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LA THÈSE À ÉTÉ  
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PARENTAL-CHILD ABDUCTION

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Submitted to the Department of  
Criminology, University of Ottawa,  
in partial fulfillment of the  
requirements for the degree of  
Master of Arts

OTTAWA, ONTARIO  
April 1984



Ellen L. Gottheil, Ottawa, Canada, 1984.

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Dedicated in loving memory, to my grandfather,  
Morris Gottheil.

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## ABSTRACT

The crime of parental-child abduction has evolved from the emotional hazards of family breakdown before, during and after the divorce process, together with the negative repercussions resulting from laws and judicial practices relating to divorce and child custody determinations. In recent years, the abduction of children by their parents has grown to be recognized as a serious problem both nationwide and internationally.

The present research is a qualitative study of the Canadian situation, which investigates the structural conditions that encourage parents to take the law into their own hands, and the specific factors which play a role in motivating parents to commit child abduction. It explores the nature and dimensions of this family crime, and the extent of the problem. It examines the development and implementation of the criminal and civil laws pertaining to the crime, and their implications in respect of Canada's domestic and international situation. Federal and provincial actions to enact legislations have derived essentially from the increasing crime incidence, coupled with the ineffective state of laws to deal with the problem.

There is an apparent scarcity of Canadian data on child abduction by a parent, particularly with regard to the extent and the nature of the crime--in terms of descriptive

information referring to important relationships between crime variables and social characteristics. The research methodology in the present study comprised several types of data sources. The legal literature, and government statutes and documents were significant sources of information concerning the relationships between child abduction and civil and criminal laws. Interviews, case analyses, interpretation of the literature and media data were equally pertinent to the knowledge of patterns in parental-child abductions.

The main findings reveal that both civil and criminal remedies are essential, in order to combat this prevalent crime. In Canada, appropriate civil and criminal measures have only recently been implemented. The most promising statutes are those which are child-oriented, recognizing that the children are the primary victims, in need of protection. Canada has taken important steps toward the advancement of the rights of children who are abducted by their mothers or fathers.

The author argues for the development and improvement of preventive measures and the cultivation of curative measures. It is clearly indicated that further empirical research is needed to investigate the varying dimensions relating to parental-child abduction.

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## CHAPTER ONE

### INTRODUCTION

Most parents hold their children dear to the heart. Some parents hold their children hostage. The abduction of children by their parents has prompted heightened public and professional concerns over the last several decades in Canada, as well as in other countries all over the world. Many of these nations, including Canada, have responded to the problem by implementing and modifying both civil and criminal laws, intended for the curtailment and deterrence of this activity. The time is ripe for the investigation of this serious family crime in contemporary society. The fundamental purpose of this preliminary study is to present an overall picture of the nature of parental-child abductions in respect of the Canadian situation, within its socio-legal and cultural contexts.

#### Defining the Problem

The origins of the word "kidnapping" derive from the act of stealing a child; the term "kidnapping", however, is not defined in the Canadian Criminal Code, and Canadian courts have not been called upon to give a definition. Yet,

it has long been an offence in common law, defined as the forcible abduction or false imprisonment of a man, woman or child from their country. However, modern Canadian law has established that the hostage does not have to be taken out of the country in order to constitute the crime of kidnapping (Mewett, 1978:479). Historically, the term "kidnapping" has been accorded to various types of unlawful acts, ranging from manstealing, under colonial law, to the current practice of divorced parents taking children from the lawful custody of the other parent (Alix, 1978:xvi).

While kidnapping is primarily an offence involving the taking or detention of a person against his will, the separate crime of abduction is concerned with the specific intent of depriving a parent of lawful custody, taking the child without authority, regardless of whether or not the child has consented. Thus, the term "abduction" is legally more appropriate in reference to the act of a parent taking or detaining a child from the custodial parent. Yet, although "abduction" is the proper legal term, "child stealing", "parental kidnapping", "child theft", "domestic relations kidnapping", "child snatching" and "civil kidnapping", are common labels employed to refer to the wrongful removal or retention of a child by a parent from the other parent,

in violation of a custody decree, or of an agreement, in fact.<sup>1</sup>

It would appear that despite parental claims, the abduction of children is not a heroic, desperate act of love, and seldom in the children's true best interests; but rather, one that is potentially destructive for the children and one which also hastens the disintegration of family cohesion.

**Data Sources**

The method of study had to be suitable for an exploratory research of a relatively unstudied phenomenon in Canadian society. The lack of statistical data, and of adequate, substantive information relating to the nature of parental-child abductions, required an attempt to tap various relevant sources which could contribute to the task of describing and analyzing the Canadian situation.

**The Literature**

The existing Canadian literature on child abduction by parents is exiguous in comparison to the available literature in the United States. Therefore, it was necessary to

<sup>1</sup> While the term "abduction" is referred to most frequently in the text, reference is also made to these interchangeable terms.

employ relevant American sources. However, both Canadian and American information relating to this problem is predominantly of the legal nature; thus, the use of magazine articles and newspaper data, particularly in Canada, were important information sources, specifically in reference to case history material for Chapter Four: The Nature and Extent of Parental-Child Abduction. Albeit, certain methods of social research cannot employ mass media sources because of suspect reliability and validity; nevertheless, it is evident that newspapers are a major bank for detailed information about crime.

It is apparent that the mass media, particularly the newspapers in Canada, have played an important role in the development of the public's conception of the seriousness of parental-child abductions. The scarcity of factual information indicated that the use of media data would be a necessary tool of investigation for this particular crime phenomenon.

### **Interviews**

Four lengthy interviews, with selected experts, were conducted to gain knowledge and specific information concerning Canadian policies with regard to international child abductions, and pertaining to local law enforcement

strategies; and, for data on the demographic profiles of offenders and victims.

Micheline Langlois, a lawyer in the division of Constitutional and International Law, at the Department of Justice, provided fruitful information relating to current legal developments and to general social issues concerning the international dimensions of parental-child abduction. The information gathered in this interview contributed to Chapter Five: International Child Abduction By A Parent: The Canadian Approach.

Howard Issac, a legal advisor for the Private and International Law Section, at the Department of External Affairs, made a major contribution to Chapter Five, by supplying vital pieces of information on the policies of the Canadian government toward dealing with international child abductions, recent legal developments, the nature of the offenders, victims, and the crime situation.

John McComby, an inspector in the Morality Division of the Ottawa Police Department, Ottawa, was very helpful in providing some important insights on the police response in child abduction cases involving parents, which contributed to Chapter Three: The Criminal Law Relating to Child Abduction By Parents.

Dr. John Dimock, a psychiatrist and Director of the Family Court Clinic, Royal Ottawa Hospital, Ottawa, contributed to Chapter Four by supplying valuable information on the profiles of offenders and children as victims.

### Case Analyses

Four limited studies were conducted and analyzed for Chapter Four: The Nature and Extent of Parental-Child Abduction.

A study of fifteen adult divorce, custody and access assessment forms performed at the Family Court Clinic, Royal Ottawa Hospital, included abduction cases<sup>2</sup> derived from a previous study conducted by the clinic, of the first eighty divorce, custody and access assessments performed between 1976 and 1980; the clinic's study analyzed demographic characteristics of the adults involved. The assessments were done either on a voluntary basis, where a client was referred by a lawyer, or by a court order or referral by a court judge. The fifteen cases recorded a history of abduction, defined by the clinic as the "removal of the child from the custodial parent without that parent's permission, for a period longer than 24 hours." The abductions took

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<sup>2</sup> In actuality, there were seventeen possible cases, but data concerning the status of the abductors and victims were missing from two cases.

place prior to, during and after initial psychiatric assessments.<sup>3</sup> Fourteen cases occurred between 1978 and 1980, but one additional case, which occurred in 1981, was also analyzed. Each case consisted of two adult assessment forms for both parents. The variables selected for investigation were: place of birth, race, number of children, age, sex, and custodial status.

Six child assessment forms on divorce and custody, performed at the Family Court Clinic between 1979 and 1981 were analyzed separately from the adult assessment cases. Although in some cases the children were from the same families which were scrutinized in the adult study, they were considered independently. The cases were also referred either by lawyers or by a court judge. The information on these six cases was derived from child custody forms for a child (children), recording a history of abduction. The variables selected for analysis were: age, length of custody arrangement, custodial parent, length of abduction, and the circumstances concerning the children's return.

Moreover, a study was conducted of eight police files from the Ottawa Police Department.<sup>4</sup> Only when amendments

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<sup>3</sup> It is interesting that a greater number of abductions occurred after the initial assessment.

<sup>4</sup> Although there were twelve possible files under the classification of child abduction by a parent, four were not acceptable for analysis because they turned out to be false alarms, mistaken reports, or the child was returned shortly after the report was filed.

were made to Section 250 of the Criminal Code in 1983, the department re-classified the filing system, in order to create a separate category for parental-child abduction cases. Prior to these changes, such cases were filed under the umbrella term of "kidnapping"; thus, files could only be obtained for 1983, because of difficulties to locate cases from previous years.. Two cases, however, were accessible from 1980 and 1981, respectively. The variables selected for analysis were: age, sex, custodial parent, offender, number of children, location, time, day, season, status of custody decrees, criminal charges, case disposition, and circumstances preceding the abduction.

Nineteen trial cases found for the offence of child abduction, were collected from the Canadian Abridgement Indexes, ranging from 1902 up until 1982.<sup>5</sup> The variables selected for analysis were: sex, custodial parent, offender status, trial decision, and appeal decision.

There are clear methodological weaknesses inherent in the small sample sizes of the four case analyses. However, the essential purpose of these studies is only to provide evidence and support to the general state of parental-child abductions in Canada. The findings are not intended for

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<sup>5</sup> The nineteen cases analyzed do not necessarily represent all recorded trials for child abduction during this period.

drawing conclusions, but only to supply descriptive information. It is the aim of these analyses, along with the use of secondary sources, to shed more light on the nature of the crime and its presence in Canadian society.

### **Chapter Contents**

Chapters Two and Three deal with the wider structural factors relating to parental-child abduction. Chapter Two: Divorce and Child Custody: Prelude To The Crime, provides a historical analysis of divorce and child custody, the adversarial process of divorce, and conflicts between federal and provincial jurisdictions over child custody. Emphasis is placed on how divorce and custody laws encourage parents to abduct their children.

Chapter Three: The Criminal Law Relating To Child Abduction By Parents, concerns the historical development of the criminal law in this area, focusing on the process of law creation, particularly with regard to recent amendments in the Criminal Code. Alternative remedies to the criminal law, and the police response to child abductions by parents are also discussed. Information gathered from the interview with Inspector John McComby of the Ottawa Police Department was employed for the section on the police response.

Chapter Four: The Nature and Extent of Parental-Child Abduction, deals with the specific factors inherent in the process of marriage dissolution which precipitate the events leading to, and occurring during the abduction. The chapter covers offender and victim profiles, the crime milieu, actions taken against the offender, and the extent of the problem. The interview with Dr. John Dimock, and the child and adult assessment analyses conducted at the Family Court Clinic, the Police File study and the Trial Case analysis were essential contributions to the chapter content.

Chapter Five: International Child Abduction By A Parent: The Canadian Approach, concerns the international character of parental-child abductions, discussing the Canadian situation and response, and recent legal developments. Interviews with Micheline Langlois at the Department of Justice, and Howard Issac at the Department of External Affairs, were significant sources of information.

Chapter Six: Conclusions and Recommendations, draws conclusions about the role of the criminal and civil law in parental-child abductions and prospects for Canada's future situation. Recommendations are made for both preventive and curative measures, toward remedying this frightful crime committed by parents against their own children.

## CHAPTER TWO

### DIVORCE AND CHILD CUSTODY: PRELUDE TO THE CRIME

Crimes committed by and against family members have prevailed throughout history. Child abuse, wife beating and other forms of family violence have become recognized as criminal acts, varying over time, according to changes in economic and socio-cultural structures.

A relatively new family crime has been born as a result of modernization and changing views toward and within family relationships. In addition to the increase in family breakdowns, parents have also learned to become flagrant violators of child custody arrangements, above and beyond the limits of the law. As the divorce process has become easier, it has also become more difficult--for the splitting partners and their children. The crime of parental-child abduction has evolved out of the changes and maladjustments faced by family members undergoing separation and divorce.

#### Divorce and Child Custody: A Historical Perspective

The handling of children involved in the dissolution of a marriage has altered over the years from a period when fathers had exclusive custody rights in fact and in law, to

a period when mothers have those rights in fact, if not always in law. Historically, custody decisions had much less to do with the welfare of children than with the supreme interests and rights of parents, notably fathers. Prior to the 19th century when the custody of children was brought up, as uncommon as divorce then was, it was generally understood that children belonged, in every sense, to their fathers.

The Roman law Patria Potestas provided the father with the right to control all other family members. The pater familias had the power of life and death over his children. The Roman custom of defining personal relationships in terms of property value, continued to be a prevailing tradition in Feudal society. The father maintained an unquestionable right to the custody of his children. The control over the care and services of children by their fathers was consistent with the subordinate status of women who held few legal rights in all spheres of life, particularly as wives and mothers.

At the close of the 18th century, the parent-child relationship underwent important changes. Children came to be viewed as developing individuals requiring affection and special care. At the same time, the child's new status affected the way women were regarded. Throughout the 19th century, mothers were increasingly viewed as special care-

takers who had a natural ability to nurture their children's love and emotional security. Although she was still considered as a form of property, the wife and mother in one sense, gained more prestige. Moreover, while the child's interests were very often identical to the interests of their fathers, the very notion of child welfare meant the slow but gradual erosion of the father's absolute right (Roman and Haddad, 1978:32).

The Canadian situation was characterized by conventional attitudes toward marriage and the family, influenced by strong economic forces and in many areas, the moral power of the church. Although the interests of children were becoming more important during the 19th century, it was the harsh economic realities of pre-industrial Canada, like elsewhere, that maintained the cohesiveness of the majority of families, especially on the frontier (Statistics Canada, 1983:41).

By the early 20th century, the social role of the family, as opposed to a centuries-long emphasis on the economic function, began to emerge more strongly. In the 1920's, maternal custody had become more than a consideration--emphasis was being placed increasingly on the mother's role in the functioning of the family and in the upbringing of the children. In 1881, the Ontario Judicature Act passed the provision that both mother and father would have equal

rights in law to the custody of their children. However, by 1916, the father's superior right to child custody was still being reckoned with in the Ontario courts. By 1923, most provinces granted mothers co-guardianship of their children and two years later, women were given the right to sue for divorce on identical grounds to men (Statistics Canada, 1983:42).

Since the mid-20th century, mothers have virtually been assured custody of their children, although their paramount claim to custody was never, and still is not, based on statutory law. The issue of child custody changed hands during this era; custodial rights were passed on from the father to the mother, whose mutual affinity with her children was viewed as a natural relationship--to be valued and protected.

The significant change in views toward the mother-child relationship was rooted in the concept of the "tender years doctrine." The doctrine provided that in case of divorce, children under the age of seven were considered better off with their mother. A less well-known common law principle is the presumption that children older than seven years were better off with their father. However, for the most part, social norms have dictated that the mother is the more suitable parent to rear and care for the children.

Although these unwritten rights remain important for decision-making, relating to child custody matters, statutory intervention has formally replaced common law. Today, the basic legal premise provides that until otherwise agreed, custody of children is vested equally in both parents. Yet, until recently "some provincial statutes did not provide a mechanism whereby the father can claim custody; instead, the bias was in favour of the mother" (Statistics Canada, 1983:200).

In recent times of single parenting and changing views on sex stereotypes, the role of fathers in the upbringing of children has surfaced as an important issue. As changes in family responsibilities and privileges have brought more opportunities and freedom to women, there has also been an increase in the number of men who spend 'more than usual' time taking care of their children. In various social circles, it is expected of fathers to participate in parenting. In turn, there are an increasing number of men who, when their marriages fail, claim a right to the custody of their children (Demeter, 1977:128).

Behavioural and psychological evidence, along with public expression through television and films such as 'Kramer v. Kramer', suggest that there is no inherent magic in a child being better off with a mother rather than the

father (Bala and Clarke, 1981:55). In accordance, the Law Reform Commission of Canada has recommended that:

Parliament endorse through legislation the principle that one parent is not to be preferred as the custodial parent on the basis of sex. Custody of a child is entrusted to a particular individual and not to a representative of popular conceptions about what a man or woman is supposed to be capable of doing or ought to do. Sexual stereotypes are irrelevant in determining the individual capacity of a parent to love, care for and raise a child (1976:58).

Unfortunately, custody awards today continue to reflect traditional sex stereotyping--which allocates the role of the primary parent to the mother. In the majority of custody disputes it is the mother who retains custody of the children. It is the father who has to fight a potential battle for the vie of attention and access to his children--when he loses, the propensity to seek alternative measures intensifies. Thus, when "divorced fathers want to maintain close, meaningful contact with their children, they are themselves the victim of the world their fathers, with some help from their mothers, made" (Roman and Haddad, 1978:23).

Because the abduction of a child by a parent is a way of taking the custody of that child, acting outside the limits of the law, the custodial parent is often viewed as the victim. Some courts of law have even viewed the abducting parent as the victim by protecting the so-called "natural" rights of the mother or father. Parental rights

continue to supersede the rights of children. Not only does the abduction of a child by a parent infringe on the child's right to security and safety and to be able to predict space and attention from others, but it also carries to the extreme the child's disillusionment and confusion from the divorce or separation. It is the child who is victimized; the primary victim of a heartless situation created by adults who claim that their love and devotion to these 'little ones' justify this crime of passion.

#### The Adversarial Process

At the time of separation, custody of the children is likely to be a major area of conflict. Currently, fathers have become more desirous of participating in parenting, and of obtaining custody of their children in case of separation or divorce. When a marriage dissolves, the division of property is a relatively easy task, but the care and upbringing of children potentially involves controversy and emotional upheaval.

The wisdom of Solomon, King of Israel in the 10th century, is recalled in a story of a custody battle involving not a father and mother, but rather two mothers who claimed rightful custody to the child. The protagonists were two prostitutes living together; both women gave birth to a child on the same day. They appeared before Solomon's

court with only one child, each with their own explanation. The first woman stated that the other woman's child had died during the night and she had placed the dead child in her bed, taking the healthy child as her own. The second woman denied this and maintained that the living child belonged to her. Solomon's dilemma--who was the mother of this child? In his wisdom, Solomon requested a sword and threatened to divide the child into two parts, giving half to one woman and half to the other. When the first woman protested, telling the king to give the child to the other, rather than to see him killed, Solomon was certain that he had found the real mother (1 Kings, Chapt. 3; versus 16-28 [cited in Statistics Canada, 1983:187]). This ancient experience tells us that Solomon understood that the desire for custody can lead to deceit and vindictiveness and determined the true parent only after he threatened to divide the child in two.

Although this biblical case and the way in which Solomon solved it is quite different from modern day custody battles, the vestiges of Solomon's wisdom remain. The elements of emotion caught up in the aftermath of separation and divorce and the struggle for custody paves the way for many distraught parents to resort to abducting their children.

The present system for resolving custody matters in Canada is very much adversarial in character. Unfortunately, when divorcing spouses enter the courts of law, they quickly learn that 'all is fair in love and war'. The divorce process is supported by a system which imposes upon parties involved in family disputes, to establish which person is guilty and the other innocent (Law Reform Commission, 1976:18).

Accordingly, when custody is contested during the divorce process, the children are often viewed as another item to be fought over and won by the successful litigant. Children are often made pawns in a contest, manipulated and sacrificed for the 'just deserts' of revengeful and bitter parents.

A significant number of parental-child abductions do in fact, entail the actions of a spumed spouse, who has seen himself or herself to suffer indignities by the courts and the estranged wife or husband. Often this involves using the children as a means of punishing or "getting even" with a spouse. The adversarial nature of the divorce process produces very few winners and many losers--principally, the children. When a parent resorts to abduction as an alternative that he or she views as the only solution, at least for that moment in time, the potential losses are unavoidable. The detrimental effects of the adversarial system of family

law are well stated by a Canadian court judge:

it is not unfair to say that the mind of man could hardly have conceived any process, ostensibly concerned with the stability of marriage and the family, that could be more likely to rip husband, wife, father, mother and children apart so thoroughly and bitterly (Irving and Schlesinger, 1978:80).

When a child is abducted by a parent, is it then fair to blame the law? To some extent, yes. A system that considers the question of child custody as a corollary relief matter--an issue incident to the process of divorce-- is one that leaves wide open to contesting spouses the opportunity to express through the children their most intense and intimate emotions.

### Jurisdictional Conflicts

In 1866, representatives of Canada, Nova Scotia and New Brunswick met in London to discuss the terms of union which culminated in the London Resolutions. "Marriage" remained under the sphere of the Dominion, while the words "Solemnization of Marriage" were added to "Property and Civil Rights." The effect was to enlarge provincial jurisdiction with respect and control over the ceremonial aspect--conditions precedent to the solemnization of marriage. This resulted from the desire of Quebec to make the procurement of divorce more difficult, but not unattain-

able, for a Protestant minority in a predominantly Roman Catholic province, and to ensure the presence of a clergyman in the performance of civil marriages. Although The Constitutional Act, 1867, was based on the London Resolutions, the actual draft separated "Solemnization of Marriage" from "Property" and "Civil Rights" to become a distinct head of power governing provincial jurisdiction by family law (Bushnell, 1978:205).

The division of powers of legislature competence for family law is set in sections 91 and 92 of The Constitutional Act, 1867. The federal government is given legislative responsibility for "Marriage and Divorce" in section 91(26), while the provinces are authorized by section 91(12) to make laws with respect to "Solemnization of Marriage" in the province. Essentially, section 91(26) concerns the capacity to marry and the marital status, while section 91(12) deals with the formalities of marriage (Fodden, 1977:1-4). In addition, the federal government has exclusive powers over the criminal law (section 91(27)) which deals in some respects with family matters. The Act also confers on provincial legislatures the power over "Property and Civil Rights" in the province (Section 92(13)) covering much of the law governing relationships between spouses and between parents or guardians and children.

The first century of Confederation was characterized by little activity relating to family law and the Constitution. Federal power over marriage was confined by courts within narrow limits, and although the Supreme Court of Canada in its early years took a firm centralist position, it recognized family matters within the jurisdiction of provincial powers.

In 1968, the federal Parliament passed the Divorce Act allocating exclusive power over divorce to federal jurisdiction. The Act provided for alimony, maintenance and custody as corollary relief provisions in divorce proceedings. Since 1968, however, there have been consistent problems between federal-provincial relations with respect to marriage and divorce provisions ancillary to divorce, particularly child custody.

The Law Reform Commission stated in a report on Family Law that "the constitutional division of powers fragmented not just legislative provisions but the entire legal process for dealing with family instability" (1967:2). This is contrary to the general theory of Canadian Constitutional Law, which contends that each level of government possesses plenary powers within its own field of competence. By virtue of practice in the real world of family law, however, there is no actual distinction between the powers of federal jurisdiction over the beginning and ending of a marriage and

provincial responsibility over what happens in between marriage and divorce.

Federal competence in relation to corollary relief provisions after divorce rests upon an ancillary jurisdiction to make provisions for needs which arise from marriage, and much controversy has surrounded the ancillary doctrine which permits Parliament to intervene into areas that prior to the Divorce Act in 1968 were traditionally governed by provincial legislatures.

The 1967 Report on Divorce submitted that alimony, maintenance, custody and marital property are not simply "property and civil rights" but are subsidiary matters of divorce and, therefore, within federal jurisdiction (Lemby, 1974:6). Since, however, ancillary legislation does not prevent the passing of provincial laws dealing with the same matters, "divorced families are faced with two sources of legislation... both in themselves constitutionally valid and both in substance essentially the same" (Abols, 1980:406).

The validity of corollary relief provisions under the Divorce Act was challenged in a case called Papp v. Papp,<sup>1</sup> a dispute dealing with an interim custody order made under the federal law. The Ontario Court of Appeal upheld the child custody provisions of the Divorce Act since there was a "rational functional connection" between such intrinsic

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<sup>1</sup> (1969), 8 D.L.R. (3d) 389 (Ont. C.A.).

concerns and the divorce situation (Ryan, 1980:99). Since the time of this appeal, the corollary relief provisions under the Divorce Act have been consistently ruled as constitutionally valid. This has been seen as an expansion of federal authority and a limitation of provincial power "unwarranted by consideration of history, precedent and society at present" (Bushnell, 1978:229).

The conflict between provincial and federal jurisdiction has inspired the doctrine of paramountcy which intends to resolve any contention between valid federal and provincial legislations. The rule invokes that when such a conflict exists, federal legislation should prevail even where the validity of federal laws derive from ancillary constitutional power. In Canada, two tests for federal paramountcy have been devised: the "occupied field" or "negative implication" test, and the "express contradiction" test. The former, more general view, contends that by legislating in the field, Parliament "occupies" it, rendering any provincial legislation inoperative in the same field. The latter view, which assumes a more narrow scope, permits provincial laws to operate while federal laws are operating in the same field as long as they do not directly contradict federal jurisdiction. Recent decisions delivered by the Supreme Court of Canada have indicated that the "occupied field" concept has been superseded by the "express

contradiction" test (Ryan, 1980:100). By the same token, Provincial Supreme Courts have declined to express an opinion on the operation of provincial laws in federal jurisdictions. This may reflect the long-standing record of uncertainty concerning the scope of federal paramountcy.

It has been held, for example, in the Case of *Gillespie v. Gillespie*,<sup>2</sup> that the order for corollary relief under the Divorce Act should overrule an antecedent provincial order with respect to the same person. However, many have argued that the doctrine of paramountcy is largely ignored and the concept implied in the "express contradiction" test is rarely examined. Courts have often disregarded the doctrine of federal paramountcy and have produced an inconsistent patchwork of decisions. In many Canadian provinces, four or even five different courts may be responsible for adjudicating family matters. Because the substantive law of divorce is within federal jurisdiction, the federal Parliament has the power to invest courts with divorce jurisdiction. In fact, it has chosen to confer divorce jurisdiction on the superior courts in each province. The superior courts of Ontario apparently are confident that a provincial order would not likely give rise to an instance of operational incompatibility between the provincial order and an

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<sup>2</sup> (1973), 6 N.B.R. (2d) 277, 36 D.L.R. (3d) 421, 13 R.F.L. at 349 (N.B. App. Div.).

existing order under the Divorce Act (Abols, 1980:415). The Ontario Court of Appeal ruled in the Case of Richards v. Richards,<sup>3</sup> that a court within a province has the power to vary the effect of an order made in a divorce action in another province, either under the Divorce Act or the existing provincial legislation (Fodden, 1977:1-7). This practice may or may not adhere to the rule of federal paramountcy, given the questionable application of the express contradiction test. It appears fair to assume, however, that the "indiscriminate use of the paramountcy doctrine has probably brought additional hardship on divorcing families that could have been avoided if a more updated and consistent understanding of constitutional principles existed" (Weiler, 1980:302).

Although The Constitutional Act, 1867, does not specifically mention custody under any of the heads of legislative power, both federal Parliament and provincial legislatures have power to enact legislation in this field: federal jurisdiction under clause 91(26), "Marriage and Divorce", and the provinces under clause 92(13), "Property and Civil Rights." In addition, the superior courts of the provinces have the authority, independent of statutory guidelines, over the custody of children within each province by virtue of the royal prerogative as parens

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<sup>3</sup> [1972] 2 O.R. 596, 26 D.L.R. (3d) 264, 7 R.F.L. 101

patriae. The provinces have inherited the traditional power of Courts of Chancery, acting as parens patriae to make orders for the custody of children with the effect of denying rights of one or both parents. Of course, in a more indirect manner, the rights of children are also inevitably denied. Parens patriae jurisdiction over a child has been exercised on the basis of the domicile of the child, ordinary residence, or presence within a territorial jurisdiction of the child. The federal Parliament has a restricted legislative power and jurisdiction over the custody of children, although it does have power over custody as a corollary relief provision in divorce proceedings. Custody jurisdiction in Canada, then is exercised under both federal and provincial legislation administered by no less than five courts within a province. In each case, the powers and considerations differ. In practice, the majority of custody cases and custody disputes do not raise questions concerning jurisdiction and constitutional issues. Nonetheless, there exists great potential conflict between provincial and federal powers (Hogg, 1977:372-373). This becomes quite apparent in the consideration of cases of parental-child abduction.

Theoretically, one could argue that the mere existence of machinery for corollary relief occupies the whole field of custody after divorce and, therefore, precludes the

operation of provincial custody orders. The possibility of ancillary powers as a basis for federal intervention was raised in the Adoption Reference case in 1938. It was established that adoption, legitimacy, guardianship, child welfare, affiliation and the maintenance and custody of children are within provincial jurisdiction; what was left unclear and undecided is the extent of federal jurisdiction in terms of these matters by virtue of Parliament's power over marriage and divorce. In practice, it has shown to have created an open field for parents who have lost custody of their children to forum shop--to take the child and to try his or her luck in another forum where a custody order will be granted.

Whereas a provincial custody order is enforceable only in the province where it is made, an order made under the Divorce Act has legal effect throughout Canada and may be registered and enforced in another province. The tendency of courts to supersede orders made under the Divorce Act can be a prime mover in cases where parents abduct their children and cross jurisdictions in an effort to obtain a custody order in their favour. In light of these considerations, it is apparent that custody orders ancillary to divorce proceedings should be nationwide in scope and effect; but, since there is a large body of older provincial laws in these areas, it does not seem to work out that way.

The typical interprovincial abduction will involve a child who is ordinarily resident in one province and physically present in another. In a leading civil abduction case, *Mckee v. Mckee*,<sup>4</sup> the court assumed jurisdiction over custody solely on the basis of physical presence. In more recent cases of abduction, however, Canadian courts take the view that the child's best interests are served if he is returned to his ordinary place of residence where the custody issue will be determined--thus, habitual residence, and not mere physical presence, is necessary to establish jurisdiction. Although, in situations where the child has established roots in the province to which he has been taken, the court may decide that it is in the child's best interest to hear the custody dispute there, despite the issue of abduction. Similarly, a court will consider to hear the custody dispute in the province where the child is present, if harm to the child is anticipated if he is returned to the jurisdiction of ordinary residence. However, more often, judges feel that the child's welfare necessitates that the custody hearing take place in the province from whence the child was abducted (Davies, 1978: 23-24). In 1974, the Canadian Conference of Uniform Laws adopted the Extra-Provincial Custody Orders Enforcement Act, to restrict Canadian courts from exercising their broad

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<sup>4</sup> [1951] 2 D.L.R. 657, [1951] A.C. 352, 2 W.W.R. 181.

jurisdiction over child custody matters, previously resolved in a foreign jurisdiction. The legislation was enacted in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Prince Edward Island, Saskatchewan and Nova Scotia (where a variant of the law was adopted). Ontario and Quebec are not participants. The Act is designed to solve jurisdictional conflicts without depending on reciprocal legislation among provinces. One of the major goals of the law is to minimize the opportunities for parents for forum shop and abduct their children from one jurisdiction to another.

The Act requires the courts in an enacting province to recognize and enforce extra-provincial custody orders unless they are satisfied that at the time the custody order was originally made, the child did not have a real and substantial connection with the jurisdiction in which the order was made or that the original order did not have a proper basis for assuming jurisdiction.

A broader acceptance by courts throughout Canada of custody orders made in jurisdictions where the child ordinarily resides, has generated more respect for judicial guidelines and as a result, widespread disapproval of child abduction by their parents. The principle adherence to the child's ordinary residence also accords generally with the increasing emphasis by legal writers and the courts on the

importance of continuity and stability in the child's environment" (Weiler, 1980:288).

Custody orders present special problems for the operation of federal paramountcy since the courts have traditionally approached such orders in terms of a reference made to a particular set of circumstances existing at a given time, with no guarantee of finality (Hogg, 1977:372-373). It can be argued that the present situation of overlap can be resolved to some extent if the courts were to apply one paramountcy rule consistently. One rule that could be endorsed is the "express contradiction" test which allows for the co-existence of federal and provincial jurisdictional powers in relation to child custody, but only with clear and well-defined limits. According to this view, the custody of children is a special case which is never final and is, therefore, subject to review by the superior courts in provincial jurisdictions. Although the parens patriae is not to be exercised lightly, it may be employed in appropriate circumstances to supersede an order for custody issued under the Divorce Act in another province.

Custody jurisdiction in Canada remains in a chaotic state of affairs. Exclusive use of the "express contradiction" test still would not affect the gravity of the problem. The potential custodian still would be faced with a bewildering array of federal and provincial legislation

administered by a variety of tribunals" (Ryan, 1980:98). In the same vein, children will continue to be moved around and sacrificed like pieces on a chess board. While advocating the welfare of children and their rights to security and continuity in relationships, the Enforcement Act implicitly undermines these guidelines, since it allows for variation in custody awards. This is not to say that the legislation should not provide such provisions for special circumstances where there is an eminent need for change in a custody order--for instance, it provides for variation where there is an apparent potential of harm to the child. In general, the Act is restricted to the enforcement of orders made by a court of a province, state or country, with a real and substantial connection with that jurisdiction. There are no provisions for difficulties that may occur in the case of problems of distance, or dangers of excessive movement of children. In addition, the Act takes a minimal legislative position in that it does not extend to abduction where there is no custody order in force (Eekelaar, 1982:302). In consequence, the enforcement legislation has proved not to be a significant form of deterrence to parental-child abductions, particularly those occurring between provinces. The main reason appears to be that the law has left too much room for intervention and discretionary powers, by relying on its basic concept of a "real and substantial connection."

In 1982, the province of Ontario passed the Children's Law Reform Act, 1981, which limits the jurisdiction of a court to the one where the child is a habitual resident. The law is based on, and extends the principles of the Hague Convention on the Civil Aspects of Child Abduction which has recently been implemented in Canada.<sup>5</sup> In accordance, in 1981, the Uniform Law Conference adopted the Uniform Custody Jurisdiction and Enforcement Act, specifically, to extend the principles of the Hague Convention. The Act specifies which court will assume jurisdiction over child custody cases in a province, and for the provincial enforcement of foreign custody orders, as well as intra-provincial decrees (Federal-Provincial Committee, 1983:25-26). A Federal-Provincial Committee on Enforcement of Maintenance and Custody Orders In Canada, has recommended that the provinces enact such legislation. In response, many of the provinces have declared intentions to implement similar laws, or are presently taking the proposal into consideration. There are clear indications for a promising future, if the uniform legislation is adopted and strictly enforced by all ten provinces throughout Canada.

It is clear that whereas the objectives of laws relating to child custody have been intended for the best

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<sup>5</sup> Chapter Five: International Child Abduction By A Parent: The Canadian Approach, discusses the aspects and implications of the Hague Convention.

interests of children, in the long run they have served the essential interests of their parents. Even though there has been considerable progress and movement toward children's rights in relation to custody after divorce, parents have continued to speak and act on behalf of their children; thus, the rights of children are often a product of the rights and interests of parents.

However, in addition to advancements in the handling of child custody matters after divorce, proposals for amendments to the Divorce Act were presented by the Minister of Justice in January, 1984. The purpose of the reform, essentially, is to "relieve the misery of spouses and children" (Maser, 1984:1).

Although the goal is to achieve a no-fault divorce system, where the only grounds for divorce would be marriage breakdown, therefore making the divorce process easier and faster, it is also meant to humanize the divorce laws by diminishing the system's adversarial character through the elimination of the guilt-oriented perspective. Further, the proposals include changes intended to enhance the rights of children. These changes entail guidelines to ensure that custody arrangements are made in the child's best interests, to encourage families to participate in mediation and conciliation services, an increase in the opportunities for marriage reconciliation, and legal representation for children.

It is hoped that if the proposals become a reality, they will eventually lead to a more rational and humane process; whereby the primary aims of the system would be to support the efforts of both parents and the courts to protect the rights of children experiencing family dissolution.

### Conclusion

There exists an interesting interaction between social norms and the law relating to divorce and child custody. The majority of legislations concerning the dissolution of a family primarily reflect the needs and interests of adults, notably parents. Although the supreme rights of parents, particularly fathers, have diminished considerably in the last century, the vestiges of their domination over the lives of their children remain. This is apparent in current values that uphold the notion that parents know and do what is 'best' for their children.

The rights of children are at best integrated into the 'best interests' test and welfare concerns which are applied primarily to legal processes, such as divorce proceedings. In present divorce legislation, for example, an official guardian is appointed as a legal agent to watch over children and to determine whether any problems exist with

respect to the custody situation. Recently, there has been more willingness to discuss the rights of children, and to express these rights in the letter of the law. Yet, more than often, the issue of children's rights is overlooked in the warfare of divorcing parents who speak for their children and depend on judicial discretion to decide what lies ahead for them. In turn, many parents, in the disenchantment and anger with the courts and their spouse, decide to take the law into their own hands--hence the abduction of their children.

It is quite evident that conflicts between federal and provincial jurisdictions also have contributed as a prime mover for parental abductions. Thus, the vagaries of the law together with the emotional hazards of family breakdown before and after official proceedings, become the principle sources for motivations and subsequent actions of parents who abduct their own children.

### CHAPTER THREE

#### THE CRIMINAL LAW RELATING TO CHILD ABDUCTION BY PARENTS

More than any other kind of offence, family crimes have traditionally been guarded by a moral and social shield of sanctity and privacy. When a third party kidnaps a child, havoc breaks loose. Everything possible is done to find the child and to capture and punish the criminal. When a parent absconds with a child, the action generally has been viewed as another domestic dispute and basically a family matter. In fact, although most countries now consider parental-child abduction to be a crime, there are nations with macho-traditions where a father cannot be charged for stealing his own child.

Although child abduction by a parent involves the same intentional act of taking away the child from a parent, and the interference with the child's liberty as does kidnapping by a third party, historically, criminal laws have granted immunity to parents, explicitly or by judicial interpretation. For example, the United States federal kidnapping statute, the Lindbergh Act of 1932, has provided a specific exemption for parents from criminal liability for over fifty years (Katz, 1981:90). Canadian criminal law, while it does

not have separate federal kidnapping legislation and no provision to explicitly exempt parents for liability, has provided for nearly a century, ample opportunity and perhaps encouraged parents to abduct their children with the use of legal loopholes by "relying on concepts of parental instincts and rights-duties analysis of parenthood" (Lewis, 1976:318). However, currently both the U.S. and Canada have achieved great strides in legislating criminal sanctions in accordance with the gravity of this crime. The new laws are aimed primarily at preventing the abduction of children by parents; they represent a significant stage in the advancement of children's rights.<sup>1</sup>

Family crimes can be referred to in terms of the grey areas of law--falling somewhere along the spectrum between civil and criminal law. In the case of an abduction within a family, legal responses have traditionally and predominantly been dealt with by civil courts. Can parents kidnap their own children? Conventional attitudes have indicated that such behaviour is impossible. Accordingly, the majority of legal actions taken against an abducting parent have tended toward civil remedies. The justifications for civil actions are implied in prevailing social norms that emphasize the preservation of the family unit. However, the

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<sup>1</sup> In the United States, the Parental Kidnapping Act was enacted in 1980; in Canada, new provisions to section 250 of the Criminal Code were enacted in 1983.

development of public and professional concern and pressure, in conjunction with the increasing incidence of divorce and abductions, has signalled the need for alternative measures. Recent amendments in Canadian criminal law proclaim that children come first and parental status is no longer a defence to criminal liability.

### Historical Development

The English common law in 1814 passed "An Act For the More Effectual Prevention of Child Stealing" which created the statutory offence of child stealing as an offence separate from that of forcible abduction. This statute, the foundation of the Canadian law dealing with child abduction, reported that the act of kidnapping children had lately prevailed and increased. This concern did not reflect the interests or welfare of children; rather, the rights of fathers were the paramount consideration. Therefore, the purpose of the Bill was to control and prevent the theft of children who were then considered as chattels, the property of their fathers (Ewaschuk, 1979:176). In response to this problem, the statute provided:

...That if any Person or Persons... shall maliciously by Force or Fraud, lead, take, or carry away, or decoy or entice away, any Child under the Age of Ten Years, with Intent to deprive its Parent or Parents, or any other Person having the lawful Care or

Charge of such Child of the Possession of such Child, by concealing and detaining such Child from such Parent or Parents, or other Person or Persons having the lawful Care or Charge of it; or with Intent to Steal any Article of Apparel or Ornament, or other Thing of Value or Use, upon or about the Person of such Child, to whomsoever such Article may belong; or shall receive and harbour with any such Intent as aforesaid any such Child, knowing the same to have been so by Force or Fraud led, taken, or carried, or decoyed or enticed away as aforesaid; every such Person or Persons, and his, her, and their Counselors, Procurers, Aiders and Abettors, shall be deemed guilty of Felony, and shall be subject and liable to all such Pains, Penalties, Punishments and Forfeitures, as by the Laws now in force may be inflicted upon, or are incurred by Persons convicted of Grand Larceny (54 Geo. III, c. 101).

The second section then provided:

...That nothing in the Act shall extend, or be construed to extend, to any Person who shall have claimed to be the Father of an Illegitimate Child, or to have any Right or Title in Law, to the Possession of such Child, on account of his getting Possession of such Child, or taking such Child out of the Possession of the Mother thereof, or other Person or Persons having the lawful Charge thereof.

In the "Offences Against the Persons Act" in 1861, the age of protected children was raised from under ten years to under the age of fourteen years. In 1869, the Canadian Parliament enacted section 57 of the "Offences Against The Persons Act" and declared the law on child ~~stealing~~ in similar terms. In addition to minor changes in the wording of the law, the only significant difference was the qualifi-

cation of penal sanctions. A person was liable to a term of imprisonment not exceeding seven years and not less than two years, or to be imprisoned in a place of confinement for any term less than two years, with or without hard labor.

In 1886, the federal statutes were revised, but the provisions for child stealing remained essentially the same. Section 45 reads as follows:

45. Everyone who,--

(a) Unlawfully, either by force or fraud, leads or takes away or decoys or entices away or detains any child under the age of fourteen years, with intent to deprive any parent, guardian or other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whosbever such article belongs, or--

(b) With any such intent, receives or harbours any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away or detained, as in this section before mentioned,--

Is guilty of felony, and liable to seven years imprisonment:

2. No person who has claimed any right to the possession of such child, or is the mother, or has claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of getting possession of such child or taking such child out of the possession of any person having the lawful charge thereof.

These provisions explicitly exempted parents from criminal charges for offences of child abduction. However, in 1892, the enactment of the Canadian Criminal Code significantly

changed the offence of child stealing, as provided for in section 284.

284. Every one is guilty of an indictable offence and liable to seven years imprisonment who, with intent to deprive any parent or guardian, or other person having the lawful charge, of any child under the age of fourteen years, of the possession of such child, or with intent to steal any article about or on the person of such child unlawfully--

(a.) takes or entices away or detains any such child; or

(b.) receives or harbours any such child knowing it to have been dealt with as aforesaid.


2. Nothing in this section shall extend to any one who gets possession of a child, claiming in good faith a right to the possession of the child. R.S.C., c. 162, s. 45.

The new statute omitted the requirement for the use of force or fraud, and therefore extended the interpretation of this offence, since the taking of children is more often done by stealth than by force or fraud (Ewaschuk, 1979:177). Another important change was the omission of the exemption of certain persons such as the mother or a father of an illegitimate child, replaced by the defence of "good faith" in claiming a right to possession of the child. The amendment appears to have enlarged the character as well as the scope of the legislation; however, the specific defence of "good faith" was later to provide a loophole for parental abductors, who otherwise could be held as violators against the criminal law.

In 1900, section 284 was amended to qualify the meaning of the word "guardian." The definition was referred to in sections 183 and 186, as interpreted by section 186A:

186A. The word "guardian in sections 183 and 186 includes any person who has in law or in fact the custody or control of the girl or child.

With the exception of the replacement of the reference to child stealing by the term "abduction" to describe the offence and the provision of the meaning of the word "guardian" dropped, the wording of this law has been repeated in similar terms in the Code revisions of 1927, 1902 and 1953-54. In the 1953-54 revision of the Criminal Code, however, the penalty for the offence of child abduction was raised from seven years to ten years imprisonment. The reason why the penalty was increased by three years is not to be found in relation to the particular offence. Rather, the increase may be attributed to the Code revision of penalties for many offences and offence categories, with the majority of penalties revised upward (House of Commons Debates, 1954a:2044). Therefore, since the enactment of the Canadian Criminal Code until 1983, there has been no significant change in the provisions for the abduction of children under fourteen years, as stated in section 236 and most recently reiterated in section 250 of the Criminal Code.



It was only in the 1970's that the first efforts were initiated to amend section 250--efforts that were to take almost a decade to achieve. Nonetheless, it is important first to consider why there had been no change or efforts to induce change prior to 1970 to amend the section on child abduction. Specifically, it is interesting why there were no endeavours to amend the "good faith" defence of subsection 250(2). This defence has been used historically as a legal excuse for parents who abduct their children, with what they claim to be an honest belief that they are entitled to possession of their child, whether or not they are legally so entitled. Basically, the rights of parents to determine the past, present and future for their children have remained unchallenged, notably in cases of abduction. The notion of children as property has only begun to weaken in the last few decades. The wording of subsection 250(2) has provided parents with the legal option to disrupt and bring emotional harm and trauma to the child's life. The test case until recently, on the implications of the "good faith" defence is R. v. Austin,<sup>2</sup> in which an order had been made pursuant to the provisions of the Deserted Wives' and Children's Maintenance Act by a judge of the Ontario Family Court, granting custody of the child to the mother. The

<sup>2</sup> (1957), 27 C.R. 355, 24 W.W.R. 293, 120 C.C.C. 118 (B.C.C.A.).

mother took the child to British Columbia where the husband found them and subsequently took the child from the wife's custody. The husband had been previously informed by an Ontario magistrate that the Ontario court order was not valid outside that province. At trial, the father was convicted. However, on appeal, the father stated that he had acted in good faith, and notwithstanding that ignorance of the law is no defence, the court held that subsection 236(2) created an exception to this principle, and that the actions and motives of the defendant constituted a defence to the abduction charge. Accordingly, the conviction was quashed and the accused acquitted. This case confirmed that parents can commit the offence of abduction, as long as they can argue that they did so, only in honest belief that they had the right to possession of the child. Because of this emphasis on the 'natural' desire of parents to exercise care and control over their children, it follows that the court would dismiss charges under this reasoning for lack of unlawful intent (Lewis, 1976:306). Until recently, society has not been prepared to move towards challenging these rights.

In the last decade, with the continued rise in the divorce rate and an increasing emphasis on the changing role of the family, in particular the role of the father, it has become an ultimate realization that the law could not cope

well with the incidence of child abduction by their parents. Traditionally, both the police<sup>3</sup> and the judiciary have condoned parental abduction of children, often viewing these situations as primarily civil in nature, which therefore should not be dealt with by the criminal process. However, because of the publicity of recent increases in parental abduction, judicial attitudes toward this type of crime appear to be changing. In the case of R. v. Kehoe,<sup>4</sup> the provision of the "good faith" defence was not successful for the accused. The Austin case is cited, but it is argued that in this case, the accused did not show evidence to support his belief that he had in good faith a right to the possession of the child. Therefore, the court was not satisfied and the accused was found guilty but given an absolute discharge on the basis of his respectable background and good behaviour. A more recent case, R. v. Fernandez,<sup>5</sup> illustrates that judicial decisions are perhaps showing that child abduction cases may constitute serious crimes, inflicting trauma and suffering, and should be punished accordingly. The accused had lived common law with the mother of their child. The father took the child without the mother's consent and placed the child in a

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<sup>3</sup> A more detailed discussion of the police response will follow later in this chapter.

<sup>4</sup> (1974), 21 C.C.C. (2d), 544.

<sup>5</sup> [1976] 6 W.W.R. 522 (B.C.C.A.).

convent in Spain. The trial judge sentenced the accused to six months imprisonment. On appeal, the sentence was raised to five years. Nonetheless, one appellate judge, in dissenting, was of the opinion that such a sentence was futile since the accused had returned to Spain by the time of the appeal and that the court should not engage in such futile exercises (Ewaschuk, 1978:182). It is evident that judicial attitudes are changing, but only in accordance with the slow, stagnant process of recognizing the rights of children.

In 1975, Lois Preston, a victimized mother, started Parents of Kidnapped Children, an organization that among many other activities, initiated efforts to pressure the federal government into amending the Criminal Code with respect to section 250 on child abduction. Stephen Preston was kidnapped by his father when he was seven years old. Three years later he was returned to his mother, and was taken from the courtroom kicking and screaming, terrified of her. The father had described Stephen's mother as a prostitute and an alcoholic. The child lived under twelve aliases and had less than a first grade education. Two months later he was kidnapped again. In 1976, Benno Friesen, an M.P. in Lois Preston's riding, brought a private member's Bill before the House of Commons to make parental kidnapping a

criminal offence, punishable by life imprisonment. In 1981, the M.P. explained to Parliament one of the reasons why he decided to propose this legislation:

Something that encouraged me to go ahead with that legislation was an experience I had in Toronto some years ago. A young lawyer was using the kidnapping provisions of the Criminal Code to counsel his clients on how to kidnap their own children and do so successfully under the Criminal Code. That provision in the Criminal Code is supposed to protect children. However, it was being used by counsel in order to abduct them. That is bad law and the sooner we get rid of it, the better (House of Commons Debates, 1981b:12303).

The operative part of the Bill read as follows:

Every parent of a child who, with intent to deprive of the possession of that child the other parent or a guardian or any other person who has been granted by a court custody of such child, unlawfully

(a) takes or entices away or detains the child, or

(b) receives or harbours the child, is guilty of an indictable offence and is liable to imprisonment for life.

Many interest groups and individuals supported Bill C-221. Child welfare agencies, Members of Parliament, victims of child abduction and many others across Canada supported the proposed legislation and the recommendation of life imprisonment. A mother of a kidnapped child, and the mother's sister, heard about Lois Preston's organization and got permission to start a Toronto chapter. The sister phoned newspapers, TV stations and radio stations. On a

television talk show she stated that she represented parents of kidnapped children, that her sister had been searching for her son for more than a year with no help from the police and that her group supported Benno Friesen's Bill to make child abduction punishable by life imprisonment (Dewar, 1977). In response to allegations that the penalty provision was too severe, however, Friesen agreed that this penalty was not a fixed provision and that the important matter was that the principle of the legislation should be accepted and passed through Parliament. It was pointed out by another member that while some people may feel that life imprisonment is too severe a penalty for this particular offence, there are crimes involving property which are subject to a life term sentence (House of Commons Debates, 1977:4007).

The reasons put forth in the House of Commons in support of the enactment of Bill C-221 reflect the recognition by many members of society that the interests of children should be paramount, even if they run counter to the prevailing values concerning parenthood and parental immunity. As M.P. Friesen commented in the House of Commons:

This is not a government problem, or an opposition problem, or a provincial problem; it is a human problem. All it requires is the will to make a few simple but fundamental changes.

The present law is based on the premise that parents cannot kidnap their children. The increasing number of marriage breakups, the increased mobility of our people, the increased expressions of hostility and violence in our land, make that premise obsolete. Bill C-221 recognizes the reality of that basic change (House of Commons Debates, 1977:4005).

In response to this proposed amendment, Ronald Basford, the then Minister of Justice, was opposed to increasing the penalty for the offence of child abduction. In 1975, the Extra-Provincial Custody Orders Enforcement Act was passed to facilitate the inter-provincial enforcement of custody orders. He believed that these acts would help resolve this problem to a great extent within Canada and internationally as well. In accordance, Basford's Parliamentary Secretary also opposed the legislation of Bill C-221:

The Criminal law is too blunt an instrument to deal with the problem--a problem which exists entirely within the context of the breaking up of the family. It would be nice if the proposals contained in Bill C-221 would do the job and bring an end to child-napping. But they would not. Indeed I would say on the basis of the experience I have had as a lawyer that no jury in the country would, with the potential of a life prison sentence, convict a parent for having taken his or her own child to another jurisdiction (House of Commons Debates, 1977:4009).

The Bill was then referred to the standing committee on Health and Welfare and Social Affairs, where it received a positive response. However, a few months later the Bill failed to pass through on the Order Paper. In the 1977

House of Commons Debates, it was stated by the Parliamentary Secretary for the Minister of Justice, that in discussions held in 1975 between Ronald Basford and provincial attorney generals relating to the problem of parental-child abduction, the Minister of Justice asked the attorney generals to make suggestions regarding improvements for section 250 of the Criminal Code. The Secretary commented that, as yet, not one had put forward a proposal (House of Commons Debates, 1977:4009). Taking these events into consideration in light of much support for the Bill, it is apparent that the state has been quite reluctant to interfere in matters preferably treated by civil laws, and to criminalize actions of parents against the best interests of the child.

Nonetheless, on May 1, 1978, the federal Minister of Justice introduced a proposed Omnibus Bill relating to sexual crimes and special offences. This piece of legislation proposed major changes in the criminal law in respect to the previous provisions in section 250 for abducted children. An important change would be that the amendment would create two separate offences: one concerning child abduction by a non-parent or non-guardian and the other concerning child abduction by a parent or guardian of the child. Penalties would be more severe for non-parents or non-guardians while abduction by parents or guardians would be punishable by up to five years or two years depending on

the circumstances. The "good faith" defence would be replaced by the defence that the abduction of the child was essential for the child's welfare. The action of "concealing" a child had been added to the list of proscribed actions describing abduction. A new distinction was made between the violation of a custody order and abduction where no custody order exists. It was decided that since a significant number of abductions take place in a de facto custody arrangement, criminal provisions should be drawn for these situations. The final change was to allow a court to direct an official guardian, when necessary, to represent the best interests of the child. This provision received considerable opposition, on the grounds that the child in the first place does not need representation, and that if representation is necessary, the attorney general is capable of fulfilling that role (Ewaschuk, 1979:197).

The proposal of Bill C-51 was stated by the Minister of Justice as not final in form, and therefore, subject to response and criticism. Interest groups, such as "Parents of Kidnapped Children" as well as a new organization called "Abducted Children's Rights of Canada"--which was formed to advocate this kind of protection--supported the principles of this legislation concerning the criminalization of parental-child abductions. In addition, there was a general consensus among House Members that this clause to amend

section 250 should be enacted. In substance, clause 38 received few criticisms. The Bill was passed by the House of Commons, August 4, 1981. The Bill was proclaimed on January 1, 1983.

With the exception of changes in the penalties for parental abductions, the elimination of the provision for official guardians to represent the best interests of the child, and the addition of the defence of consent, few changes were made to the final draft of clause 38 on child abduction. The section, as it now appears in the 1983 Criminal Code reads as follows:

**Abduction of person under fourteen.**

250. Every one who, not being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, unlawfully takes, entices away, conceals, detains, receives or harbours that person with intent to deprive a parent or guardian or any other person who has the lawful care or charge of that person of the possession of that person is guilty of an indictable offence and is liable to imprisonment for ten years.

**Abduction in contravention of custody order.**

250.1 Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person in contravention of the custody provisions of a custody order in relation to that person made by a court anywhere in

Canada with intent to deprive a parent or guardian or any other person who has the lawful care or charge of that person of the possession of that person is guilty of:

- (a) an indictable offence and is liable to imprisonment for ten years; or
- (b) an offence punishable on summary conviction.

**Abduction where no custody order--Consent required.**

250.2 (1) Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in relation to whom no custody order has been made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person, is guilty of

- (a) an indictable offence and is liable to imprisonment for ten years; or
- (b) an offence punishable on summary conviction.

(2) No proceedings may be commenced under subsection (1) without consent of the Attorney General or counsel instructed by him for that purpose.

**Defence.**

250.3 No one shall be found guilty of an offence under sections 250 to 250.2 if he establishes that the taking, enticing away, concealing, detaining, receiving or harbouring of any young person was done with the consent of the parent, guardian or other person having the lawful possession, care or charge of that young person.

**Defence.**

250.4 No one shall be found guilty of an offence under sections 249 to 250.2 if the court is satisfied that the taking, enticing away, concealing, detaining,

receiving or harbouring of any young person was necessary to protect the young person from danger or imminent harm.

**No defence.**

250.5 In proceedings in respect of an offence under sections 249 to 250.2, it is not a defence to any charge that a young person consented to or suggested any conduct of the accused.

The current amendment to section 250 proves that it is possible to supersede the longstanding value of parental immunity. The new law recognizes that children have rights--that they are entitled to security, stability and continuity in their lives. However, the offence of child abduction and the criminal law, even in its new form, retain elements of conflicting values and interests that stand little chance of being resolved. As Wilson (1980) has commented in consideration of Bill C-51:

...in considering the child's rights, it is important to realize that both the present and proposed law speaks to the issue of taking a child away from a parent. In abduction charges, the basic concern is the deprivation of property. The state wants to protect the adult's property rights; the rights of the property, the child's rights, are incidental.

Although we have come a long way with the advance of children's rights, the unfortunate notion that children are the legal and moral property of their parents is still very much alive. It is apparent that children have few, if any rights, as autonomous persons. In abduction cases, these

rights are inextricably connected to the rights of at least one parent. Since children in these situations are often too young to speak for themselves, someone must speak for the children. Almost always, it is the parent who has that privilege--ironically, not always in the child's best interests.

No matter what sanctions or measures exist, the children remain the losers, the pawns in the vicious game of post-separation or divorce retaliation. It is they who potentially suffer life-time emotional harm. It is the children who ask unanswered questions, "Where are you taking me?", "When will I see my mother, or father, again?".

#### Alternative Remedies

An action of laying criminal charges against a parent for child abduction has generally been regarded as deleterious both to the children and to family stability. Even though there has been currently, a broader acceptance for the necessity of criminal sanctions for parental abductions, the prevailing remedies are derived from the civil law.

The civil contempt process appears to be the standard remedy for situations where a non-custodial parent has violated a custody decree. Child abduction by a parent is the most serious act in such contempt proceedings. The purpose of holding a parent in civil contempt is to oblige him or

her to comply with a lawful court order, rather than to impose punishment. A fine or imprisonment may be issued with a contempt charge, although this usually follows only on the condition of continued non-compliance with the decree (Lewis, 1976:312). Court judges have had the tendency to be reluctant to summon alleged offenders, since the intentions of many victimized parents are to use the contempt process with the stipulation that further proceedings would be dropped if the child was returned. Often, the process is slow, requiring intervention and negotiations by lawyers and private detectives (Ewaschuk, 1979:184).

The limitations of civil contempt proceedings are apparent when considering the hardship of obtaining personal jurisdiction over the abducting parent who has left the province. Although a custody award is valid only in the province in which it is made, sections 14 and 15 of the Divorce Act<sup>6</sup> have provided for variation in territorial applications. Despite these provisions, the effectiveness of the civil contempt process is barred by legal protocol and rules of jurisdiction. In addition to a reluctance by some judges to enforce custody orders issued by other judges, especially by a non-local jurist, there is also the

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<sup>6</sup> Section 14 provides that a petition has legal effect throughout Canada. Section 15 provides that a custody order may be registered in any superior court in any such manner directed by the rules of the court.

tendency to relitigate custody decrees on the basis that they are never final. The granting of a second custody hearing is apparently in concern for the child's welfare. In abduction cases, the concern is misplaced (Lewis, 1976: 306). In fact, civil contempt orders seem to be most effective when brought in as evidence to convince a second court not to exercise authority (Katz, 1981:9). In essence, "only when the custody order has been made by a superior court and both parent and child are located in that province, may expedition result" (Ewaschuk, 1979:185).

Another alternative to a charge of abduction is section 116 of the Canadian Criminal Code which provides:

116. (1) Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money is, unless some penalty or punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years.

(2) Where the order referred to in subsection (1) was made in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, any proceedings in respect of a violation of or conspiracy to violate that order may be instituted and conducted in like manner.

In order to employ this remedy, a lawful court order must be in existence, as in civil proceedings. However, this section cannot apply where an alternative legal procedure is

apparent; for example, section 116 cannot be used if a charge of abduction could be established (Ewaschuk, 1979: 184).

In addition to civil proceedings, other civil actions are available to the parent-victim. A writ of habeas corpus can be issued by a court on behalf of a person who claims that they were legally entitled to custody of the child. The parent requesting a writ simply must prove a legal right to custody, normally on the basis of an original decree. Habeas corpus prescribes that the person wrongfully in custody of the child must bring the "body" (the child) before the court. The court may also initiate an action for a financial remedy based on an alleged tort of intentionally causing mental harm and suffering. In custody cases, tort liability originated from the father's right to his children's services. The notion of children as property still prevails, since it appears that courts are more willing to assess damages against a parent who has abducted a child than to impose criminal sanctions upon him or her (Katz, 1981: 108-109). Although tort actions to recover damages for mental distress have been rare, there have been successful cases, particularly in the United States where the custodial parent received financial compensation (Scott, 1981). In circumstances where no custody order exists, civil remedies are not applicable. In a significant number

of abduction situations, there is only a de facto custody arrangement in effect. However, civil law recognizes such arrangements and will grant an interim custody order on that basis.

The civil actions available are generally ineffective. When a remedy is possible, the process often involves considerable red tape and expenses, stipulations and a slow, tedious recourse.

#### The Police Response

It is general knowledge that police have traditionally been disinclined to become involved in what they call 'family disputes'. In the case of an abduction within a family, it often takes additional efforts by a lawyer to convince police to investigate. Even when a court makes an order for civil contempt, police are reluctant to act. Again, problems of jurisdiction arise. Since an arrest warrant is valid only within the province in which it is made, a parent cannot be arrested once he or she leaves a provincial border--which is almost always the case. However, an arrest warrant may be registered into CIPIC (Canadian Police Information Center Computer) and if, for instance, an abducting parent is stopped for a traffic violation, a computer check may lead to an arrest (Anderson, 1981:74).

Nonetheless, police reluctance is amplified when a request to investigate a complaint of child abduction is made. Especially when the whereabouts of the parent and child are unknown, the police feel that the time and expense involved should be allocated to more important criminal matters. However, if presented with a custody order or separation agreement, police will attempt to locate the children, provided they are still within the jurisdictional area of the police force. There is legislation existing in the provinces of British Columbia, Manitoba, New Brunswick and Ontario, which provide for specific remedies to enforce custody orders. Such remedies include the posting of a security bond, a warrant for arrest where it is feared that the abducting parent will flee the jurisdiction, the deposit of travel documents, and custody orders directing peace officers to locate and assist in the return of abducted children. The Federal-Provincial Committee on Enforcing Maintenance and Custody Orders, has recommended that all the provinces should enact similar legislations, to enforce custody decrees within a province, inter-provincially, and internationally. Several other provinces are considering these provisions (Federal-Provincial Committee, 1983: 24-25). An order to process a child abduction complaint may also come from an agent of the Attorney General.

There are several reasons why the police hesitate to lay a charge of child abduction against a parent. The most obvious is the difficulty of proving the specific or criminal intent. Some provinces have had a policy that if the child has been taken out of Canada, notwithstanding a custody order, no charge would be laid. A particular concern expressed by one province regarded the issue of whether or not a charge of parental-child abduction is constitutional. Its officials maintained that since such a charge indirectly results in a custody hearing, which is civil in nature, it therefore is contrary to federal jurisdictional power in relation to the criminal law (Ewaschuk, 1979:189-190). Nevertheless, until most recently, the predominant problem in obtaining a criminal charge was the provisions set forth in section 250 of the Criminal Code. Before the criminal law amendments, no charge could be laid if no custody order was in existence, or if parents had custody orders from different courts. A parent also had an almost complete defence on the grounds of a claim of good faith in the best interests of the child. These provisions are now repealed. Inspector John McComby, in the Morality Division of the Ottawa Police Department, says that child abductions by parents are the most difficult and sensitive cases which law enforcement officers have to deal with. Yet, the new guidelines set forth in the criminal law amendments, assists

the department, and makes their duties clear at the provincial level (McComby, 1983: interview).

The new law allocates to police the power to lay charges against parents. It is projected that changes in the current legislation will change police attitudes and subsequent actions toward parents who abduct their children. In essence, the new provisions leave little room for police discretion.

### Conclusion

Remedies for parental abductors will remain deficient, essentially because emotions may run too high among determined parents. Thus, mothers and fathers, emotionally charged, will ~~often~~ risk civil or criminal liability. However, with current changes in criminal sanctions for parents who abduct their children, the potential for deterrence and retribution is considerably higher.

It can be argued that in contrast to criminal actions, civil proceedings serve as a direct remedy to the parent who has wrongfully been denied custody. Therefore, the main purpose of initiating actions--to return the child to the appropriate parent--is more likely to occur through civil procedures. Nevertheless, criminal actions with respect to parental-child abductions are not limited to the deterrent and punitive aspects, as Katz (1981) explains:

If applied strictly, criminal sanctions apply only to the question of wrongdoing; they do not ensure that custody is returned to the proper parent. In practice, however, the child is typically returned to the parent who was originally entitled to custody. A non-custodial parent, incarcerated, is not in a position to press custody claims; even if the penalty were less severe, the fact of abduction alone is normally enough to place custody again with the lawful custodian and is persuasive evidence that the abducting parent should not be granted custody later (p. 98).

Therefore, the use of criminal measures can also serve to remedy the situation in terms of the curative aspect, by returning children to the parent with whom they have lived prior to the abduction. In view of both remedial and deterrent aspects of criminal and civil actions, civil liability appears to prove less effective than criminal sanctions.

It has become clear that criminal sanctions are a necessary measure to counteract the increasing rate of child abduction within the family. In reference to the rights of children, the goals of civil remedies are aimed directly toward the interests of the parents, while the present criminal law is intended directly in the best interests of children. The Canadian criminal courts appear to have a solid base for decision-making in cases involving the abduction of a child by a parent. Whereas the guiding principle in civil cases regarding this issue is the paramount concern for the child's welfare, criminal proceedings are estab-

lished to vindicate the authority of the court and to protect the public interest. There is some evidence that the judicial system is beginning to recognize the best interests of the child as an integral part of the public interest.

## CHAPTER FOUR

### THE NATURE AND EXTENT OF PARENTAL-CHILD ABDUCTION

The conventional process of divorce normally does not leave the parties involved without some legal, social, or emotional repercussion. When a marriage dissolves, family members are susceptible to experience varying side-effects that can be short-lived or long-lasting, overt or latent. Researchers have associated the impact of divorce on adults with such factors as fear, sadness, anxiety and loneliness, which in effect, may trigger episodes of poor physical and mental health. The literature in diverse disciplines is abundant with studies and analyses on the deleterious effects of divorce on children--about the trauma, the feelings of guilt and remorse they endure.

For most families, divorce goes on and on, both for parents and their children. Yet, few divorcing mothers and fathers are really aware, much less prepared, for what lies ahead--the complications, compromises and burdens, until a more satisfying life situation presents itself. The negative impact of divorce on both parents and children is relatively a normal expectancy in a majority of cases; however, even in those of contested custody of the children, most conflicts eventually become resolved. But, somehow,

the adjustment of some adults to marriage failure and to the status of non-custodial parenthood, becomes thwarted--a chemistry evolves which spawns the crime of parental-child abduction. It appears that it has something to do with extra-pain, extra-sorrow, extra-strain, and how they degenerate into a bitterness beyond normalization.

In preparation for this chapter, data on parental-child abduction were gathered and analysed from three primary sources--eight police files from the Ottawa Police Department; fifteen adult custody assessment cases and six child custody assessment cases from the Royal Ottawa Hospital's Family Court Clinic; and, nineteen trial cases from the Canadian Abridgement indexes.<sup>1</sup>

### The Offender and Victim(s)

The actions of the parental abductor involve the victimization of at least two individuals with whom there has been an intimate connection or knowledge by the offender. The primary victim is the defenseless child who suffers direct consequences, resulting from the abduction. The secondary victim is the parent from whom the child is taken; intrinsically, a victim of circumstance. Offender and victim profiles are crucial to understanding the process

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<sup>1</sup> Information concerning the methodology and details of these studies is discussed in Chapter One: Introduction.

of victimization and criminal motivations entailed in parental-child abductions. An important contribution to this cause is Michael Agopian's empirical study (1981a) of the nature and patterns of this crime in the city of Los Angeles.<sup>2</sup> Notable reference will be made to this work throughout this chapter. \*

Parental-child abductions in general, are not bound to one social class or racial group, but can be experienced by all social strata in society. However, certain offenders' characteristics tend to have a predominant trend--racial composition is one such distinction. In the study of fifteen cases of adult custody assessment files, Caucasian individuals accounted for thirteen of these cases. This racial trend is supported by Agopian's findings which are explained by the tendency of Caucasians to place lesser emphasis on the seriousness of violating court orders, and to display patterns of greater mobility, maintained by a more contemporary lifestyle (1981a:58). However, in context of the Canadian situation, differences between Caucasians and other racial groups are not necessarily as great as they appear to be in the United States.

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<sup>2</sup> See, M. Agopian (1981a), Parental Child-Stealing. Toronto: Lexington Books; M. Agopian (1982), "Parental Child-Stealing: Participants and The Victimization Process," Victimology: An International Journal, vol. 5; and M. Agopian and G. Anderson (1981b), "Characteristics of Parental Child-Stealing Offences," Journal of Family Issues, vol. 2.

Eight out of the fifteen abductors were born in North America, while the other seven were born in Europe or elsewhere. Dr. John Dimock, Director of the Royal Ottawa Hospital's Family Court Clinic, noted that many of the offenders were non-Canadian fathers who abducted their children for apparent cultural reasons, including cultural tensions in terms of the upbringing of their children, especially sons<sup>3</sup> (Dimock, 1983:interview).

Parental abductors are generally young. The mean age for both the fifteen abductors in the adult custody assessment cases and the eight offenders in the police report cases is thirty-four years old. Absconding parents usually have a stable source of income, or qualifications which make it relatively easier to relocate or travel and sustain sufficient income sources. However, there are also many cases where fugitive fathers depend on welfare payments and unemployment insurance.

The over-representation of fathers in the offender population of parental-child abductions, is quite clear. In recent years, it has become increasingly evident that more fathers are becoming interested in the upbringing of their children, and participating more seriously in parenting

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<sup>3</sup> Specific information about the nature and extent of international parental-child abductions will be discussed in Chapter Five: International Child Abduction By A Parent: The Canadian Approach.

responsibilities. These current views are a reflection of the slow but gradual changes in sex role stereotypes. In fact, there has also been an indication towards an increasing trend to award custody of the children to fathers. In the fifteen adult custody assessment cases, six fathers were the custodial parent; yet, in only two of the eight police file cases, the father was the custodial parent. In Agopian's study, 29 percent of custodial parents were fathers. It is apparent, however, that although there is a strong indication towards the trend of equalizing child custody awards between mothers and fathers, it still remains a slow-moving process.<sup>4</sup> The slow course of changing social attitudes is also apparent in that the stigma and guilt of being a non-custodial parent are much greater for a mother than for a father. Thus, when mothers lose custody of their children, there is the greater tendency to continue to fight, even to point of abducting their children.

The profiles of female abductors, necessarily constitute a different breed than male abductors. Mothers who lose custody battles are more likely to face social obstacles, primarily role expectations which dictate that the 'mother must not have been a good parent if custody was awarded to the father'. Mothers will often look at the

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<sup>4</sup> Statistics on custody awards and divorce trends will be discussed later in this chapter.

custody decision as a personal slap in the face, undermining her adequacy as both an individual and mother. Also, many mothers who lose custody have been raised themselves to believe that 'children belong to their mothers', and therefore view custodial fathers as inadequate in comparison, in terms of raising the children. Thus, the combination of social pressures, traditional sex role expectations and personal desires serve as strong influences which eventually lead mothers to abduct their children; more often than not, an act out of desperation.

The male offender is typically the father who feels alienated from his children, reduced to a visitor status during designated times, and cheated by a legal system that is every father's adversary. In one case, a father, four years after his divorce and subsequent frustrations concerning access privileges for his daughter, viewed his ex-wife and the courts as the enemy, the United States as his haven, and abduction as the only way out of a losing battle (Defalco, 1983a:19). Fathers feel that prejudice is perpetuated when they are restricted to participate as full-time parents; while at the same time, are expected to be prompt and consistent with support payments.

"The quest for vengeance, shapes history. It creates traditions of hate, feuds and wars" (Halleck, 1982:103). There is a general belief that parental-child abductions are

promoted by feelings of anger and vindictiveness toward the ex-spouse rather than altruism, as many parents contend. In Michael Agopian's study (1981a), however, the examination of communications, or lack thereof, between the parent-victim and offender during the abduction, did not render results to support the view that vengeance is an important crime motive; but, that the main objectives are the intention to have full-time custody of the children, or the desire to have a reconciliation of the broken marriage. Yet, Agopian does leave room for speculation, in that he notes 'sketchy crime reports' as one of the reasons for why the amount of animosity as an element in fostering an abduction can be greater than actually discovered in the study. In our discussion of offender's personality characteristics, Dr. John Dimock explained that the typical feelings of most parental abductors contain a mixture of anger and depression--"I'm so sad, so I'll fight back." In fact, in several of the fifteen adult custody assessment cases, the abducting parent had had some psychiatric, emergency or outpatient treatment for depression in relation to the custody dispute. Fathers in particular, Dr. Dimock told a reporter for the Ottawa Citizen, act on distorted feelings of anger and bitterness toward their ex-wives, selfishness and overwhelming love for their children (Defalco, 1983a:19). Although there are parental-child kidnappings that are clearly motivated by one

objective, such as pure revenge against an estranged spouse, or a consumed desire to retain custody of the child, it appears fair to assume that most cases involve a combination of related factors which trigger a parent into action.

In an Ottawa case, the motives of the abductor involved at least that of revenge against the ex-spouse and the desire for a reconciliation. After seven months of no communication whatsoever, the mother received a phone call from her estranged husband saying, "I heard you were looking for me". She believes he might have seen her advertisement in the local newspaper of his American home town. The father told her where he and the child were, on the condition that she would agree to rekindle their relationship. The mother agreed, went to Ohio and on the pretense that there would be a reconciliation, the mother took the boy for a walk, then called a cab and went to the bus station. When she arrived at the bus depot for Toronto, her ex-husband was there, screaming and trying to grab the child. When the police arrived, she told them she was awarded custody of their son; in fact, shortly after the father abducted him. The police allowed the mother to board the bus with her son--after months of anguish, fear, and ultimately by employing the tactic of deceit, this parent-victim had her child back (Egan, 1983a:1).

When child abduction occurs in the early stages of divorce, often there is no custody arrangement, sometimes not even a de facto situation whereupon the parents have agreed to a temporary arrangement for the child with one parent; in this situation, the parent with de facto custody can apply for an interim custody order, granting official custody until the case is brought before the court. In one of the cases studied in the Ottawa police files, the mother abducted her daughter, but nothing could be done, at least by the police at the time of the report. The mother had, in fact, previously been awarded legal custody of the child. Although, there had been an apparent de facto situation accorded to the father and agreed upon by both parents and witnessed by a professional child care counsellor, the police cleared the case because of the legal document.<sup>5</sup>

"Many parents must wait as long as ten years or more before finding their children. Many give up after a year or two. It's a part of them they want to forget. Some remarry, start new families; others stay single, afraid to try again" (Gill, 1981:181). One father waited fourteen years to find his daughter who was abducted by her mother at the age of three--actually, she had found him, only learning of her father's true identity one year before. After spend-

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<sup>5</sup> The father was not present at the time of the alleged abduction and the police could not reach him at the time the complaint was filed.

ing thousands of dollars on private detectives, writing hundreds of letters to politicians, spending hours in court-rooms trying to find her, he eventually gave up. He had recently remarried and had another child. "I knew I would find her someday, but the main thing was that she found me. After all I did, to try and track her down, it's sort of sad I failed" (Burgess, 1983:1).

When children are abducted, the parent-victim usually spends the first few days doing everything they think can be done, such as calling friends, relatives, their lawyer, police and crown attorneys. The decision to take action to search for their children is often a more difficult task for housewives than for working mothers or fathers. They have lost their only profession--as mothers. Thus, it may take them somewhat longer to take a decisive step, while working mothers, as most fathers, have their careers and accompanying responsibilities to make the search easier, both in terms of financial and emotional support (Gill, 1981:172). Yet, many of these parents soon learn that they are faced with simultaneous dead-ends, even with the help of lawyers, investigators and law enforcement personnel. Many times, a parent experiences phases of depression and emotional exhaustion, and is on the verge of giving up. There are cases, when parents take on full responsibility to find their children. They actually go out and search for their

children themselves, leaving home and jobs, alienating friends and family (Gill, 1981:19). But most parents also rely on the help of others, spending thousands of dollars, that few can normally afford. In one case, a father returned from a business trip to find his wife and four-month old son gone, along with everything in their home. "I came from a wealthy family. I am wealthy. I found them." he told a reporter from the Montreal Gazette. "You know, I am not the average father. I can spend \$125,000 on lawyers. What average father can do that? I have lost half my business. A guy who's working in an office--can he spend days and weeks in court. Can he afford to spend two hundred and fifty (\$250) dollars on a single letter from a lawyer?" (Bagnall, 1983:F-1).

When parents are lucky enough to recover their abducted children, they often view it as a gift, a miracle come true. They generally unwind and go back to their old routines of daily living; many parents, however, remain frightened and cautious, especially when the children are too young to physically resist another possible abduction, to use the telephone, or to know their telephone numbers, area codes or home addresses. Thus, parents often spend the first few weeks or months trying to teach their children all these details; while at the same time, trying their best to convey to the children that everything will be okay, now

that they are 'home'. Yet, these parents know quite well that everything will not be completely "okay", at least until the child can control his or her own fate.

The Canadian Bill of Rights guarantees to each the right "to life, liberty and security of person". Yet, there are countless children born with these rights who have them denied by the unjustified actions of their parents. When a child is abducted against his or her will or understanding of the act or consequences thereof, the act interferes with the child's personal liberty and has the potential for creating irreversible psychological and emotional damage. While there is credence to the argument that the child is taken away by someone he knows so well and most probably loves very much--and, may not fully comprehend or feel the impact of the circumstances at the time, there are nevertheless, serious repercussions. To be torn apart, both physically and emotionally between two parents can be devastating; running and hiding from mom or dad may seem like an adventure to the child at the time--but, fantasies do not last too long. Sooner or later the realities come to surface. Of course, many children who are emotionally stronger than others are able to survive the experience of the abduction without measurable damage. However, there is a significant number of children who do suffer emotional

scars, requiring counselling for deep-rooted problems precipitated by the abduction (Dimock, 1983:interview).

It is the opinion of several scholars that a child's need for stability and continuity should be reflected in the finality and unconditional status of all custody orders, at least in principle--and that the parent given custody should have complete discretion over visiting arrangements for the non-custodial parent (Goldstein et al., 1973:101). Yet, post-divorce tensions, often involving the issue of child custody, frequently create an unhealthy environment for the children. In fact, the abduction for the children is often merely an extension of the pain endured during the period following their parent's separation.

There is no doubt that the true victims of this crime are the children, who suffer from the sudden upsetting of their stability and from the trauma of losing contact with the parent who has been the primary caretaker in their lives. They must also face the uncertainty and confusion that accompanies the necessity of adapting to a new environment. Even though younger children will adapt more readily to a new community, or language and culture, the impact of the dramatic change usually will reveal itself if and when the child is returned. Furthermore, in many cases the child is spirited from one place to another--"We lived like gypsies", one absconding father told a reporter, "zigzagging

the United States to elude police and private detectives who were hired by my wife" (Defalco, 1983a:19). In one of the police file cases that lasted two and a half years, the mother and her abducted daughter lived in five European countries and Jamaica before returning to Canada.

Generally, children are quite young when they are abducted. The mean age in the police file study and the child custody assessment study is six years old and four years old, respectively. The mean age in Agopian's study (1981a) was seven years old. As Agopian points out, children in their early childhood years are more desirable targets--old enough to take care of themselves in certain tasks, and too young to have the knowledge or capability to acquire access to telephone or notify by other means, the parent-victim (p. 65). Although there were three children under three years of age in each of the two studies, the children in all six cases were returned promptly. Agopian discovered in his study, that the abduction of a lone child was most common. Yet, in the six child custody assessment cases, where ten children were abducted, only two cases involved a single child, whereas two children were involved in four cases. Seven out of the eight police cases, however, entailed the abduction of a lone child, whereas four children were involved in one particular case. Addition-

ally, Agopian found that there does not appear to be any particular preference on the part of the parental abductor towards males or females. (1981a:65).

Since most children are abducted during the childhood years of crucial development--when they learn to trust in others, particularly their parents--the abduction is an explicit breach of that trust. Children wonder why they were taken away. Is it because they were bad, that mommy or daddy didn't come after them, to bring them home? The guilt many children feel about causing their parent's marriage to break up, can be amplified beyond predictability. The loss of trust is transferred into many other negative feelings such as confusion, fear, insecurity, and especially anger. Dr. John Dimock explained that the most typical emotion that children are willing to express is anger and resentment. They are not only angry at the absconding parent for taking them away, but also show anger towards the parent who allowed this to happen. This can be a significant problem if the abducting parent made an effort to influence the child against the other parent. Thus, when children are returned, many parents will usually make extra time, and make the extra effort to help their children readjust their lives, reassure them of their love, and counter any possible antipathy instilled by the absconding parent. But, no matter what is done, it is often not enough. Some emotional

scars are irreparable. The child remains a child at risk-- to being abducted again, to becoming a troubled adult, or even to becoming a generational parental abductor--the ultimate victim.

### The Crime Milieu

Child abduction by parents could potentially occur during all stages of marriage and divorce. The crime could signal the beginning of a separation, or it could announce the end of a waging battle between parents, even long after court orders have been issued. Thus, the abduction could take place shortly after marital dissension begins or years later, following the official divorce. However, in most cases the abduction usually takes the form of a last resort event, following an ominous period succeeding the termination of a marriage in fact, if not by decree. Waters and Dimock (1983) explain that "divorce involving children is often a protracted business, not a single legal event. It is preceded by marital discord, is often conducted in an atmosphere of acrimony and competition over children, money and property and may be followed by years of further dispute over these same matters in the legal and social arenas" (p. 82-1051). Thus, the emotional tremor that sets off parents to kidnap their children emanates from a speci-

fic event, or more typically a combination of events which result from family breakdown.

Although a substantial number of child abductions take place subsequent to the granting of child custody awards, a significant proportion of these crimes also occur during a de facto custody situation--an arrangement in fact, but not officiated by a court of law. Yet, as aforementioned, the law recognizes a separation agreement providing for custody (de facto custody) and will maintain it by an interim court order, pending a formal court hearing. Nevertheless, de facto situations can be problematic; notably, an interim custody order can prove more difficult to enforce than an order pursuant to a custody award. As well, during this period many adults have a hard time becoming accustomed to the fact that the marriage has ended--the abduction of children is testimony of this maladjustment (Bala and Clarke, 1981:46). In the same vein, the perception that custody awards are prejudiced can also contribute to the self-help remedy of abduction. In fact, many Canadian males believe that they do not stand an equal chance of obtaining custody in contested proceedings, particularly if the child is female. Currently, however, family court judges' orientation is undergoing significant changes whereby they tend to base their decisions for child custody awards on whatever serves the best interests of the child. The factors that a

court may take into consideration range from the child's stated preferences, to the length of time a child has enjoyed a stable environment, and the ability of both parents to provide for both material and emotional needs. Nonetheless, many fathers see de facto custody as their only choice, even if they have to abduct the child to obtain it.

In the police file study, the parent-victim had been awarded official custody of the child in six cases out of eight. In one case, an interim court order was granted to the victim who was awaiting an official custody order in the immediate future. In the other case, it turned out that the offending parent was, in fact, the lawful custodian. In both the adult custody assessment and child custody assessment studies, all the parent-victims had official custody of the children at the time of the abduction. As Agopian (1981a) discovered in his study, a significant amount of parental-child abductions are indeed perpetrated under the guise of a non-custodial parent exercising court approved visitation privileges. Further, the offender's apparent compliance with the custody arrangements for a sensible period of time "appears to be an essential preparatory element of the crime scheme" (Agopian, 1981a:267). In the six child custody assessment cases, the length of the custody arrangement was no less than three months, and the longest period was two years.

In most divorced families, the relationship between the custodial parent and the parent without custody, generally focuses on arranging visiting periods with the children and support payment obligations. The tenuous contacts between the two parents are enough to create hostile relations, especially on issues concerning the children. The non-custodial parent is susceptible to becoming frustrated and angry when the custodial parent presents obstacles to an apparent mutual agreement concerning visiting rights. Such obstacles include visitation only in the presence of the custodial parent, sudden changes in access plans, and most important the spiteful attitude of the custodial parent towards the visiting situation. These behavioural patterns can play an important role in encouraging a parent to desire total control of the child's welfare. In an American case, a father told his story of how he was nearly driven to abduct his son, and how the trouble started with restraints on his visitation privileges--"My wife disliked me and for this reason she was undermining my role as a father" (Clarke, 1983:315). In other situations, visitation rights are used as a ploy to attain another purpose, with the children in the middle, as the 'bargaining chips'. One custodial mother told a reporter from the Gazette, "If he's late with the support cheque, he doesn't see them" (Bagnall, 1983:F-1). Such a vicious game, with the children played as

pawns, can prove to be self-destructive, in that its potential to create an extreme act of revenge--the abduction, is essentially brought upon by its own calculated motives. An even more volatile situation is one where the non-custodial parent is denied complete or partial access to visit with the children. In nine out of the fifteen adult custody assessment cases, there was a history of denied access of the non-custodial parent's visiting privileges. A resulting abduction from such situations can take a most extreme form, in terms of the possible adverse effects on the children.

The visitation period can also contribute as a precipitating event to the crime of parental-child abduction in the sense that the time spent with the child may emphasize to the parent what she or he is missing by not having contact with the child on a regular basis. Thus, this may lead to the retention of the child beyond the legally permitted time period. In several of the cases analysed in the police file study, the non-custodial parent did, in fact, over-extend his or her visitation rights. Yet, in most of these cases, the child was returned within forty-eight hours. However, the desire to hold over the child on a more permanent basis is more likely to happen during an extended visitation period, such as a month during the summer (Agopian, 1981a: 69). In one case, a mother left with her son and daughter to Jamaica for a month's holiday; when the access period was

over, she returned her son with a note saying that she planned to keep her daughter (The Gazette, October 15, 1983:12). When relations between ex-spouses are unstable, court-approved visitation rights can place a custodial parents in a precarious position; while they violate the law by denying the non-custodial parent his or her right to have access to the children, they could also inadvertently aid the offender in carrying out an unpredictable, yet often a premeditated criminal offence (Agopian, 1981a:71).

The crime of parental-child abduction can either take the form of an impulsive act, or of a well-planned, elaborate scheme. The latter usually involves a getaway vehicle, and sometimes the necessary means to change identities, cross borders, and arrange for safe house accommodations. In seven out of the eight police cases, the crime was perpetrated during the visitation period, while one case involved the abrupt removal of the child from his place of residence. It appears that the most common strategy of carrying out a successful abduction is a contrived plan that is activated during a legal visitation period. A court mandated visit can be quite convenient for the offender, who has the opportunity to carefully determine the crime strategy and to actually commit the offence without concern for alerting suspicions. It also provides time for the offender to design an elaborate plan that involves arrangements for

employment, a school for the child, and a place to live, with the aim to ensure anonymity and to hide from the custodial parent, private investigators, and the authorities. In one case, it was discovered that the absconding parent had secured employment and enrolled his children in school far in advance before the actual crime was committed. There are many Canadian cases where the parental abductor, particularly the father, has re-located into a small community in another province, remarried, and has even had other children. In one case, a woman finally tracked down her estranged husband and daughter after five years of no communication and an endless search. They were located in a tiny Northern Saskatchewan town, where the father was running a small motel with a woman, and they had had three children (Defalco, 1983b:19).

The parental abductor usually works alone, seldom accompanied by an accomplice. Yet, in cases where there is an accomplice present, it usually is a hired professional who commits the actual abduction while the parent awaits, generally in the getaway vehicle. Generally, witnesses are present at the scene of the crime. The most common witnesses are the custodial parent, grandparents, or other close relatives. The crime location employed is usually one that the offender views as predictable, and relatively uncomplicated in terms of departing from the crime scene.

The child's place of residence ranks high on the list of target places where the crime is most likely to occur. Since a significant proportion of child abductions are committed during a legitimate visitation period, the child's home is a typical point of departure. In six of the police cases, the children were taken from their homes, under the guise of a regular visit with the non-custodial parent. In one case the child was taken from the home, but involved an abrupt removal into a getaway vehicle. In another case, the crime took place during the visitation period, but occurred in a shopping centre, apparently chosen because the custodial parent was present during all visits. When access to the children is made difficult, either by a court decree or by poor relations with the estranged spouse, other locations that are associated with the child's activities, become more desirable. In 1975, a Canadian study of two hundred abduction cases was conducted by Lois Preston, founder of Parents of Kidnapped Children. She discovered that forty-six percent of the children were abducted from schools, streets or backyards (Anderson, 1981:73). Thus, if the home appears to be an impracticable or inaccessible location, places that are frequented by the child, such as school, become primary targets. In fact, some American schools have even established a "never-the-father" protocol, specifying who may

and who may not pick up the children after school" (Demeter, 1977:XV).

Parental-child kidnappings can happen at any time, during any season of the year. However, there appears to be a significant association between certain months and days and court approved visitation periods. In seven of the police cases, the abduction occurred during the summer months. One case occurred in the late fall. The summer months are particularly attractive, since most extended visitation periods are granted during the summer holidays. The weekend days are convenient for weekend parents; fridays present opportunities for parents with little or no visitation privileges, where a child could be taken en route to or from school, leaving the weekend to travel and relocate, if only on a temporary basis (Agopian, 1981a:71). Since most of the crimes in the police study were perpetrated during the visitation period, occurrences were reported several hours after the child should have been returned, generally on Sunday afternoon and evenings or Monday mornings.

The modus operandi of parental-child abductions usually entails little or no resistance from the child and rarely requires the actual use of force. More frequently, the threat of force is employed whereas physical force is used only to secure possession of the child, if necessary. In twenty-five percent of the cases in Preston's study (1975)

physical acts of violence, such as the smashing of windows, breaking down doors, manhandling the ex-spouse or the child, were employed. In the one police case which involved abrupt removal of the child, the father smashed open a window, snatched the child and fled in a waiting taxi. Because of the abductor's anguish or anger that is often involved, child abductions, particularly those cases where there is an abrupt removal of the child, can entail serious physical harm towards those protecting the child, against the children, or both. In the United States, there are cases which involved the double death of a son and father whose car crashed while attempting a getaway, a mother who was shot to death while trying to stop her ex-husband from abducting their daughter, and a father who had previously abducted his two sons, who returned and shot the children, and then himself. Other parents have been beaten, sprayed with mace or tied up while their children were taken away by ex-spouses or hired professionals. Thus, what transpires is an actual tug-of-war between the offender and the parent victim, with the child as the winning prize. However, in general, child abductions are not as dramatic; since the visitation period appears to be an integral part of the criminal act in a significant amount of cases, the primary modus operandi is deception, so there is no need for the offender to apply or communicate any kind of violence.

Sometimes, the abduction is over quickly. Many parents decide to return the child promptly, after a talk with a lawyer, or because they realize it is the only adult thing to do. In our discussion of the adult custody assessment cases, Dr. John Dimock reported that most parents return within a few weeks, after they realize the gravity of their situation. Additionally, in comparison to males, females tend to commit less well-planned abductions, where children are returned in a shorter amount of time. In the child custody assessment study, it was revealed that the length of abduction for returned children ranged from one week to one year. In the police study, the range was from less than forty-eight hours to two and a half years. Among the cases where children were returned, however, the motive to return the child was not always on a voluntary basis. In the child custody assessment cases, three parents were forced to return the child; whereas, only two parents brought back the children on consent. In one case, the child had not been returned. In the police study, three parents returned the children on consent, while two cases involved a forced return by authorities. In two cases, the children were still missing. But, more often than not, the parent is obstinate about keeping the child--often moving from province to province, from country to country--no matter

what their consciences tell them, because it is usually not what they want to hear.

#### Actions Taken Against The Offender

Children who fall victim to parental abductions should be afforded general rights granted by the Charter of Rights. They have the right to be protected and they have the right to every resource of the law, even more than any other kidnap victims in our society. But, they have not been afforded these privileges. The main reason is because the offenders are also their parents. Thus, actions taken against the parental abductor--from the filing of the complaint to deciding the verdict of guilty or not guilty--have traditionally been colored by a blind faith in parental discretions over the lives of children.

The decision to file a complaint and to press charges against an ex-spouse, can be an arduous task for the parent-victim. Many parents express reluctance to call the police. Since many abductions occur during the visitation period, parents often deliberate over whether the ex-spouse is just late in bringing the child home, or if he or she can actually have criminal intentions. A parent may also hesitate to call the police in fear that the complaint will be

interpreted as another family disagreement.<sup>6</sup> Yet, the angrier a parent becomes, the more likely he or she is going to make all efforts, including filing a complaint, to recover the child.

Once a complaint is made, the nature of the charges often depends on the role of the police and crown attorney's office. The parents of a mother whose daughter was abducted by her estranged husband, wrote a letter to the crown attorney, saying that only after a letter was written to the Attorney General, was the case picked up by the police, almost three months after the complaint was filed. In the police file study, criminal charges were laid in four cases. In all of these cases, the crown attorney was involved in advising and initiating criminal proceedings. In three of these cases, charges were laid under section 250(1) for abduction of a child in the Canadian Criminal Code; in two cases the children were still missing, and in the third case, the child was recovered and the mother was due to face a preliminary hearing to face her charges. In another case, even after the child was returned in a few days, the mother decided to go through with a criminal charge. However, through contact with the crown attorney's office, she was advised that they would not like to see a

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<sup>6</sup> The police response is discussed in detail in Chapter Three: The Criminal Law Relating Child Abduction By Parents.

charge laid for abduction under the circumstances, and that a contempt charge would be more appropriate. In one of the cases, the complainant presented to the police, court orders granting her custody of the child, of which one included the stipulation that in the event that the child is taken unlawfully by the ex-husband, the police should initiate a search for the child. In the occurrence report, the police writer ~~exclaimed~~, that "this direction is contrary to police involvement in child custody orders." The crown attorney consented to the order, but recommended that he should be consulted on the matter before any further action is taken, if the child should be recovered. The role of the crown attorney in the police investigation of parental-child abductions appears to be important; even when an information is laid, the radius of the warrant will normally be extended only on the advice of the crown attorney's office.

If a parent is charged with contempt of court, it is most probable that the child has been returned in a relatively short period of time, or because the victimized parent does not want to press criminal charges, primarily for the sake of the children. While more parents are laying criminal charges against absconding ex-spouses, many drop the charges once the child is returned, usually laying the charge in the first place to ensure that the investigation and search is taken seriously (Gill, 1981:100; Defalco,

1983a:19). But, some parents continue to proceed with the abduction charge, even after the child is recovered, insistent that justice be served. Nevertheless, both criminal and civil approaches address the problem primarily when the parental abductor and the children are located. They rarely find the children, and that is the essential part of the problem (Gill, 1981:66). This is not to indicate that the strategies of law enforcement personnel are entirely ineffective. In fact, it was revealed in Agopian's study that the location or return of children is actually enhanced when the parent-victim notifies the police early. But, many parents do not call the police at all, or they simply give up after dealing with a tedious legal process. Thus, often parents resort to the quasi-legal world of self-help to help them find their children. In fact, the prevalence of parental-child abductions in recent years has inspired the growth of a new practice, particularly in the United States, of "custody-vigilantes." These are not licensed investigators, but self-proclaimed professionals who make child searching their only business. In the majority of the re-stealing cases, however, parents hire licensed private investigators to help them to recover their children.

In Agopian's study, data were analysed for the disposition of cases. Of the ninety-one cases, charges were filed in 55 percent of the instances, while prosecution was

rejected in 45 percent of the cases. Of the forty-one cases rejected for prosecution, 32 percent were rejected because of incomplete evidence to link the suspect with the crime, and 32 percent were referred for misdemeanor prosecution. Charges were dismissed in the 'interest of justice' for 20 percent of the cases. Other reasons included the improbability of a conviction and the refusal of the custodial parent to prosecute. Of the cases brought to trial, only 14 percent obtained a guilty determination. The most common sentence was probation; no offender received a prison sentence.

An analysis was conducted by the author for all trial cases found for the offence of child abduction under section 250 (and preceding sections) of the Canadian Criminal Code up until 1982. Nineteen cases were analysed from 1902 to 1982. Six cases occurred in the first half of the century, between 1902 and 1926. In 1957, the Austin case came to trial which set a precedent to the use of the "good faith defence". The remaining twelve cases were tried between 1970 and 1982. Although the data is crude, it can be speculated that a parallel exists between the majority of cases occurring in the 1970's and the rise in the divorce rate during the same period.<sup>7</sup> In addition, the significant

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<sup>7</sup> An extended discussion on the relationship between the extent of the crime and related divorce trends follows in the subsequent section of this chapter.

number of unreported and unresolved cases, and cases not brought to trial must be taken into account. In the 1970's, many of these cases were brought to public attention. Also, the number of cases that involve the services of private investigators is not known, yet it is surmised that a significant number are dealt with in this manner and diverted from the criminal justice system.

Due to the limitation of the data information, only certain variables were assessed. Table 1 presents the status of the offender in child abduction cases.

Table 1

Status of Offender In Parental-Child  
Abduction Cases

<u>Offender</u>	<u>Number</u>	<u>Percent</u>
Mother	2	10.6
Father	12	63.1
Third Party	<u>5</u>	<u>26.3</u>
TOTAL (N) =	19	100.0

As expected, fathers comprise 63.1 percent of the cases; a third party was involved in 26.3 percent of the cases; while mothers constitute only 10.6 percent of the offenders prosecuted for child abduction. In at least three of the five cases involving a third party, the individual knew the children and the parents; in two cases the offender was

domiciled with the child prior to the abduction charge. In support of previous findings, this study reveals that the father is involved in the majority of cases (particularly when we exclude a third party).

Table 2 presents trial decisions by offender status.

Table 2

Trial Decision of Child Abduction  
Cases by Offender Status

<u>Accused</u>	<u>Conviction</u>		<u>Acquittal</u>		<u>Extradition</u>	
	<u>No.</u>	<u>%</u>	<u>No.</u>	<u>%</u>	<u>No.</u>	<u>%</u>
Mother	-	-	1	5.2	1	5.2
Father	4	21.0	7	36.8	1	5.2
Third Party	3	15.7	2	10.5	-	-
TOTAL (N) =	7	36.8	10	52.6	2	10.6

Of the seven offenders convicted, fathers were convicted in four cases while a third party was convicted in three instances. Acquittals comprised 52.6 percent of the cases; fathers were acquitted in 36.8 percent of the cases, third parties in 10.5 percent and an acquittal was granted to one mother (5.2%). Two extraditions were granted each to a mother and a father who were both remanded and extradited to stand trial in the United States. It can be crudely estimated that third parties are convicted more often, while parents are more often granted acquittals in charges of abduction of children under fourteen years of age.

Table 3 presents appeal decisions by offender status and trial verdict.

**Table 3**  
**Appeal Decisions In Nine Cases**  
**of Child Abduction**

<u>Offender</u>	<u>Conviction</u>		<u>Acquittal</u>	
	<u>Quashed</u>	<u>Upheld</u>	<u>Quashed</u>	<u>Upheld</u>
Mother	-	-		1
Father	1	2		-
Third Party	2	3		-
TOTAL (N) = 9				

Eight conviction cases were appealed; in five cases the conviction was upheld while the conviction was quashed upon appeal in three cases. Where a third party was convicted, the conviction was quashed in two cases and upheld in three cases. One appeal was issued by the Crown upon an acquittal involving a mother who abducted her child. The appeal was dismissed and the acquittal upheld.

Table 4 presents the status of the offender by custody arrangement.

Table 4.

Parental Abductor By  
Status of Custodian

<u>Custodian</u>	<u>Mother</u>		<u>Offender Father</u>		<u>Third Party</u>	
	<u>No.</u>	<u>%</u>	<u>No.</u>	<u>%</u>	<u>No.</u>	<u>%</u>
Mother	-	-	6.0	31.5	1.0	5.2
Father	2.0	10.5	-	-	1.0	5.2
Third Party	-	-	-	-	-	-
No. Custody Arrangement			<u>6.0</u>	<u>31.5</u>	<u>3.0</u>	<u>15.7</u>
TOTAL (N)=	2.0		12.0	63.1	5.0	26.3

In both cases involving the mother, the father had legal custody of the children. Fathers who abducted their children were evenly distributed in cases where the mother had legal custody of the children and where no custody order existed at the time of the abduction. Third parties were involved in one case where the mother was the custodian and in one case where the father had custody of the child. In three cases, there was no custody order in force when the child was kidnapped. It is significant that in 47.3 percent of the abduction cases, there was no court order in existence. This supports other findings that many abductions take place during a de facto custody situation. However, despite the fact that child custody is likely to be a major source of conflict during separation, there is substantial

evidence that proves that conflict over the care of children does not necessarily end once custody has been determined.

Although convicted parental abductors face up to ten years imprisonment in Canada, seldom do they receive more than a small fine, probation, or a suspended sentence (Defalco, 1983b:19; McComby, 1983;interview). As Agopian's findings revealed, sentences for parental abductors are generally forbearing when compared to crimes of a similar nature committed by a third party. Yet, there is some indication that the Canadian judicial system is beginning to treat parental-child abductions in a more serious manner<sup>8</sup> (Defalco, 1983a:19). For example, a recent case involved the abduction of a nine year old girl by her father, a prominent millionaire and politician. He was charged under section 250 for abduction. In turn, the charge was appealed on grounds that treating abduction as a criminal act, rather than as a family matter, is unconstitutional. However, the appeal was rejected by a supreme court, and criminal actions are still pending. It is apparent that many professionals now feel and express a moral obligation to help and protect the missing child.

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<sup>8</sup> Judicial attitudes and practices in cases of parental child abduction are also discussed in Chapter Three: The Criminal Law Relating to Child Abduction by Parents.

### The Extent of The Problem

It is no revelation that things are not working out so well for the family in the last several decades. In Canada, five hundred thousand children under eighteen years are affected by their parent's separation or divorce. In the United States, more than twelve million children have become the casualties of their parent's broken marriages (Bagnall, 1983). As if the separation or divorce is not damaging enough, some of these children are victimized once more; true victims of a crime: abduction by their parents.

Since related divorce trends appear to have an important correlation to the extent of parental-child abductions, an examination of these trends is first in order. Currently, four out of ten Canadian marriages end in divorce. Of these broken families, there is an estimated 300,000 weekend parents; 85 percent of these parents are fathers. In a recent study on divorce, Statistics Canada (1983) reports that irrespective of who initiates the court action, mothers most frequently obtain custody of the children. The study examined the cases of divorce over a period of eleven years from 1969 to 1979 to ascertain the impact of the legislative changes in the Divorce Act of 1968. The findings for that period reveal that one in seven fathers received custody of their children. Women begin two-thirds of all divorce petitions. They were also awarded

custody of the children in 85 percent of the cases. Despite changing judicial attitudes and practices, the predominance of traditional values toward motherhood, is reflected in the figures of spouses receiving custody by sex of petitioner and year. The trend for petitioner husbands declines steadily from 1969 (55.8 percent) to 1975 (39.9 percent), increases slightly in 1976 and then subsequently declines in the last four years to 38.8 percent in 1979. Conversely, a slow but steady increase exists for husbands as respondents receiving custody. The trend begins at 1.9 percent, rises to 3.8 percent in 1973 and continues to increase to 5.6 percent in 1978. The reverse trend occurs when the wife as petitioner receives custody. Between 1969 and 1979, female petitioners were awarded custody in 95.7 percent of the cases. The figure for male petitioners was 42 percent. In only three percent of the cases were split awards issued; for instance, custody of one child awarded to the mother and one child to the father. Additionally, it appears that joint custody is so rare in Canada that, according to Statistics Canada, data regarding this type of custody arrangement were not available.

Although it is difficult to estimate the number of abductions in Canada, there are some figures as to propensity and there are figures which show potential abductions by reason of the increase in family breakdowns. It is esti-

mated that approximately 100,000 North American fathers live in hiding with their abducted children (Defalco, 1983a:19). Unofficial estimates have suggested that at least ten thousand Canadian children, and anywhere from 25,000 to 100,000 American children are kidnapped by their parents annually (Bagnall, 1983:F-1).

The rising divorce rate has been specified as one of the major reasons for the prevalence of this crime. The rate is still about ten percent lower in Canada than in the United States, but it has been rising continually. Nearly forty percent of Canadian marriages now end in divorce, representing a 500 percent increase over the rate in 1968 when the Divorce Act relaxed requirements to obtain a divorce. Statistics Canada suggests that the rate has slowed somewhat since 1975 merely because courts have reached the limit of their ability to absorb and process the growing backlog of cases. In the 1970's, a half million children became children of divorced families. In the United States, the divorce rate has also increased steadily, more than doubling between 1960 and 1978. Agopian (1980, 1981a) says that "such a rapid increase in the divorce rate signals the potential for an epidemic of parental child stealing". By 1921, the Canadian Divorce rate was 6.4 per 100,000 population, a number that more than doubled to 14.3 in 1936. After World War II, the rate rose dramatically to

63.1 and then subsequently declined to 37.6 by 1951. The fifties experienced a fairly stable divorce rate; however, by the 1960's the rate once again began to move upward, reaching 51.2 by 1966. The most consequential change occurred in 1969 following the passage of the new divorce laws in 1968. The rate stood at 124.2 and subsequently soared to 148.4 in 1972, 200.6 in 1974, 235.8 in 1976 and 243.4 in 1978. There has continued to be an upswing in the divorce rate in the last five years.

The full extent of parental-child abduction can only be crudely estimated; the incomplete data of law enforcement agencies and the significant rate of underreported cases account for gross estimates and correlations with other reported behaviours such as the divorce rate. The lack of accurate data also has to do with the recent awareness of this serious crime problem. In fact, a recent national study conducted in the United States has revealed that the actual number of child abductions by parents exceeds previous estimates. The research results were based on telephone interviews with 3,745 adults, of whom 7.3 percent reported that they had personal knowledge of at least one instance of parental-child abduction in 1983. Further, 1.5 percent reported that they were personally involved in such an incident. The most conservative estimate was 313,000, but the study concluded that there may have been as many as

626,000 incidents, if there was no duplicated counting of households in the random sample (Collins, 1983:11).. It follows that if a similar study was conducted in Canada, the results would also most probably transcend current estimates.

It is apparent that the incidence of parental-child abduction occurs substantially more than is recorded. In consideration of increasing divorce rates, more frequent challenges to custody decrees, and the availability of modern, rapid transportation, the plight of children who are kidnapped by a parent will increase.

It is important to mention, however, that any generalizations made about the nature of typical cases of child abduction by parents have to be treated with caution. The above discussion was based by necessity on very unrepresentative cases which actually went to court, were reported to the police, or were publicized by the media. Since these may be the most extreme cases, which should naturally be our primary concern, they are not necessarily representative of the majority of parental abduction incidents. At this point of time, there are simply no research resources available which would provide a more systematic and comprehensive diagnosis of the nature and extent of this crime.

### Conclusion

The impact of legislative change on the abduction of children by a parent cannot be measured as yet; but we can speculate on the future impact of the recent amendment of section 250 of the Canadian Criminal Code. If we assume, apart from the criminal law provisions, that the divorce rate will continue to rise and that longstanding traditions of granting custody awards will change only slightly, we could also expect a concomitant rise in parental-child kidnappings in the next few years. However, if the new provisions of section 250 are taken into account, it is possible that there will be a slight decrease or leveling off in the first years after its inception and increasing control of the situation, on a long-term basis. It is surmised that the new provisions will serve as a deterrent to potential abductions, at least to a minimal degree.

Another speculation can be made with regard to the potential impact of proposed changes in Canadian divorce laws. Since the new legislation proposes to make the divorce process easier, it would be fair to assume that there would also be a natural increase in the divorce rate, therefore, indicating a possible rise in the number of parental-child abductions. However, the proposals also intend to change the substance of the divorce process--to make it more humane, less adversarial. Additionally, some of the provisions are intended towards the advancement of

children's rights. Thus, there could be some impact on deterring parents from acting upon emotional displacement and committing such a crime.

The current criminal law intends to serve the best interests of children; how the law is received and enforced in the next five years will tell us more about how our society decides whose interests and values will supersede those of another. The effects of the proposed divorce legislation on child kidnappings by parents are likely to take considerable time after its promulgation to measure any successes or failures. However, a positive impact, together with the projections of the criminal law amendments, could prove to significantly alter both the nature and extent of a crime that is detrimental to the health of the family and its most vulnerable members--the children.

The harmful consequences of divorce can be minimized if both parents remain loyal to their children. The failure of parents to cooperate after a marriage has ended is expressed most vividly in the abduction of children by their parents.

**CHAPTER FIVE****INTERNATIONAL CHILD ABDUCTION BY  
A PARENT: THE CANADIAN APPROACH**

The problem of parental-child kidnapping is not restricted to national jurisdictions, but transcends international boundaries around the globe. In only a matter of hours, a parent can successfully commit child abduction in one country and take refuge in a second country; perhaps, even in another continent.

The general state of private international law in relation to the recognition and enforcement of foreign child custody orders has traditionally provided ample opportunities for parental abductors to obtain custody in their favour, in another country. Although most nations today employ the 'best interests of the child' as a decisive factor in determining child custody awards, it is often the case that particular cultural and social attitudes of a given national community are reflected in value judgements upon the country from where the child was abducted. A foreign court has the jurisdictional power to grant custody to a parent, even where a custody order already exists; judicial authorities are more likely to do so if the parent is also a national of that country. Thus, the 'best

interests' rule is valued differently by different nations; indeed, many abduction cases involve countries as disparate as Australia and Yugoslavia, or Iran and Canada.

In recent years, however, much progress has been made at the international level. In 1980, one year following the international year of the child, two conventions, aimed at securing the prompt return of kidnapped children to the country of their habitual residence, were signed by a considerable number of countries. One is a European treaty, while the other is worldwide in effect.<sup>1</sup> The hopeful achievements of the conventions will represent significant steps toward controlling this particular family crime, for the sake of the children, both nationwide and internationally.

### The Situation

The rapid advancements in international transportation and communications are viewed as major reasons for the increase in the number of children abducted across international frontiers by their parents. The demands of industrial economies for mass-international transit, has led to limited controls at border crossings, and relaxed visa requirements. Thus, the growth of multinational corpora-

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<sup>1</sup> The nature and significance of the conventions, specifically with regard to the Canadian situation, are discussed later on in this chapter.

tions, which have placed a high value on the relatively free mobility of people within the international market, accompanied by the ease of jet travel, have clearly facilitated the operations of the abducting parent.

In Canada, this increase is also as much a result of it being an immigration country for diverse nationals. Indeed, there is an abundant number of marriages between persons from different countries, or even continents, and native Canadians--when these marriages break down, the existence of significant cultural differences between the two nationalities can produce an explosive combination when the issue of child custody arises. Thus, it follows that when mixed marriages fail, the fear that custody of the children is most likely to be awarded to the spouse who is a Canadian, will quite often play an important role in the abduction of a child by a parent of immigrant status.

There are no reliable estimates on the number of Canadian children who are abducted by their parents to other countries. However, there is a general figure of approximately fifty percent of the total number of parental-child abductions occurring in Canada that cross Canadian borders into the United States or overseas (Anderson, 1981:74). The Department of External Affairs reports that they receive two to three phone calls every week from a parent reporting that their child has been kidnapped to another country by an

estranged spouse. In 1976, for the first time, a parent requested help from the Canadian Government--that case is still open. The legal division of private international law has between thirty and forty files which are still active, approximately two thirds of all the cases on file. Yet, the abduction cases which request Governmental aid most probably represent only the tip of the iceberg. Many parents do not know about the department, or they simply wish to find their children on their own, through the help of lawyers and other professionals. Furthermore, there are many children who are abducted to the United States, where there appears to be considerable cooperation between social welfare agencies on an informal basis.

Consequently, the Government does not seem to receive much pressure from Canadian parents in respect of child kidnappings to the United States, because of the apparent remedies that are available at the private and individual levels. Evidently, the opportunities for communications between the two nations are adequate enough, in that a solution can be found without governmental assistance. Since Europe has been the traditional source of Canadian immigrants, it follows that the European countries, such as Italy, France, Greece, Portugal and Germany, are involved in a large number of cases. However, Great Britain is seldom involved, at least in cases requesting help from the

Government, because like the United States, there appears to be less difficulties with legal systems that are similar to that of Canada. In fact, the most problematic cases involve Middle Eastern nations, with quite dissimilar judicial systems in comparison to Canada, which represent a large proportion of the cases brought to the attention of the Department of External Affairs. The requests for governmental aid, from parents whose children have been absconded in international territories, come from areas throughout Canada. Yet, a significant number of these cases are from the province of Ontario.<sup>2</sup> Even though there are particular countries which figure prominently in Canadian child abductions of an international character, no nation is immune as a state of refuge. Canadian parents abduct their children to places throughout the world, seeking asylum in all six continents.

Canadian born parents who flee with their children to foreign countries, often have accessibility to job mobility within the international labour market; some travel from country to country, constantly in hiding, trying to secure custody of their children in foreign jurisdictions. However, the international parental abductor is most typi-

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<sup>2</sup> This is not necessarily to be interpreted as Ontario representing the largest number of international child abductions in the nation. It only indicates that it is the province with the highest amount of cases requesting assistance from the government.

cally a dual national, whose passport is valid in both Canada and the country of origin. Apparently, it is difficult to obtain such a passport here, in Canada, but not in an "Old Country". Parents who abduct their children across international borders are at an immediate advantage when they are also citizens of a foreign nation. The parent may be an Italian or an Iranian; he or she would just have to make certain that the children had the same nationality when they leave the country. The child is simply registered in the appropriate Canadian consulate and, thus, enters the foreign country as a legal national.<sup>3</sup> In effect, a child may wake up one morning at home, in Canada, and by bedtime be in a country thousands of miles away from the social and cultural background which shaped his or her life.<sup>4</sup>

A reporter for the New York Times writes:

Their stories sound like the scenario from an out-of-date spy movie. There is talk of false passports, elaborate disguises and

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<sup>3</sup> Presently, there are new passport regulations which aim to control the abduction of children by a parent leaving Canada. This is discussed further in the following section.

<sup>4</sup> Since the effects of the abduction on the child is discussed in Chapter Four: The Nature and Extent of Parental-Child Abduction, it is not dealt with in this chapter. Yet, it is important to note how vulnerable children are to a sudden change in social and cultural environments. Especially, if the child does not speak the foreign language, he or she will most probably feel rejected, lost, and shut out from a world that has no bearing on their life experiences up until their removal.

pay-offs to foreign bureaucrats, talk of hideouts, get away cars and escapes in light engine planes. Rather than espionage agents, however, the characters in these personal dramas are divorced parents describing the ordeals of child snatching, international style (1980:14).

Albeit, many parents do have to go through such elaborate procedures to successfully carry out the crime plan. Yet, more often, the actual abduction entails a fairly 'clean' set up without much difficulty. The most convenient format for an international abduction is to have the custodial parent send the child to the country where the potential abductor lives, in belief that the trip is only a temporary visit, adhering to the visitation rights of the other parent. When the visiting period has ended, the abducting parent refuses to return the child, or they just disappear to another region of the country, or another nation altogether. In other cases, parents take the child on a holiday abroad, with consent from the rightful custodian, on the pretext that they are exercising proper visitation privileges. It is not surprising, then, when a parent exercising custody of the children may fear or resist claims for access rights by a parent who lives in a foreign country--they never forgive themselves when their worst fears are realized.

### The Response

There is a standard rule of private international law that a child, or any person who is in a foreign country, is also under the sole jurisdiction of that country's judicial system. In fact, some countries will confer custodial rights on a parental abductor in full disregard of any court decree issued in another foreign jurisdiction. In such cases, there is a conflict of law situation between two nations. Fundamentally, it is a matter of a different country with particular social and legal traditions, where the attitudes of the local authorities and the courts are quite different from those of another nation. For example, the Canadian Government has been involved with a notorious case in the country of Jordan, where the decision to grant custody to the father, who is also a national, was based on the religion of that country, Islam. In such circumstances, it is almost an impossible situation; many times a parent victim will see no other alternative but to go to the country and try to abduct the child back (Gill, 1981:102).

The response of Canada's department of External Affairs is, therefore, limited by international law when it is approached by a parent whose child has been taken by an ex-spouse out of the country. Since child custody is considered as a private matter in international law, the government has to remain neutral in matters of the merits of

custody. Thus, proceedings to secure the recognition and enforcement of the original custody decision is most often conducted by the wronged parent through professional help, or his or her own efforts. Although the government does not express a reluctance to do work to aid parents of children abducted out of Canada, they will not take a position with one parent against the other. However, External Affairs does make an active effort to help parents bring their children back home. While the department is hesitant to interfere with foreign legal systems, it will intervene directly on a diplomatic level in countries where the legal system is approachable.

The first step taken by the government is to inquire about the well-being of the child, if the location is known. Interpol will look for abducted children; if and when they locate the child's whereabouts, they will not reveal any details to the requesting parties, but will inform the foreign authorities. An effort is made, through the Canadian Mission in the foreign jurisdiction, to establish contact with the other parent and to satisfy the parent in Canada that the child is being properly cared for. If any problems exist, the department will refer to social institutions in the country concerned to ensure that the child's welfare is looked after. The parent-victim is advised to retain a lawyer in the country where the child is

residing, and will receive help from the department, if necessary, to obtain the appropriate services of a local lawyer. Even though the government cannot act as an intermediary between the two parties, it does make the effort to encourage and facilitate communications between the estranged spouses, to try and work out a resolution that serves their own interests, and ultimately, the best interests of the child.

In some cases, depending on the country involved, the situation is resolved quickly. Yet, more often than not, the department will request the support of local authorities in the foreign state, to help establish some progress in reaching an agreement between the parents to send the child back to Canada, or at least, to initiate communications that will hopefully lead to an amicable solution. Some governments will agree to help, while others will refuse; it depends a lot on the specific country that is involved. For instance, a country is less likely to be cooperative if the abductor is also a citizen of that nation. Thus, Canada cannot demand another government to send the child back; however, officials can request the Ministry of Health and Welfare, or Child Welfare officials in the country of refuge, to return the child on the basis of his or her Canadian citizenship, in view of a Canadian Court order and the child's habitual residence being Canada (Health, Welfare

and Social Affairs, 1977:55:21). Frequently, the answer is "no", simply because the child is also a national of the country of refuge.

In many cases, the most intense efforts can prove to be fruitless, when the parent in Canada finally believes that some progress has been made, then suddenly learns that he or she has to start all over again. The most reliable course taken by the Canadian Government in relation to such cases, is to try and prevent the parent from moving on to another jurisdiction by ensuring that all that can be done, is done with expediency (Health, Welfare and Social Affairs, 1977: 55:7). Essentially, the degree of governmental success in returning a child to Canada varies from case to case, from country to country.

Extradition of alleged offenders for child abduction is "available between Commonwealth countries, pursuant to the appropriate Fugitive Offenders Act" (Ewaschuk, 1979:187). In order for extradition to be applicable, there must be an extradition treaty listing child abduction as an offence, in both the demanding and requested countries. Additionally, child abduction by a parent must be a criminal offence in both nations; often, this is not the case. Furthermore, problems may arise where the parental abductor is a national of the country of refuge. The authorities of that country may decide that it is unfair to send back their citizens to be tried in a 'foreign' jurisdiction (Ewaschuk, 1979:187).

Thus, although child abduction is a criminal and extraditable offence in Canada, it does not guarantee either the extradition of the fugitive parent or the return of the abducted child, as the child is the victim and may be retained by an extended family in the foreign country. The view of the Canadian government is generally that the remedy of extradition has not been very successful in international child abductions (Issac, 1983:interview). Aside from it being used as a scare tactic, it appears to be a waste of time; very few governments are willing to extradite. The Royal Canadian Mounted Police, however, are apparently ready to extradite for this crime so foreign governments could be able to prosecute. Another possible remedy that the Canadian government may have recourse to, is the process of deportation. Although criminal charges laid in Canada would have no effect in a foreign jurisdiction, the information itself may have important bearing on the decision made by a foreign country, on whether or not to deport an alleged offender (Health, Welfare and Social Affairs, 1977:55:21). However, like the extradition process, the deportation of a parent does not necessarily mean that the child will follow; and, that is the crux of the problem--to return children to their home, in Canada. Since the department of External Affairs prefers to try and solve the problem through admin-

istrative means, and because extradition and deportation are rarely employed, it appears quite evident that criminal remedies in relation to parental-child abduction are generally futile in the international context.

Canadian efforts dealing with the problem of international child abductions by a parent have focused primarily on the curative dimension. However, there are ways in which Canada has provided preventive interventions, specifically designed to deter parents from abducting their children to other countries. Canadian judges have included in child custody orders, clauses concerning the limitations of parents from removing children from Canadian jurisdictions. There are some orders which have prohibited the removal of the child to a foreign jurisdiction by either or both custodial and access parents without proper consent by a court. In reference to visitation privileges, courts have imposed guarantees such as the holding of an access parent's passport, the posting of cash bonds, and sworn undertakings to return the child at an agreed upon time. There are also cases in which the order includes a clause which stipulates that in the event that the access parent fails to return the child to Canada at the end of the visitation period, an irrevocable consent in writing by the access parent allows for the immediate deportation of the children from the

foreign jurisdiction (Hague Convention of Private International Law, 1982:77).

The policies of the Canadian government with respect to passport regulations, contain considerable preventive measures in connection to potential international abductors. Firstly, the Canadian Criminal Code provides for the offence of procuring of a passport in section 258(2); this would apply in cases where an access parent falsely lists himself or herself as the lawful custodian of the child (Ewaschuk, 1979:188). Secondly, precautions are taken whereby passport application forms require an applicant to indicate their marital status. In cases where it is indicated that the person is separated or divorced, the passport office will initiate a screening process to check for evidence of either custody arrangements, custody rights, or the consent of both parents (Health, Welfare and Social Affairs, 1977:55:22).

In 1981, the Canadian Passport Order that came into effect included a clause which allowed custodial parents to obtain a child's passport if there were no custody orders restricting the removal of the child from Canada. It did not require the written consent of both parents. However, in January 1984, External Affairs passed new passport regulations on the recommendations by the Federal-Provincial Committee on Enforcement of Maintenance and Custody Orders,

which provide that it will be necessary for anyone applying for a child's passport to have written consent of both parents. If a parent is not available or refuses to sign a consent form, the department will make certain that there are no court orders prohibiting a child from foreign travel before delivering the document.

Nevertheless, the preventive aspect is still limited, as passports are not required for a Canadian citizen to leave Canada, nor for entry into many other countries. Further, in countries where a visa is required, often the child has dual nationality and, therefore, can gain entry to the country on a foreign passport (Federal-Provincial Committee, 1983:30-31).

### Recent Developments

The culmination of developing concerns among the international community relating to the problem of child kidnapping by a parent, has resulted in the recent signing of two conventions dealing with this family crime, affecting children in many parts of the world. The Strasbourg Convention, also known as the "European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and On Restoration of Custody of Children", applies only between the twenty-one Council of Europe Nations; it was signed in May, 1980, by fifteen of these

countries.<sup>5</sup> The treaty focuses on dealing with child abductions which occur only after custody has been awarded to a parent (Westbrook, 1980:690). In October of the same year, the Fourteenth Session of the Hague Conference on Private International Law adopted the "Convention on the Civil Aspects of International Child Abduction", signed by France, Portugal, Switzerland and Canada. All four countries have ratified; consequently, the Hague Convention came into force for these nations on December 1, 1983. Belgium, Greece and the United States have intentions to ratify in the near future (Bagnall, 1983:F-1). In 1980, the Uniform Law Conference of Canada adopted an Act to implement the Hague Convention. Thus far, the provinces of British Columbia, Manitoba, Nova Scotia, New Brunswick, and Ontario have implemented such legislations. The other provinces are considering and expected to implement similar laws. Further, there is an understanding among the cooperating provinces that in the case of conflict between the convention and a provincial enactment, the convention shall prevail (Eekelaar, 1982:281).

The Hague treaty primarily focuses on the prompt restoration of children to their country of origin, if possible on a voluntary basis; if necessary, court orders or

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<sup>5</sup> Austria, Belgium, the UK, Cyprus, France, West Germany, Greece, Italy, Ireland, Liechtenstein, Luxembourg, The Netherlands, Portugal, Spain and Switzerland.

police enforcement would be employed to ensure the child's return to the country of habitual residence, wherein the custody dispute would be resolved.<sup>6</sup>

The predecessor to the Strasbourg and Hague Conventions, was the 1961 Hague Convention for the Protection of Minors which represented the first international endeavor to recognize the child's habitual residence, rather than to base jurisdiction on the nationality of either or both parents. However, only a few countries signed the convention and subsequently, many courts of these countries failed to uphold the mandate of the convention, frequently applying their own national laws and policies (Westbrook, 1980:689). As Westbrook comments, "although the convention contained some promising provisions for international consultations and exchange of information, it has been labelled a failure for not dealing at all with abduc-

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<sup>6</sup> The scope of this chapter is limited to the general aspects of the conventions. Further, particular emphasis is placed on the Hague Treaty, because of Canada's role in the convention. For more detailed discussions on the legal, social policy and developmental aspects of the Hague Convention, see: A.E. Anton, "The Hague Convention on International Child Abduction", (1981), International and Comparative Law Quarterly, Vol. 30; Keith Farquhar, "The Convention of International Child Abduction Comes To Canada", (1983), Canadian Journal of Family Law, Vol. 1; J.M. Eekelaar, "International Child Abduction By Parents", (1982), University of Toronto Law Journal, Vol. 32; and, Hague Convention of Private International Law (1982), Acts and Documents of the Fourteenth Session, Book III, Child Abduction.

tions of children in violation of an existing decree" (1980:689).

The European Convention appears to be more promising in achieving success, both in terms of enforcing and recognizing foreign custody orders, and expediting the return of abducted children. Apparently, in some countries the interventions of administrative authorities in promoting the voluntary return of abducted children by the country of refuge, have been quite successful (Hague Convention of Private International Law, 1982:228). Some countries have taken the initiative of making bilateral arrangements to improve international situations of abducted children. Such an agreement was made in 1977 between France and the province of Quebec, providing cooperation for matters of custody, or protection of children in respect of violation or denial of visitation rights (Dyer, 1978:12).

Canada has shown considerable enthusiasm for international controls over parental-child abductions. In fact, the proposal for an international treaty on the civil aspects of child abduction was made by a delegate representing Canada, at a Special Commission meeting held at the Hague in 1976. The Hague Conferences in 1979 resulted in a draft convention<sup>7</sup> that, unlike the European treaty, which is directed at the recognition and enforcement of custody

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<sup>7</sup> This draft convention was officiated in October, 1980.

orders, made its goals to return abducted children under sixteen years of age to the country from where they were removed or retained, and to respect rights of custody and access among participating nations. Furthermore, the convention not only pertains to situations where a custody decree is already in effect, but equally recognizes situations where custody rights have been conferred by agreement, and were, in fact, being exercised at the time of the abduction. Thus, the general philosophy of this convention is to protect children internationally from the harmful effects of their wrongful removal or retention by a parent or any other person for the intention of assuming care and control over their lives.

The aims of the Hague Convention are both curative and preventive. The treaty is meant to provide deterrence to parents who kidnap their children across international boundaries, and who believe their schemes involve little risk. The mandate of the convention, however, is primarily curative, designed to secure the reintegration of children to their habitual environment, as soon as possible. There are no provisions for the merits of custody rights--the purpose of the Hague treaty is not to allow foreign countries to decide whether the mother or father is the better parent. Foreign courts could not decide which parent should have custody of a child, but only if there has been an

abduction. Indeed, the basic principle is the paramount interests of children, which in this case, are interpreted as the return of children to their country of origin.

An integral part of the convention's strategy is the role of the "Central Authority." In Canada, the provinces adhering to the treaty have designated this role to their Attorney Generals. Essentially, their responsibilities entail setting in motion whatever machinery is available to secure the return of children from the country of refuge to the country of habitual residence. Such duties may include providing legal representation either directly or indirectly, helping to arrange and facilitating the voluntary return of the child, promoting the exercise of visitation rights, and taking steps to locate abducted children (Hoff, 1982:10-11).

The Federal-Provincial committee has recommended for both federal and provincial governments to introduce legislations which provide for agencies, unions, professional organizations, information banks, and individuals to release information pertaining to addresses, employment particulars or other information that would serve to locate family members for the purpose of enforcing or bringing application for maintenance or custody orders. In particular reference to child abduction, the use of information may take the form of parent locator services, to assist in locating both

abducted children and parental abductors. The development of such services are meant to assist in the implementation of the Hague provisions. Presently, the provinces of Manitoba, Ontario, Quebec and New Brunswick have similar legislations. The committee has reported that these services have not led to abuse, either in Canada or in the United States, and that "individual rights of privacy must be secondary to the rights of an abducted child" (Federal-Provincial Committee, 1983:5).

Although it is the convention's aspiration to achieve maximal cooperation and compliance with its objectives and regulations among contracting nations, there are several grounds for the defence of not returning the child back to the country of origin. Authorities are not bound to order the return of a child, if it is established that at the time of the alleged kidnapping, the applicant was not actually exercising custody rights, or consented to the removal or retention of the child. The apparent risk of psychological or physical harm to the child, if returned to the place of habitual residence is another justification for refusal to restore the child to the home environment which existed prior to the abduction. There is also an article which provides for situations where a child objects to returning, and has reached the age and degree of maturity that it is appropriate for authorities to take into account his or her

views. Lastly, there is an arrangement for a defence which would appear to be employed in quite exceptional cases, where the refusal to return children by foreign authorities is maintained by the "fundamental principles of the requested State relating to the protection of human rights and freedoms."

The Hague treaty only has an initial life of five years (Crouch, 1981:593); the rights to protection and freedom as individuals for children, worldwide, depends on how participating countries, during this crucial time, interpret the exceptions and limitations of the convention, and live up to their conviction that the children's best interest is to restore them to the custody situation, as it existed before the abduction of the child. To a significant degree, the long term success of the convention will rely on the bureaucrats who are responsible for channelling and coordinating international control over the abduction of children by parents.

### Conclusion

The movement towards reaching an international solution for dealing with parental-child abductions has come close to realization in recent years. There appears to be considerable room for optimism, in that the Hague Convention on the Civil Aspects of Child Abduction may be the most effective

response thus far. Albeit, it is most probable that there are bound to be shortcomings in any treaty which deals with diverse cultural and socio-legal backgrounds in relation to the custody of children, and specifically, their abduction by parents. Accordingly, the European Convention can be susceptible to these problems since it is prone to experience inherent difficulties encountered in a system based on the recognition and enforcement of foreign custody determinations--and, the need for intricate rules of jurisdiction (Eekelaar, 1982:305). In comparison, the Hague Convention has made arduous efforts to minimize the risks of failure, by devising a scheme based on the principle of returning children to their original home, simply because of their wrongful removal or retention.

The Hague treaty can become very important to Canada's situation in respect of child kidnapping by a parent, both internationally and domestically. Ideally, if all the provinces would pass legislations relating to the convention, the problem would likely be controlled. Presently, any country or province which does not adopt the convention can become a haven for parental abductors; conceivably, this could serve to circumvent the goals of the convention, at least to some extent.

Nonetheless, it is expected that the progress which has already been made with regard to child abductions, will

continue, both on an international and a national basis-- since, when it comes to the issue of protecting and preserving the well-being of the children, countries should be able to overcome problems of cultural diversities, jurisdictional conflicts, and territorial controls.

## CHAPTER SIX

### CONCLUSIONS AND RECOMMENDATIONS

Children begin by loving their parents; as they grow older they judge them; sometimes they forgive them.

Oscar Wilde  
The Picture of Dorian Gray  
(1891, Chapter 5)

#### Conclusions

Most parental abductors will be forgiven by their children. Yet, this does not redeem them from the crime they have committed, nor the liability to face the due consequences.

The abduction of children by strangers for the purposes of profit, psychotic needs, and sexual gratifications, is a horrendous crime of predatory cruelty. In the United States, national concern has recently inspired nationwide attention to finding solutions toward recovering victims, and educating parents, children and professionals alike, on prevention. The dismal reality is that only a few cases are solved, and only a small number of these children are found alive (Gelman, 1984:78). If there is any consolation to victimized parents of children abducted by their mothers or fathers, it is that in light of existing research, in most cases there is at least the assurance that the child is

relatively safe and being properly cared for. Nonetheless, this does not, in any way, reduce the seriousness of parental-child abductions, nor the exigency of measures to counteract this prevalent crime.

It is important to acknowledge that any attempt to deal with the problem, primarily at the level where precipitating circumstances trigger parents to kidnap their own children, is at best a piecemeal endeavor. It is essential, however, to take into consideration underlying structural factors which play a significant role in producing criminal motivations.

There is no revelation in observing that the family is in deep trouble. Children of divorce have become accepted as a common group in modern society. This does not imply, however, that parents should remain together for the sake of the children. It can be an unfortunate situation, when children live with parents who do not love each other or derive satisfaction from the marriage. Yet, some parents are able to provide a fulfilling environment for their children, despite these shortcomings. However, when parents convey overt hostility and dissatisfaction towards each other, it only forsakes the children's well-being. Nevertheless, when children are involved, the divorce process can effectively create an explosive situation, whereby the children are likely to be caught in the crossfire. The adversarial system of divorce in Canada, instead of repre-

senting a termination of only the spousal relationship, often serves to diminish the status of one parent. Hence, it can take the raw emotions of parents in despair, and abuse them to the detriment of the children. Although parents should make the utmost effort to prevent the dissolution of their marriage, they should not be forced to compete against each other in a drawn out divorce settlement. Thus, when other alternatives fail, a no-fault divorce system would appear to be the most fair and justifiable solution for all concerned parties, especially the children.

It is quite apparent, that in addition to legal constraints, it is necessary to have non-coercive measures, of both therapeutic and educational value to combat the abduction problem (Bodenheimer, 1977:148). As Bodenheimer has explained:

...the urge to kidnap may not arise if parents clearly understand their children's needs in the process of dividing the family, if they understand their responsibilities of co-parenting, or if they learn to work through, or at least around, their mutual resentments for the child's benefit (1977:148).

One thing is abundantly clear: the primary right of children is to have access to both parents.

The complex nature of parental-child abduction requires more than one or two solutions to affect significant

curtailment of the problem (Agopian, 1981a:98). There is no doubt that the employment of criminal sanctions is essential, both as a deterrent and punitive measure. The argument that parents are criminally responsible for abducting their children, is no longer debatable. Yet, the criminal law is not a panacea--in many cases, circumstances demand remedies of a civil nature. The most viable solution, however, appears to be the combination of the criminal law and effective civil measures, such as the enforcement of custody orders. The support and reinforcement of civil remedies by criminal procedures would only serve to enhance the processes of both preventing and rectifying the situation of kidnapped children by parents. Accordingly, Canada has taken important steps in this direction.

In 1983, Canada made strides in both the civil and criminal areas relating to child abduction by a parent. The amendments to section 250 of the Criminal Code, represented an extreme effort to remedy parental immunity to criminal liability, and to protect the rights of children who fall victim to this crime. The ratification of the Hague Convention on the Civil Aspects of Child Abduction marked further the country's commitment to deal with this problem in both the national and international contexts. There have also been a number of changes, recently, in policies and

practices of law enforcement, and in judicial attitudes and practices toward the granting and enforcement of custody orders. The criminal law amendments and the provisions of the Hague Convention have, no doubt, played an important role in the development of such reforms. It is hoped that in the near future, advancements which have been implemented in many provincial jurisdictions, will spread throughout the country.

The progress that Canada has achieved is an affirmation that children have the right not to be exploited for the gratification of adults.

#### Recommendations

The objectives of the following recommendations are to provide for both preventive and curative aspects for controlling the incidence of child abduction committed by parents.

#### **A Central Registry Should Be Established for the Enforcement and Recognition of Custody Orders**

Traditionally, there have been no real effective procedures available in either the criminal law or civil law areas, to assist parents or children who are victimized by parental abductors. Recently, however, changes in the criminal law indicate a potential for deterring parents from committing child abduction, and for remedying this crime

problem. Nevertheless, in such cases which usually involve strong emotional elements, the deterrence function of the criminal law may not be highly effective. It is important, therefore, to also have civil measures which can best provide support to the criminal law. The implementation of a central registry for enforcing custody orders would serve to uphold the role of criminal law procedures by aiding law enforcement sources to trace offenders and missing children, and to prevent parents from obtaining a custody award in another province.

Jurisdictional conflicts relating to judicial awards and enforcement of custody orders have significantly contributed to encouraging parents to abscond with their children, with the intention of obtaining a favourable award in another forum. Moreover, efforts to locate parental abductors have been largely unsuccessful because of an inadequate system of monitoring orders for child custody. Thus, there has been no reliable source or system to ascertain whether or not original orders have been granted, or altered by another court's jurisdiction.

The establishment of a central registry for custody orders, therefore, would serve to facilitate respect and enforcement of custody orders across Canada.<sup>1</sup> This would

<sup>1</sup> In fact, a proposal, recommended by the Federal-Provincial Committee on Enforcing Maintenance and Custody Orders, to establish a central registry for custody decrees, was presented to the Federal Parliament on February 9, 1984. The proposal was approved, and also received positive responses from many provincial governments.

comprise a centralized federal network with subsidiaries administered on provincial levels. The system would provide access to law enforcement officials with regard to information about the status of custody arrangements, so they could act more expeditiously to enforce such orders. Additionally, improvements in communications pertaining to the status of custody decrees, would also assist in tracing the location of abducting parents, and consequently, promoting the likelihood of recovering kidnapped children.

#### **Divorce and Child Custody Mediation Should Be Made Mandatory**

Although the role of the criminal law is essential to dealing with the problem of parental-child kidnapping, it is also in the best interests of the parties involved, to avoid last resort methods of punitive law. Instead, there should be a stronger focus on prevention, whereby the role of educational and therapeutic measures could serve to divert potential abductors from taking the law into their own hands, and from necessitating their involvement with the criminal justice system. Divorce and child custody mediation is a vital form of prevention for families who may fall victim to child abduction.

The contesting of custody for the children represents the ultimate incapability of the family to function. Parents become adversaries, bargaining and competing for

guardianship, and negotiating for rights to reasonable access. In Canada, concerns relating to negative effects resulting from traditional divorce procedures have inspired courts throughout the country to introduce services for divorce mediation and conciliation, to help parents sort out their own lives, and the future for their children. In fact, many of these services have proved to be quite successful. However, at best, these efforts constitute cautious, sporadic attempts to supplement the adversarial system (Abella, 1983:469).

The 1984 proposals for amendments to the Divorce Act, include provisions that require lawyers to advise parents of conciliation and mediation services. Yet, this does not guarantee that lawyers will fulfill this duty, nor that clients will care to take advantage of available services. Furthermore, many families may not be able to afford such assistance. Instead, mediation services should be made mandatory, as part of the court's program, to all couples going through a divorce or separation who have children, regardless of whether or not there will be a custody dispute. This would most certainly reduce costs for families who otherwise could not afford the expenses for such services.

It is through the process of mediation, that prevention can be achieved, to work through differences of opinions, mutual resentments, and conflicting desires; the hostilities

and frustrations that eventually motivate some parents to abduct their children, could be channelled by mediators into a fair and carefully planned arrangement that is agreeable to both parents, and in the best interests of their children.

#### **Divorce Courts Should Increase The Use of Joint Custody Awards**

One of the general assumptions of crime prevention efforts is that whenever we want to prevent a crime from occurring, we must begin by looking at the underlying circumstances which may lead to a criminal action. Joint custody awards have the potential of preventing the crime, of parental-child abduction, in that the events which could motivate a parent to abduct a child may be avoided by such custody arrangements.

The traditional form of awarding custody of the children to one parent, often creates situations where the non-custodial parent feels isolated and excluded from the children's everyday lives, and from the basic responsibilities of parenting. Further, the visiting arrangements which accompany sole custody awards, also have the potential of creating difficulties with regard to access privileges. Thus, the circumstances surrounding single custody dispositions, frequently contain the ingredients which precipitate parental-child kidnappings.

Joint custody offers a reorganized family structure, whereby both parents can continue their duties of parenting, while the children can have the benefit of ongoing contact with both parents, and a home life that promotes quality and growth. The notion of joint custody has only recently emerged in Canadian courts which have generally restricted such decisions to families that express a firm commitment to make such an arrangement successful (Wilson, 1980:41). In fact, the proposals for amendments to the Divorce Act intend to include a guideline that provides for the granting of joint custody, even where custody is in dispute.

Although joint custody is not the answer to all child custody conflicts, and may not be advisable for parties who appear extremely hostile or resistant to the idea, the encouragement or option to work towards such an arrangement, perhaps with the help of mediation services, can prove to be a vital resource for diverting or reducing antagonisms which may induce discontented parents to abscond with their children. The use of joint custody awards is a rare practice in Canada, and should be made more available as a viable alternative to exclusive custody decrees.

The status of joint custody orders differentiates between physical and legal custody. In the latter situation, the child lives with only one parent but both share in the decision-making of the child's welfare, health and

education; whereas, physical joint custody involves varying arrangements, wherein the child lives with each parent for specified time periods. Regardless of the particular form of joint custody, it still conveys to children that both parents want and love them; it also pronounces that parents are willing to recognize the child's best interests above and beyond any desire to assume total control over their upbringing. Thus, it could prevent or minimize the possibility of conflicts, inherent in custody battles, which can propel mothers or fathers to conclude that their only choice is to abduct their children.

#### Concluding Remarks

The dimensions relating to parental-child abduction are vast, and pose an important challenge to social scientists. The study of this crime in Canada has just begun. The need for further investigation, specifically empirical research, is clearly evident.

Children will continue to be abducted by their parents. As long as divorcing parents are willing to wage a war, with children as the victor's claim, the rights of children to security, stability, continuity, and liberty will be violated.

Children, even very young children, have curious powers of observation; they observe and they do their best to

construe and form conclusions, which frequently endure. Thus, although children may forgive parents who have abducted them; rarely if ever, will they forget.

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