarity by the appellate courts. Section 1 requires the prosecution to prove that D does not reasonably believe that V consents. By subsection (2) "whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps [D] has taken to ascertain whether [V] consents". It is unclear whether the test is properly understood as requiring proof only that a reasonable person would have realised there was no consent in the circumstances in which D found himself, or whether it is necessary to rebut the defendant's claim that it was reasonable for him to hold that belief. This difficulty was recognised, but left unresolved, recently by Lord Justice Pitchford in *R v MM*.[30] His lordship stated at [53]:

> There is, we recognise, an interesting argument to be addressed as to whether there is a material difference between (1) an honest belief held by a defendant which may have been reasonable in the circumstances and (2) a belief which a reasonable man, placed in the defendant's circumstances, may have held. A statutory reasonable man test was held by the Privy Council in *A-G for Jersey v Holley*[31] to be stricter than the 'looser' concept of an honest belief which was reasonable in the circumstances (see the opinion of Lord Nicholls, particularly at paras 17-25). In the latter case it is arguable that the circumstances may include a mental illness which materially affected the defendant's ability to interpret the complainant's lack of consent. This, however, is not the time to engage in that argument since, on the facts of this case, a permissive construction of the section would not have availed this appellant.

4.55 Consultees are asked whether in any new offence the requirement of fault as to the circumstance of V's lack of consent should be:

(1) a requirement that D reasonably believed in V's consent to the act; or

(2) a requirement that D genuinely believed in V's consent to the act.

[30] [2011] EWCA Crim 1291.

[31] [2005] AC 580 (PC).

Procedural issues

4.56 The offences of kidnapping and false imprisonment are presently triable only on indictment – that is they can be tried only in the Crown Court and not in a magistrates' court. This position reflects the historical origins of the offences at common law. In contrast, only a few offences against the person are triable only on indictment. The offence of intentionally causing grievous bodily harm contrary to section 18 of the Offences against the Person Act 1861 is one such offence. Most of the other offences against the person are triable either way (in the Crown Court or a magistrates' court) depending on the seriousness of the offence and all the relevant circumstances. Examples of triable either way offences include the offence under section 20 of the 1861 Act of malicious wounding or inflicting grievous bodily harm and that under section 47 of occasioning actual bodily harm. Both are serious offences, carrying maximum sentence of 5 years' imprisonment if tried in the Crown Court.

4.57 We consider that there are arguments for making the proposed replacement offence for kidnapping and false imprisonment triable either way. First, this would reflect the position in relation to all but the most serious offences against the person such as that under section 18 of the 1861 Act.

4.58 Secondly, we can readily conceive of examples where the conduct that would fall within the definition of the offence (whichever model is proposed) would be suitable for trial in the magistrates' court with the more limited sentencing powers available to that court. As we have seen,[32] in existing law 21% of sentences for kidnapping and false imprisonment are non-custodial or are for terms of 6 months or less.

> Example, D1 and D2, young adults travelling on a bus, decide "as a joke" to detain V on the bus against V's will, so that V misses V's stop and has to walk back from the next one some considerable distance further along the route.

The conduct involved is an unpleasant form of bullying, and may warrant criminal prosecution,[33] but we doubt whether it would merit a Crown Court trial with the cost and delay that process entails.

4.59 Thirdly, making the offence one that is triable either way may have benefits for the prosecution. There may currently exist cases in which the conduct is not so serious that a charge of kidnapping is felt to be appropriate (as with the bus bullying above), but the alternative is to bring no prosecution at all, or to charge a low level offence against the person or a public order offence that, whilst not accurately describing the conduct, at least avoids an expensive and time-consuming Crown Court trial. It would be preferable if it were possible to bring a charge which accurately describes what has taken place and can be tried in a magistrates' court.

[32] Para 2.4 above.

[33] It is easy to see how the public interest in prosecution would be met, if for example the victim was a vulnerable person or the bullying was founded on V's disability.

4.60 Fourthly, for the defence, the benefit of a triable either way offence will be that in less serious cases the mode of trial procedure will allow the defendant the opportunity to plead guilty and to persuade the magistrates to retain jurisdiction for sentencing.

4.61 As against these arguments, it could be urged that at present kidnapping is an offence, and a word, carrying a uniquely powerful stigma, and that most examples of it involve a serious attack on an individual's dignity and autonomy. Allowing the new offence to be tried in a magistrates' court may be perceived as trivialising it. If the kidnapping label is lost, changing the mode of trial at the same time will appear to dilute the offence still further. If the label is retained, it would appear strange for "kidnapping" to be triable in a magistrates' court.

4.62 Another argument against making the new offence or offences triable either way is that it may have unintended consequences. At present some fairly trivial cases are prosecuted, such as the bullying cases described above:[34] we may infer that many more such cases are reported but are not thought worth the trouble and expense of a Crown Court prosecution. Allowing trial in a magistrates' court could encourage the bringing of more prosecutions in these minor cases and increase the burden on the criminal justice system.[35]

4.63 We provisionally propose that the offences replacing kidnapping and false imprisonment should, under whichever model is adopted from those provisionally proposed below, be triable either way. We seek consultees' views.

4.64 We do not at this stage propose any scheme for differentiating the types of offending that ought to be tried in a magistrates' court as opposed to in the Crown Court. We consider that the matter of appropriate allocation can be left to the normal mode of trial process.[36] This is the position with many offences including for example, fraud, theft, and assault occasioning actual bodily harm. As an alternative, it would be possible to devise a scheme for identifying certain categories of case which, presumptively or automatically, had to be tried in the Crown Court. The bases on which such categories could be defined could include the presence of aggravating features such as the use of a weapon or the vulnerability of the victim.

MODELS FOR THE OFFENCE OR OFFENCES

4.65 The questions we address here include whether there should be one offence or two; if there are two offences, whether they should be distinguished as detention and abduction respectively or by degree of seriousness; if by degree of seriousness, whether this should follow the level of fault or the presence of aggravating factors. All the models we discuss involve abolishing the common law offences of false imprisonment and kidnapping.

[34] Para 4.58.

[35] On the other hand, on the argument of para 4.59 it is not undesirable that these cases should be prosecuted but only that they should be prosecuted as kidnapping.

[36] See *Blackstone's Criminal Practice* (2011) Part D6.

Model 1: one offence

4.66 In this model, both false imprisonment and kidnapping would be replaced by a single offence of deprivation of liberty. This offence might be worded something like the following.

> A person who intentionally or recklessly deprives another of his freedom of movement without that person's consent and without lawful excuse is guilty of the offence of [unlawful detention].

4.67 The above wording is a suggestion only, as there are many other possibilities. One such possibility is that contained in the draft Criminal Code prepared by the Criminal Law Codification Advisory Committee for the Republic of Ireland,[37] which reads:

> **3206.**—(1) A person commits the offence of false imprisonment if he or she intentionally, knowingly or recklessly—
>
> (a) takes or detains,
>
> (b) causes to be taken or detained, or
>
> (c) otherwise restricts the personal liberty of,
>
> another without that other's consent.

4.68 This model satisfied the elements identified above: it is focused on the relevant conduct of D that causes the harm amounting to a loss of liberty, and includes the relevant elements of fault, consent and lawful excuse.

4.69 The advantage of this model is simplicity. It covers all instances of detention and the more serious instances of abduction, while excluding cases in which V is simply sent on a fool's errand. A related advantage is that it avoids disputes about whether D should be charged with false imprisonment or kidnapping, and whether kidnapping needs to cause loss of liberty during its course or later. As in all the proposed models, there is no separate requirement of force or fraud. **Both the problems mentioned in paragraph 4.1, namely the problem of abduction without force or fraud and the problem of movement followed by confinement, are therefore solved.**

4.70 As in all the models, the absence of consent would be a central element. In this model, it would be very straightforward in application. Consent to loss of liberty would be the sole question. The question of whether the journey itself was an unwanted one, apart from the means used to make V take it or its results in the form of captivity, would not arise.

[37] Appendix B para B.46 below.

Example. V, as part of a collusive ransom fraud, agrees to be taken from home, tied up in the back of a van, driven to Manchester and held there till the ransom is paid. In fact the van is driven to Liverpool. On the one-offence model, this is not an offence, as V has consented to the deprivation of freedom of movement and has only not consented to the destination. However, it becomes an offence if V continues to be held after noticing that they are in the wrong place and demanding to be released.

4.71 Equally straightforward would be the relevant fault elements. The same standard of fault would apply to all instances. In the one-offence model, as in the existing offence of false imprisonment, the offence would be largely based on consequences rather than on the exact nature of D's conduct. There would be the possibility of defining the fault element as to circumstances of V's lack of consent in either objective or subjective terms (ie either that D must reasonably believe in consent or that D must genuinely believe in consent). Neither would overcomplicate the offence.

4.72 The harm targeted by the new offence would also be clear: loss of freedom of movement. The definition of the offence would be directed solely to this harm, other harms being relevant only to sentencing. It would be immaterial whether the loss of liberty occurred while V was in motion or at rest. However, simply causing V to go on an unwanted journey would not constitute the offence, as this does not in itself imply a sufficient loss of liberty.[38]

4.73 The principal disadvantage is one of labelling. The term "kidnapping" carries a strong stigma, which is apt to single out the more serious offences against liberty. For some people, having just one offence, even though adequate in coverage and sentencing powers, might appear comparatively colourless and fail to respect a public perception that kidnapping should be distinguished as worse than ordinary unlawful detention. The labelling problem is not readily solved by calling the new single offence "kidnapping" as that risks diluting the impact of that word by applying it to too many instances.

4.74 A related disadvantage of this option is that it may be considered to be over-simplistic and not to recognise the distinctive wrongs involved in abducting and detaining. Similarly, it conveys the impression that deprivation of liberty is the sole harm with which the offence is concerned, whereas in practice the victim of abduction may also be subjected to additional harms, such as the fear of being in an unknown place. Loss of liberty may be suitable as a threshold harm, to distinguish those instances that should be criminal from those that should not, but it might not always express the true nature of the victim's experience.

[38] Para 4.15 above.

4.75 Arguably, this option leaves too many important facts to be determined by the judge in a *Newton* hearing, rather than by the jury at the trial. (A *Newton* hearing is a hearing conducted before a judge without a jury, following conviction, to decide between conflicting factual accounts between the parties which are relevant to sentencing. These usually arise when defendant pleads guilty to an offence but factual issues remain unresolved.) For example, if D is found guilty of abduction but claims that he was only trying to frighten V, while the prosecution alleges that D intended to murder V, the two accounts amount to substantially different offences between which the jury should have the chance to choose.

4.76 One further potential problem is that questions may arise about whether a victim who is a baby or a paralysed person can be deprived of freedom of movement. The test should be, and the definition would need to make clear, that D subjected V to an external constraint that would prevent an able person in V's position from leaving: it should be irrelevant that V is also subject to an internal constraint. As we have seen, in existing law false imprisonment can be committed when V is asleep.[39] This is largely a drafting problem, and would be avoided by wording such as that in the draft Irish Criminal Code, cited above.

Model 2: two offences, detention and abduction

4.77 This model would involve creating separate offences for detention and kidnapping or abduction, that is:

(1) the intentional or reckless detention of one person by another, without the consent of the person detained and without lawful excuse; and

(2) the intentional or reckless abduction of one person by another, without the consent of the person abducted and without lawful excuse.

For reasons which will become apparent, this is no more than an outline and will need considerable refinement to become a workable definition of the offences.

Detention

4.78 The concept of detention is reasonably unambiguous and can be used without further attempts to define it. The potential uncertainty whether it can be committed by fraud as well as by force can be removed if the offence is defined in such a way that it is clear that it can be committed by fraud if the intended, and actual, effect of the fraud is that V believes that V cannot leave the place of confinement.[40]

[39] Para 2.162 above.

[40] In fleshing out the detail of the offence, it will be necessary to discuss whether V's belief would have to be a reasonable one given the fraud, and whether D needs to be aware that the fraud is likely to cause this reaction in V.

Abduction

4.79 Significant difficulties do however arise in defining the abduction offence. It would be a necessary (but perhaps not sufficient) condition that V is made to go from one place to another without consent. As mentioned above,[41] there are many variations of this.

(1) At the lowest level there are the pure fool's errand cases, where D induces V (say by fraud) to make an unwanted journey, whether or not in the company of D. Arguably this is no different from inducing V to undertake any other unwanted action. The main harm to V in these cases is not so much loss of liberty as waste of time and effort, and possible humiliation.

(2) Further along the spectrum are cases of the *Wellard*[42] type, where V's freedom of movement is genuinely removed or pre-empted, because V has or feels[43] V has no option but to go where V is told. Here D has caused a loss of freedom, in the same sense as in the detention cases though perhaps in not so obvious a form. There will also be loss of time, and there may or may not be other harms such as fear.

(3) Another category is those cases where D, whether by fraud or pure enticement, induces V to go from one place to another and V is confined on arrival at the destination. Here the harms are basically the same as in detention, but perhaps with the added fear caused by being in a strange place.

(4) At the highest level are the full-scale snatching cases, where D physically overpowers V and V is in genuine captivity throughout the journey, whether or not V is also confined at the end of it. Again there is loss of liberty, but the associated harms (fear, loss of dignity, exposure to violence) are present in a high degree and may be more important to V than the loss of liberty.

(5) Finally, there could in theory be cases where loss of liberty is present in too low a degree to justify criminalisation on its own but the other harms, such as fear and exposure to ransom demands, are sufficient to bring the case into the criminal category. This will mainly apply to cases of sending a person abroad.

4.80 The question is whether an offence of abduction should encompass every one of these instances of causing a person to go from one place to another (subject to any defence of consent or lawful excuse) or whether it needs to be restricted by some further requirement to prevent overcriminalisation.

[41] Para 4.14 and following.

[42] Para 2.13.

[43] See n 40 above.

4.81 We consider that an offence based on the imposition of an unwanted journey, without further qualification, would indeed be too wide. It would include all five of the variations in paragraph 4.79, in particular the sending of V on a fool's errand. As argued above,[44] this harm is not in itself sufficient to justify criminalisation.

4.82 A second, narrower, approach to defining abduction would be to base that element on a requirement of "carrying" or "taking" V from one place to another. This would imply that there must be compulsion and that causing V to travel unaccompanied by D or D's agent does not suffice. This may be too narrow, for the following reasons.

(1) It implies that D must accompany V; or rather, compel V to accompany D. Thus, if D pulls V into a railway carriage with D and stays with V till the destination is reached, that will be kidnapping. But if D locks V into the carriage and arranges for a confederate to take V out at the other end, it will not (though it will amount to detention). Arguably this distinction is arbitrary, as the harm suffered by V is the same, and D's wrongful purpose is the same whether D is present or not.

(2) It places too much importance on the order of events. If D forcibly takes V to a destination and confines V there, that will be kidnapping. But if D sends or entices V there by fraud and then captures and confines V, that will not, though once more it will be a detention offence. Yet the harm suffered by V is similar in both cases: V has been subjected to an unwanted journey and has been deprived of liberty. The only difference is in the mechanics.

In both respects, it reinstates the problems with the law of kidnapping that we have identified in Part 3.[45]

4.83 In identifying the appropriate limits of the abduction offence, the harm that should be targeted is not simply having been caused to go to a place where one does not wish to be: it is a complex harm combining an unwanted journey with loss of liberty. If so, it should not matter whether the harms were experienced together or in sequence, or in which order, provided that they result from the same course of conduct.

4.84 The principal disadvantages of this model are: first the difficulty in defining abduction; second, that there would be arbitrary distinctions on the border between the detention and abduction offences; and third, difficulties in dealing with cases involving both moving and stationary phases of the same operation. As argued in Part 3, a case where a person is captured and held for ransom is recognisably kidnapping in the popular sense of that word: it seems artificial and counter-intuitive that the offence ends as soon as the place of confinement is reached.

4.85 However, these disadvantages will not produce the unsatisfactory practical consequences of the existing law. This is for two reasons.

[44] Para 4.13 and following.

[45] Paras 3.25 to 3.31 above (for accompanying); paras 3.3 to 3.14 (for order of events).

(1) Cases involving detention following enticement by fraud or otherwise may fall outside the abduction offence, but can be prosecuted under the detention offence; and unlike in existing law the two offences will be of equal status and gravity. In cases of doubt both can be charged together.

(2) In all the models we are now considering, the requirement of force or fraud, as a distinct element from that of lack of consent, has been removed. This will avoid the problem mentioned in Part 3, whereby the enticement of a child or mentally impaired person to a place of confinement does not at present amount to kidnapping, because there is no force or fraud until the journey is over. If however a narrow definition of abduction is used, involving compulsion,[46] the force or fraud requirement will in effect have been reinstated under another name and the case will still fall outside kidnapping, because the child or mentally impaired person has not been compelled.

It would also be possible to overcome this problem by specifically defining the conduct element of the abduction offence as including any period of confinement following the abduction. A possible draft is provided below.[47]

4.86 In summary, the purpose of distinguishing detention from abduction should be to distinguish those courses of conduct that involve abduction from those that do not. It should not be to distinguish the detention and abduction phases of the same course of conduct. The course of conduct should constitute kidnapping if its overall effect is to leave V in a different place from that in which D found V, and V was deprived of liberty at some stage.

4.87 In conclusion, in this model:

(1) the problem of abduction without force or fraud[48] would be solved, provided that the taking by compulsion definition is not used;

(2) the problem of moving followed by confinement[49] remains a concern but can be solved by sufficiently careful drafting.

Fault

4.88 The basic action underlying these types of offence is normally carried out intentionally: one may be reckless as to the circumstances which prevail or the consequences of the action. However, the very terms “detain” and “move” imply a consequence as well as a type of action: in that sense one can be reckless as to whether one detains or moves another.[50] We propose that:

[46] As in para 4.82 above.

[47] Para 4.89.

[48] Para 4.1(1).

[49] Para 4.1(2).

[50] Para 4.33 above.

(1) as the detention offence may consist of any action which has the effect of depriving V of freedom of movement, it should require that D either intends to deprive V of freedom of movement or is (subjectively) recklessness as to whether such deprivation results;

(2) in the case of abduction, D must intend or be (subjectively) reckless both about the fact that D's action will cause V to be moved at all and about any loss of freedom of movement occurring during or after the journey.

4.89 Given the above discussion, the two offences may be refined to look somewhat like the following, though once more it should be emphasised that we are not at this stage providing anything like a draft statute.

(1) Statutory false imprisonment is committed where D intentionally or recklessly detains V, without the consent of V and without lawful excuse.

(2) Statutory kidnapping is committed where D:

(a) intentionally or recklessly sends, takes or carries V, or does anything which results in V going or being sent, taken or carried, from one place to another; and

(b) in connection with or as a consequence of that sending, taking, carrying or other action, intentionally or recklessly deprives V of freedom of movement;

without the consent of V and without lawful excuse.

Model 3: two offences, basic and aggravated

4.90 Model 1 contains just one offence, while Model 2 contains two offences of equal gravity. The remaining possibility is a vertical scheme, with a more serious and a less serious offence: this would have the advantage of retaining the stigma of "kidnapping" for the most serious cases.

4.91 One possibility would be to distinguish by degrees of fault, for example by having one offence of reckless deprivation of liberty and one of intentional deprivation of liberty. This pattern is found elsewhere in the criminal law, for example in the distinction between murder and manslaughter, and between the offences under sections 18 and 20 of the Offences Against the Person Act 1861. As we have seen, however, while reckless deprivation of liberty can occur, the examples are marginal and unlikely and most detentions and abductions are likely to be intentional.[51] Distinguishing by reference to intention will therefore not achieve the object of isolating the exceptionally serious examples from the rest.

[51] Paras 2.142 and 4.33 above.

4.92 Our final model follows an approach found in previous law reform proposals,[52] the legislation of more than one Commonwealth country[53] and the United States Model Criminal Code.[54] This approach reflects the arguments (i) that it is important to keep the label "kidnapping" for the most serious cases and (ii) that neither the distinction between abduction and detention nor that between recklessness and intention is quite sufficient for this purpose. Kidnapping is therefore defined as detention or abduction (or sometimes abduction only) where any of a list of aggravating factors is present: usually the intention to commit another offence.

4.93 The basic offence would be one of deprivation of liberty (by detention or abduction), as in Model 1. The more serious offence would be detention or abduction aggravated by any of a list of factors: we discuss below[55] whether this offence should include the same loss of liberty requirement as the basic offence.

4.94 The rationale for this model is that while, as we have said, the moving of V is a different type of wrong from merely detaining V and will often involve more of the additional harms (fear, loss of dignity, loss of time, economic loss, distress to one's family and vulnerability to physical or psychological abuse), this is not necessarily true in every case. On this reasoning it would be better for any kidnapping offence to target these additional harms directly rather than by way of a presumption that they are more likely to occur in cases where V is moved.

4.95 The aggravating factors in the different schemes mentioned above are as follows.

(1) In the Criminal Law Reform Committee's 1976 proposals, the intention of holding the person to ransom or as a hostage, the intention of sending him or her out of the realm, the use of drugs, force or the threat of injury.

(2) In the draft Criminal Code of 1989, the intention to hold the person to ransom or as a hostage, to send him or her out of the United Kingdom or to commit an [arrestable][56] offence.

(3) In New South Wales, committing the crime in company with others, inflicting actual bodily harm or (in the specially aggravated form) both.

(4) In Victoria, the intention to demand ransom or obtain some other advantage.

(5) In the other Australian states, the intention to gain anything or procure anything to be done, the use of threats being a further aggravation.

(6) In Canada, the fact of "kidnapping" (presumably in the English sense)[57] combined with intention to imprison, send out of the country or hold to ransom or in service.

[52] Appendix A.

[53] Appendix B.

[54] Appendix B para B.48.

[55] Para 4.103.

[56] That category has now been abolished.

(7) In New Zealand, intention to imprison, send out of the country or hold to ransom or in service.

4.96 Out of these, the recurrent aggravating factors consist of the intention to engage in any of the following types of conduct:

(1) the infliction or threat of force or actual bodily harm;

(2) obtaining or demanding ransom or some other advantage;

(3) holding V in service;

(4) sending V out of the country.

A similar list could form part of Model 3.

4.97 On this approach, kidnapping would be an offence of intention as opposed to recklessness. The aggravating factors all reflect distinct wrongs consisting of the intention to engage in certain forms of conduct, either in order to capture V or while V is in custody. This intention cannot logically be formed unless D either believes that D has V in his custody or intends to capture V. This fact further serves to underline the greater seriousness of kidnapping compared with the basic offence of detention or false imprisonment, which may be merely reckless.

4.98 The full kidnapping offence would be committed whether the types of conduct referred to in the aggravating factors were performed or merely intended.[58] Inchoate offences such as attempt and conspiracy to kidnap would require the intention to deprive V of liberty together with the intention to engage in the relevant conduct.

4.99 The advantage of this model is that it reserves the label "kidnapping" for the most serious examples, which the public would recognise as deserving it. At the same time, it uncouples the distinction between the more serious offence and the less serious offence from that between abduction and detention; and since the basic offence would include minor cases, it would be possible to consider making it triable either way rather than on indictment only.[59] Like Model 1, it avoids artificial distinctions on the boundary between the detention and abduction phases of a course of conduct. If an aggravating factor is present each will constitute kidnapping; if there is no aggravating factor each will constitute the lesser offence.

[57] Which must include transporting a person from one place to another: *Karpenko, Mayo, George and Mayo* 2005 MBQB 40, para B.21 below.

[58] It would be possible to provide an alternative mode of commission, on the model of burglary, namely that D, having deprived V of liberty, proceeds to engage in those types of conduct, but we believe that this would merely complicate matters. (Theft Act 1968 s 9 defines burglary as either entering as a trespasser with the intent to commit certain offences or the committing of certain offences by one who has entered as a trespasser.)

[59] Para 4.56 and following, above.

Example. D invites V to D's flat without any use of force or fraud and V comes willingly. D then locks V in and keeps V there for weeks while making repeated ransom demands. In existing law this is false imprisonment but not kidnapping. Arguably it should carry the same odium as kidnapping, and if two offences are to be created it should fall within the more serious of the two.

Example. D is taking V, his girlfriend, out on a date in his car. They get into an argument; D drives the car round the neighbourhood and refuses to let her out until he has finished saying what he wants to say. Technically this would at present be kidnapping; but the experience which V has undergone is no different from that of false imprisonment.

4.100 The main disadvantage of this model is its complexity. It could further be argued that this complexity is unnecessary. Since most of the aggravating factors consist of the intention to commit an existing offence in English law, it would be easier to charge the basic detention or abduction offence together with attempt to commit the other offence (or the offence itself, if the intention is fulfilled). As concerns abduction cases where aggravating factors are not present, it has the same disadvantage as Model 1, of trying to explain abduction on the analogy of detention rather than as a separate wrong, though as argued above[60] the loss of liberty test is useful in excluding the fool's errand cases.

4.101 A second disadvantage of distinguishing between basic and aggravated offences is the danger of wrong charging: if a person is charged with the basic offence and the facts that emerge at the trial would justify conviction for the aggravated offence, the possible sentence is limited to that for the basic offence. It would be simpler to have one offence, as in Model 1, spanning the whole range of possible sentences, and for the aggravating factors to be reflected in sentencing guidelines.[61]

4.102 A third disadvantage is that the choice of aggravating factors is necessarily rather arbitrary: for example some might ask why the list includes intent to cause bodily harm but not to commit murder or rape. We emphasise that the list set out above, drawn from the factors most commonly found in Commonwealth legislation and previous law reform proposals, is given simply by way of example and that we invite suggestions for additional factors or entirely different lists.

4.103 One final difficulty would lie in identifying how to incorporate a loss of liberty test in the two offences within Model 3. As the basic offence would be defined as deprivation of liberty, as in Model 1, a loss of liberty test would be present automatically in that offence. For the more serious offence there are two choices.

(1) The more serious offence could follow the basic offence, with the addition of the aggravating factors.

[60] Para 4.15.

[61] Sentencing guidelines are prepared by the Sentencing Council set up by Part 4 of the Coroners and Justice Act 2009.

(2) Alternatively it could be defined as any detention or moving where the aggravating factors are present, whether or not V suffers a loss of liberty. This would mainly cover cases where V is caused to go abroad without the use of physical compulsion or other means of confinement.[62]

4.104 The argument for this last possibility is that, within the more serious offence, moving can be treated independently of detention with no risk of criminalising the mere fool's errand cases, as the aggravating factor will be sufficient in itself to show that seriously criminal behaviour is present.

4.105 The argument against it is that, under this scheme, the greater offence will not always include the lesser and that it will not be possible to convict of the lesser offence if the greater is charged but not made out; though this problem can be obviated by charging the two offences together. That presents its own disadvantages in practical terms. From a more conceptual point of view, omitting the loss of liberty test from the more serious offence is inelegant: the listed factors will be not aggravations but conditions making the difference between full kidnapping and no offence at all.

4.106 As in all the models, there would be no separate requirement of force or fraud, apart from those particular applications of force that form part of the aggravated offence. As in Model 1, there is no distinction between the stationary and the moving forms or phases of conduct causing a loss of liberty. This model therefore solves both the problems mentioned in paragraph 4.1 above, namely abduction without force or fraud and moving followed by confinement.

THE CHOICE

Model 1

4.107 A single offence of deprivation of liberty, possibly defined as follows.

> A person who intentionally or recklessly deprives another of his freedom of movement without that person's consent and without lawful excuse is guilty of the offence of [unlawful detention].[63]

Model 2

4.108 Two offences, as follows.

(1) Statutory false imprisonment, defined as the intentional or reckless detention of one person by another, without the consent of the person detained and without lawful excuse.

(2) Statutory kidnapping, which exists where one person:

(a) intentionally or recklessly sends, takes or carries another, or does anything which results in that other going or being sent, taken or carried, from one place to another; and

[62] Para 4.16(2) above.

[63] Para 4.66 and following.

(b) in connection with or as a consequence of that sending, taking, carrying or other action, intentionally or recklessly deprives that other of freedom of movement;

without the consent of the person taken, carried or detained and without lawful excuse.[64]

Model 3

4.109 Two offences, as follows.

(1) A basic offence of intentional or reckless deprivation of liberty by detention or abduction, as in Model 1.

(2) A more serious offence of kidnapping, defined as detention or abduction with the intention of engaging in any of the following forms of conduct, namely:

(a) the infliction or threat of force or actual bodily harm;

(b) obtaining or demanding ransom or some other advantage;

(c) holding the person detained or abducted in service;

(d) sending that person out of the country.[65]

4.110 We do not propose any one of these models in preference to the rest. **Consultees are asked if they have any preference among these models. They are also invited to suggest models other than these.**

[64] Para 4.77 and following.

[65] Para 4.90 and following.

PART 5
QUESTIONS FOR CONSULTATION

5.1 We provisionally propose that the existing common law offences of false imprisonment and kidnapping should be abolished and replaced by one or more statutory offences. (Paragraph 4.4)

Consent, force and fraud

5.2 We provisionally propose that:

(1) lack of consent should be a condition of liability in any new offence that may be created to replace false imprisonment or kidnapping; and

(2) any such offence should contain no separate requirement of force or fraud, but force and fraud should be taken into account in establishing whether or not a person consented to being detained or moved. (Paragraph 4.26)

Lawful excuse

5.3 We provisionally propose that, in any new offence, detaining or moving a person should only be criminal if done without lawful excuse, and that the question of what is a lawful excuse (including the question of putative defences) should be determined in accordance with the general law applying to offences against the person. (Paragraph 4.32)

Fault

5.4 We provisionally propose that the fault element of any new offence should be intention or subjective recklessness, both as to the nature of the act and as to its consequences such as loss of liberty and being required to take an unwanted journey. (Paragraph 4.35)

5.5 Consultees are asked whether in any new offence the requirement of fault as to the circumstance of V's lack of consent should be either :

(1) A requirement that D reasonably believed in V's consent to the act

(2) A requirement that D genuinely believed in V's consent to the act. (Paragraph 4.55)

Triable either way

5.6 We provisionally propose that the offences replacing kidnapping and false imprisonment should, under whichever model is adopted from those provisionally proposed below, become triable either way. We seek consultees' views. (Paragraph 4.63)

Models for the new offence or offences

5.7 Consultees are asked to comment on the merits of the following models.

(1) Model 1: a single offence of intentionally or recklessly depriving another person of freedom of movement without that person's consent and without lawful excuse. (Paragraph 4.107)

(2) Model 2: two offences, one of unlawful detention and the other of unlawful abduction. (Paragraph 4.108)

(3) Model 3: one basic offence, defined as in Model 1, and one aggravated offence, defined as detention or abduction with the intention to inflict force or bodily harm, obtain or demand ransom or another advantage, hold the victim in service or send the victim out of the country. (Paragraph 4.109)

5.8 Consultees are also invited to suggest models other than these. (Paragraph 4.110)

APPENDIX A
PREVIOUS REFORM PROPOSALS

A.1 There have been two proposals for the reform of false imprisonment and kidnapping in the last few decades.

A.2 The Criminal Law Revision Committee's 1976 Working Paper on Offences against the Person suggested replacement of all detention and abduction offences.[1] There would be five new offences, as follows.

(1) Unlawful detention (maximum 3 years' imprisonment).

(2) Kidnapping, meaning unlawful detention aggravated by:

(a) the intention of holding to ransom or as a hostage;

(b) the intention of sending the person out of the realm;

(c) the use of drugs, force or the threat of injury.

(3) Taking a child under 14 out of the custody of its parents or guardians.

(4) Abduction of a child under 14 with the intention of holding it to ransom or as a hostage or of sending it out of the realm (this was necessary to cover cases where the child consents and therefore kidnapping cannot be charged).

(5) Abduction of a child with intent to commit a sexual offence.

A.3 These recommendations were never implemented, though a fresh code of child abduction offences was adopted in 1984 and overhauled in 1989.[2]

A.4 The relevant clauses of the 1989 draft Criminal Code[3] read as follows.

Interpretation

79. For the purposes of sections 80 to 85—

(a) a person takes another if he causes the other to accompany him or a third person or causes him to be taken;

(b) a person detains another if he causes the other to remain where he is;

(c) a person sends another if he causes the other to be sent; and

[1] The recommendations are discussed in more detail by Napier, "Detention Offences at Common Law", in Glazebrook, *Reshaping the Criminal Law* (1978) 190 at pp 197 to 198.

[2] Para C.2 and following, below.

[3] Criminal Law: a Criminal Code for England and Wales (1989) Law Com No 177.

(d) a person acts without the consent of another if he obtains the other's consent —

(i) by force or threat of force; or

(ii) by deception causing the other to believe that he is under legal compulsion to consent.

Unlawful detention

80.—(1) A person is guilty of unlawful detention if he intentionally or recklessly takes or detains another without that other's consent.

(2) A person is not guilty of an offence under this section if the person taken or detained is, or he believes him to be, a child under the age of sixteen and—

(a) he has, or believes he has, lawful control of the child; or

(b) he has, or believes he has, the consent of a person who has, or whom he believes to have, lawful control of the child, or he believes that he would have that consent if the person were aware of all the relevant circumstances.

Kidnapping

81. A person is guilty of kidnapping if he intentionally or recklessly takes or detains another without that other's consent, intending—

(a) to hold him to ransom or as a hostage; or

(b) to send him out of the United Kingdom; or

(c) to commit an arrestable offence.

A.5 For the purpose of these offences, "without consent" is defined as including cases where the consent is obtained by force or threat of force, or by deception causing the other to believe that he is under legal compulsion to consent.

Scotland

A.6 In 2003 a draft Code published under the auspices of the Scottish Law Commission proposed a revised offence of abduction.[4]

Abduction

45. A person who carries off or takes away another person, without that person's consent, intending such abduction or being reckless as to whether there is such abduction, is guilty of the offence of abduction.

[4] A Draft Criminal Code for Scotland with Commentary, Edinburgh 2003.

Deprivation of liberty

46. A person who deprives another person of liberty, without that person's consent, intending such deprivation or being reckless as to whether there is such deprivation, is guilty of the offence of deprivation of liberty.

APPENDIX B
THE LAW IN OTHER COUNTRIES

AUSTRALIA

B.1 There is no offence of kidnapping in the Federal Criminal Code, except for a specialised offence of kidnapping UN personnel.[1]

B.2 Such an offence is however included in the Model Criminal Code (MCC). This is an optional model, since the federal government has no authority under the Constitution to enact criminal laws at state level; it may only enact law relating to crimes against the Commonwealth (such as the specialised offence of kidnapping UN personnel, already mentioned). The relevant part of the MCC reads:

> **Division 8: Kidnapping, child abduction and unlawful detention**
>
> **5.1.32 Taking or detaining—interpretation**
>
> For the purposes of this Division:
>
> (a) taking another person includes causing the person to accompany a person and causing the person to be taken, and
>
> (b) detaining another person includes causing the person to remain where he or she is.
>
> **5.1.33 Kidnapping**
>
> (1) A person who takes or detains another person, without the person's consent:
>
> (a) with the intention of holding that other person to ransom or as a hostage, or
>
> (b) with the intention of taking or sending that other person out of the jurisdiction, or
>
> (c) with the intention of committing an indictable offence against that other person or a third person,
>
> is guilty of an offence.
>
> *Maximum penalty: Imprisonment for 15 years.*
>
> *Maximum penalty (aggravated offence): Imprisonment for 19 years.*
>
> (2) A person who takes or detains a child is to be treated as acting without the consent of the child.
>
> (3) A person who takes or detains a child with the intention of taking or sending the child out of the jurisdiction does not commit an offence against subsection (1) (b) if:

[1] Commonwealth Criminal Code, s 71.9.

(a) the person has lawful custody of the child or is acting with the consent of the person who has lawful custody of the child, and

(b) the person is not acting in contravention of any order of a court relating to the child.

5.1.34 Child abduction

(1) A person who takes or detains a child with the intention of removing or keeping the child from the lawful control of any parent of the child, without the consent of that parent, is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

Maximum penalty (aggravated offence): Imprisonment for 9 years.

(2) It is not a defence to a charge under this section that the child consented to being taken or detained unless, at the time of the taking or detention, the person who took or detained the child was the child's spouse or de facto partner and the child was over 14 years of age.

(3) A person does not commit an offence against this section if the person is a parent of the child.

5.1.35 Unlawful detention

A person who takes or detains another person without the other person's consent is guilty of an offence.

Maximum penalty: Imprisonment for 5 years.

Maximum penalty (aggravated offence): Imprisonment for 6 years.

B.3 All jurisdictions in Australia now have a statutory offence of kidnapping, though some still retain the common law offence alongside the statutory one.[2] In all the Australian definitions discussed below, it appears that the main ingredient distinguishing (statutory) kidnapping from ordinary false imprisonment is the intention to gain or procure something.[3] However beyond that the tests differ, even in their *actus reus*; Justice Demack remarked in *Campbell and Brennan*[4] that the provisions in the three states, Queensland, Victoria and New South Wales, were "quite different", but did not elaborate on which, if any, he thought was preferable.

New South Wales

B.4 In New South Wales, the Crimes Act 1900 defines kidnapping as follows.

86. Kidnapping

(1) *Basic offence* A person who takes or detains a person, without the person's consent:

[2] M Bagaric and K J Arenson, *Criminal Laws in Australia: Cases and Materials* (2004) p 280.

[3] See the Queensland case of *Campbell and Brennan* [1981] Qd R 516.

(a) with the intention of holding the person to ransom, or

(b) with the intention of obtaining any other advantage,

is liable to imprisonment for 14 years.

(2) *Aggravated offence* A person is guilty of an offence under this subsection if:

(a) the person commits an offence under subsection (1) in the company of another person or persons, OR[5]

(b) the person commits an offence under subsection (1) and at the time of, or immediately before or after, the commission of the offence, actual bodily harm is occasioned to the alleged victim.

A person convicted of an offence under this subsection is liable to imprisonment for 20 years.

(3) *Specially aggravated offence* A person is guilty of an offence under this subsection if the person commits an offence under subsection (1):

(a) in the company of another person or persons, AND[6]

(b) at the time of, or immediately before or after, the commission of the offence, actual bodily harm is occasioned to the alleged victim.

A person convicted of an offence under this subsection is liable to imprisonment for 25 years.

(4) *Alternative verdicts* If on the trial of a person for an offence under subsection (2) or (3) the jury is not satisfied that the accused is guilty of the offence charged, but is satisfied on the evidence that the accused is guilty of a lesser offence under this section, it may find the accused not guilty of the offence charged but guilty of the lesser offence, and the accused is liable to punishment accordingly.

(5) A person who takes or detains a child is to be treated as acting without the consent of the child.

(6) A person who takes or detains a child does not commit an offence under this section if:

(a) the person is the parent of the child or is acting with the consent of a parent of the child, and

[4] [1981] Qd R 516.

[5] Emphasis ours.

[6] Emphasis ours.

(b) the person is not acting in contravention of any order of a court relating to the child.

(7) In this section:

"child" means a child under the age of 16 years.

"detaining" a person includes causing the person to remain where he or she is.

"parent" of a child means a person who has, in relation to the child, all the duties, powers, responsibilities and authority that, by law, parents have in relation to their children.

"taking" a person includes causing the person to accompany a person and causing the person to be taken.

B.5 "Intention to hold" means "an intention to hold the victim irrespective of whether the victim is willing or consents to remain with the accused".[7]

B.6 There is no separate statutory offence of false imprisonment, though the offence survives at common law.[8] In *Davis*[9] Justice Howie considered the meaning of "kidnapping" at common law and whether section 86 (previously 90A) created two offences ("taking away" and "detaining") or whether these are two ways of committing the same offence. The defendant was convicted under section 86(2)(b) of having taken the victim, driven her away and then, after stopping the car, inflicting actual bodily harm while sexually assaulting her. The defendant's case on appeal was that there were in fact two separate offences, aggravated taking and aggravated detention. Since he had harmed her only during the detention and not at the point of the taking, and the count in the indictment only referred to "taking", his conviction could not stand.

B.7 Justice Howie began by discussing the common law offence. He quoted Lord Brandon's definition in *D*[10] and went on to observe that the distinguishing feature between kidnapping and false imprisonment at common law seemed to be movement from one place to another (he called it "asportation"),[11] but noted that this asportation does not have to be over a very long distance; here he cited *Wellard*.[12] He then charted the development of the statutory offences in New South Wales, beginning as a way to deter abduction of young girls for marriage or carnal knowledge and, after the notorious Lindbergh case, to address cases of kidnap to hold for ransom.

B.8 On the distinction between the two forms (taking away and detaining), he said

7 *DMC* [2002] NSWCCA 513.

8 Criminal Procedure Act 1986 (NSW) Sch 1 Table 1 para 16C.

9 [2006] NSWCCA 392.

10 [1984] AC 778.

11 See for example Orton J in *Smith v State*, Wisconsin Supreme Court (1885) 6 *Criminal Law Magazine* 708; "Kidnapping and the Element of Asportation" (1962) 35 *Southern California Law Review* 212 at 216.

12 [1978] 1 WLR 921.

> The terminology used for the statutory offence of kidnapping was that which had generally been employed for the offences of abduction, that is the offence was made out if the offender either detained or took away the victim with the necessary intention. These offences incorporated both the common law offence of kidnapping, in so far as they involved an asportation of the victim, and false imprisonment, insofar as they involved a detention without any removal of the victim. Yet, although the statutory abduction offences have existed for more than a century, it has never been suggested in any of the cases or texts which I have been able to discover that there were in fact two offences created by each of the relevant provisions: one where the victim is taken away and one where the victim is detained. This is not surprising because at common law every kidnapping involved a false imprisonment.[13]

B.9 Later, on the current section 86, he said

> The history of the present offence of kidnapping in s 86 of the Crimes Act seems to confirm my initial impression that the section contains only one offence but provides that it can be committed in one of two ways so far as the *actus reus* of the offence is concerned: by taking or detaining the victim. As at common law, every taking will include a detention, but not every detention will involve a taking. In any event it is the interference with the liberty of the person that is the conduct at the heart of the modern day concept of kidnapping. I can see no policy consideration that would warrant an interpretation of the section as giving rise to two distinct offences as the appellant asserts.[14]

The appellant had submitted that his argument, of there being two separate offences, was supported by the English Court of Appeal's decision in *Reid*,[15] where it was held that:

> We can find no reason in authority or principle why the crime should not be complete when the person is seized and carried away, or why kidnapping should be regarded, as was urged by counsel, as a continuing offence involving the concealment of the person seized.

However, Justice Howie held that:

[13] [2006] NSWCCA 392 at [44].

[14] [2006] NSWCCA 392 at [56].

[15] *Reid* [1973] QB 299.

> These remarks, made in the context of a discussion of the common law offence of kidnapping, do not assist the appellant. The Court was simply holding that the crime of kidnapping is complete once the victim has been detained and carried away (or taken), and, in addition, that concealment of the victim during or following the carrying away is not an element of the offence. It is the fact of the carrying away, not its duration or extent, that is important. If the victim is detained and moved just a short distance, the offence is just as complete as if the person was detained and moved a thousand miles. That is not the same thing as saying that the carrying away of the person who was taken a thousand miles ceased to be a carrying away once the person had been moved just a short distance.

Victoria

B.10 In Victoria, the Crimes Act 1958 provides:

> **63A. Kidnapping**
>
> Whosoever leads takes or entices away or detains any person with intent to demand from that person or any other person any payment by way of ransom for the return or release of that person or with intent to gain for himself or any other person any advantage (however arising) from the detention of that person shall, whether or not any demand or threat is in fact made, be guilty of an indictable offence and liable to level 2 imprisonment (25 years maximum).

There is a separate offence of child stealing.[16] In addition, the table of maximum prison terms in the Crimes Act 1958 indicates that both false imprisonment and kidnapping survive at common law.[17]

[16] Crimes Act 1958 (Vic) s 63.

[17] Above, s 320.

B.11 In *Nguyen*[18] it was argued that the common law offence of kidnapping had been abolished by this section. Justice of Appeal Kenny, with whom the other members of the court agreed, held that the common law offence still survived. In reaching this conclusion he considered other statutes intended to deter a particular form of kidnapping without affecting the common law offence,[19] and also referred to *D*[20] in which the House of Lords held that the common law offence survives in relation to children. This was so notwithstanding the existence of the statutory offence of child stealing, in relation to which it was observed that "there is no reason to believe that the position is any different in Victoria". Noting that any abolition of such a longstanding offence ought not to be readily implied, he concluded that "I can find nothing in the terms of the Crimes (Kidnapping) Act or in the Parliamentary debates on the Bill indicating, expressly or by necessary implication, that Parliament intended to abolish the existing common law offence of kidnapping".

B.12 Indeed, the common law offence has continued to be used long after the enactment of the section: see for example *Dixon-Jenkins*[21] in which the Supreme Court held that although the charge was common law kidnapping and therefore the sentences were at large, the maximum penalties under section 63A could be taken into account.

Queensland

B.13 In Queensland, the Criminal Code 1899 contains the following offences; there are no surviving common law offences. Other states have criminal codes based on or similar to that of Queensland.

> **354. Kidnapping**
>
> (1) Any person who kidnaps another person is guilty of a crime.
>
> *Maximum penalty--7 years imprisonment.*
>
> (2) A person kidnaps another person if the person unlawfully and forcibly takes or detains the other person with intent to gain anything from any person or to procure anything to be done or omitted to be done by any person.
>
> **354A. Kidnapping for ransom**
>
> (1) Any person who--

[18] [1998] 4 VR 394.

[19] For example Criminal Law and Practice Act, s 50 (abduction of an heiress), s 51 (forcible abduction of a woman), s 52 (abduction of a girl under 16 years); and similar provisions in Crimes Act 1890, ss 50 to 52; Crimes Act 1915, ss 55 to 59; Crimes Act 1928, ss 56 to 59 and Crimes Act 1958, ss 55 to 56 and 63.

[20] [1984] AC 778.

[21] (1991) 55 A Crim R 308.

(a) with intent to extort or gain anything from or procure anything to be done or omitted to be done by any person by a demand containing threats of detriment of any kind to be caused to any person, either by the offender or any other person, if the demand is not complied with, takes or entices away, or detains, the person in respect of whom the threats are made; or

(b) receives or harbours the said person in respect of whom the threats are made, knowing such person to have been so taken or enticed away, or detained;

is guilty of a crime which is called kidnapping for ransom.

(2) Any person who commits the crime of kidnapping for ransom is liable to imprisonment for 14 years.

(3) If the person kidnapped has been unconditionally set at liberty without such person having suffered any grievous bodily harm, the offender is liable to imprisonment for 10 years.

(4) Any person who attempts to commit the crime of kidnapping for ransom is guilty of a crime and is liable to imprisonment for 7 years.

355. Deprivation of liberty

Any person who unlawfully confines or detains another in any place against the other person's will, or otherwise unlawfully deprives another of the other person's personal liberty, is guilty of a misdemeanour, and is liable to imprisonment for 3 years.

B.14 In the case of *F*[22] the Queensland Court of Appeal considered the meaning of the word "procure" in section 354. The defendant and an accomplice kidnapped the victim (the accomplice's ex-girlfriend), beat her, then tied her up and the accomplice then sexually assaulted her. The trial judge concluded that there was a "serious ambiguity" in the section and stayed the proceedings on the basis that it was not possible to say that D had "procured" the sexual assault perpetrated by his accomplice.

B.15 The Court of Appeal disagreed; Justice of Appeal Williams, with whom Justice of Appeal Davies agreed on this point, said that the critical words were "... with intent ... to procure anything to be done ... by any person" so that:

> in the context of this case it would be open to a jury to conclude that an intent to bring about, cause, or facilitate an assault by A on J was a sufficient intent to constitute the offence defined in section 354.[23]

B.16 Justice Cullinane dissented, holding that:

[22] *R v F ex parte Attorney General* [2004] 1 Qd R 162.

[23] [2004] 1 Qd R 162 at [37].

> The present case is plainly not one in which, on the facts placed before the learned judge at first instance, it can be said that the respondent intended in forcibly taking or detaining the complainant that A be thereby induced to effect the sexual assault upon her or to put in terms similar to that used by Cusack J in the passage set out above, with the intention of bringing about conduct on the part of A (namely the sexual assault) which he would or may not have embarked upon of his own volition…
>
> I do not think that the section should be read so that "procure" is construed so as to include "facilitate" or "permit".[24]

B.17 In *Campbell and Brennan*[25] the defendant got into the victim's car, forced him at gunpoint to drive a short distance, told him to stop and then got out of the car. The defendant argued that since the thing procured by his threats was the taking itself, the additional element of intention to gain something was not satisfied. Justice Demack (Justices Campbell and Kneipp agreeing) held:

> The taking, enticing away or detaining of a person is serious because it infringes upon that person's liberty. In the light of this it becomes clear that it is the quality of infringement, rather than its duration that is significant… In the present case I am satisfied that the evidence that Mr French was compelled to leave his front yard and to get into his motor car is sufficient to constitute a 'taking' …He was compelled to go where he did not want to go, and in my opinion that is sufficient to constitute a 'taking.'
>
> Mr Healy's second submission was based upon the premise that the "taking" involved in this case was the period that Mr French was in the car. He submitted that the "taking" involved the very thing that the taking, with threats, was supposed to achieve, that is transportation in the motor vehicle. In my opinion this approach places far too much emphasis upon the need for a substantial degree of time and distance in the "taking". For my part I am satisfied that the "taking" may properly be regarded as being complete when both Brennan and Mr French got into the car. [26]

B.18 Although it seems to avoid addressing the point directly, this appears to establish that no additional intention to gain anything is necessary, or rather that the intention to procure the very act of taking can be sufficient.

CANADA

B.19 The Canadian Criminal Code contains the following definitions:

> **279**.—(1) Every person commits an offence who kidnaps a person with intent

[24] [2004] 1 Qd R 162 at [60] to [62].

[25] [1981] Qd R 516.

[26] [1981] Qd R 516, 521 to 522.

(a) to cause the person to be confined or imprisoned against the person's will;

(b) to cause the person to be unlawfully sent or transported out of Canada against the person's will; or

(c) to hold the person for ransom or to service against the person's will.

…

(2) Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

(3) In proceedings under this section, the fact that the person in relation to whom the offence is alleged to have been committed did not resist is not a defence unless the accused proves that the failure to resist was not caused by threats, duress, force or exhibition of force.

B.20 This definition, like much of the Canadian Criminal Code, is based on Stephen's draft Criminal Code. The code is intended to be exhaustive (provincial governments may not enact criminal law),[27] and no common law offence of false imprisonment survives, it being replaced by forcible confinement under subsection (2). The term "kidnap" is treated as self-defining, but is not sufficient to constitute the offence: there must be an aggravating factor, namely intent to imprison, to send out of Canada or to hold for ransom.

B.21 A helpful summary of the principles was given by Mr Justice Beard in *Karpenko, Mayo, George and Mayo*[28] where he said

A review of the cases discloses the following principles regarding these offences:

As there is no definition of kidnapping in the Criminal Code, the elements of the offence are to be determined from the common law (see *R v Oakley* (1977) 36 CCC (2d) 436 (Ont CA) and *R v Tremblay* (1997) 117 CCC (3d) 86 (Que CA)).

Every kidnapping will necessarily include a forcible confinement, while every forcible confinement is not a kidnapping.

[27] Constitution Act 1982 ss 91, 92.

[28] 2005 MBQB 40 at [36].

The common law definition of kidnapping requires the transportation of the victim from one location to another, and without transportation, there can be a forcible confinement but not a kidnapping.

Consent is an element of forcible confinement, such that the crown must prove that the confinement, imprisonment or forcible seizure was against the will or without the consent of the victim (see *R v Gough* (1985) 18 CCC (3d) 453 (Ont CA) at page 458).

Similar reasoning applies to the charge of kidnapping, that is, that the crown must prove that the complainant did not consent to be transported by the accused. The issue of consent was reviewed by Lady Justice L'Heureux-Dubé, in a unanimous decision in *R v Chartrand* (1994) 91 CCC (3d) 396 (SCC).

The cases have also held that the transportation need not necessarily be against the complainant's will to found a charge of kidnapping, as for example:

- if the consent to be transported was obtained by fraud, as in *R v Brown* (1972) 8 CCC (2d) 13 (Ont CA) and *R v Metcalfe* (1983) 10 CCC (3d) 114 (BCCA), where the accused pretended to be taking the victim home for a visit when, all along, they were planning to hold him for ransom;

- if the consent to be transported is withdrawn during what began as a consensual transportation, as in *R v Tremblay* (1997) 117 CCC (3d) 86 (Que CA),[29] where the victims were picked up as hitchhikers and, during the ride, the accused confined them and later sexually assaulted them (see also *Gough*).

B.22 The most recent significant case is *Tse*.[30] A gang had kidnapped a group of 3 people, held them captive for several weeks during which they were tortured and threatened with death, and extorted a ransom of over $1.3 million in return for their release. In relation to the kidnapping charge, Mr Justice Davies held:

> To establish that any or all of the accused are guilty of the offence of kidnapping charged against them as particularized in the indictment, the Crown must prove beyond a reasonable doubt:

[29] So in report: but the reference would appear rather to fit *Oakley,* discussed at paragraph B.26 below.

[30] 2010 BCSC 474.

> (1) the identity of that named accused as a participant in the offence of kidnapping;
>
> (2) the time and place of the alleged kidnapping for ransom (between February 21, 2006, and March 20, 2006, at Burnaby and Richmond, British Columbia);
>
> (3) that the named accused took the named complainant from one place to another;
>
> (4) the taking of that complainant was without his or her consent; and
>
> (5) that the named accused intended that the complainant be held for ransom against his or her will.[31]

B.23 Although the identity, time and place are clearly specific to the facts of the case, items (3) to (5) are essential ingredients of the offence.

B.24 In *Brown*[32] the defendant tricked the victim, a ten-year-old girl, into getting into his car by telling her that her father had asked him to drive her to school. He then drove out of the city, stopped and choked her until she became unconscious. He put her in the boot of the car, drove to a rubbish dump and there left what he believed to be her dead body. Once he left, she climbed out and ran to get help. One of the defendant's submissions was that since the victim had initially gone with him willingly, the case did not fall within the kidnapping section (presumably because the victim did not resist and that non-resistance was not caused by threats, duress, force or exhibition of force, thus giving him a defence under subsection 3). Justice of Appeal MacKay held:

> We cannot accept this submission because whatever may be said for what occurred from the time he picked the girl up until the time of the choking, although we think, having regard to his false statements that induced her to enter the car that that did constitute kidnapping, but irrespective of that, the fact that he put her in the trunk of his car and drove 24 miles to a dump after choking her was clearly within the kidnapping section, section 247.[33]

[31] 2010 BCSC 474 at [265].

[32] 8 CCC (2d) 13.

[33] Above, at [9]. Section 279 was previously section 247. The only change to the text of the offence is to the maximum sentences available for the confinement offence.

B.25 Any non-resistance subsequent to the choking could clearly be attributed to threats, duress, force or exhibition of force. However the conclusion that his inducing her to get into the car by false statement did constitute kidnapping is less obvious since the Canadian definition does not include fraud as well as force (note that this point was ultimately settled in *Metcalfe*).[34] Of course, the reference to force and so on comes in the subsection relating to a defence to the charge: the term "kidnapping" itself is not defined and so can include taking by fraud alone, as at common law. The definition of the offence was discussed further in the following case.

B.26 In *Oakley*[35] a lorry driver picked up two women hitchhikers. After driving for a while, he pulled out a gun and told them to get into the back part of the lorry where, after driving some distance further, he then stopped and subjected them to violent sexual assaults. The bulk of the judgment is devoted to addressing the meaning of the term "kidnapping", which is not defined in the Code. Justice of Appeal Morrow, giving the judgment of the court, discusses the historical origins of the term and various common law definitions, but frustratingly he does not reach a clear conclusion or adopt any one definition. He does endorse as "one of the best statements" a quote by Justice Coffey of the Supreme Court of Indiana in an 1894 case, *Eberling v State*,[36] where at he says:

> Mr Bishop, in his work on Criminal Law, (volume 1, § 553) says: "Kidnapping and false imprisonment, two offenses against the individual, of which ordinarily the latter is included in the former, are punishable by the common law. False imprisonment is any unlawful restraint of one's liberty, whether in a place set apart for imprisonment generally, or used only on the particular occasion, and whether between walls or not, effected either by physical force, actually applied, or by words and an array of such forces. Kidnapping is a false imprisonment aggravated by conveying the imprisoned person to some other place". Taking this definition as correct, kidnapping, then, as known to the common law, was false imprisonment aggravated by carrying the imprisoned person to some other place. 2 Bish Crim Law, § 750.[37]

B.27 He also quotes from the English case of *Reid*,[38] where Lord Justice Cairns says:

> We can find no reason in authority or in principles why the crime should not be complete when the person is seized and carried away, or why kidnapping should be regarded, as was urged by counsel, as a continuing offence involving the concealment of the person seized.

B.28 As to the ground of appeal that only false imprisonment and not kidnapping had occurred, the court concluded:

[34] (1983) 10 CCC (3d) 114, para B.36 below.

[35] [1977] 4 WWR 716.

[36] (1894) 35 NE 1023.

[37] Above, p 1024.

[38] [1973] QB 299.

> It is to be remembered that, historically, kidnapping was taken to connote more than just confinement or imprisonment, but rather the stealing away or carrying away of the person whether for the purpose of unlawful confinement or imprisonment later or for the purpose of selling the person into bondage on the plantations, as in the earliest cases, or for some other purpose.
>
> The appellant here is, in respect to each charge, charged that he "did kidnap — with intent to cause her to be confined against her will ..." The learned trial judge in his reasons for judgment states that "once a person is bound, placed in an area of confinement, such as in the sleeper in this truck, that constitutes kidnapping within the meaning of s 247(1)(a)."
>
> In my respectful opinion this does not go quite far enough. To make the offence one of kidnapping under subs (1)(a) rather than confinement or imprisonment under subs (2) requires a movement or taking of the persons from one place to another. In the present case the facts do go this far. The act of forcing the girls into the back of the truck, tying them up and then moving the truck for some considerable distance along the highway with the intent of sexually assaulting them does constitute the offence of kidnapping. I see no justification for interfering with the sentences imposed.[39]

B.29 It is clear therefore that the element which distinguishes kidnapping from false imprisonment is the movement from one place to another; the "taking and carrying away". The same conclusion was reached by the Quebec Court of Appeal in *Robins*[40] and *Tremblay.*[41]

B.30 It is regrettable that the court did not fully discuss the issue of whether the kidnapping was complete upon the defendant luring the women into his truck by false pretences, or only occurred when he forced them into the back. Justice of Appeal Morrow did say:

> There can be no doubt that the two women, from the time they received the threats from the appellant as he held the revolver and were required to move back to the sleeping compartment, were suffering an unlawful and total restraint of their personal liberty. At this point in time, any consent they had given or any willingness they had shown to ride along with the accused must surely be taken to have disappeared. Certainly any consent or willingness had to have disappeared once they were tied up.[42]

[39] [1977] 4 WWR 716 at [47] to [49].

[40] (1982) 66 CCC (2d) 550, 558.

[41] (1997) 117 CCC (3d) 86, para B.33 below.

[42] [1977] 4 WWR 716 at [43].

B.31 This suggests that the offence was only completed at the point where force (or threat of force) was exerted, contrary to the dictum in *Brown*.[43] However he went on to say:

> It seems clear from all the evidence that from the beginning it was the intention of the appellant to hold the women until he could find a suitable place either along or off the highway where he could then attack them sexually.[44]

B.32 This could be seen to suggest that this intention, underlying the defendant's fraudulent act of inviting the women into his truck on the false basis that he would simply drive them to their destination, formed the basis of the kidnapping charge even before any force was applied. This was the effect of the decision in *Metcalfe*.[45]

B.33 A similar case is that of *Tremblay*.[46] The defendant met the victim, a waitress, in the bar where she worked and after talking for a while suggested they go back to her place. She agreed and got into the defendant's car. After they set off, he suggested they go for a drink with his friends instead; she refused and said she wanted to be driven home but he ignored her request. At this point he also tried to touch her thigh. After repeatedly insisting that they return to her place and repeatedly being ignored, she jumped out of the moving car, sustaining some minor injuries.

B.34 The case was held to be one of confinement under section 247(2), but not kidnapping. The court held:

> La séquestration prive l'individu de sa liberté de se déplacer d'un point A à un point B. L'enlèvement, quant à lui, consiste dans la prise de contrôle d'une personne pour l'amener contre son gré d'un point A à un point B. La distinction entre les infractions devient parfois délicate car pour amener une personne d'un point A à un point B, on l'empêche par le fait même de se déplacer d'un point A à un point B. C'est la raison pour laquelle un enlèvement entraîne nécessairement une séquestration. La séquestration, cependant, peut survenir sans qu'un enlèvement ait eu lieu à l'origine.

[43] 8 CCC (2d) 13.

[44] [1977] 4 WWR 716 at [44].

[45] (1983) 10 CCC (3d) 114, para B.36 below.

[46] (1997) 117 CCC (3d) 86.

> (Confinement deprives the individual of his or her liberty to move from point A to point B. Kidnapping, on the other hand, involves taking control of another in order to take him or her from point A to point B against his or her will. The distinction between the two offences can sometimes be a fine one, since taking a person from point A to point B necessarily prevents that person going from some other point A to another point B. This is why every kidnapping necessarily comprises a confinement. Confinement, however, can be committed without a kidnapping taking place at the outset).[47]

B.35 The Court concluded that while the victim was deprived of her liberty to leave the car, she was not confined for the purpose of going to a particular point. This seems to be inconsistent with *Oakley*,[48] in which the victims were similarly confined within a moving vehicle and this was held to be a kidnapping. The difference surely cannot be in the fact that the defendant had no specific intended destination, since the taking from one place to another must have been complete at the moment the car began to move.

B.36 In *Metcalfe*[49] the defendant and another man had agreed to meet the victim, an old school acquaintance. They picked him up, falsely saying they would take him back to the defendant's place for a drink. Instead they drove to a garage, where they tied him up and kept him while they demanded ransom payments from his family. Chief Justice Nemetz, with whom the other judges agreed, held that:

> In my opinion the offence of kidnapping to hold for ransom was complete on Molnar's (the victim's) entry into the car. Molnar's agreement to go with the abductors was no consent at law. It was obtained by a fraudulent stratagem. Fraud was used as a substitute for force…
>
> In Canada, Parliament found it unnecessary to define kidnapping in the Criminal Code. I cannot say for certain why they did not do so, but applying common sense and appreciating to subtle and ingenious methods employed by criminals undertaking this evil, it is readily apparent that offering sweets to children is not the only stratagem available to induce victims to accompany abductors.
>
> It is my opinion that under the Criminal Code "to kidnap" has as one of its meanings "to take and carry away a person against his will by unlawful force or by fraud". The fact that the person is not forcibly conveyed by a stratagem of an inducement can make no difference. The crime is complete when the person is picked up and then transported by fraud to his place of confinement.[50]

[47] Our translation.

[48] [1977] 4 WWR 716.

[49] (1983) 10 CCC (3d) 114.

[50] (1983) 10 CCC (3d) 114 at [9] to [12].

B.37 He thus endorsed a statement by Mr Justice Parker, speaking for the majority of the state Supreme Court, in *State of North Carolina v Gough*[51] where, at page 124, he said

> "kidnap" ... means the unlawful taking and carrying away of a person by force or fraud against his will...

B.38 This definition matches the English authorities. Taking away by fraud, therefore, would seem conclusively to constitute the offence.

B.39 In *Gallup*[52] Mr Justice Peter Martin said:

> … if I may respectfully observe, the kidnapping provision of the *Criminal Code*, s 279, could greatly benefit from legislative redrafting and clarification. As I understand it, what the legislation intended to prohibit by this offence, but does not expressly state, is the taking or movement of a person against the will of that person, for the purpose of committing an indictable offence. Further, *consent obtained by fraud or force is not consent*; and where the person taken is a child under the age of 14, only the consent of the child's parent or lawful guardian may be a defence. In effect, the consent of a child, however obtained, is irrelevant.[53]

B.40 Chief Justice Nemetz further held that "the crime is complete when the person is picked up and then transported by fraud to his place of confinement". It is not entirely clear whether this means that all of these stages must have been completed before the offence is constituted, or whether it is complete when the person is simply picked up. The emphasis on the requirement of movement to some other place, however, would suggest that at least the journey if not the subsequent confinement must have taken place for there to be a kidnapping.

NEW ZEALAND

B.41 The Crimes Act 1961 defines kidnapping as follows:

> **209. Kidnapping**
>
> Every one is liable to imprisonment for a term not exceeding 14 years who unlawfully takes away or detains a person without his or her consent or with his or her consent obtained by fraud or duress,—
>
> (a) with intent to hold him or her for ransom or to service; or
>
> (b) with intent to cause him or her to be confined or imprisoned; or
>
> (c) with intent to cause him or her to be sent or taken out of New Zealand.

[51] (1962) 126 SE 2d 118.

[52] (2002) 319 AR 131.

[53] Above, at [52]. Emphasis added.

209A. Young person under 16 cannot consent to being taken away or detained

For the purposes of sections 208 and 209, a person under the age of 16 years cannot consent to being taken away or detained.

There does not appear to be a separate offence of false imprisonment, though there are offences of abduction for purposes of marriage or sexual connection[54] and abducting young persons under 16.[55]

B.42 The New Zealand Act is based on the Stephen model, but unlike the Canadian code does not treat "kidnap" as self-defining and does not provide a separate offence of forcible detention.

B.43 Unlike in Canada, the essence of the offence is not the taking from one place to another, or false imprisonment in motion. This is clear from, for example, *Ahmed*[56] in which Mr Justice Heath said that "the essence of a kidnapping charge is that one person has detained another unlawfully with intent to cause that person to be confined". There does not appear to be a separate offence of false imprisonment or confinement in New Zealand law.

REPUBLIC OF IRELAND

B.44 There is a statutory offence of false imprisonment under section 15 of the Non-Fatal Offences Against the Person Act 1997, defined as follows.

> **15.**—(1) A person shall be guilty of the offence of false imprisonment who intentionally or recklessly—
>
> (a) takes or detains, or
>
> (b) causes to be taken or detained, or
>
> (c) otherwise restricts the personal liberty of,
>
> another without that other's consent.
>
> (2) For the purposes of this section, a person acts without the consent of another if the person obtains the other's consent by force or threat of force, or by deception causing the other to believe that he or she is under legal compulsion to consent.

This offence covers all instances that would be prosecuted as either false imprisonment or kidnapping in England and Wales, and is close to our Model 1, above.

[54] Crimes Act 1961 s 208.

[55] Above, s 210.

[56] [2009] NZCA 220 at [10].

B.45 The common law offences of false imprisonment and kidnapping were abolished by section 28 of the same Act. Charleton's *Offences Against the Person*[57] explains that the common law offence of kidnapping was never used in practice, because of the uncertainty as to whether the law follows *Edge*,[58] the last reported Irish case, or *D*.[59]

B.46 The Criminal Law Codification Advisory Committee published a "Draft Criminal Code and Commentary" on 31 May 2010. This defines an offence of false imprisonment in almost identical terms: changes are shown in italics.

> **3206.**—(1) A person *commits* the offence of false imprisonment *if he or she* intentionally*, knowingly* or recklessly—
>
> (a) takes or detains,
>
> (b) causes to be taken or detained, or
>
> (c) otherwise restricts the personal liberty of,
>
> another without that other's consent.
>
> (2) For the purposes of this Head*, and without prejudice to the generality of Head 1105 (consent),* a person acts without the consent of another if the person obtains the other's consent by deception causing the other to believe that he or she is under legal compulsion to consent.

B.47 The commentary on that clause explains that the fault element of the offence, namely intention, knowledge or recklessness, does not relate to D's physical act. It relates to the result of that act, whether that result consists of taking or detention, the causing of taking or detention or the restriction of personal liberty. It also relates to the circumstance element, namely that V does not consent.

UNITED STATES

B.48 The Model Criminal Code, designed for enactment with modifications by the individual states, defines kidnapping as follows.

> **212.1 Kidnapping**
>
> 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

[57] P Charleton, *Offences Against the Person* (1992), para 7.10.

[58] [1943] IR 115.

[59] [1984] AC 778.

(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.

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

B.49 One purpose of this formulation was to provide a minimum distance through which the victim should be moved in order for the offence to be committed: from in his house or workplace to outside it, or otherwise a "substantial" distance. This was to avoid defendants being charged with kidnapping as an alternative to other crimes, for example when a victim is forced to go from one room to another in the course of a rape or burglary.[60] Another purpose was to make a clear distinction between kidnapping, regarded as particularly heinous, and lesser crimes of restraint.

[60] Eg *People v Chessman*, 38 Cal 2d 166, 238 P 2d 1001 (1951), *People v Knowles* 35 Cal 2d 175, 217 P 2d 1.

APPENDIX C
OTHER ABDUCTION OFFENCES

C.1 There have, for some centuries, been statutory offences aimed at particular forms of kidnapping. Today these include, among other offences, child abduction and hostage-taking. In considering both these subjects it is necessary to take into account the impact of international conventions.[1] In addition, there are offences covering various forms of people trafficking.[2]

CHILD ABDUCTION OFFENCES

C.2 There is an offence of child abduction that can be committed by parents and guardians, against the will of the others responsible for the child. The offence is confined to cases where the child is taken out of the United Kingdom.[3] Another offence is abduction by other persons, in such a way as to take the child out of the control of its parents or guardians.[4] In both cases, the consent of the child is immaterial. These offences are reproduced unaltered in the 1989 draft Code.[5] A further offence is provided by Children Act 1989 section 49, specifically in relation to children in care.

C.3 These offences were neither created in response to an international convention, nor did the 1989 Act specifically aim at bringing them into accord with international conventions. The 1989 Act does reflect certain conventions on the civil aspects of child abduction, but the amendments to the 1984 Act only update the definitions of what persons have responsibility for the child, so as to accord with the post-1989 framework. Nevertheless, were we to reform or consolidate these offences, we should need to be careful to ensure that the law continues to fit the general law of guardianship of and responsibility for children.

C.4 The relevant sections, as amended, read as follows.

> **1. Offence of abduction of child by parent, etc**
>
> (1) Subject to subsections (5) and (8) below, a person connected with a child under the age of sixteen commits an offence if he takes or sends the child out of the United Kingdom without the appropriate consent.
>
> (2) A person is connected with a child for the purposes of this section if—
>
> (a) he is a parent of the child; or

[1] Para C.5 below.

[2] Para C.10 and following.

[3] Child Abduction Act 1984 s 1 (as amended by Children Act 1989).

[4] Above, s 2.

[5] Criminal Law: a Criminal Code for England and Wales (1989) Law Com No 177, clauses 83 and 84 of draft Bill.

(b) in the case of a child whose parents were not married to each other at the time of his birth, there are reasonable grounds for believing that he is the father of the child; or

(c) he is a guardian of the child; or

(d) he is a person in whose favour a residence order is in force with respect to the child; or

(e) he has custody of the child.

(3) In this section 'the appropriate consent', in relation to a child, means—

(a) the consent of each of the following—

(i) the child's mother;

(ii) the child's father, if he has parental responsibility for him;

(iii) any guardian of the child;

(iv) any person in whose favour a residence order is in force with respect to the child;

(v) any person who has custody of the child; or

(b) the leave of the court granted under or by virtue of any provision of Part II of the Children Act 1989; or

(c) if any person has custody of the child, the leave of the court which awarded custody to him.

(4) A person does not commit an offence under this section by taking or sending a child out of the United Kingdom without obtaining the appropriate consent if—

(a) he is a person in whose favour there is a residence order in force with respect to the child, and

(b) he takes or sends him out of the United Kingdom for a period of less than one month.

(4A) Subsection (4) above does not apply if the person taking or sending the child out of the United Kingdom does so in breach of an order under Part II of the Children Act 1989.

(5) A person does not commit an offence under this section by doing anything without the consent of another person whose consent is required under the foregoing provisions if—

(a) he does it in the belief that the other person—

(i) has consented; or

(ii) would consent if he was aware of all the relevant circumstances; or

(b) he has taken all reasonable steps to communicate with the other person but has been unable to communicate with him; or

(c) the other person has unreasonably refused to consent.

(5A) Subsection (5)(c) above does not apply if—

(a) the person who refused to consent is a person—

(i) in whose favour there is a residence order in force with respect to the child; or

(ii) who has custody of the child; or

(b) the person taking or sending the child out of the United Kingdom is, by so acting, in breach of an order made by a court in the United Kingdom.

(6) Where, in proceedings for an offence under this section, there is sufficient evidence to raise an issue as to the application of subsection (5) above, it shall be for the prosecution to prove that that subsection does not apply.

(7) For the purposes of this section—

(a) "guardian of a child", "residence order" and "parental responsibility" have the same meaning as in the Children Act 1989; and

(b) a person shall be treated as having custody of a child if there is in force an order of a court in the United Kingdom awarding him (whether solely or jointly with another person) custody, legal custody or care and control of the child.

(8) This section shall have effect subject to the provisions of the Schedule to this Act in relation to a child who is in the care of a local authority, detained in a place of safety, remanded to a local authority accommodation or the subject of proceedings or an order relating to adoption.

2. Offence of abduction of child by other persons

(1) Subject to subsection (3) below, a person, other than one mentioned in subsection (2) below, commits an offence if, without lawful authority or reasonable excuse, he takes or detains a child under the age of sixteen—

(a) so as to remove him from the lawful control of any person having lawful control of the child; or

(b) so as to keep him out of the lawful control of any person entitled to lawful control of the child.

(2) The persons are—

(a) where the father and mother of the child in question were married to each other at the time of his birth, the child's father and mother;

(b) where the father and mother of the child in question were not married to each other at the time of his birth, the child's mother; and

(c) any other person mentioned in section 1(2)(c) to (e) above.

(3) In proceedings against any person for an offence under this section, it shall be a defence for that person to prove—

(a) where the father and mother of the child in question were not married to each other at the time of his birth—

(i) that he is the child's father; or

(ii) that, at the time of the alleged offence, he believed, on reasonable grounds, that he was the child's father; or

(b) that, at the time of the alleged offence, he believed that the child had attained the age of sixteen.

…

5. Restriction on prosecutions for offence of kidnapping

Except by or with the consent of the Director of Public Prosecutions no prosecution shall be instituted for an offence of kidnapping if it was committed—

(a) against a child under the age of sixteen; and

(b) by a person connected with the child, within the meaning of section 1 above.

C.5 The relation of these offences to the civil aspects of child abduction and child custody is complex. The layers are as follows.

(1) The domestic law whereby the court awards custody of a child in family proceedings.

(2) The international conventions whereby countries recognise each other's custody awards: an example is the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children,[6] as incorporated in the Child Abduction and Custody Act 1985.

(3) The international conventions whereby countries make arrangements in civil law for the tracing and return of children abducted contrary to the custody rights in force in their previous country of residence, principally the Hague Convention on the Civil Aspects of International Child Abduction (1980), also incorporated in the 1985 Act.[7]

(4) The Child Abduction Act 1984 is a stand-alone arrangement, in that it makes it an offence to abduct a child whether or not it is being taken to a Hague Convention country. Its references to "custody", "residence order" and the like are confined to custody or residence ordered by a United Kingdom court.

(5) Where abduction is imminent, the police may issue an all ports warning.[8]

HOSTAGE TAKING

C.6 Hostage taking is defined[9] as follows.

> **1. Hostage-taking**
>
> (1) A person, whatever his nationality, who, in the United Kingdom or elsewhere,—
>
> (a) detains any other person ("the hostage"), and
>
> (b) in order to compel a State, international governmental organisation or person to do or abstain from doing any act, threatens to kill, injure or continue to detain the hostage,
>
> commits an offence.
>
> (2) A person guilty of an offence under this Act shall be liable, on conviction on indictment, to imprisonment for life.

This definition is restated in the draft Code.[10]

C.7 The language of this provision reflects that of the International Convention against the Taking of Hostages of 1979. The relevant article states:

6 Also known as the Luxembourg Convention: it is a Council of Europe treaty.

7 As between EU countries, these arrangements are modified by Council Regulation (EC) No 2201/2003 of 27 November 2003: Child Abduction and Custody Act 1985 s 1.

8 For these, see *Practice Direction (child; removal from jurisdiction)* [1986] 1 WLR 475, [1986] 1 All ER 983.

9 Taking of Hostages Act 1982.

10 Criminal Law: a Criminal Code for England and Wales (1989) Law Com No 177, clause 82 of draft Bill.

> Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

It is not clear whether the omission of the phrase "as an explicit or implicit condition for the release of the hostage" from the Taking of Hostages Act 1982 has the effect of making the offence under that Act go beyond the needs of the Convention. However, this is not one of those topics where it is desirable for international standards to be absolutely uniform and any extension is disapproved of as "gold-plating". Similarly we do not consider the omission of the words "seizes or" to be significant. It is difficult to envisage a case in which someone is "seized" for long enough for the threats to be made without that seizure amounting to detention.

C.8 The offence can be committed by any person, and neither the Convention nor the Act contains any geographical limitation or any requirement that more than one country must be involved. It has however been argued that, since the Convention was designed to deal with international terrorism, it would be improper to use this provision in prosecuting a purely domestic act of kidnapping for ransom. If one accepts this argument, it leaves two grey areas where it is uncertain whether a prosecution under the Act would be appropriate: a purely commercial kidnapping that happens to involve more than one country, and hostage-taking constituting full-blown political terrorism taking place entirely within one country.

C.9 Hostage taking is a hybrid offence, in that it contains both an element of kidnapping or false imprisonment and an element of blackmail. (By "blackmail" we mean the broader statutory definition, namely demanding with menaces of any kind, rather than the popular meaning of demanding by threat of exposure.) Normally it should be sufficient to charge either or both of these offences, especially as kidnapping and false imprisonment, being common law offences, carry a potential life sentence. The reasons for having a dedicated offence are:

(1) to demonstrate compliance with the Convention;

(2) for the sake of appropriate labelling, to reflect the odium attached to hostage taking;

(3) more practically, to allow the new offence to have full international scope and to permit mutual extradition arrangements with other countries which have enacted similar offences.

TRAFFICKING OFFENCES

C.10 The expression "people trafficking" is often used to mean what should more naturally be called people smuggling, namely assisting people to evade immigration control.[11] This does not contain any element of kidnapping or detention, and the person "trafficked" is not the victim of the offence of trafficking, though there may be other offences involving mistreatment or exploitation on the way.

C.11 Trafficking of people for sexual purposes is made an offence by sections 57 to 60 of the Sexual Offences Act 2003. This is wider than kidnapping, as it is defined as "arranging or facilitating" the arrival, travel or departure of a person for the purposes of sexual exploitation, meaning the commission of any offence under sections 1 to 79 of the same Act. It therefore includes cases where the person is acting voluntarily as a prostitute and there is no element of fraud or coercion.

C.12 Where the trafficking does involve kidnapping, it can be charged either as trafficking, with a maximum sentence of 14 years, or as kidnapping or false imprisonment, with a maximum sentence of life. (Where the trafficking is into the UK, the initial capture may be exempt from the common law offence for jurisdictional reasons, but the defendant can be charged in respect of the continued detention of the person trafficked after his or her arrival.)

C.13 So far as non-sexual exploitation is concerned, section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2003 creates an offence of 'trafficking people for exploitation' and provides that a person commits an offence if he or she arranges or facilitates the arrival in the UK (or subsequent travel within the UK) of an individual and intends to exploit the individual or believes that another person is likely to do so. 'Exploitation' is defined as including behaviour which contravenes article 4 of the European Convention on Human Rights, as well as subjecting someone to force, or using threats or deception designed to induce him or her to provide or acquire services or benefits of any kind.

[11] Immigration Act 1971 ss 25, 25A and 25B.

APPENDIX D – IMPACT ASSESSMENT

Title: **Kidnapping** **Lead department or agency:** Law Commission **Other departments or agencies:** Ministry of Justice Home Office	Impact Assessment (IA) **IA No:** LAWCOM0007 **Date: 06.09.2011** **Stage:** Consultation **Source of intervention:** Domestic **Type of measure:** Primary legislation **Contact for enquiries:** Simon Tabbush 020 3334 0273

SUMMARY: INTERVENTION AND OPTIONS

What is the problem under consideration? Why is government intervention necessary?

The definition of kidnapping is uncertain. Some conduct that ought to be caught by an offence of kidnapping is not under present law, e.g. the consensual abduction and forcible detention of a child is only likely to be false imprisonment. There are uncertainties about the boundary between false imprisonment and kidnapping, making it necessary to reform both offences. The ambiguity and uncertainty may lead to wasted prosecutions and longer trials. Both offences are currently indictable only, with the result that even relatively minor incidents charged as kidnapping or false imprisonment have to be dealt with at the Crown Court when they could be dealt with more quickly and cost-effectively in a magistrates' court.

What are the policy objectives and the intended effects?

The objectives are (1) to make the offence of kidnapping just, certain and proportionate, so that it clearly includes the cases that ought to be covered, (2) to clarify the boundary between false imprisonment and kidnapping, and (3) to provide for magistrates' courts to have the power to deal with minor instances falling within the scope of kidnapping and false imprisonment. The intended effect is to clarify the scope of these offences and to ensure that minor instances of the offences can be dealt with by magistrates' courts in appropriate cases.

What policy options have been considered? Please justify preferred option (further details in Evidence Base)

Option 0: Do nothing

Option 1: Replace kidnapping and false imprisonment with a single statutory offence of deprivation of liberty triable either way

Option 2: Replace kidnapping and false imprisonment with one statutory offence of unlawful detention and one statutory offence of kidnapping, both triable either way

Option 3: Replace kidnapping and false imprisonment with one either way statutory offence of deprivation of liberty and a more serious offence of deprivation of liberty coupled with any of a list of aggravating factors.

In our Consultation Paper, we leave the choice between the other three open and express no preference.

When will the policy be reviewed to establish its impact and the extent to which the policy objectives have been achieved?	It will not be reviewed
Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?	No

Chair's Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Chair:..... Date:.....

SUMMARY: ANALYSIS AND EVIDENCE POLICY OPTION 1

Description:

Replace kidnapping and false imprisonment with a single statutory offence of deprivation of liberty

Price Base Year 09/10	**PV Base Year** 2011	**Time Period Years** 10	**Net Benefit (Present Value (PV)) (£m)**		
			Low: Optional	**High:** Optional	**Best Estimate: £2.84**

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low	£0	3	Optional	**Optional**
High	£0		Optional	**Optional**
Best Estimate	£0.222		£0	**£0.222**

Description and scale of key monetised costs by 'main affected groups'

Her Majesty's Court Service (HMCS), Crown Prosecution Service (CPS): An initial spike in appeals for three years, £77,250 per year.

HMCS, CPS, Her Majesty's Prison Service (HMPS): The total number of prosecutions is not expected to differ significantly from the number presently prosecuted for false imprisonment and kidnapping combined.

Other key non-monetised costs by 'main affected groups'

There might be an adverse public perception of the fact that there will no longer be a specific offence of kidnapping. Conversely, describing the new offence as "statutory kidnapping" would satisfy public perceptions in more serious cases, but at the risk of over-stigmatising minor cases.

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low	£0	0	Optional	**Optional**
High	£0		Optional	**Optional**
Best Estimate	£0		£0.470	**£3.057**

Description and scale of key monetised benefits by 'main affected groups'

HMCS, CPS, LSC: The definition of the offence will be clearer, leading to a possible saving in legal argument, in wasted prosecutions and in appeals. Having one and not two offences will render charging decisions easier. This may save both prosecutorial and court time. Arguments relating to whether there was movement of the victim and at what point in the conduct the detention arose will become irrelevant. Allowing minor cases to be tried in a magistrates' court will save court and legal costs.

Other key non-monetised benefits by 'main affected groups'

The redefinition would ensure that it will clearly be criminal to entice and confine a child or mentally impaired person. Clarifying the offence would increase its perceived effectiveness. Minor cases can be tried in the magistrates' court and not over-stigmatised.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

Assumptions: 1. Zero training costs and 2. An initial spike in applications for leave to appeal and appeals from years 0 to 2 for all policy options. Subsequently appeals will return to the previous level or lower. For Option 1 we have assumed a 25% increase.

Risks: 1. A moderate risk of initial disputes about definitions (e.g. of deprivation of liberty) unless drafted very carefully and 2. A moderate risk of adverse public reaction unless the "kidnapping" label is retained.

Impact on admin burden (AB) (£m):			**Impact on policy cost savings (£m):**	**In scope**
New AB: £0	**AB savings:** £0	**Net:** £0	**Policy cost savings:** £0	No

ENFORCEMENT, IMPLEMENTATION AND WIDER IMPACTS

What is the geographic coverage of the policy/option?			England and Wales		
From what date will the policy be implemented?					
Which organisation(s) will enforce the policy?			HMCS, Police, CPS		
What is the annual change in enforcement cost (£m)?			£0		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			N/A		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** 0		**Non-traded:** 0
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:** 100%		**Benefits:** 100%
Percentage of annual cost per organisation	**Micro** 0%	**< 20** 0%	**Small** 0%	**Medium** 0%	**Large** 0%
Are any of these organisations exempt?	No	No	No	No	No

SPECIFIC IMPACT TESTS: CHECKLIST

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[1] Statutory Equality Duties Impact Test guidance	Yes/No	
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	
Small firms Small Firms Impact Test guidance	No	
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	Yes/No	
Human rights Human Rights Impact Test guidance	Yes/No	
Justice system Justice Impact Test guidance	Yes	
Rural proofing Rural Proofing Impact Test guidance	No	
Sustainable development Sustainable Development Impact Test guidance	No	

[1] Race, disability and gender impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. Statutory equality duties part of the Equality Bill applies to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

SUMMARY: ANALYSIS AND EVIDENCE POLICY OPTION 2

Description:

Replace kidnapping and false imprisonment with one statutory offence of unlawful detention and one statutory offence of kidnapping

Price Base Year 09/10	**PV Base Year** 2011	**Time Period Years** 10	**Net Benefit (Present Value (PV)) (£m)**		
			Low: Optional	**High:** Optional	**Best Estimate: £2.614**

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low	£0	3	Optional	**Optional**
High	£0		Optional	**Optional**
Best Estimate	£0.443		£0	**£0.443**

Description and scale of key monetised costs by 'main affected groups'

Her Majesty's Court Service (HMCS), Crown Prosecution Service (CPS): An initial spike in appeals for three years, £154,500 per year.

HMCS, CPS, HMPS: The total number of prosecutions is not expected to differ significantly from the number presently prosecuted for false imprisonment and kidnapping combined.

Other key non-monetised costs by 'main affected groups'

There may still be cases in which there is difficulty in deciding which of the two new offences to charge; but there will be less difficulty than in deciding between false imprisonment and kidnapping in existing law, and therefore this does not represent an additional cost compared to Option 0.

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low	£0	0	Optional	**Optional**
High	£0		Optional	**Optional**
Best Estimate	£0		£0.470	**£3.057**

Description and scale of key monetised benefits by 'main affected groups'

HMCS, CPS, LSC: The definition of the kidnapping offence will be clearer, leading to a possible saving in legal argument, in wasted prosecutions and in appeals. This may save both prosecutorial and court time. Allowing minor cases to be tried in a magistrates' court will save court and legal costs.

Other key non-monetised benefits by 'main affected groups'

The kidnapping offence will be defined to include certain cases that are at present excluded or doubtful, principally the enticement and subsequent detention of children and mentally impaired persons. This will not lead to increased cost, as at present these cases can be prosecuted as false imprisonment. The labelling of cases will be more in accordance with the popular meaning of kidnapping. Minor cases can be tried in the magistrates' court and not over-stigmatised.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

Assumptions: 1. Zero training costs and 2. An initial spike in applications for leave to appeal and appeals from years 0 to 2 for all policy options. Subsequently appeals will return to the previous level or lower. For Option 2 we have assumed a 50% increase.

Risks: 1. A moderate risk of borderline difficulties between the two offences and 2. A moderate risk that both offences will have to be charged at alternative counts in such cases which will increase court costs.

Impact on admin burden (AB) (£m):			**Impact on policy cost savings (£m):**	**In scope**
New AB: £0	**AB savings:** £0	**Net:** £0	**Policy cost savings:** £0	No

ENFORCEMENT, IMPLEMENTATION AND WIDER IMPACTS

What is the geographic coverage of the policy/option?			England and Wales		
From what date will the policy be implemented?					
Which organisation(s) will enforce the policy?			HMCS, Police, CPS		
What is the annual change in enforcement cost (£m)?			£0		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			N/A		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** 0		**Non-traded:** 0
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:** 100%		**Benefits:** 100%
Percentage of annual cost per organisation	**Micro** 0%	**< 20** 0%	**Small** 0%	**Medium** 0%	**Large** 0%
Are any of these organisations exempt?	No	No	No	No	No

SPECIFIC IMPACT TESTS: CHECKLIST

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[2] Statutory Equality Duties Impact Test guidance	Yes/No	
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	
Small firms Small Firms Impact Test guidance	No	
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	Yes/No	
Human rights Human Rights Impact Test guidance	Yes/No	
Justice system Justice Impact Test guidance	Yes	
Rural proofing Rural Proofing Impact Test guidance	No	
Sustainable development Sustainable Development Impact Test guidance	No	

[2] Race, disability and gender impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. The statutory equality duties part of the Equality Bill applies to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

SUMMARY: ANALYSIS AND EVIDENCE POLICY OPTION 3

Description:

Replace kidnapping and false imprisonment with one either way statutory offence of deprivation of liberty and a more serious offence of deprivation of liberty coupled with any of a list of aggravating factors

Price Base Year 09/10	**PV Base Year** 2011	**Time Period Years** 10	**Net Benefit (Present Value (PV)) (£m)**		
			Low: Optional	**High:** Optional	**Best Estimate: £2.614**

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low	£0	3	Optional	**Optional**
High	£0		Optional	**Optional**
Best Estimate	£0.443		£0	**£0.443**

Description and scale of key monetised costs by 'main affected groups'

Judicial College: Training costs are £0**;** Her Majesty's Court Service (HMCS), Crown Prosecution Service (CPS): An initial spike in appeals for three years, £154,500 per year**;** HMCS, CPS, HMPS: The total number of prosecutions is not expected to differ significantly from the number presently prosecuted for false imprisonment and kidnapping combined. As the more serious offence includes a number of factors, extra time and resources may be required to prove those factors

Other key non-monetised costs by 'main affected groups'

The law will be perceived as complex. The burden of proving the aggravated offence would be greater than in the other models as there are more facts to prove, including the defendant's ulterior intention, and there would be fewer guilty pleas to this offence. The list of ulterior acts that must be intended might prove to be under-inclusive and subsequent legislative amendment may be necessary.

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low	£0	0	Optional	**Optional**
High	£0		Optional	**Optional**
Best Estimate	£0		£0.470	**£3.057**

Description and scale of key monetised benefits by 'main affected groups'

HMCS, CPS, LSC: The definition of the basic offence will be clearer, leading to a possible saving in legal argument, in wasted prosecutions and in appeals. By not distinguishing detention from abduction, it obviates the need for time and effort in deciding which offence to charge. This may save both prosecutorial and court time. Allowing minor cases to be tried in a magistrates' court will save court and legal costs.

Other key non-monetised benefits by 'main affected groups'

The law will be clearer and more in accordance with the public perception of kidnapping. The minor cases will be excluded from the more serious offence. Minor offences will be tried in the magistrates' court and not over-stigmatised.

Other affected groups are children and other vulnerable persons, as potential victims of the offence. As in options 1 and 2, their position will be made clearer and the offence will give them better protection.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5

Assumptions: 1. Zero training costs and 2. An initial spike in applications for leave to appeal and appeals from years 0 to 2 for all policy options. Subsequently appeals will return to the previous level or lower. For Option 3 we have assumed a 50% increase.

Risks: 1. A moderate risk of public dissatisfaction with the list of factors, with the consequent need for amendment, 2. A moderate risk of difficulties in proving an ulterior intention and 3. A low risk of borderline disputes.

Impact on admin burden (AB) (£m):			**Impact on policy cost savings (£m):**	**In scope**
New AB: £0	**AB savings:** £0	**Net:** £0	**Policy cost savings:** £0	No

ENFORCEMENT, IMPLEMENTATION AND WIDER IMPACTS

What is the geographic coverage of the policy/option?			England and Wales		
From what date will the policy be implemented?					
Which organisation(s) will enforce the policy?			HMCS, Police, CPS		
What is the annual change in enforcement cost (£m)?			£0		
Does enforcement comply with Hampton principles?			Yes		
Does implementation go beyond minimum EU requirements?			N/A		
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** 0		**Non-traded:** 0
Does the proposal have an impact on competition?			No		
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?			**Costs:** 100%		**Benefits:** 100%
Percentage of annual cost per organisation	**Micro** 0%	**< 20** 0%	**Small** 0%	**Medium** 0%	**Large** 0%
Are any of these organisations exempt?	No	No	No	No	No

SPECIFIC IMPACT TESTS: CHECKLIST

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on…?	**Impact**	**Page ref within IA**
Statutory equality duties[3] Statutory Equality Duties Impact Test guidance	Yes/No	
Economic impacts		
Competition Competition Assessment Impact Test guidance	No	
Small firms Small Firms Impact Test guidance	No	
Environmental impacts		
Greenhouse gas assessment Greenhouse Gas Assessment Impact Test guidance	No	
Wider environmental issues Wider Environmental Issues Impact Test guidance	No	
Social impacts		
Health and well-being Health and Well-being Impact Test guidance	Yes/No	
Human rights Human Rights Impact Test guidance	Yes/No	
Justice system Justice Impact Test guidance	Yes	
Rural proofing Rural Proofing Impact Test guidance	No	
Sustainable development Sustainable Development Impact Test guidance	No	

[3] Race, disability and gender impact assessments are statutory requirements for relevant policies. Equality statutory requirements will be expanded 2011, once the Equality Bill comes into force. The statutory equality duties part of the Equality Bill apply to GB only. The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

EVIDENCE BASE (FOR SUMMARY SHEETS) – NOTES

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

References

Include the links to relevant legislation and publications, such as public impact assessment of earlier stages (e.g. Consultation, Final, Enactment).

No.	Legislation or publication
1	Simplification of Criminal Law: Kidnapping (Law Com CP No …)
2	
3	
4	

+ Add another row

Evidence Base

Ensure that the information in this section provides clear evidence of the information provided in the summary pages of this form (recommended maximum of 30 pages). Complete the **Annual profile of monetised costs and benefits** (transition and recurring) below over the life of the preferred policy (use the spreadsheet attached if the period is longer than 10 years).

The spreadsheet also contains an emission changes table that you will need to fill in if your measure has an impact on greenhouse gas emissions.

Annual profile of monetised costs and benefits* - (£m) constant prices

	Y_0	Y_1	Y_2	Y_3	Y_4	Y_5	Y_6	Y_7	Y_8	Y_9
Transition costs										
Annual recurring cost										
Total annual costs										
Transition benefits										
Annual recurring benefits										
Total annual benefits										

* For non-monetised benefits please see summary pages and main evidence base section

Microsoft Office Excel Worksheet

EVIDENCE BASE (FOR SUMMARY SHEETS)

1. INTRODUCTION

Background

This project forms part of the wider project for the simplification of criminal law. The purpose of the wider project is to review some older common law offences, so as to consider either abolishing them or restating them in statute. The current instalment of this project concerns kidnapping.

Kidnapping is a common law offence: particular forms of it first appeared in the seventeenth century. It attained a more comprehensive form in the early nineteenth century, and is now defined (following the House of Lords decision in *D* [1984] AC 778) as an attack on infringement of personal liberty, consisting of the taking or carrying away of one person by another, by force or fraud, without the consent of the person taken or carried away and without lawful excuse. "Taking or carrying away" includes any means of moving a person from one place to another, or of inducing that person to move him or herself.

In *Hendy-Freegard* [2008] QB 57 it was clarified that the kidnapper had to accompany the victim, and that simply causing a person to move from one place to another, without circumstances indicating loss of liberty, was not sufficient.

In *Wellard* (1978) 67 Cr App R 364 the defendant posed as a police officer searching for drugs and ordered the victim to accompany him to his car, but the victim's friends arrived and she went away with them before the car could be driven anywhere. It was held that this was a taking, and a deprivation of liberty, sufficient to constitute the offence. However it was not stated whether the loss of liberty occurred during the walk to the car or while sitting in it, or whether this made a difference to whether the offence had been committed.

Kidnapping is sometimes regarded as an aggravated form of false imprisonment, which is a common law offence including every act whereby one person intentionally or recklessly circumscribes the freedom of movement of another without lawful excuse. The sentence for both offences is unlimited.

Both kidnapping and false imprisonment are currently indictable-only offences, meaning that they can only be tried in the Crown Court. There are generally 600-750 prosecutions a year for kidnapping which reach a first hearing at the magistrates' court (figures supplied by CPS), of which between 100 and 150 result in conviction (figures supplied by Ministry of Justice via Sentencing Council). For false imprisonment, the figures are as follows. 1100-1200 prosecutions per year reach a first hearing at the magistrates' court, of which between 200 and 250 result in conviction. However the figures for first hearings and for convictions are not directly comparable, as the number of prosecutions reflects the number of charges rather than the number of persons charged.

The problem

Briefly, the problems are as follows.

1. In relation to kidnapping it is not clear whether the essential element of a "deprivation of liberty" must occur during the taking and carrying, or whether it is sufficient that it occurs after it. After *Hendy-Freegard* it appears that every kidnapping must contain both an element of abduction and an element of detention. It is still not clear whether it can consist of abduction followed by detention, or whether the abduction must take the form of detention in motion.
2. The requirements of force or fraud and lack of consent are separate and cumulative, though they largely exist for the same purpose. This creates problems where a young child or a mentally ill or learning disabled person is enticed to go to a place and does not consent, but the taking does not involve force or fraud. This deficiency was underlined by Munby LJ in *HM (Vulnerable Adult: Abduction)*.[4]
3. For both these reasons, it is doubtful whether the offence covers some cases that ought to be included, principally the enticement of a child or mentally incapacitated person who puts up no resistance followed by the confinement of that person at the destination.
4. This causes problems regarding the boundary between kidnapping and false imprisonment. Kidnapping is generally regarded as the more serious offence of the two, though the sentencing

[4] [2010] EWHC 870 (Fam); [2010] 2 FLR 1057.

powers are the same; but it is not clear why detention in motion should be considered worse than detention in one place, or why they should be separate offences at all.

5. The offences of kidnapping and false imprisonment can cover a wide range of behaviour, some very serious and some far less so. Currently these offences are indictable only with the result that even the less serious cases must be dealt with in the Crown Court when it would be more appropriate and proportionate to do so in the magistrates' court.

Some of these problems particularly affect children and mentally impaired adults: their position needs to be explained in more detail.

CHILDREN

At present there are three main offences relating to the abduction of children. Section 1 of the Child Abduction Act 1984 addresses abduction by parents, for example in the course of a custody battle, but only where the child is taken or sent outside the UK. Section 2 of that Act addresses abduction by unconnected persons, where the effect is to remove the child from the custody of parents or guardians. The maximum penalty for both offences is seven years' imprisonment. Finally there is kidnapping, which as we have seen can only be used where the child was forcibly taken or captured by deception: where the kidnapping was by a parent or guardian, the consent of the Director of Public Prosecutions is required for any prosecution.

The difficulty with this is that the more serious offence, kidnapping, does not cover the case where a child comes willingly, following a show of friendliness or a promise of toys or sweets, to a destination where he or she is then confined, even if ransom demands are made or the child is ill-treated at that destination. The reason for this is that, though the child was in a sense taken without consent (as the child lacked capacity to consent), there is no identifiable force or fraud, and force or fraud is an essential part of kidnapping. A case of this kind can only be prosecuted as false imprisonment or as the section 2 offence, which does not convey the full gravity of what occurred. By contrast, if any sort of deception is used, it is kidnapping, even if the child was only taken a short distance and later released unharmed.

MENTALLY IMPAIRED ADULTS

The same problem arises in connection with mentally impaired adults. Where a person in this category is invited to a place and subsequently confined there, there is a "taking", and it is without consent because of the victim's lack of capacity. But there is no kidnapping because the taking was not by force or fraud. In these cases there is no offence equivalent to child abduction and false imprisonment is the only possible charge. This was the situation discussed in *HM (Vulnerable Adult: Abduction)*, as mentioned above.

The objective and intended effects

The objective of this part of the simplification project is to replace the existing offences of kidnapping and false imprisonment with one or more clearly defined offences set out in statute. The intended effects include:

1. clarifying the scope of the offence of kidnapping to ensure that the scope of kidnapping no longer omits taking without consent in the absence of force or fraud;
2. clarifying the protection for children and mentally impaired persons;
3. paving the way for codification of the criminal law;
4. (in the version of our proposals here considered) ensuring that, in appropriate cases, the magistrates' have the power to deal with the less serious instances of wrong-doing falling within the scope of the offences.

The rationale

This objective can only be achieved through legislation, as it involves the creation of a new statutory offence or offences.

The conventional economic approach to government intervention to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are failures in the way markets operate (e.g. monopolies overcharging consumers) or if there are failures in existing government interventions (e.g. waste generated by misdirected rules). In both cases the proposed new intervention itself should avoid creating a further set of disproportionate costs and distortions. The

Government may also intervene for equity (fairness) and redistributional reasons (e.g. to reallocate goods and services to the more needy groups in society).

Within this analysis, the present project falls within the waste and equity justifications. The classification of these offences as indictable only means that unnecessary resources are used on taking certain cases through the Crown Court which would be dealt with more appropriately at the magistrates' court. Uncertainty in the law may lead to lengthier legal argument, unnecessary appeals and wasted prosecutions.

Option description

Introduction

As in all impact assessments, Option 0 is to do nothing, and the other options, involving reform, are measured against it. Options 1, 2 and 3 all involve the replacement of both kidnapping and false imprisonment with one or more statutory offences. In the Consultation Paper we indicate no preference among these options.

Another issue raised in the Consultation Paper is mode of trial. At present both kidnapping and false imprisonment are triable on indictment only: that is to say, they must always be tried by the Crown Court. In the Consultation Paper we raise the possibility of making the new offence or offences triable either way: that is to say, either by the Crown Court or in a magistrates' court. This possibility applies equally to all three of Options 1 to 3. For reasons which will appear, the economic impact of redefining the offences, without altering the mode of trial, is unlikely to be very great. In this Impact Assessment we therefore assume that all three proposals will involve allowing magistrates' court trial in some cases.

Option 0: Do nothing

This option would leave the common law offence of kidnapping in its existing form, namely an attack on personal liberty consisting of the taking or carrying away of one person by another, by force or fraud, without the consent of the person taken or carried away and without lawful excuse. It would also leave the existing offence of false imprisonment in its existing form, namely any act whereby one person intentionally or recklessly circumscribes the freedom of movement of another without lawful excuse.

Option 1: Replace kidnapping and false imprisonment with a single statutory either way offence of deprivation of liberty

Option 1 would be to replace the separate offences of kidnapping and false imprisonment with one offence triable either way targeting intentional or reckless conduct that causes non-consensual loss of freedom of movement, irrespective of whether the detention arises in transit or afterwards.

1. There would be no separate requirement of taking by force or fraud, as with kidnapping at present: force and fraud would be simply two possible reasons for lack of consent.
2. Where the victim is moved and undergoes stationary detention as a result of the same course of conduct, the whole series of events would fall within the loss of freedom of movement.
3. There would be no requirement that the defendant accompanies the victim during the moving process.

The advantage of this option is simplicity. As there would be only one offence, any problems concerning the boundary between the two existing offences would be eliminated.

Option 2: Replace kidnapping and false imprisonment with a statutory either way offence of unlawful detention and a statutory either way offence of kidnapping

In this option, the distinction between false imprisonment and kidnapping would remain, and the requirement of detention, or loss of liberty, would remain part of the kidnapping offence. In these respects this option would reproduce the existing law in statutory form. There would however be some changes, though less radical than under option 1.

1. There would be no separate requirement of taking by force or fraud: force and fraud would be simply two possible reasons for lack of consent.
2. Where the victim is moved and undergoes stationary detention as a result of the same course of conduct, the whole series of events would fall within the kidnapping offence.
3. There would be no requirement that the defendant accompanies the victim during the moving process.

The advantage of this option is that it reflects the public perception that kidnapping is a wrong distinct from false imprisonment. At the same time, the scope of kidnapping would be broadened so as to avoid the anomalies and uncertainties in the existing definition.

Option 3: Replace kidnapping and false imprisonment with a statutory either way offence of deprivation of liberty and a more serious indictable only offence of deprivation of liberty coupled with any of a list of aggravating factors

In this option, there would be a basic either way offence of deprivation of liberty, covering both stationary detention and cases where the victim is moved, exactly as in Option 1.

There would in addition be an aggravated offence, consisting of deprivation of liberty where any of the following types of conduct is intended, namely:

1. the infliction or threat of force or actual bodily harm;
2. obtaining or demanding ransom or some other advantage;
3. holding the person detained or abducted in service;
4. sending that person out of the country.

The aggravated offence would be triable only on indictment.

The advantage of this option is that it reflects the public perception that kidnapping is an exceptionally serious offence. Accordingly the distinction between kidnapping and the more basic offence would depend on the overall seriousness of the crime rather than on whether the victim is moved or not.

Scale and Context

Both kidnapping and false imprisonment are currently indictable-only offences, meaning that they can only be tried in the Crown Court. A person accused of one of these offences is brought before a magistrates' court, but under section 51 of the Crime and Disorder Act 1998 the court must then immediately send the case to the Crown Court, forwarding any necessary documents. This should be contrasted with the procedure in offences triable "either way", where the magistrates' court has an active role in considering which court should try the case, and gives the defendant the opportunity to consider whether to plead guilty.

There are generally 600-750 prosecutions a year for kidnapping which reach a first hearing at the magistrates' court (figures supplied by CPS), of which between 100 and 150 result in conviction (figures supplied by Ministry of Justice via Sentencing Council). For false imprisonment, the figures are as follows. 1100-1200 prosecutions per year reach a first hearing at the magistrates' court, of which between 200 and 250 result in conviction. However the figures for first hearings and for convictions are not directly comparable, as the number of prosecutions reflects the number of charges: a case where a defendant faces two charges of kidnapping counts as two prosecutions. The figures for convictions on the other hand reflect the numbers of individuals dealt with.

Ministry of Justice statistics for 2010 (http://www.justice.gov.uk/downloads/publications/statistics-and-data/criminal-justice-stats/volume-1.zip Volume 1 Part 1 Table S1.1(A)) indicate that a total of 1196 individuals were committed for trial for "kidnapping etc". They further indicate (http://www.justice.gov.uk/downloads/publications/statistics-and-data/criminal-justice-stats/volume-2.zip Volume 2 Part 1 Table S2.1(A)) that, in the same year and offence group, 730 individuals were listed for trial, of whom 350 were acquitted, 362 convicted and 18 not tried.[5]

In 2010, out of the 362 convicted, 95 pleaded guilty to kidnapping while 55 were convicted after trial; 158 pleaded guilty to false imprisonment while 53 were convicted after trial; in one case the plea was not recorded.

The Ministry of Justice research paper "Are Juries Fair" gives a conviction rate of 52.9% for kidnapping and 55.2% for false imprisonment for the years 2006-08.[6] These figures are based on a sampling method rather than on the total of all cases for the period.

[5] Figures supplied by Sentencing Council.

[6] C Thomas, *Are Juries Fair?* (2010 Ministry of Justice), Technical Annex 9.

We do not have any data on the average length of trials, but we do have sentencing data. Tables 1 to 3 below show the sentences passed over a period of 11 years (2000 to 2010), in relation to the total number of kidnapping and false imprisonment convictions.

*Table 1: Average number (and range) of sentences in kidnapping cases, 2000-2010**

Sentence	2010	Period range (Min – Max)	Annual average	Percentage of cases
Non-custodial	6	4-29	14	10%
Suspended sentence	8	1-23	7	5%
6 months or less	2	1-5	3	2%
over 6 months to 3 years	51	33-74	56	37%
over 3 years to 5 years	25	22-39	29	19%
over 5 years to 10 years	41	10-42	25	16%
over 10 years	18	4-34	17	11%
Total	151	107-194	151	100%
Within power of magistrates	8	6-32	17	11%
Within power of magistrates (%)	5%	4-21%	11%	N/A

Source: Ministry of Justice; Sentencing Council

* Annual sentencing data for 2010 (latest available) is also provided

*Table 2: Average number (and range) of sentences in false imprisonment cases, 2000-2010**

Sentence	2010	Period range Min-Max	Annual average	Percentage of cases
Non-custodial	32	32-77	55	24%
Suspended sentence	20	3-34	15	7%
6 months or less	8	0-12	7	3%
over 6 months to 3 years	85	81-112	94	41%
over 3 years to 5 years	31	15-40	28	12%
over 5 years to 10 years	13	8-24	16	7%
over 10 years	30	2-38	17	7%
Total	219	214-262	233	100%
Within power of magistrates	40	40-84	63	27%
Within power of magistrates (%)	18%	17%-34%	27%	N/A

Source: Ministry of Justice; Sentencing Council

* Annual sentencing data for 2010 (latest available) is also provided

*Table 3: Average number (and range) of sentences for both offences, 2000-2010**

Both offences together	2010	Period range Min-Max	Annual average	Percentage of cases
Non-custodial	38	38-90	70	18%
Suspended sentence	28	5-57	23	6%
6 months or less	10	2-17	10	3%
over 6 months to 3 years	136	114-176	150	39%
over 3 years to 5 years	56	43-79	57	15%
over 5 years to 10 years	54	31-58	40	11%
over 10 years	48	6-72	34	9%
Total	370	334-425	384	100%
Within power of magistrates	48	48-101	80	21%
Within power of magistrates (%)	13%	13%-29%	21%	N/A

Source: Ministry of Justice; Sentencing Council

The mean length of custodial sentences for kidnapping is 4 years 2 months, 40% higher than that for false imprisonment, 2 years 11 months. These figures exclude indeterminate sentences such as life sentences and indeterminate sentences of imprisonment for public protection.

The estimated annual cost of one prison space depends on the category and ranges between £31,374 and £69,885, with an average of £44,703.[7] The most common sentence length for all of the offences is between one and two years.

Our reforms may impact on the number of application for leave to appeal against conviction and appeal heard. The data on current appeals is tabulated below.

Table 4: Applications for leave to appeal and appeals against conviction (June 2010 – May 2011)

	Applications for appeal	**Heard**	**Percentage Heard**	**Allowed**
False imprisonment	6	3	50%	3
Kidnapping	22	6	27%	3
Total	*28*	*9*	*32%*	*6*

Source: Her Majesty's Court Service

The main affected bodies are:

1. the courts;
2. the prosecutors;
3. the police and;
4. the Legal Services Commission.

[7] Information from the Ministry of Justice.

2. COSTS AND BENEFITS

This Impact Assessment identifies both monetised and non-monetised impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the do nothing option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However there are important aspects that cannot sensibly be monetised. These might include how the proposal impacts differently on particular groups of society or changes in equity and fairness, either positive or negative.

When calculating the net present value (NPV) for the impact assessment we have used a time frame of ten years, with the present being year 0. We have assumed that the transitional costs and benefits occur in years 0, 1 and 2, and on-going costs and benefits accrue in year 1 to 10. We have used a discount rate of 3.5%, in accordance with HM Treasury guidance. Unless stated all figures are in 2009/10 prices, and have been uprated using the GDP deflator.

The Ministry of Justice guidance on rounding says that figures below one million are rounded to the nearest £500,000. However as our figures are very low this would make it impossible to distinguish between the different policy options. We have therefore left the figures unrounded.

Option 0: Do nothing

This option avoids any immediate implementation costs. However the problems identified in the present law of kidnapping will continue, for example the boundary between kidnapping and false imprisonment. In particular there will continue to be doubts about whether the offence covers the following types of cases:

- where a child or vulnerable adult is abducted without the use of physical compulsion or deception;
- where a person is abducted and then confined at the destination, though he or she was not in any way coerced or confined during the journey to that destination.

Though these uncertainties have not hitherto been reflected in the evidence base, they have the potential to give rise to lengthy trials, failed prosecutions in doubtful cases and a disproportionately high number of successful appeals.

The offence of kidnapping will also continue to cover minor incidents, for which false imprisonment would be fully adequate, while excluding far more serious instances such as *Hendy-Freegard*.

In some cases minor incidents will not lead to prosecution, as prosecutors will use their discretion not to prosecute on public interest grounds; however this will not always be possible. Where there is no suitable alternative charge and the conduct is serious enough to warrant prosecution there may be no alternative but to charge kidnapping or false imprisonment even though they are indictable only

As a result, under Option 0 relatively minor incidents charged as false imprisonment or kidnapping will continue to have to be dealt with in the Crown Court, incurring unnecessary expense and longer hearings than if they could have been dealt with in a magistrates' court.

Because the do-nothing option is compared against itself its costs and benefits are necessarily zero, as is its Net Present Value (NPV)[8].

[8] The Net Present Value (NPV) shows the total net value of a project over a specific time period. The value of the costs and benefits in an NPV are adjusted to account for inflation and the fact that we generally value benefits that are provided now more than we value the same benefits provided in the future.

Option 1: Replace kidnapping and false imprisonment with a single statutory either way offence of deprivation of liberty

Costs

Transitional costs

1. Training

Judges will require appropriate training and guidance about the legal change. Since this change is simple and easy to explain, the Judicial College would probably not need to roll out training. Instead notification of the change would be included in the criminal newsletter. The newsletters come out monthly. Inclusion into the newsletter would be at no additional cost.

Therefore the net present value of this cost is **£0**.

2. Increase in appeals

As with all reforms, there may be a small spike in appeals while practitioners and judges come to terms with the new law.

We assume that the spike in appeals will be generated by cases tried in the Crown Court, and so will be heard by the Court of Appeal Criminal Division. There is no current data on the average cost of an appeal to the Court of Appeal. We do have the following data:

- The estimated cost of a day's sitting for the Court of Appeal Criminal Division in 2009/10 is £16,635.
- A simple model of the average cost to the criminal justice system of an appeal against a conviction or sentence imposed by the Crown Court is £20,821 (in 2009/10 prices).[9]
- If leave is refused on the papers, the court will not sit and the cost will be far lower. However, an application for leave to appeal potentially increases the workload for those who handle the leave applications – the judges and staff of the Crown Court – and for those who handle the appeals against the refusal of leave, namely the judges and staff of the Court of Appeal Criminal Division, even if leave is refused. We have estimated that an application for leave to appeal costs £3,000.

The figure of £20,821 for the cost of an appeal includes legal aid costs and costs to the CPS. It does not include any private costs to the defendant and so the figure might be an underestimate. To account for this we have used the estimate of £25,000 for the cost of an appeal in the Court of Appeal.

We have estimated a 25% increase in the applications for leave to appeal against conviction per year, which will be paired with a 25% increase in appeals heard. This increase will begin in year 0 and end in year 2. The costs are tabulated below:

Table 5: Costs from transitional increase in appeals

Percentage increase in applications	25%
Number of additional applications	7
Cost per application	£3,000
Cost of additional applications	*£21,000*
Number of additional appeals heard	2.25
Cost per appeal	£25,000
Cost of additional appeals	*£56,250*
Additional annual cost	*£77,250*
Present value	**£221,563**

[9] R Harries, *Cost of Criminal Justice* (Home Office Research, Development and Statistics Directorate Research Findings No 103, 1999). This research has excluded some costs, such as compensation.

On-going costs

The new offence will cover the same range of cases as the two existing offences: the number of cases prosecuted should in principle be the same as at present. Some situations in which at present it is uncertain whether the conduct amounts to kidnapping will certainly fall within the new offence. However we do not anticipate that this will result in an increase in prosecutions or convictions overall, since such cases would almost certainly fall within the scope of other offences at present.

The power of sentencing for the two existing offences is presently unlimited. Since the reform under this option would only remedy existing defects in the current law and would not significantly change the nature of the offence it is not anticipated that more severe sentences would be passed as a result. Offenders are sentenced according to considerations such as their culpability, the harm caused, their remorse and previous convictions and these factors would not be affected by the reform proposed under this option.

As the new offence replaces both false imprisonment and kidnapping, and resembles false imprisonment in its emphasis, unless the label kidnapping is used in some form in the offence there may be an adverse public and press reaction to the fact that the offence of kidnapping, which carries a special stigma, has been abolished apparently without replacement, although this risk may be reduced by careful explanation of the benefits of reform. Conversely, if the new offence is described as "kidnapping" that may dilute the impact of the word by applying it to all cases of unlawful detention.

Benefits

Transitional benefits

There are no transitional benefits of this option to our knowledge.

On-going benefits

1. Prosecution savings

As explained above, the new offence will cover the same range of cases as the two existing offences. By merging the two offences into one, Option 1 should in principle save the need to spend time and resources deciding which to charge, and with it the possibility of failed prosecutions because the wrong offence was charged. However, as we do not know how many of these borderline cases there are at present, we cannot put a figure on this possible saving.

At present the conviction rates for kidnapping and false imprisonment are in the range 52-55%, as opposed to an average of 65% for all offences, and two thirds of appeals against conviction for these offences heard by the Court of Appeal Criminal Division are allowed. We do not know whether the reason for these differences is connected with the uncertainties we have identified in the definition of the offences, but this is clearly a possibility. If so, the increased clarity of the new offence should improve both these figures by excluding doubtful cases.

2. Security of children and mentally impaired persons

An important practical impact made by our proposals will be on the abduction of children and mentally impaired persons: the scope of the offence will be clarified to include wrongful instances where they are lured away and then confined.

At present the abduction of children without the use of force or fraud, even if followed by their detention by force or fraud, is not kidnapping, though it may be false imprisonment or child abduction. This option, by removing the distinction between kidnapping and false imprisonment, resolve this anomaly.

The same problem arises in connection with mentally impaired adults. In these cases there is no offence equivalent to child abduction and false imprisonment is the only possible charge. Reform is therefore even more important in relation to this group. By merging the two offences our proposals resolve this problem.

3. Court savings as a result of reclassifying the offences as either way

Between 2000 and 2010 11% of kidnapping cases and 27% of false imprisonment cases resulted either in a non-custodial sentence or in a sentence of 6 months or less: the figures are set out in more detail in

tables 1 and 2. (We exclude suspended prison sentences from these figures as we have no information on the length of the sentences.) Taking the two offences together, at least 21% of cases during this period were dealt with by way of a sentence that could have been passed by a magistrates' court. Under this option less serious incidents of this sort could be dealt with by magistrates' courts instead of being sent to the Crown Court.

From the figures in the Crown Prosecution Service Annual Report for 2009/10 it can be calculated that, over the period from 2007/08 to 2009/10 inclusive, out of all prosecutions for "either way" offences reaching the magistrates' courts, 14.4% are committed for Crown Court trial on the magistrates' direction, 2.0% are committed on the defendant's election and 83.6% are tried summarily. It follows that, in 2.3% of all "either way" cases regarded by the magistrates as suitable for trial by them, the defendant elects for Crown Court trial.

Assuming that 2010 is a typical year, the total number of cases of kidnapping and false imprisonment listed for trial in the Crown Court is approximately 730 per year, of which 250 plead guilty, 110 are convicted after trial and 370 acquitted or not tried: we expect the corresponding figures for the new offence to be similar. In what follows we disregard those cases which come before a magistrates' court and are not committed, as they will not be affected by our proposals. We also take no account of cases in which kidnapping or false imprisonment is charged but is not the principal offence, as we have no figures for the outcome of these.

One effect of making the new offence triable either way is that, in some cases, the defendant will plead guilty before the magistrates, who will either pass sentence themselves or commit the defendant to the Crown Court for sentence. This may bring about some saving in costs but we do not have sufficient data to quantify this.

As concerns the cases that go for trial, we can assume (by extrapolating from the sentencing figures) that 21% would be regarded as suitable for trial in the magistrates' court. In a certain proportion of cases, the defendant would elect for Crown Court trial: this proportion may well be higher than that for the whole range of either-way offences, where there is a higher proportion of guilty pleas and magistrates' courts deal with a far higher proportion even of the cases that are contested. For this reason, rather than assuming that defendants will elect Crown Court trial in 2.3% of cases regarded as suitable for trial by magistrates, we shall assume that they elect in 2% of all contested cases whether regarded as suitable or not, leaving 19% of contested cases to be tried in magistrates' courts, i.e. 87 cases per year (350 acquitted plus 55 convicted of kidnapping plus 53 convicted of false imprisonment makes 458; 19% of 458 is 87).

We have no figures for the length of trials in kidnapping and false imprisonment cases. We may assume that, in the least serious cases, where a sentence of 6 months or less is likely, Crown Court trial will take one or two days. Removing the need for instructing the jury and for jury discussion, one may assume that the same case in a magistrates' court would take half a day to just over a day (allowing for the magistrates to deliberate overnight in more complex cases).

We have assumed that a Crown Court "sitting" occupies a whole day (4.45 hours on average) and costs £4,454 on average, whereas a magistrates' court "session" takes only half a day (2.5 hours), and costs £2,005 on average. Consequently, there is one Crown Court sitting per day and two magistrates' court sessions per day. A full day in a magistrates' court is estimated to cost £4,010.

A case within the "least serious" category should therefore cost on average £6,700 in the Crown Court and £3,300 in a magistrates' court. The proposal to allow magistrates' court trial in these cases should lead to a saving of 87 x £3,400, i.e. £295,800 a year in court costs.

In addition to this there will be savings in legal fees. Under the Criminal Defence Service's Graduated Fee Scheme the basic fee for a junior advocate appearing alone in the Crown Court to defend a charge of kidnapping or false imprisonment is £1509: where the trial lasts more than two days, or there are more than 10 prosecution witnesses or more than 50 pages of documentary prosecution evidence, the appropriate uplifts apply. In a magistrates' court, the maximum basic advocate's fee is £468; should the trial go to a second day an additional sum of up to £162 is payable (2010 Standard Crime Contract – Specification, Payment Annex October 2011). On average, then, there will be a saving to the Criminal Defence Service of approximately £1000 per case: we may assume that the prosecution saving is similar. (We assume that the fee payable to a defence solicitor who does not act as an advocate is similar in both courts.) The total saving in legal fees should be 87 x £2000, i.e. £174,000 a year. Table 6 below shows the total savings.

Table 6: Annual court and legal fee savings as a result of reclassification

Category of Savings	*Savings*
Transfer of "Least serious" cases from Crown Court to Magistrates (87 x £3,400)	£295,800
Reduced legal fees (87 x £174,000)	£174,000
Total annual savings	£469,800
Present value over ten years	£3,057,417

4. Possible savings in prison costs

As pointed out above, the sentence for both the existing offences are unlimited, and the overall number of cases should not increase as a result of our proposal, so no extra prison costs should result. Should a fixed maximum sentence be introduced there may even be a small reduction if the maximum is set lower than the longest prison sentences currently passed, although such a change may not be welcomed by the public. As no proposals have been made about sentencing we cannot attach a figure to this reduction and we do not count it as a monetised benefit.

Reclassification as an either way offence would mean that those cases sentenced at the magistrates' court would be subject to its maximum sentencing powers of 6 months imprisonment. However a significant proportion of both kidnapping and false imprisonment cases are currently dealt with by sentences that could be passed by a magistrates' court and it is anticipated that these are the cases that would be dealt with at the magistrates' courts once the offence is reclassified as either way. In some cases it may be found, following trial in a magistrates' court, that the offence was more serious than originally thought and that Crown Court powers of sentencing would have been appropriate; but in these cases the magistrates' court has power to commit the case to the Crown Court for sentence. We therefore do not expect significant savings in prison resources as a result of making the offence triable either way.

Net impact

Table 7: Net impact of option 1

	Best estimate
Transitional costs	£221,563
Ongoing costs (annual)	£0
Present value of costs	£221,563
Transitional benefits	£0
Ongoing benefits (annual)	£469,800
Present value of benefits	£3,057,417
Net present value	**£2,835,854**

Option 2: Replace kidnapping and false imprisonment with one statutory offence of unlawful detention and one statutory offence of kidnapping

Costs

Transitional costs

The costs associated with judicial training are the same as in Option 1, **£0**.

As with Option 1 there is a possible spike in appeals. The costs per appeal and per day's sitting would be the same as in Option 1. However, given the somewhat greater complexity of this option, and the possibility of cases on the boundary between unlawful detention and kidnapping, the number of appeals may be somewhat higher. We have estimated a 50% increase in the applications for leave to appeal against conviction per year, which will be paired with a 50% increase in appeals heard. This increase will begin in year 0 and end in year 2. The costs are tabulated in table 8 below:

Table 8: Costs from transitional increase in appeals

Percentage increase in applications	50%
Number of additional applications	14
Cost per application	£3,000
Cost of additional applications	*£42,000*
Number of additional appeals heard	4.5
Cost per appeal	£25,000
Cost of additional appeals	*£112,500*
Additional annual cost	*£154,500*
Present value	**£443,126**

On-going costs

Under Option 2, the two offences will between them cover the same range of cases as the two existing offences: the only change will be in the boundary between them. There should therefore be no increase in prosecutions.

The boundary between the two offences would be to some extent arbitrary and in some cases there may be difficulties in deciding which to charge. However, as the definition of kidnapping would be clarified to include periods of detention forming part of the same course of conduct, and as the separate requirement of force or fraud would be removed, this problem would be on a smaller scale than in the existing law. In cases of doubt it will be possible to charge both offences together or in the alternative. This difficulty therefore does not represent a cost as compared to Option 0.

The burden on the prison service should also be the same as at present, subject to the remarks made below under "benefits".

Benefits

Transitional benefits

There are no transitional benefits of this option to our knowledge.

On-going benefits

1. Prosecution savings

There will be some increase in legal certainty compared with the present law. It reduces but (unlike Option 1) does not altogether eliminate the difficulty of deciding which offence to charge and the possibility that some prosecutions will fail because the wrong offence was charged. However, given that the law will be much clearer than at present it is far more likely that the right charge will be brought, and

where it is not this will be the result of avoidable wrong charging decisions rather than of ambiguity in the law.

As with Option 1, therefore, increased clarity in the law could in principle have a net effect of increased guilty pleas, shorter trials and a lower proportion of convictions appealed against, but as we have no evidence of how far the problems of definition in the existing law are in practice reflected in the conviction rates we can put no figure on this saving.

2. Security of children and mentally impaired persons

The impact on cases involving the abduction of children and mentally impaired persons is the same as in Option 1.

By eliminating the requirement of force or fraud from the kidnapping offence, and by clarifying that that offence can include periods of stationary detention, Option 2 also resolves the anomaly concerning mentally impaired persons. Where such persons are enticed by whatever means to a place of confinement this will certainly be kidnapping.

3. Court savings as a result of reclassifying the offences as either way

The benefits of reclassifying the offences as either way will be the same as in option 1.

4. Possible savings in prison costs

For the same reasons as in Option 1, we do not expect the redefinition of the offences to have any effect on prison resources, unless one or both of the new offences has a fixed maximum sentence, in which case there may be a small reduction if the maximum is set lower than the longest prison sentences currently passed, although such a change may not be welcomed by the public. As no proposals have been made about sentencing we cannot attach a figure to this reduction and we do not count it as a monetised benefit. A possible saving may result from making the offences triable either way, but given the possibility of committal to the Crown Court for sentence we do not expect this to be significant.

Net impact

Table 9: Net impact of option 2

	Best estimate
Transitional costs	£443,126
Ongoing costs (annual)	£0
Present value of costs	£443,126
Transitional benefits	£0
Ongoing benefits (annual)	£3,057,417
Present value of benefits	£2,835,854
Net present value	**£2,614,291**

Option 3: Replace kidnapping and false imprisonment with one statutory offence of deprivation of liberty and a more serious offence of deprivation of liberty coupled with any of a list of aggravating factors

Costs

Transitional costs

The costs associated with judicial training are the same as in Option 1, **£0.**

As with Option 1 there is a possible spike in appeals. The costs per appeal and per day's sitting would be the same as in Option 1. However, given the somewhat greater complexity of this option, and the introduction of a new list of aggravating factors, the number of appeals may be somewhat higher. We have estimated a 50% increase in the applications for leave to appeal against conviction per year, which will be paired with a 50% increase in appeals heard. This increase will begin in year 0 and end in year 2. The costs are tabulated in table 10 below:

Table10: Costs from transitional increase in appeals

Percentage increase in applications	50%
Number of additional applications	14
Cost per application	£3,000
Cost of additional applications	*£42,000*
Number of additional appeals heard	4.5
Cost per appeal	£25,000
Cost of additional appeals	*£112,500*
Additional annual cost	*£154,500*
Present value	**£443,126**

On-going costs

Under Option 3, as under Option 2, the two offences will between them cover the same range of cases as the two existing offences: the only change will be in the boundary between them. There should therefore be no increase in the number of prosecutions.

The main on-going cost is that the law will be perceived as complex. The more serious offence will depend on proof of any of a number of factors: some extra time and expense will be involved in producing such proof, and some prosecutions for the more serious offence may fail because the relevant factor is not proved, though in such cases the defendant may be convicted of the basic offence. There may be fewer pleas of guilty to the more serious offence; conversely, however, there will be an added incentive to offer a plea of guilty to the more basic offence, whichever offence is charged.

As with Option 2, there may sometimes be difficulty in deciding which of the two offences to charge. The effect of mistakes should not be significant: as stated above, a person charged with the aggravated offence can be convicted of the basic offence if the aggravating factors are not made out. This will be so whether or not the basic offence has been charged as an alternative.

The burden on the prison service should also be the same as at present, subject to the remarks made below under "benefits".

Benefits

Transitional benefits

There are no transitional benefits of this option to our knowledge.

On-going benefits

1. Prosecution savings

As with the other two options, increased clarity in the law could in principle have a net effect of increased guilty pleas, shorter trials and a lower proportion of convictions appealed against, but as we have no evidence of how far the problems of definition in the existing law are in practice reflected in the conviction rates we can put no figure on this saving.

The more serious offence includes aggravating factors such as the making of ransom demands, and therefore expresses the full range of the defendant's conduct in a single charge. There may therefore be less need to charge multiple offences, for example false imprisonment together with blackmail: this should shorten trials, as there will be less need either to give complex directions on the ingredients of the different offences or to consider complicated questions about how to sentence a defendant for several offences at once.

While removing the need to consider technicalities about whether the victim was in motion or stationary at a given stage, this option distinguishes between a more serious and a less serious offence, and the more serious offence will include all or most cases which the public would regard as deserving the stigma associated with kidnapping. Unlike Option 1 it will therefore not create an impression that the criminal law is being diluted (or, as the case may be, that the kidnapping label is being over-extended). Conversely, less serious cases involving the moving of the victim will not fall within the more serious offence as at present: the stigma will therefore be reserved for cases that deserve it. This will save the need for the prosecution to limit the over-wide scope of kidnapping by deciding as a matter of discretion not to bring kidnapping charges for minor cases involving moving.

2. Security of children and mentally impaired persons

The position of children and mentally impaired persons will be resolved in the same way as in Option 1. If such a person is enticed to a place of confinement, this will constitute the basic offence. If aggravating factors such as ransom demands are present or intended, it will constitute the more serious offence.

3. Court savings as a result of reclassifying the less serious form of the offence as either way

The benefits of making the less serious of these two offences either way will be the same as under options 1 and 2 above. The more serious offence will remain triable only on indictment. We do not expect that this will have any effect on the proportion of cases tried in magistrates' courts, as cases where the aggravating factors are present will always be at the serious end of the spectrum and would not be regarded as suitable for magistrates' court trial under any of the options.

4. Possible savings in prison costs

For the same reasons as in Option 1, we do not expect the redefinition of the offences to have any effect on prison resources, unless the basic offence has a fixed maximum sentence, in which case there may be a small reduction if the maximum is set lower than the longest prison sentences currently passed, although such a change may not be welcomed by the public. As no proposals have been made about sentencing we cannot attach a figure to this reduction and we do not count it as a monetised benefit. A possible saving may result from making this offence triable either way, but given the possibility of committal to the Crown Court for sentence we do not expect this to be significant.

Net impact

Table 11: Net impact of option 3

	Best estimate
Transitional costs	£443,126
Ongoing costs (annual)	£0
Present value of costs	£443,126
Transitional benefits	£0
Ongoing benefits (annual)	£469,800
Present value of benefits	£3,057,417
Net present value	**£2,614,291**

Assumptions

We assume the following.

- Our account of the law is correct. One unresolved question is whether abduction followed by detention qualifies as kidnapping. As one of the effects of our proposals is to remove this doubt, the proposed reform works equally well on either assumption.
- Training costs under all three options are zero.
- There will be an initial spike in application for leave to appeal and appeals from years 0 to 2 for all policy options. Subsequently appeals will return to the previous level. For Option 1 we have assumed a 25% increase and for Options 2 and 3 a 50% increase.
- The figures supplied by the Ministry of Justice for committals, convictions and acquittals for 2000 and for sentencing for the years 1998 to 2008 are accurate for those years, and typical of current trends.
- In the committal figures, “kidnapping etc” includes false imprisonment.
- The reason for the discrepancy between the number of cases committed to the Crown Court and the number of cases listed for trial is that some cases were discontinued.
- The cost of a day’s sitting is £16,635 for the Court of Appeal Criminal Division, £4,454 for the Crown Court and £4,010 for a magistrates’ court.
- The total number of cases prosecuted under our proposals will be the same as at present.
- If the new offence or offences were triable either way, the proportion of cases which would be regarded as suitable for trial in a magistrates’ court would be the same as the proportion of convictions leading to non-custodial sentences or sentences of 6 months or less.
- Cases in this category, when tried in the Crown Court, typically last one to two days.
- The same cases, if tried in a magistrates’ court, would take between half a day and just over a day.
- Cases in which factors such as the intention to cause bodily harm or to demand ransom are present will usually or always attract custodial sentences of over 6 months and be regarded as suitable for trial in the Crown Court.

Risks

Some risks are listed under the “costs” sections of the costs benefit analysis, for example the risk of adverse public reaction to the removal of the “kidnapping” label.

In addition, there is the risk that one or more of the above assumptions is incorrect. In particular, there is a medium level risk that, if the new offence is made triable either way, there will be more prosecutions in minor cases that would at present be regarded as not justifying Crown Court trial. This is to some extent offset by the possibility that the availability of magistrates’ court trial will encourage pleas of guilty. We have therefore not taken account of this risk in our above analysis.

SPECIFIC IMPACT TESTS

Here we deal with the specific tests that we suggest are relevant to our provisional proposals.

Statutory Equality Duties

We have considered the three screening questions as the prerequisite for a full equality impact assessment. Using a range of sources of evidence we have not identified any adverse impact on equality of opportunity – but identify a number of positive policy implications as follows:

Gender

The majority of reported kidnapping cases appear to concern the taking of women or girls by men. To that extent, any strengthening or clarifying of the offence applies unequally between the sexes, but only because the problem itself does so. Any gender imbalance in the impact of our proposals is therefore justified, and indeed desirable in strengthening the protection of women and girls (while giving equal protection to males who are kidnapped).

Disability

The proposals should have a positive impact as concerns disability, as they confirm that the abduction of a person without the mental capacity to give a meaningful consent is capable of amounting to kidnapping, without the need to demonstrate force or fraud.

Race

Under Option 3, the intention to send a person outside the United Kingdom is one of the aggravating factors. In some cases, for example those involving forced marriage, this may have a greater impact on families with existing foreign connections, but only because the problem itself is more likely to arise in these circumstances. Otherwise the proposals appear to be neutral as to religion and ethnic origin.

Competition

There are four filter questions provided by the Office of Fair Trading to ascertain whether a competition impact assessment in necessary. If the answer to one or more of the questions is positive a competition assessment should be carried out. As our proposals do not impact on business they do not directly or indirectly limit the number or range of suppliers, or their ability to compete. Nor do they reduce suppliers' incentives to compete vigorously. Therefore a competition assessment is not necessary and we do not think that our provisional proposals would have any competition effects.

Small firms

We do not think that our provisional proposals would have any effect on small firms.

Greenhouse gas assessment

We do not think that our provisional proposals would have any effect on greenhouse gas emissions.

Wider environmental issues

We do not think that our provisional proposals would have any effect on wider environmental issues.

Health

We have considered the screening questions set by the Department of Health.[10] There are three screening questions, and according to the guidance, a health impact assessment is only necessary if the answers to two or more of them are positive.
Our proposals will not have any impact on lifestyle related variables, or on the demand for relevant medical or social services.
The only question with a potential affirmative answer, is "Will your policy have a significant impact on human health by virtue of its effects on the following wider determinants of health?", where one of the "wider determinants" listed is "Crime". We are not proposing any changes which would change behaviour, but rather a new definition of the crime of kidnapping, so it is unlikely that our proposals will change behaviour which may impact on health.

[10] At http://www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Healthassessment/DH_4093617.

Thus there is therefore no need for a health impact assessment, and we conclude that our proposals will not impact on health.

Human Rights

Our proposals clarify the definition of the offence of kidnapping, and therefore accord with the rights of the accused under Article 7 of the European Convention on Human Rights. They also increase the protection of young and vulnerable persons from kidnapping, in accordance with Article 5 of that Convention: see above under Option 1: Benefits (page 17).

Justice

The impact on the justice system of our proposals has been considered throughout the evidence base of the impact assessment. Therefore, we do not feel it is necessary to conduct a further, specific, impact assessment on this issue.

Rural proofing

We do not think that our provisional proposals would have any effect on rural communities or the farming industry.

Sustainable development

We do not think that our provisional proposals would have any effect on sustainable development.

ANNEXES

Annex 1 should be used to set out the Post Implementation Review Plan as detailed below. Further annexes may be added to provide further information about non-monetary costs and benefits from Specific Impact Tests, if relevant to an overall understanding of policy options.

ANNEX 1: POST IMPLEMENTATION REVIEW (PIR) PLAN

A PIR should be undertaken, usually three to five years after implementation of the policy, but exceptionally a longer period may be more appropriate. A PIR should examine the extent to which the implemented regulations have achieved their objectives, assess their costs and benefits and identify whether they are having any unintended consequences. Please set out the PIR Plan as detailed below. If there is no plan to do a PIR please provide reasons below.

Basis of the review: N/A
Review objective: N/A
Review approach and rationale: N/A
Baseline: N/A
Success criteria: N/A
Monitoring information arrangements: N/A
Reasons for not planning a PIR: The Law Commission does not implement policy, therefore does not review policy implementation.