

# **The Impact of Parental Kidnapping Laws and Practice on Domestic Violence Survivors**

*National Clearinghouse for the Defense of Battered Women*

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## *Introduction*

*Jane Doe fled from State A to State B with her child to escape from her husband's abuse. Jane's husband, John Doe, tracked her down in State B, where her family lived. At John's request, State A prosecuted Jane for custodial interference, forcing her to return to State A. Several years later, John Doe was incarcerated for attempting to murder and rape Jane Doe in State A.<sup>1</sup>*

Parental kidnapping harms families across the nation. A recent national study found that parental kidnapping occurs at an estimated rate of 203,900 cases per year.<sup>2</sup> What is not recognized generally, however, is that domestic violence underlies many of the most tragic parental abduction cases.

When parents take their children in domestic violence cases, the abductions generally occur in one of two distinct contexts. In one set of circumstances, batterers<sup>3</sup> take the children in order to harm victims<sup>4</sup> further. In another, victims flee with their children in an effort to protect themselves and their children from the batterers' violence. Despite the dramatic difference between these two acts – one vindictive and the other protective – the criminal justice system rarely considers the context of abductions. Typically, the response to perpetrators and to victims of domestic violence is the same regardless of the reasons why the parents left with the children.

Batterers often use children as weapons to hurt or to frighten their partners.<sup>5</sup> They may, for example, pursue protracted custody or visitation litigation as a means of controlling their former partners.<sup>6</sup> Batterers may manipulate custody proceedings to obtain information about their former partners, to continue to monitor them, or to perpetrate additional violence.<sup>7</sup>

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<sup>1</sup> Case description from practitioner survey, National Clearinghouse for the Defense of Battered Women (2003). For description of practitioner survey, see *infra*, *Process of Developing Report*.

<sup>2</sup> DAVID FINKELHOR, HEATHER HAMMER AND ANDREA J. SEDLAK, NATIONAL INCIDENCE STUDIES OF MISSING, ABDUCTED, RUNAWAY, AND THROWN AWAY CHILDREN, CHILDREN ABDUCTED BY FAMILY MEMBERS: NATIONAL ESTIMATE AND CHARACTERISTICS (OCTOBER 2002) (providing estimated number of children who were victims of family abduction in 1999).

<sup>3</sup> In this report, the terms “batterer,” “perpetrator,” and “offender” are used interchangeably to refer to the person perpetrating the violence against family members.

<sup>4</sup> While those in the domestic violence field tend to use the term “survivor” to reinforce the idea that an individual has survived the abuse, criminal laws often use the term “victim.” In this report, the terms “victim” and “survivor” are used interchangeably to refer to the adult person against whom the violence is being perpetrated.

<sup>5</sup> See, e.g., LUNDY BANCROFT, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2002).

<sup>6</sup> Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOCIAL WORK 51, 53 (1994).

<sup>7</sup> LUNDY BANCROFT, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2002).

Some batterers abduct their children after or during custody litigation, while others take their children without initiating any legal proceedings. According to one study, at least 34% of abusers threaten to kidnap their children, and 11% actually abduct them.<sup>8</sup> A groundbreaking study on parental kidnapping found that approximately half of the abductors had been violent toward the other parent during marriage.<sup>9</sup> In particular, researchers categorized 40% of the abducting males as “violent visitors,” meaning that they had battered the children’s mothers previously.<sup>10</sup>

There is, however, another dimension to the intersection of parental kidnapping and domestic violence. Victims of domestic violence may flee to another city or county, go underground, or escape across state or tribal lines with children to avoid abuse or to protect children. Sometimes, as a result, they may be charged with violating parental kidnapping laws. A parental kidnapping study found that more than half of the parents in the study were victims of violence and that almost half of the parents who were contemplating abducting their children were motivated by the perceived need to protect the child from physical, sexual and emotional abuse.<sup>11</sup> According to this study, 27% of women who abduct their children are “nonviolent shared custodians.”<sup>12</sup> Researchers concluded that such abductors may be on the run from what they perceive as abusive situations.<sup>13</sup>

*Victims of domestic violence may flee to another city or county, go underground, or travel across state or tribal lines with children to escape abuse or to protect children, and, as a result, they may be charged with violating parental kidnapping laws.*

Victims of domestic violence often relocate to seek a safe haven from abuse. In most cases, victims flee to locations in which they have family support or a network of friends who can shelter them and their children.<sup>14</sup> Survivors also may flee to states where they have better employment or educational opportunities, allowing them to survive economically without relying on their abusers.<sup>15</sup> Although relocation laws vary by

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<sup>8</sup> Marsha B. Liss and Geraldine Butts Stahly, *Domestic Violence and Child Custody*, in BATTERING AND FAMILY THERAPY 175, 183 (Marsali Hansen and Michele Harway, eds. 1993).

<sup>9</sup> GEOFFREY L. GREIF AND REBECCA L. HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES 59 (1993).

<sup>10</sup> GEOFFREY L. GREIF AND REBECCA L. HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES 37 (1993).

<sup>11</sup> GEOFFREY L. GREIF AND REBECCA L. HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES 8 (1993). *See also*, Eva J. Klain, *Parental Kidnapping, Domestic Violence and Child Abuse: Changing Legal Responses to Related Violence*, American Prosecutors Research Institute 23 (March 1995) (finding that nearly 49% of parental kidnapping cases involved allegations of domestic violence made by the abducting parent or by the left-behind parent).

<sup>12</sup> GREIF AND HEGAR, *supra* note 11, at 41.

<sup>13</sup> *Id.*

<sup>14</sup> *See* Deborah Goelman, *Shelter From the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence After the Violence Against Women Act of 2000*, COLUM. J. OF GENDER AND THE LAW (Fall 2003).

<sup>15</sup> *Id.*

jurisdiction, increasingly, they reflect an understanding that a parent who is a domestic violence survivor may need to relocate for safety.<sup>16</sup>

As this report demonstrates, some parental kidnapping laws similarly recognize the desperate plight of domestic violence survivors, while others fail to acknowledge victims' needs to relocate. Even today, relatively few states have enacted parental kidnapping laws with specific protections for victims of domestic violence,<sup>17</sup> and very few communities are utilizing innovative protocols to help these victims. Many of the current laws and practices penalize domestic violence survivors for fleeing in an effort to protect themselves and their children.

The extent to which parental kidnapping charges are brought against domestic violence victims varies widely by state.<sup>18</sup> Statutory language, criminal justice practices and policies, law enforcement and prosecutorial training on domestic violence, and community resources all influence the rate of parental kidnapping charges filed against victims.<sup>19</sup> Additional research on this topic would be helpful in understanding arrest rates and trends.

It is critical for the criminal justice system to respond promptly and effectively when children are abducted. Responses should be tailored, however, to the context of the parental kidnapping. When the abductors are batterers, law enforcement's efforts to locate the children and return them to the non-violent parent and prosecution's filing of criminal charges may protect children and help prevent perpetrators from misusing the legal system to continue a pattern of domestic violence. When victims have fled with the children, however, the same response by law enforcement may not serve the ends of justice or make the children safer.

There is relatively little information documenting precisely how many domestic violence survivors are charged with parental kidnapping or related crimes. However, it is clear from the present survey that victims not only are charged with such crimes, but they

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<sup>16</sup> Janet M. Bowermaster, *Relocation Custody Disputes Involving Domestic Violence*, 46 KAN. L. REV. 433 (1998).

<sup>17</sup> As of 2005, 29 states had one or more statutory provisions that could be used to assist survivors, including survivors who may have fled to protect children. The breakdown was as follows: Only 7 (17.5%) states had parental kidnapping statutes that included a specific reference to victims of domestic violence. Nine states (18%) included provisions that referred to parents fleeing "harm to self;" one of these specifically referenced fleeing harm "from other parent." Over half the states (28) recognized a parent's need to flee to protect his or her children. These categories are not exclusive; 13 of these 28 states also referred either to domestic violence victims or fleeing harm to self.

<sup>18</sup> Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003) (finding that prosecutors in some states pursue numerous parental kidnapping charges while prosecutors in other states rarely charge parents). *See also*, Kathi L. Grasso et al., *The Criminal Justice System's Response to Parental Abduction*, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice 3 (December 2001) (finding that only 15% of all reported cases of parental abduction resulted in arrest and that prosecutors filed charges in 23% of the cases they opened); Klain, *supra* note 11, at 23 (finding that prosecutors' offices vary in the number of parental kidnapping cases they handle). Note that it is unclear how many of these cases involve charges against domestic violence offenders.

<sup>19</sup> The batterers' pressuring of prosecutors also may play a role. For example, batterers frequently urge prosecutors to file charges against victims.

often are placed in jail, convicted, and lose contact with their children.<sup>20</sup> It was Congressional concern about this topic that led to this survey.

*It is clear from the present survey that victims not only are charged with parental kidnapping crimes, but they often are placed in jail, convicted, and lose contact with their children as a result.*

## ***Legislative Background***

The Violence Against Women Act of 2000 (VAWA 2000) was enacted on October 28, 2000 as Division B of the Victims of Trafficking and Violence Protection Act of 2000.<sup>21</sup> The VAWA 2000 reauthorized critical grant programs, established new grant programs, and strengthened federal law to increase victim safety and offender accountability.<sup>22</sup> In addition, for the first time under federal law, the VAWA 2000 acknowledged explicitly the link between domestic violence and interstate custody cases and the potential impact of interstate jurisdictional statutes on victim safety.<sup>23</sup>

In particular, the VAWA 2000 required the Attorney General to conduct a study of federal and state laws relating to child custody, including the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Parental Kidnapping Prevention Act (PKPA), and to analyze the effect of those laws on child custody cases involving domestic violence.<sup>24</sup> The law also required the Attorney General to examine the sufficiency of defenses to parental abduction charges in domestic violence cases and the burdens and risks encountered by victims as a result of the PKPA.<sup>25</sup> Moreover, the VAWA 2000 required the Attorney General to submit a report to Congress describing the results of the study and offering recommendations.<sup>26</sup>

The Act's legislative history suggests that members of Congress understood the critical need to examine the impact of federal and state laws on domestic violence survivors in custody and parental kidnapping cases.<sup>27</sup> Although the VAWA 2000

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<sup>20</sup> See also, Janet R. Johnston et al., *Early Identification of Risk Factors for Parental Abduction*, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice 8 (March 2001) (finding that women who were arrested for abduction were more likely than men to be convicted and incarcerated, in part due to the criminal codes they usually violate; women were more likely to abduct after a custody order existed, a criminal offense that is generally easier to prove.) Note that victims may lose contact with their children when victims are arrested or subsequently as a result of custody proceedings.

<sup>21</sup> Pub. L. No. 106-386 (codified as amended in scattered sections of 8, 16, 18, 20, 28 and 42 U.S.C.).

<sup>22</sup> *Id.*

<sup>23</sup> 28 U.S.C. § 1738A note.

<sup>24</sup> 28 U.S.C. § 1738A note (a)(1).

<sup>25</sup> 28 U.S.C. § 1738A note (b).

<sup>26</sup> 28 U.S.C. § 1738A note (a)(2).

<sup>27</sup> See, e.g., Congressional Record, Senate, S10164, S10194, October 11, 2000, Division B, The Violence Against Women Act of 2000, Section-by-Section Summary, referring to Section 1303; Congressional Record, House, H8855, H8883, October 5, 2000, Division B, The Violence Against Women Act of 2000, referring to Section 1303; Conference Report to accompany H.R. 3244, Victims of Trafficking and Violence Protection Act of 2000, 106-939, October 5, 2000, at 108.

required reports on several topics, Congress authorized appropriations only for the parental kidnapping report.<sup>28</sup> While earlier versions of the VAWA 2000 proposed significant changes to the federal PKPA, Congress determined that a study of federal and state laws was a necessary prerequisite to enacting substantial changes to the PKPA.<sup>29</sup>

Federal and state laws regarding parental kidnapping are complementary. State parental kidnapping laws determine what acts constitute a crime in a particular state.<sup>30</sup> Federal law does not criminalize parental kidnapping, but provides a mechanism for apprehending those persons who commit state parental kidnapping offenses and travel across state lines.<sup>31</sup> As a result, this report examines the impact of federal and state laws on domestic violence survivors who flee across state or tribal lines seeking safety.

## ***Process of Developing Report***

To gather information regarding the impact of parental kidnapping laws and practices on domestic violence survivors, staff from the National Clearinghouse for the Defense of Battered Women used several research tools. First, staff researched state and federal parental kidnapping laws.<sup>32</sup> For each state, staff analyzed the relevant statutory provisions regarding offenses and defenses related to domestic violence.<sup>33</sup> Using state-specific statutory terms, staff also researched the case law related to domestic violence in order to better understand the statutes. Next, staff reviewed social science, law review, and newspaper articles regarding parental kidnapping and domestic violence. These materials provided background information for the report and for a survey of practitioners.

To understand how state actors apply parental kidnapping laws in practice, staff conducted interviews with relevant criminal justice system players and community members. In particular, staff interviewed selected prosecutors, defense attorneys, victim advocates, family law attorneys, state domestic violence coalition employees, and others, including domestic violence survivors. Participants in this qualitative “practitioner survey” described their understanding of state and federal laws and local protocols. Their case descriptions and anecdotal feedback were invaluable to assessing statutory language and to understanding how laws and practices are affecting domestic violence victims across the country.

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<sup>28</sup> 28 U.S.C. § 1738A note (c).

<sup>29</sup> Note, however, that the VAWA 2000 made one substantial change to the PKPA, amending it by expanding emergency jurisdiction to cover domestic violence cases. *See* 28 U.S.C. § 1738A(c)(2)(C)(ii).

<sup>30</sup> *See infra*, section on state parental kidnapping laws.

<sup>31</sup> *See* 28 U.S.C. § 1738A, 18 U.S.C. § 1073. *See also, infra*, section on federal laws.

<sup>32</sup> Note that the scope of this report addresses state and federal law, but not international parental kidnapping cases or laws.

<sup>33</sup> Appendix A contains the results of this statutory review. Because the laws vary by state, the offenses use different terms such as “parental kidnapping,” “parental abduction,” “child concealment,” or “custodial interference.”

## *Findings*

As noted above, the VAWA 2000 required the Attorney General to report on the “sufficiency of defenses to parental abduction charges available in cases involving domestic violence, and the burdens and risks encountered by victims of domestic violence arising from jurisdictional requirements of the PKPA.”<sup>34</sup> Because defenses to parental abduction primarily are available under state law, staff examined the legal protections and gaps existing under both state and federal law. The results revealed that there are severe risks to victims of domestic violence.

### *A Catch-22 for Victims*

Victims of domestic violence who have children face many difficult decisions and often have very few options. They face risks if they flee with their children or if they remain in the jurisdiction and attempt to separate from their batterers. They also face risks if they do not want to or are unable to leave their abusers.

#### *Risks of flight*

Domestic violence survivors are at risk of prosecution if they flee with their children in violation of state laws. As will be demonstrated below, this occurs fairly frequently due to the structure of state parental kidnapping laws and the outcome of family court decisions. When victims flee in violation of state laws or court orders, however, they face several hazards. Many victims ultimately may be arrested and jailed, convicted, and even serve prison time for these acts. At a minimum, when caught, victims may lose their children to batterers and may be prevented from having any contact with their children in the future. In some cases, victims who flee risk living underground with their children, constantly on the run for fear of losing their lives and their children. These dangers may be unknown to victims when they flee.

***Domestic violence survivors are at risk if they flee with their children in violation of state laws. They face arrest, incarceration, loss of their children, and a life on the run.***

#### *Risks of remaining within abusers' reach*

Domestic violence victims often face equally dangerous obstacles if they do not flee with their children. When survivors take steps to leave abusive partners, they are at increased risk for physical violence and murder.<sup>35</sup> Since domestic violence is a pattern of power and control, when victims attempt to break free of this domination, many batterers

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<sup>34</sup> 28 U.S.C. § 1738A note (b).

<sup>35</sup> CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: INTIMATE PARTNER VIOLENCE 1, 5 (May 2000) (finding that the percentage of female murder victims killed by intimate partners has remained at about 30% since 1976 and that divorced or separated persons were subjected to the highest rates of intimate partner victimization). *See also*, Mindy Abel, Denver Metro Domestic Violence Fatality Review 5 (2002) (finding that in 67% of the homicides, the victim had expressed a desire to leave or to end the relationship).

are desperate to reassert control. During this time period, batterers often perpetrate “separation assault” to prevent survivors from leaving, to retaliate for the separation, or to force survivors to return.<sup>36</sup> It is fear of this potentially lethal violence that propels many victims to flee across state or tribal lines for refuge, and those who do not leave the area are likely to be stalked or harmed.

***Domestic violence victims face dangerous obstacles – including separation violence or murder, and harm to the children – if they do not flee.***

In addition to their own safety concerns, many domestic violence survivors fear that abusers will harm their children. In fact, where there are children in the home, perpetrators who abuse their partners abuse the children in 30-60% of cases.<sup>37</sup> The primary parental kidnapping study demonstrated that almost half of the parents who were contemplating abduction wished to protect their children from abuse,<sup>38</sup> a motivation shared by many domestic violence survivors.

Besides physical abuse, victims fear that exposing children to batterers may harm children. According to a recent study, batterers typically are self-centered, authoritarian, and underinvolved with respect to their children.<sup>39</sup> They often use children as weapons after separation to punish victims for leaving or to force them to reconcile.<sup>40</sup> Victims who remain in the same location as abusers see their children used as pawns in batterers’ struggle for control.

In some cases, victims are held responsible for batterers’ violence against children. They may face criminal or civil “failure to protect” or “neglect” charges, or they may have their children removed from them.<sup>41</sup> While victims may be penalized for failing to

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<sup>36</sup> See, e.g., Walter S. DeKeseredy, McKenzie Rogness, and Martin D. Schwartz, *Separation/Divorce Sexual Assault: The Current State of Social Scientific Knowledge* (2002) (forthcoming, in AGGRESSION AND VIOLENT BEHAVIOR: A REVIEW JOURNAL) (finding that the risk of assault is highest immediately following separation and when women attempt permanent separation through legal or other action and that the risk of intimate femicide is highest when women seek freedom from their abusive partners). See also, Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90(1) MICH. L. REV. 1, 65 (1991).

<sup>37</sup> See Peter G. Jaffe, *Children of Domestic Violence: Special Challenges in Custody and Visitation Dispute Resolution*, in DOMESTIC VIOLENCE AND CHILDREN: RESOLVING CUSTODY AND VISITATION DISPUTES, A NATIONAL JUDICIAL CURRICULUM 3-31 (FAMILY VIOLENCE PREVENTION FUND, 1995) (stating that the most conservative estimates suggest at least a 30% overlap between wife assault and child abuse). See also, Mildred Daley Pagelow, *Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements*, 7(4) Mediation Q. 348 (1990).

<sup>38</sup> GEOFFREY L. GREIF AND REBECCA L. HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES 8 (1993).

<sup>39</sup> LUNDY BANCROFT, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS (2002).

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., *Nicholson v. Williams*, 203 F.Supp.2d 153 (E.D.N.Y. 2002) (issuing preliminary injunction against state agency from continuing its practice of separating children, without a court proceeding, from their mothers who were considered to have “engaged in domestic violence” because they were victims of abuse).

protect their children from abuse, they also may be punished if they remove the children from the reach of batterers.

*The legal system and the use of ongoing litigation often serve as a new battleground for batterers' ongoing harassment of victims.*

In fact, the legal system often serves as a new battleground for batterers' ongoing harassment of victims.<sup>42</sup> In the face of persistent custody and visitation litigation, domestic violence survivors also face the risk that family courts will make decisions endangering them and their children. Research indicates that many legal actors – including family law attorneys, custody evaluators, guardians ad litem, and judges – lack education about domestic violence and its impact on children.<sup>43</sup> Interviews of practitioners, for example, disclosed the following harmful practices perpetrated by some family courts: courts refuse to hear evidence of abuse due to overloaded dockets and a lack of resources; judges tell victims that if they raise the issue of child abuse, sexual abuse, or domestic violence, custody will be transferred to the other parent; and, if evidence of abuse is presented, courts fail to view such evidence as relevant to the custody and visitation matters at hand (or use the evidence to penalize victims).<sup>44</sup>

At least two states have conducted recent surveys regarding domestic violence survivors' experiences in family courts. These reports indicate that systemic flaws in the family court system jeopardize survivors and their children.<sup>45</sup> The findings suggest that persistent and dangerous discrimination against victims often results in the loss of their children.<sup>46</sup>

As a result of these risks, domestic violence survivors confront an impossible choice with respect to flight with children. If civil laws and practices protected victims more effectively, they would be less likely to flee. When they do flee, such flight often constitutes a violation of parental kidnapping laws.

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<sup>42</sup> See Bancroft, *supra* note 5, and Saunders, *supra* note 6.

<sup>43</sup> Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003); National Center on Full Faith and Credit, Pennsylvania Coalition Against Domestic Violence, national survey conducted (2002); NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE AND CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE (1999); DEBORAH GOELMAN AND ROBERTA VALENTE, EDS., THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK (ABA COMMISSION ON DOMESTIC VIOLENCE, 1996).

<sup>44</sup> Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003).

<sup>45</sup> Battered Mothers Speak Out, Battered Mothers' Testimony Project, Wellesley Centers for Women (2003); Battered Mothers' Testimony Project: A Human Rights Approach to Child Custody and Domestic Violence, Arizona Coalition Against Domestic Violence (2003) (arguing that the treatment of domestic violence victims in custody cases rises to the level of human rights violations).

<sup>46</sup> *Id.*

## Overview of federal laws related to parental kidnapping

### *Parental Kidnapping Prevention Act*

Congress enacted the PKPA in 1980 to resolve jurisdictional conflicts in child custody cases.<sup>47</sup> The PKPA was designed to discourage interstate conflicts, deter abductions, and promote cooperation between states about custody matters.<sup>48</sup> To do so, the law established a hierarchy of jurisdictional bases, prioritizing the child's home state.<sup>49</sup> The PKPA also prohibited a court in one state from exercising jurisdiction if a valid custody proceeding already was pending in another state, consistent with the PKPA.<sup>50</sup>

The PKPA is a full faith and credit law.<sup>51</sup> It tells courts when to honor and enforce custody determinations issued by courts in other states or tribes.<sup>52</sup> The PKPA is not a federal criminal statute, however.

### *There is no federal parental kidnapping crime*

In fact, there is no federal criminal parental kidnapping offense. The federal law that prohibits kidnapping does not cover acts of parental kidnapping.<sup>53</sup> Similarly, while there is a federal crime prohibiting international parental kidnapping, the offense does not encompass parental kidnapping across state lines within the United States.<sup>54</sup> It is noteworthy, however, that if a defendant was fleeing an incidence or pattern of domestic violence, this is a defense to a charge of international parental kidnapping.<sup>55</sup>

### *Unlawful Flight to Avoid Prosecution (UFAP)*

Another section of federal law creates a federal offense for persons who flee across state lines to avoid prosecution or giving testimony.<sup>56</sup> This law is a jurisdictional device that permits federal officers to search for state felons,<sup>57</sup> to assist in locating and apprehending fugitives from state justice. Legislators intended to allow federal warrants

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<sup>47</sup> See Pub. L. No. 96-611, § 7, note to 28 U.S.C. § 1738A.

<sup>48</sup> *Id.*

<sup>49</sup> 28 U.S.C. § 1738A(c).

<sup>50</sup> 28 U.S.C. § 1738A(g).

<sup>51</sup> 28 U.S.C. § 1738A.

<sup>52</sup> State jurisdictional laws, such as the Uniform Child Custody Jurisdiction Act and the Uniform Child Custody Jurisdiction and Enforcement Act, determine whether a state has the authority to issue a child custody order.

<sup>53</sup> See 18 U.S.C. § 1201(g).

<sup>54</sup> See 18 U.S.C. § 1204.

<sup>55</sup> 18 U.S.C. § 1204(c)(2) (stating that “it shall be an affirmative defense under this section that the defendant was fleeing an incidence or pattern of domestic violence”).

<sup>56</sup> 18 U.S.C. § 1073.

<sup>57</sup> See United States Attorneys' Criminal Resource Manual, § 1780 (stating that the primary purpose of the Fugitive Felon Act is to permit the Federal government to assist in the location and apprehension of fugitives from state justice).

to be used as a vehicle to aid in state extradition proceedings.<sup>58</sup> Actual federal prosecution appears to be limited to extraordinary cases.<sup>59</sup>

UFAP warrants function in the following manner. First, a local law enforcement officer seeks a state or local warrant for violation of a state criminal statute. Next, the local law enforcement officer contacts the FBI or the United States Attorney's Office in the district and requests that a federal officer seek a UFAP warrant. As long as the original state's authorities intend to extradite the defendant when found,<sup>60</sup> the federal authorities are likely to get involved. The FBI attempts to locate the defendant and, when the defendant is found, federal officers bring the defendant to a federal magistrate in the new state or transfer the defendant to the appropriate state or local authorities.<sup>61</sup> At that time, most UFAP charges are dismissed.<sup>62</sup>

In 1980, when Congress enacted the PKPA, it declared that the federal UFAP provision applied to cases involving parental kidnapping and interstate or international flight to avoid prosecution.<sup>63</sup> Despite the enactment of domestic violence defenses in some state parental kidnapping laws and in the federal international parental kidnapping offense, no parallel legal protection prevents UFAP warrants from being issued against domestic violence survivors. As a result, this federal law has been used in some cases against victims who have fled across state lines with their children.<sup>64</sup>

UFAP warrants pose a problem to victims even if UFAP charges ultimately are dismissed. At present, there is no mechanism to alert federal authorities to the fact that the defendant is a victim who has fled to escape a batterer's abuse,<sup>65</sup> and there is no federal defense to an extradition procedure. As a result, perpetrators can squander the resources of the FBI by asking prosecutors to issue UFAP warrants to track down victims who have gone into hiding. Practitioners report that in a number of interstate cases, the FBI has located victims in refuge states, sometimes tracking them to domestic violence shelters.<sup>66</sup> Similarly, because there is no screening mechanism for domestic violence, a victim's profile may be posted as a missing person's notice on the FBI website tracking "parental kidnappers," or the children's descriptions may be on the website of the National Center for Missing and Exploited Children. A domestic violence screening

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<sup>58</sup> *U.S. v. Love*, 425 F.Supp. 1248 (SD NY 1977).

<sup>59</sup> *Id.*

<sup>60</sup> See United States Attorneys' Manual, § 9-69.420 (March 2001).

<sup>61</sup> See United States Attorneys' Criminal Resource Manual, § 1782.

<sup>62</sup> The statute expressly requires "formal approval in writing" by a designated Department of Justice official before a UFAP violation can be actually prosecuted in federal court. See United States Attorneys' Manual, § 9-69.400 (March 2001).

<sup>63</sup> Pub. L. No. 96-611, § 10(a). State requests for the filing of unlawful flight complaints in felony parental abduction cases are to be treated in the same manner as other unlawful flight requests. See United States Attorneys' Manual, § 9-69.421 (March 2001).

<sup>64</sup> Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003).

<sup>65</sup> This failure to consider domestic violence endangers survivors. In contrast, related federal laws, such as those governing the Federal Parent Locator Service (which can be used in parental kidnapping cases), contain provisions safeguarding information about victims where there is evidence of domestic violence or child abuse. See 42 U.S.C. § 653(b)(2).

<sup>66</sup> Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003).

process prior to the issuance of UFAP warrants would provide federal authorities with an opportunity to protect victims at an early stage in the criminal justice process and to preserve scarce federal resources.

*A domestic violence screening process prior to the issuance of UFAP warrants would provide federal authorities with an opportunity to protect victims at an early stage in the criminal justice process and to preserve scarce federal resources.*

The impact of the federal process on survivors is dire. When the FBI tracks down victims, they often are forced to return to dangerous jurisdictions and their children are usually returned to the batterer. Even if victims eventually are acquitted of parental kidnapping charges, they may have served jail time after an arrest, and they usually lose custody of their children. Improving federal laws, protocols, and training could complement remedies on the state level.

### *Overview of state laws*

State parental kidnapping laws vary widely. Statutes and case law define the nature of the criminal act and the type of prohibited behavior. Some states criminalize a parent's flight with children in violation of a court order, while other states criminalize flight with children even in the absence of a court order. In still other states, there may be a separate crime called "violation of a court order" for which defendants are prosecuted.

Some state laws include exemptions or defenses that could be used to assist victims of domestic violence who flee with their children for safety. Some laws create exemptions, indicating that individuals who meet certain criteria should not be charged with parental kidnapping. Other state laws create various defenses for individuals who are charged with such crimes. These may include defenses<sup>67</sup> for flight to avoid domestic violence, flight from imminent harm, or flight to protect a child. In still other states, statutes or case law set forth defenses based on good cause. General criminal law defenses such as necessity or duress also exist and may be relevant in these cases.

State parental kidnapping statutes establish different penalties. In various states, acts may be categorized as misdemeanors or as felonies. Certain actions, such as removing the child from the state, may increase the offense level and the penalty. A few states impose civil as well as criminal consequences for violating parental kidnapping laws. For example, in Michigan, if one parent has concealed the child from the other parent, this is a factor that civil courts may consider when awarding parenting time with the child.<sup>68</sup>

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<sup>67</sup> In many states, these defenses are called "affirmative defenses." However, because the definition of an affirmative defense varies by state, this report uses the broader term, "defense," except where specific laws employ the language "affirmative defense."

<sup>68</sup> MICH. COMP. LAWS § 722.27A, 7a(6)(h). Note, however, that temporary residence in a domestic violence shelter may not be construed as concealing the child from the other parent.

### *Evidence of domestic violence*

Parental kidnapping laws differ in the extent to which they explicitly or implicitly permit courts to consider evidence of domestic violence as one reason why parents might flee with their children. This can affect profoundly a domestic violence survivor's ability to respond to criminal charges. In states that have acknowledged domestic violence by creating a specific domestic violence defense, evidence of abuse is admissible.

However, there are many state statutes that do not include any defenses or exemptions that specifically reference domestic violence. Within these jurisdictions, laws that are written and construed to enable the factfinder to take evidence of abuse into account are the ones most likely to provide courts with the context they need to make a fair decision in such cases. Depending on the state, and on how the elements of the offense are defined, some survivors may have a more difficult time than others trying to present evidence of the abuse.

For example, statutes that contain language permitting a showing of "good cause" for the taking of the child,<sup>69</sup> or similar language permitting consideration of the circumstances of the taking, should allow survivors to bring in evidence of domestic violence. North Carolina's child abduction statute provides that the state must prove that a child was taken "without legal justification or defense."<sup>70</sup> A survivor potentially could argue that fleeing domestic violence constituted such a defense, and then the abuse evidence should be heard.

There are other ways in which state offense language varies, affecting the likelihood that survivors will be able to present evidence of abuse. Statutes that contain very specific language concerning intent may be more helpful to victims.<sup>71</sup> For instance, in New Mexico, custodial interference "consists of any person, having a right to custody of a child, maliciously taking, detaining, concealing or enticing away or failing to return that child without good cause and with the intent to deprive permanently or for a protracted time...".<sup>72</sup> In responding to charges that the taking was malicious and performed with an intent to permanently deprive, survivors could explain that they took the children only with an intent to protect them from harm.

When a statute does not require a specific intent level, such as "malice" or "intent to permanently deprive," it may not be as clear how evidence of abuse could be presented. In Alaska, for example, a defendant can be convicted of custodial interference in the first degree "if the person ... causes the child ... to be (1) removed from the state; or (2) kept

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<sup>69</sup> See, e.g., MO. REV. STAT. § 565.153 (2003).

<sup>70</sup> N.C. GEN. STAT. § 14-41 (2003).

<sup>71</sup> Parental kidnapping offenses have varying levels of intent as an element of the crime, including some that do not specify any intent level at all.

<sup>72</sup> N. M. STAT. ANN. § 30-4-4 (Michie 2002).

outside the state."<sup>73</sup> With statutory language such as this, it may be more difficult to persuade a court that evidence of abuse is relevant and admissible.

### *Domestic violence exemptions*

In a few states, parental kidnapping laws contain explicit exemptions for domestic violence victims who have fled to escape abuse. This means that if the statutory criteria are met, victims should not face criminal charges. In these states, the laws are designed to prevent the imposition of criminal sanctions against victims who flee to safety.

***A few state laws have domestic violence exemptions which are designed to prevent the imposition of criminal sanctions against victims who flee to safety.***

For example, California's law states the following:

Section 278.5 [child abduction offense] does not apply to a person with a right to custody of child who has been a victim of domestic violence who, with a good faith and reasonable belief that the child, if left with the other person, will suffer immediate bodily injury or emotional harm, takes, entices away, keeps, withholds, or conceals that child. "Emotional harm" includes having a parent who has committed domestic violence against the parent who is taking, enticing away, keeping withholding, or concealing the child.<sup>74</sup>

Similarly, Florida's custodial interference law provides:

This section does not apply in cases where a spouse who is the victim of any act of domestic violence or who has reasonable cause to believe he or she is about to become the victim of any act of domestic violence . . . seeks shelter from such acts or possible acts and takes with him or her any child 17 years of age or younger.<sup>75</sup>

Such statutes attempt to protect victims of domestic violence from being arrested, charged criminally, or serving jail time. The laws acknowledge that victims should not be punished for fleeing with children to escape abuse. In practice, however, these laws have generated mixed results for survivors because some of the statutory prerequisites are difficult to meet.<sup>76</sup>

For example, Florida's exemption requires a victim to make a report to the sheriff's office or to the state attorney's office within 10 days of taking the child, to provide current contact information, and to commence a custody proceeding consistent with the PKPA or the UCCJA within a reasonable time.<sup>77</sup> The legal exemption is unavailable to

<sup>73</sup> ALASKA STAT. § 11.41.320(a) (Michie 2001).

<sup>74</sup> CAL. PEN. CODE § 278.7(b)(2003).

<sup>75</sup> FLA. STAT. ch. 787.03(6)(a)(2003).

<sup>76</sup> See *infra*, impact of domestic violence exemptions.

<sup>77</sup> FLA. STAT. ch. 787.03(6)(b)(2003).

victims who learn about these requirements after the short time frames have passed. The law also raises confidentiality concerns. Victims who have fled for their safety are unlikely to be willing to provide their current addresses and telephone numbers, fearing that their abusers will be able to find them. The law also limits relief to those victims who are married, excluding large numbers of survivors from protection.

### *Domestic violence defenses*

In some states, parental kidnapping laws contain defenses based on flight from domestic violence. These were designed to permit survivors to have an opportunity to explain the context of their flight with children to authorities in the state from which they fled. With this type of structure, a victim faces criminal charges, but may raise a defense at or before trial.

For example, the Illinois child abduction statute provides that it is an affirmative defense that “the person was fleeing an incidence or pattern of domestic violence.”<sup>78</sup> Similarly, Rhode Island’s childsnatching statute creates an affirmative defense if “the person was fleeing an incidence or pattern of domestic violence.”<sup>79</sup> Other states have created similar defenses but used slightly different language.

Missouri law states that it is an “absolute defense” to the crimes of parental kidnapping and child abduction that “the person was fleeing an incident or pattern of domestic violence.”<sup>80</sup> The defense in Missouri has proved helpful for victims, but it depends on whether criminal justice system actors – from police to prosecutors to defense attorneys – know about and apply the law.<sup>81</sup> In Missouri, some prosecutors’ offices have formal or informal protocols in place to address this statutory language.<sup>82</sup> In some local communities, law enforcement officers who are aware of the law may take domestic violence into account when they conduct an investigation, and if they determine that the abducting parent was a victim, they may not refer the case to the prosecutor’s office.<sup>83</sup>

Case law suggests that such defenses may not always be working as envisioned by legislators. In *People v. Griffith*, for example, a mother removed a child from the father who had abused the mother physically and verbally.<sup>84</sup> Eight years later, an FBI agent in another state identified the mother and had her arrested; the child was returned to the father.<sup>85</sup> At trial, two former neighbors and the mother’s brother testified about the

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<sup>78</sup> 720 ILL. COMP. STAT. 5/10-5(c)(3)(2003). The law also includes an exemption stating that while generally it is a crime to conceal a child from another parent for 15 days, “it is not a violation of this provision for a person fleeing domestic violence to take the child with him or her to housing provided by a domestic violence program.” 720 ILL. COMP. STAT. 5/10-5(b)(6)(2003).

<sup>79</sup> R.I. GEN. LAWS § 11-26-1.1(b)(3)(2003).

<sup>80</sup> MO. REV. STAT. § 565.160 (2003).

<sup>81</sup> Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003).

<sup>82</sup> *Id.* For example, prosecutors in one office ask the local police to investigate abuse prior to referring cases for prosecution. *See also, infra, State Improvements.*

<sup>83</sup> *Id.*

<sup>84</sup> 620 N.E.2d 1130 (Il. App. Ct. 1993).

<sup>85</sup> *Id.* at 1132.

father's abuse of the mother.<sup>86</sup> The father's former wife testified that the father abused her as well, jumping on her stomach when she was pregnant, and causing her child to be delivered early.<sup>87</sup> Similarly, the defendant testified that the father punched her in the stomach when she was pregnant, shoved her, choked her, hit her, threw her to the ground, and attempted to run her over.<sup>88</sup> Over the years she suffered injuries including bruised ribs, a split nose, bruises, missing hair, and depression.<sup>89</sup> Despite this evidence of an extensive history of violence, the jury seemed to misunderstand the domestic violence and found the defendant guilty of abduction.<sup>90</sup> Such a finding is difficult to understand, given the state's affirmative defense for flight from domestic violence.

### *Defense for parent fleeing harm to self*

In some states, there is a defense to parental kidnapping if a parent flees to avoid harm to himself or herself. While the precise language varies by state, the defense usually addresses situations in which a parent is escaping from an immediate risk of physical harm. Conceivably, such a defense should be useful to domestic violence survivors.

For example, Idaho's custody interference statute provides that it is an affirmative defense if "the action is taken by a parent fleeing from imminent physical harm to himself."<sup>91</sup> Minnesota's law creates a different standard, stating that it is an affirmative defense if "the person reasonably believed the action was necessary to protect the person taking the action from physical or sexual assault."<sup>92</sup> Similarly, Wisconsin's custodial interference statute provides a defense if the action "is taken by a parent fleeing in a situation in which the parent reasonably believes that there is a threat of physical harm or sexual assault to himself or herself."<sup>93</sup>

Some state laws require the defendant to have taken protective actions prior to utilizing the defense. In Washington, a defendant may establish a "complete defense" to custodial interference by proving that the defendant's purpose was to protect himself or herself from imminent physical harm, that the belief in the existence of the imminent physical harm was reasonable, and that the defendant sought the assistance of the police, sheriff's office, protective agencies, or a court prior to committing the act.<sup>94</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1133.

<sup>88</sup> *Id.* at 1134.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1136. Note that jury members asked for further information regarding the definition of "pattern of domestic violence" but did not receive the clarification they were seeking.

<sup>91</sup> IDAHO CODE § 18-4506(2)(b)(2002).

<sup>92</sup> MINN. STAT. § 609.26, Subd. 2(2)(2003).

<sup>93</sup> WIS. STAT. § 948.31(4)(a)(2)(2001).

<sup>94</sup> WASH. REV. CODE § 9A.40.080(2)(a)(1997). The question of whether "protective agencies" include non-profit domestic violence shelters has not been answered yet.

### *Defense for protection of child*

Many states include a defense for flight to protect children. The legal standards vary by state, in some cases requiring imminent physical harm<sup>95</sup> and in others requiring a reasonable belief that the action was necessary to protect a child.<sup>96</sup> Since batterers who assault their intimate partners often abuse their children,<sup>97</sup> such defenses should be available to many victims of domestic violence who flee to safety.

For example, Colorado law provides an affirmative defense to violation of a custody order (a criminal offense in Colorado) if “the offender reasonably believed that his conduct was necessary to preserve the child from danger to his welfare.”<sup>98</sup> Wisconsin law specifies that a defense applies if the parent “reasonably believes that there is a threat of physical harm or sexual assault to the child.”<sup>99</sup> Michigan’s law creates a different standard, providing for a “complete defense . . . if a parent proves that his or her actions were taken for the purpose of protecting the child from an immediate and actual threat of physical or mental harm, abuse, or neglect.”<sup>100</sup>

The type of harm varies by state as well. In Minnesota, it is an affirmative defense to protect a child from “physical or sexual assault or substantial emotional harm.”<sup>101</sup> In New York, an individual may protect a child who “has been subjected to or threatened with mistreatment or abuse.”<sup>102</sup> Wyoming’s law requires the action to have been “necessary to preserve the child from an immediate danger to his welfare.”<sup>103</sup>

In some states, to assert the defense, the abducting parent must have taken certain steps. For instance, Arizona’s law requires the defendant to have begun the process to obtain an order of protection or to file for custody within a reasonable period of time.<sup>104</sup> Maryland law instructs the individual to file a petition in equity court stating that a failure to do the act “would have resulted in a clear and present danger to the health, safety, or welfare of the child.”<sup>105</sup> Similarly, New Hampshire law requires a petition documenting the danger to be filed within 72 hours.<sup>106</sup> New Jersey law requires a defendant to make a report to the police, prosecutors’ office, or social services within 24 hours of taking the child.<sup>107</sup>

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<sup>95</sup> See, e.g., IDAHO CODE § 18-4506(2)(a)(2002).

<sup>96</sup> See, e.g., LA. REV. STAT. § 14:45.1(A)(2002).

<sup>97</sup> Jaffe, *supra* note 37.

<sup>98</sup> COLO. REV. STAT. § 18-3-304(3)(2002).

<sup>99</sup> WIS. STAT. § 948.31(4)(a)(1)(2001).

<sup>100</sup> MICH. COMP. LAWS § 750.350a(5)(2002).

<sup>101</sup> MINN. STAT. § 609.26, Subd. 2, (1)(2001).

<sup>102</sup> N.Y. PEN. LAW § 135.50(2002).

<sup>103</sup> WYO. STAT. ANN. § 6-2-204(c)(i)(2002).

<sup>104</sup> ARIZ. REV. STAT. § 13-1302(C)(1)(2001).

<sup>105</sup> MD. CODE ANN. FAM. § 9-306(a)(1)(1998).

<sup>106</sup> N.H. REV. STAT. ANN. § 633:4(III)(2002). In addition, the affirmative defense is available only if the defendant has remained in New Hampshire. N.H. REV. STAT. ANN. § 633:4(IV)(2002).

<sup>107</sup> N.J. STAT. ANN. § 2C:13-4(c)(1)(2002).

In some states, defendants have argued successfully that they are entitled to present evidence of a child's abuse to prove an affirmative defense.<sup>108</sup> For example, in *State v. Bissell*, the Washington Court of Appeals held that the trial court had erred in excluding evidence of the child's sexual abuse, restricting the mother's ability to present her affirmative defense.<sup>109</sup> In other cases, defendants have been unable to utilize these defenses because they did not take the necessary steps.<sup>110</sup>

Some courts have disregarded the claims of an abducting parent that he or she fled to protect children from abuse. For example, in *State v. Shafer-Imhoff*, the Supreme Court of North Dakota upheld a trial court's ruling that excluded evidence of a father's assaults on a mother in the presence of children.<sup>111</sup> The Court held that the assaults were not directed at the children so they were irrelevant to the mother's claim that she fled to protect the safety of the children.<sup>112</sup> A narrow interpretation of such affirmative defenses can limit the cases in which defendants may assert the defense.

### *Defense or exemption for good cause*

A few states include a generic "good cause" exemption or defense to parental kidnapping charges. In theory, courts could utilize such catchall provisions to encompass domestic violence cases. It is unclear whether such defenses currently are being used in this way.

In Hawaii, for example, there is a good cause affirmative defense to prosecution for custodial interference.<sup>113</sup> However, "good cause" is defined specifically as a "good faith and reasonable belief that the taking, detaining, concealing, enticing away, or removing of the minor is necessary to protect the minor from immediate bodily injury."<sup>114</sup> This definition makes the good cause defense similar to the child protection defenses in other states.

Most states that have similar provisions do not define "good cause" by statute. For instance, Missouri's parental kidnapping statute states that a person commits the crime "if he removes, takes, detains, conceals, or entices away that child . . . without good cause . . ." <sup>115</sup> Similarly, New Mexico's custodial interference law defines the crime as "maliciously taking, detaining, concealing or enticing away or failing to return that child

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<sup>108</sup> See, e.g., *People v. Mossman*, 17 P.3d 165 (Colo. Ct. App. 2000) (holding that defendant was entitled to present evidence that his daughter was being physically, mentally, and sexually abused by his ex-wife and another man who were living together in violation of a restraining order); *State v. Basye*, 859 P.2d 542 (Or. Ct. App. 1993) (holding that the trial court erred in excluding evidence that the defendant fled to protect the children from abuse).

<sup>109</sup> 1998 Wash. App. LEXIS 424 (Wash. Ct. App. 1998).

<sup>110</sup> See, e.g., *State v. Strayer*, 2003 Ohio 2941 (Ohio Ct. App. 2003) (holding that appellant did not give notice to law enforcement and judicial authorities as required by the statute's affirmative defense).

<sup>111</sup> 632 N.W.2d 825 (N.D. 2001).

<sup>112</sup> *Id.*

<sup>113</sup> HAW. REV. STAT. § 707-726(2)(1997).

<sup>114</sup> *Id.*

<sup>115</sup> MO. REV. STAT. § 565.153(1)(2003).

without good cause . . .”<sup>116</sup> Likewise, Utah’s statute prohibits concealing or detaining a child “without good cause.”<sup>117</sup>

Such statutes have been challenged as void for vagueness when the term “good cause” is undefined by law.<sup>118</sup> However, courts have found that such phrases have a settled common sense meaning and may be defined by case law or by analogy to other legal contexts.<sup>119</sup> Given the flexibility of the standard in most states, courts should be able to interpret flight from domestic violence as good cause.

### *Necessity defense*

Many states permit defendants to assert a necessity defense in criminal cases, including parental kidnapping cases. Although the terminology varies by state, in general, necessity defenses are not codified by statute. Rather, case law tends to define the standards under which a necessity defense may be claimed.

In Alaska, for example, the defense of necessity requires a showing of three elements: 1) the act charged must have been done to prevent a significant evil; 2) there must have been no adequate alternative; and 3) the harm caused must not have been disproportionate to the harm avoided.<sup>120</sup> In *Gerlach v. State*, the mother fled with her daughter and hid for a year, alleging that she was protecting her daughter from the father’s physical abuse.<sup>121</sup> The Alaska Court of Appeals found that the mother’s claim failed to meet the necessity standard because the harm caused by her flight – denying the father all visitation with his daughter – was disproportionate to the harm avoided, and the mother should have exhausted her legal remedies.<sup>122</sup>

Similarly, in Connecticut, the defense of necessity requires the following showings: 1) that there was no legal alternative available; 2) that the harm to be prevented was imminent; and 3) that a direct causal relationship may be reasonably anticipated to exist between the defendant’s action and the avoidance of harm.<sup>123</sup> In *State v. Rubenstein*, after an expert concluded that the mother’s son had been abused, the mother refused to allow court-ordered visitation with the father.<sup>124</sup> The Superior Court of Connecticut found that the mother was not entitled to assert a necessity defense because she failed to exercise legal alternatives and violated the court order.<sup>125</sup>

Case law from other states also has emphasized that a necessity defense is available only when there are no alternate means to alleviate the potential harm, and when

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<sup>116</sup> N.M. STAT. ANN. § 30-4-4(B)(2002).

<sup>117</sup> UTAH CODE ANN. § 76-5-303(2002).

<sup>118</sup> See, e.g., *State v. Luckie*, 901 P.2d 205 (N.M. Ct. App. 1995), cert. denied, 899 P.2d 1138 (N.M. 1995).

<sup>119</sup> *Id.*

<sup>120</sup> *Gerlach v. State*, 699 P.2d 358 (Alaska Ct. App. 1985).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *State v. Rubenstein*, 2003 Conn. Super. LEXIS 1638 (2003).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

committing the illegal act is the only viable and reasonable choice available.<sup>126</sup> Even if a necessity defense may be asserted, some courts may interpret reports to the authorities after committing the act to be an important factor.<sup>127</sup> Moreover, a necessity defense may be overcome by proving that the defendant acted beyond the scope of what was reasonably necessary to protect a child.<sup>128</sup>

***Courts have emphasized that a necessity defense is available only when there are no alternate means to alleviate the potential harm and when committing the illegal act is the only viable and reasonable choice available.***

#### *Other relevant state law provisions*

State laws contain other statutory provisions or case law holdings that may affect domestic violence survivors charged with parental kidnapping. For example, such provisions may address traditional criminal law defenses, mitigating circumstances, or the civil consequences of violating parental kidnapping laws. These provisions have had a diverse impact on victims.

The traditional criminal law defense of duress conceivably could assist survivors in parental kidnapping cases. While substantive duress law varies among jurisdictions, duress generally requires a present, imminent or immediate threat that would induce a well-grounded fear of death or serious bodily injury if the defendant did not commit the otherwise criminal act, and that a person of reasonable firmness in the same situation as the defendant would be unable to resist.<sup>129</sup> Many statutes and cases imply or require expressly that the defendant had no reasonable opportunity to escape or to avoid committing the act. Others also require that the defendant not have “recklessly placed” herself or himself in the situation or “contributed” to the predicament in any way.

In theory, survivors who flee with their children to avoid further harm could present duress defenses. Practitioners do not report, however, that duress defenses have been effective for survivors charged with parental kidnapping.<sup>130</sup> Many survivors flee during a time when there has not been an explicit threat or act of violence, and their flight may take place over a series of days or even months. To observers unfamiliar with domestic violence, it may appear as if survivors had many opportunities to escape. Without a thorough

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<sup>126</sup> See, e.g., *People v. Beach*, 194 Cal. App. 3d 955 (1987) (finding that defendants had other legal alternatives); *People v. Lovercamp*, 43 Cal. App. 3d 823 (1974) (finding that criminal conduct may be excused to avoid imminent peril when there is no time to resort to the legal authorities or such resort would be futile).

<sup>127</sup> See, e.g., *People v. Grever*, 211 Cal. App. 3d Supp. 1 (Cal. App. Dep’t Super. Ct. 1989).

<sup>128</sup> See, e.g., *People v. Dworzanski*, 580 N.E.2d 1263 (Ill. App. Ct. 1991) (finding that even if mother acted to protect child from intoxicated father, misleading the police went beyond the scope of what was necessary).

<sup>129</sup> See, e.g., MODEL PENAL CODE, § 2.09 (stating that duress is an affirmative defense where an actor engages in crime due to use of or threat of unlawful force that a person of reasonable firmness in the situation could not resist).

<sup>130</sup> Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003).

understanding of survivors' experiences, courts may be reluctant to permit a duress defense.<sup>131</sup>

There are additional statutory provisions that could be applied to parental kidnapping cases involving domestic violence. For instance, some states permit deferred adjudication for first-time offenders.<sup>132</sup> Others provide that a quick or voluntary return of a child negates the offense or reduces it from a felony to a misdemeanor.<sup>133</sup> While deferred adjudication for first-time offenders may be useful to survivors, other provisions (such as dismissing charges if there is a voluntary return of a child) are unlikely to provide any legal protection. Victims who take the children to protect them from further violence are unlikely to return the children within a short time frame, making "quick return" provisions unhelpful.

Certain statutory provisions penalize defendants convicted of parental kidnapping in the civil arena. In Alaska, for example, custodial interference constitutes domestic violence.<sup>134</sup> This means that a victim's flight with children can be used as grounds for a batterer to obtain a protective order.<sup>135</sup> In other states, courts may misinterpret a victim's flight with children as "misconduct" under jurisdictional laws.<sup>136</sup>

### *Impact of state law defenses and exemptions on victims*

The present survey suggests that state parental kidnapping laws have varied effects on domestic violence survivors. While many state laws contain provisions that could be applied to protect victims, certain statutory provisions – or the narrow application of exemptions and defenses – have limited the usefulness of such laws for survivors. The impact of the laws differs depending on statutory language and on state practice.

#### *Impact of domestic violence exemptions*

Domestic violence exemptions hold promise for survivors because they provide legal protection to victims at an early stage of the criminal justice process. When the system works as intended, a victim is not charged with parental kidnapping. This allows survivors to remain in refuge states with their children, pending the results of civil custody cases.

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<sup>131</sup> See, e.g., *State v. Barrett-Sprence*, 1998 Del. Fam. Ct. LEXIS 142 (1998) (holding that the duress defense was unavailable where a mother fled with the child after the father allegedly threatened to kill her and the child; the court found that the mother had other viable options besides removing the child, as she had filed a domestic violence report with the police but had not pursued criminal charges, and she had spoken with her mother-in-law prior to flight).

<sup>132</sup> See, e.g., MI. COMP. LAWS § 750.350a (2002).

<sup>133</sup> See, e.g., AZ. REV. STAT. § 13-1302(D)(4)(2001); IDAHO CODE § 18-4506(3)(2002); NEV. REV. STAT. 200.359(6)(2001).

<sup>134</sup> ALASKA STAT. § 18.66.990(3)(A)(2003).

<sup>135</sup> Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003).

<sup>136</sup> But see Goelman, *supra* note 14.

Practitioners report that these laws have been helpful for some survivors, but of limited utility to others.<sup>137</sup> Because the laws require victims to take certain steps to avail themselves of the exemptions, they protect only those victims who are aware of the requirements prior to flight. Many victims do not receive representation from attorneys or information from advocates before they flee, so they do not know about these conditions. In addition, certain requirements do not reflect the reality of the lives of many survivors.<sup>138</sup>

***Many victims do not receive representation from attorneys or information from advocates before they flee, so they do not know about reporting or other requirements in parental kidnapping laws.***

For instance, the requirement in Florida's law, described previously, and in similar laws to commence a custody proceeding quickly may be difficult for survivors to meet. A narrow application of jurisdictional statutes may require survivors to return to the children's home state (the state from which they fled) to file for custody.<sup>139</sup> Due to financial limitations and the danger of returning to states in which abusers reside, survivors may be unable to comply with this type of condition.

Despite the limits of exemption laws, in a few states, such laws have proved helpful to some survivors. In some communities in which law enforcement officers and domestic violence victim advocates enjoy collaborative relationships, they have established protocols allowing victims to make the necessary reports to law enforcement and leave the state without fearing criminal charges.<sup>140</sup> The uneven implementation of these laws and their statutory limitations, however, suggest that such statutes could be improved to better serve victims.

***In some communities in which law enforcement officers and domestic violence victim advocates enjoy collaborative relationships, they have established protocols allowing victims to make the necessary reports to law enforcement and leave the state without fearing criminal charges.***

#### *Impact of domestic violence defenses*

Domestic violence defenses also provide a measure of protection to victims who have fled with children. Unlike exemptions, however, they generally require at least the initial involvement of the criminal justice system. This structure means that victims may face criminal charges and may be tracked down in refuge states, and that their children may be

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<sup>137</sup> Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003).

<sup>138</sup> See *infra*, note 152.

<sup>139</sup> But see Goelman, *Shelter From the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence After the Violence Against Women Act of 2000*, *supra* note 14.

<sup>140</sup> For example, a former shelter director described a collaborative relationship between a local domestic violence program and a prosecutor's office in Florida. Staff established a system for notifying the prosecutor prior to a survivor's flight, including developing a specific form for survivors to fill out before leaving. Other practitioners described similar collaborative relationships in California and in Missouri. Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003).

returned to batterers. Victims may be arrested and jailed initially and permitted to raise a defense later. Practitioners suggest that a mechanism that would allow survivors to raise the defense at an earlier point in the process – before prosecutors are involved – would be preferable.<sup>141</sup>

In addition, in some states, these defenses have been interpreted in limited ways by courts or juries. Where parental kidnapping statutes do not define “an incident or pattern of domestic violence,” such language has been read narrowly to refer only to severe and ongoing physical violence. Practitioners suggest that such terms should be defined in a way that is parallel to other domestic violence laws, for example, to include threats, sexual abuse, false imprisonment, stalking, and harassment, in addition to physical assault.

#### *Impact of imminent harm defenses*

Like domestic violence defenses, imminent harm defenses require the initial involvement of the criminal justice system, including the arrest of survivors. In addition, an “imminent harm” or an “imminent physical harm” standard may be difficult for victims to prove. Many victims lack physical documentation of the abuse, such as police reports or criminal convictions. Moreover, juries may not believe that a battered woman’s flight meets the legal standard of flight to avoid “imminent physical harm.” Such language fails to capture the ongoing dynamics of power and control in domestic violence cases, suggesting that the defense only may be useful when a victim flees to avoid a pending physical assault. If the abusive parent is not nearby when the victim flees, or if the batterer is not threatening to immediately harm the survivor prior to the moment of flight, juries may find that the statutory requirements have not been met.

***Many victims lack physical documentation of the abuse, such as police reports or criminal convictions, making the defense difficult to assert.***

#### *Impact of child protection defenses*

Child protection defenses may be helpful to domestic violence survivors in cases in which batterers abuse their children and their partners. However, legal standards that require “imminent danger” or “an actual and immediate threat to the child” may fail to capture the ongoing nature of abuse. Similar to other defenses, numerous reporting requirements (e.g., to police, prosecutors, or social services) and the minimal time frames within which to make reports (often 24 – 72 hours) make these defenses less useful to victims. When victims flee, they may be unaware of such requirements or unable to perform the tasks immediately.

***Legal standards that require “imminent danger” or “an actual and immediate threat to the child” may fail to capture the ongoing nature of abuse.***

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<sup>141</sup> Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003). This would be similar to the exemptions that exist in some state laws.

In cases in which batterers do not abuse the children, the applicability of such child protection defenses may be limited. While experts suggest that witnessing domestic violence causes harm to children,<sup>142</sup> courts may not interpret a child protection defense to cover that type of harm. In addition, practitioners suggest that there may be unintended consequences of equating exposure to domestic violence with causing harm to children.<sup>143</sup> For example, survivors may be charged criminally in “failure to protect” cases or penalized in custody cases in which perpetrators have harmed children.<sup>144</sup>

### *Impact of necessity defense*

In many cases, domestic violence survivors have not been able to utilize necessity defenses effectively.<sup>145</sup> Most states require defendants to demonstrate that there was no legal alternative to committing the illegal act prior to asserting a necessity defense. Thus victims must prove that they made efforts to access all available forms of legal relief prior to flight.

In some domestic violence cases, however, it may be dangerous for victims to contact the police, courts, or child protective services due to potential retaliation from batterers. Because the risk of assault often increases when victims separate or attempt to separate from abusers,<sup>146</sup> they may need to leave the state for their own safety rather than stay and access local social services or legal options.<sup>147</sup> The necessity standard presumes that state systems function effectively to protect survivors and children, and that court and other personnel are educated about the realities of domestic violence. In many communities, this vision has not yet been realized.

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<sup>142</sup> See, e.g., Bonnie E. Carlson, *Children of Battered Women*, in ALBERT E. ROBERTS, ED., HELPING BATTERED WOMEN: NEW PERSPECTIVES AND REMEDIES 172, 173 (1996).

<sup>143</sup> Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003).

<sup>144</sup> *Id.*

<sup>145</sup> Some experienced defense attorneys, however, find that common law defenses such as necessity have worked more effectively for victims than narrow statutory defenses. In some cases, attorneys have asked juries to consider whether the greater harm would have been for the victim-defendant to comply with a court’s order or to protect the children, and such strategies have been successful. *Id.*

<sup>146</sup> See *supra* note 35.

<sup>147</sup> Moreover, victims often have no meaningful access to legal counsel.

### *Sufficiency of defenses (and exemptions) under state laws*

A review of state statutes thus suggests that the laws provide insufficient protection to domestic violence victims. First, many of the laws were not drafted with domestic violence cases in mind. As a result, such laws do not contain language that helps law enforcement officers, defense attorneys, prosecutors, and judges respond to parental kidnapping cases in which victims have fled with children to escape abuse. Second, some of the laws that include legal protections for victims fail to protect them at early enough stages in the criminal justice process. This means that survivors are arrested or jailed before being permitted to assert a defense. Third, when the laws contain safeguards for victims, they often create unrealistic barriers preventing survivors from using the protections. Legal requirements may endanger victims or children by exposing the new locations to which victims have fled, or by requiring them to take actions that are inconsistent with safety planning (such as litigating against batterers). Victims also may lack knowledge of the statutory prerequisites, such as stringent deadlines, necessary to use the exemptions or defenses.

*When the laws contain exemptions or other safeguards for victims of domestic violence, they often create unrealistic barriers preventing victims from using the protections.*

Beyond the language of the laws, the application of the laws in practice has been ineffective for domestic violence survivors. First, victims often lack competent legal representation in criminal cases or in related family law cases,<sup>148</sup> so statutory protections may not be utilized. Where attorneys represent or prosecute victims, they may not completely understand state law provisions. For example, they may be unfamiliar with the difference between an exemption and a defense, or they may fail to apply such provisions to domestic violence cases. This lack of knowledge extends to all actors in the legal system – from police officers, prosecutors, defense attorneys, and judges to victim advocates – and harms victims as a result. It is compounded by a lack of knowledge about domestic violence, its dynamics, and the impact of abuse on parental kidnapping cases.

### *Criminal justice and civil legal system gaps*

The insufficiency of parental kidnapping laws and their implementation is related to broader gaps in the criminal justice and civil legal system. Public education about parental kidnapping – including the protections and limitations of the laws – is woefully inadequate. As a result, most domestic violence survivors are unaware of the consequences of their flight when they flee with their children or when they go into hiding.

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<sup>148</sup> Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003); GOELMAN AND VALENTE, EDS., *supra* note 43.

### *Lack of training of the family law bar*

Victims rely on the quality of legal advice available to them. As noted above, many victims have no access to legal representation prior to fleeing abuse or afterwards. While living with abusers, some victims cannot leave their homes to meet with civil attorneys. Moreover, in communities across the nation, those victims who wish to meet with attorneys cannot find family law attorneys without joining long waiting lists.

Unfortunately, even those victims who are fortunate enough to be able to meet with attorneys do not always receive adequate legal advice. Family law attorneys may not know the criminal consequences of flight with children and may advise victims unwisely to flee as long as there is no custody order in effect. In actuality, most states now criminalize child concealment even in the absence of existing custody orders. Even reasonable legal advice later may be negated by a court's reinterpretation of a parental kidnapping statute in a particular case.<sup>149</sup>

***Family law attorneys may not know the criminal consequences of flight with children and may advise victims unwisely to flee as long as there is no custody order in effect.***

### *Inadequate training for police officers, prosecutors, and defense attorneys*

In addition to the family law bar's lack of training on these issues, criminal justice system players often are unfamiliar with the impact of domestic violence on parental kidnapping cases. Police officers who are not trained on these matters may inadvertently assist batterers by tracking down and arresting victims. Prosecutors who have not learned about the dynamics of abuse may fail to use prosecutorial discretion. Practitioners report that some prosecutors may file motions to exclude necessity or other defenses despite a history of domestic violence against defendants.<sup>150</sup> However, prosecutors who understand the dynamics of domestic violence may use their knowledge and discretion to refrain from charging victims.

### *Inappropriate decisions from courts and juries*

Court decisions reflect a lack of understanding of the impact of domestic violence on survivors and children. Often courts simply refuse to believe that domestic violence or child sexual abuse has occurred. Even where judges comprehend that perpetrators have abused victims, they may fail to understand why the violence is relevant to the victim's flight with children. Often, courts punish survivors who have violated court orders without understanding that a victim was motivated by a need to escape abuse, not by a desire to flaunt a court order.

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<sup>149</sup> Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003). For example, attorneys may advise victims that they can flee in the absence of a custody order only to find later that their client is the defendant in the first case establishing that such flight constitutes parental kidnapping.

<sup>150</sup> *Id.* See also, Klain, *supra* note 11, at 25 (finding that 57% of prosecutors would still charge the abducting parent in cases where the left-behind parent was alleged to be a batterer).

Like judges, juries may not view flight from domestic violence as a compelling reason for concealing children or for violating custody or visitation orders. Even in states with statutory domestic violence defenses, juries may fail to consider properly the history of domestic violence and its relationship to the victim's defense, even when there is a significant history of abuse.<sup>151</sup> Similarly, judges and juries may not understand the complex nature of domestic violence and may fail to comprehend the level of danger a victim may face even when there is an absence of overt acts of violence by the batterer.<sup>152</sup> When judges and juries do not understand this reality, a victim's ability to assert statutory defenses involving threats of imminent harm may be limited severely. In addition, misunderstandings about domestic violence may prevent victims from using other available legal defenses. For example, judges or juries may perceive a lack of police reports or hospital records as evidence that there was no abuse.<sup>153</sup> The use of expert testimony may help educate factfinders about the effects of domestic violence.

*Due to a lack of understanding about the dynamics of domestic violence, juries may not view flight from domestic violence as a justification for concealing children or for violating custody or visitation orders.*

## **Recommendations**

### **Overview**

This survey suggests that current laws and practices often penalize domestic violence survivors for fleeing to safety. While some states have enacted parental kidnapping laws with protections for victims, and some communities have used innovative protocols to help victims charged with related crimes, overall, the national response to this problem has been insufficient. Criminal justice system players can develop improved responses in part based on emerging trends in the civil justice system.

*Current laws and practices often penalize domestic violence survivors when they flee with their children. Penalties maybe more severe when victims flee across state lines.*

<sup>151</sup> See, e.g., *People v. Griffith*, 620 N.E.2d 1130 (Ill. App. Ct. 1993).

<sup>152</sup> See, e.g., Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women Syndrome*, 21(4) HOFSTRA L. REV. 1191, 1208 (1993) (suggesting that to negate the impact of the time period between discrete episodes of serious violence – a time period during which the woman may never know when the next incident will occur and may continue to live with ongoing psychological abuse – is to fail to recognize what some battered women experience as a continuing “state of siege”). See also, JUDITH HERMAN, *TRAUMA AND RECOVERY* 77 (1992) (stating that it is not necessary to use violence to keep the victim in a constant state of fear); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58(4) ALBANY L. REV. 973, 986 (1995) (finding that physical violence may not be the most significant factor about most battering relationships; rather, the clinical profile revealed by battered women reflects the fact that they have been subjected to an ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman's life, including sexuality, material necessities, work, and relations with family, children, and friends – and sporadic violence makes this strategy of control effective.)

<sup>153</sup> But see Klain, *supra* note 11, at 32 (explaining that the absence of police reports or other records does not necessarily discredit a claim of abuse).

For example, on the civil side, laws recognize the link between interstate flight with children and domestic violence. Under the UCCJEA,<sup>154</sup> it is not misconduct to flee across state lines with children to avoid domestic violence.<sup>155</sup> Similarly, both the UCCJEA and the federal PKPA now define “emergency jurisdiction” to include situations where one parent is fleeing from the violence of another parent.<sup>156</sup> This allows victims to remain (at least temporarily) in refuge states without being penalized in child custody litigation. In addition, the first factor that courts in UCCJEA states now must consider when making decisions about whether or not to hear an interstate custody case is whether domestic violence has occurred and which state could best protect the parties and the children.<sup>157</sup> These concepts – which acknowledge the impact of domestic violence on interstate flight and prioritize the safety of victims and children – should be applied to criminal parental kidnapping cases as well.

### State improvements

The following types of improvements on the state level may assist states to prosecute parental kidnapers in appropriate cases without penalizing domestic violence victims.

- 1) *Train prosecutors, judges, law enforcement officers, advocates, defense attorneys, and family law attorneys about the intersection of domestic violence and parental kidnapping*

Civil and criminal justice system players must understand that domestic violence survivors often are compelled to flee across state lines with children for safety. This knowledge may encourage police and prosecutors to use their discretion in filing criminal charges against victims.<sup>158</sup> Training also may help defense attorneys, family law attorneys, and judges increase the likelihood that victims will not be punished when they flee for survival.

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<sup>154</sup> Drafted by the National Conference of Commissioners on Uniform State Laws in 1997 and adopted by 34 states and the District of Columbia at present.

<sup>155</sup> See UCCJEA, Comment to § 208.

<sup>156</sup> See UCCJEA § 204, 28 U.S.C. § 1738A(c)(2)(C).

<sup>157</sup> See UCCJEA § 207(b)(1).

<sup>158</sup> See, e.g., Klain, *supra* note 11, at 2 (stating that allegations of family violence complicate application of criminal parental kidnapping statutes, demanding sensitivity from law enforcement and prosecutors).

2) *Provide resources for prosecutors and law enforcement officers to investigate underlying abuse in parental kidnapping cases prior to charging defendants*

Often, police officers and prosecutors are unaware of the reason for a victim's flight with children. After victims have left the state, law enforcement officers may receive information only from batterers who claim that their partners have absconded with the children merely to deny them visitation. Prior to pursuing charges, prosecutors or police officers should investigate whether the left-behind parent previously abused the children or the parent who has fled.<sup>159</sup> To do so, law enforcement departments require adequate resources.

3) *Establish protocols for law enforcement to prevent referral of cases to prosecutors where investigations indicate that victims fled to escape abuse*

Police officers should determine whether a case involves domestic violence as soon as possible. If law enforcement officers find evidence that a victim has fled to escape abuse, the officers may be able to avoid referring the case to prosecutors.<sup>160</sup> In Missouri, for example, prosecutors in one office ask the local police to investigate abuse prior to referring cases for prosecution.<sup>161</sup> This preserves criminal justice system resources and protects victims.

4) *Establish protocols that prevent prosecutors from charging victims where the evidence reveals that there is a history of domestic violence against the alleged kidnapper*

Prosecutors should develop protocols to ensure that they are not filing parental kidnapping charges against victims who flee.<sup>162</sup> In Brooklyn, for example, prosecutors screen cases carefully to be sure that charges are not being used punitively against victims.<sup>163</sup> Similarly, in a Delaware district attorney's office, the lead prosecutor asks line prosecutors to look up the history of violence against the fleeing parent by the other parent.<sup>164</sup> Where there is a domestic violence history against a fleeing parent, prosecutors will not press charges or extradite the victim.<sup>165</sup> In another innovative approach, a Missouri prosecutor obtains information

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<sup>159</sup> See Klain, *supra* note 11, at 29, 31 (recommending that investigators routinely ask about both domestic violence and child abuse when taking a case history and providing screening questions for prosecutors to ask the parent alleging abuse).

<sup>160</sup> Of course, in cases that are referred, prosecutors still would have the opportunity to use prosecutorial discretion to decline to pursue charges.

<sup>161</sup> Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003).

<sup>162</sup> The vast majority of prosecutors' offices (86%) do not have policies or written guidelines on the handling of parental abduction cases and staff do not receive formal training on these cases. See Grasso et al., *supra* note 18 at 4. See also, Klain, *supra* note 11, at 36 (recommending that prosecutors evaluate cases thoroughly to understand abuse allegations and then make a decision about declining to prosecute after a full investigation).

<sup>163</sup> Practitioner survey, National Clearinghouse for the Defense of Battered Women (2003).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* Note, however, that if a defendant did not previously go to a shelter, seek a protection order, or file criminal charges, this does not mean that the individual was not abused.

from a local domestic violence shelter with survivors' consent and takes it into account in charging decisions.<sup>166</sup> These types of policies are more protective of victims and allow prosecutors to exercise their discretion in parental kidnapping cases.

- 5) *Train defense attorneys to understand domestic violence and to utilize all possible statutory exemptions and defenses, as well as traditional criminal law defenses, in such cases*

Defense attorneys may be unaware of the dynamics of domestic violence or the context that compels survivors to flee with children. As a result, they may not properly or adequately question clients to learn about their histories of abuse. Or, if they are aware that their clients have experienced abuse, they may not understand its relevance to possible defense strategies and may fail to assert fully the legal exemptions and defenses available. Similarly, requesting and obtaining jury instructions related to the domestic violence or child abuse can be particularly useful. With training, defense attorneys may be able to provide more comprehensive representation to victims who are charged with parental kidnapping.

- 6) *Encourage partnerships between advocates and prosecutors, defense attorneys, and law enforcement officers so that local relationships are in place when such cases arise*

Practitioners suggest that the legal remedies available to victims are more accessible when victim advocates or family law attorneys have pre-existing relationships with defense attorneys and prosecutors. That way, advocates can inform law enforcement officers or prosecutors, with victims' consent, about the history of domestic violence in particular cases to prevent charges from being filed against victims. Similarly, where charges already have been filed, advocates may be able to find qualified representation for victims in criminal cases.

- 7) *Consider amending state parental kidnapping laws to include legal protections for victims*

This survey suggests that certain statutory elements provide more effective protection for domestic violence survivors. The following preliminary list summarizes briefly such provisions. Since the needs of local communities vary, such recommendations may be adapted as suitable by each jurisdiction.

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<sup>166</sup> *Id.*

### **Beneficial elements in state parental kidnapping laws**

- Enact two-tier laws that include both a domestic violence exemption and a domestic violence defense so victims can utilize the legal protections at different stages of the process
- Pass rules allowing evidence of domestic violence and child abuse to be admissible and relevant in parental kidnapping cases, even in those jurisdictions that do not have existing domestic violence defenses and/or exemptions
- Allow victims to use a variety of forms of evidence to establish a history of abuse, not limited to protection orders, police reports, and medical records
- Do not require victims to make reports to law enforcement or to other protective agencies prior to flight
- Do not include mandatory or restrictive time frames in which victims must take certain actions, such as reporting to law enforcement or filing for custody
- Establish discretionary reporting protocols enabling victims who wish to do so to notify local agencies before they flee
- Create flexible standards for discretionary reporting protocols, for example, enabling victims to report to domestic violence shelters, police departments, or prosecutors' offices
- Do not impose penalties against victims who, often for their safety or because they are unaware of the law, choose not to report prior to flight
- Include confidentiality safeguards for information that victims provide to reporting agencies (for example, keep information about a victim's location confidential)
- Consider establishing a federal address confidentiality program similar to state programs that would enable victims to flee to refuge states but continue to receive service of process
- Ensure that statutory definitions of domestic violence include behavior such as threats, sexual abuse, false imprisonment, harassment, and stalking, as well as physical assault
- Include a flexible evidentiary rule to prove abuse, similar to the immigration law standard admitting "all credible evidence of battering or extreme cruelty"
- Ensure that victims can utilize statutory exemptions or defenses without being arrested, forced to relinquish children, or compelled to return to home states
- Admit expert testimony regarding battering and its effects in these cases to help educate judges and juries about the dynamics of domestic violence when requested by defendants

8) *Develop a sample model law on parental kidnapping for states to adapt*

Improvements in state laws would enable states to pursue more arrests and appropriate prosecutions in parental kidnapping cases without punishing victims of domestic violence who flee for safety with children. While this preliminary survey suggests some elements that may be useful for states to adopt, a thorough process of developing a model state parental kidnapping law should be funded. An expert panel of police officers, prosecutors, victim advocates, judges, family law attorneys, and defense attorneys should be convened to assist in the development of such a model law.

*Federal improvements*

A protocol should be developed to prevent domestic violence perpetrators from misusing federal resources to track down and harass their former victims when the victims have fled to safety across state lines. This could be accomplished by creating a special guideline for the issuance of UFAP warrants in parental kidnapping cases. In the past, federal authorities have had separate guidelines for such cases. For example, shortly after the enactment of the PKPA, the Department of Justice required independent and credible information that a child was seriously abused or neglected prior to the issuance of a UFAP warrant against the abducting parent in parental kidnapping cases.<sup>167</sup> Likewise, at present, U.S. Attorneys are required to prevent the use of UFAP warrants to assist in the enforcement of discriminatory state statutes or to compel discharge of civil obligations.<sup>168</sup> Thus, creating a specialized rule for the issuance of UFAP warrants in certain cases is not inconsistent with their historical use. Because domestic violence is an underlying factor in so many interstate parental kidnapping cases, a similar, cautionary rule for the issuance of UFAP warrants in such cases should be developed.

Developing a screening tool to avoid the issuance of federal warrants against victims of domestic violence would preserve scarce federal resources and protect victims. A screening process would be most appropriate, however, at the state level, prior to the involvement of federal authorities. While it would be possible to structure an alternative process in which federal authorities conduct a separate investigation of whether an abducting parent is a victim of domestic violence prior to the issuance of a UFAP warrant, this would not be the most efficient use of resources. State and local authorities have greater access to the evidence of domestic violence against the fleeing parent. Moreover, if federal authorities conducted such investigations and subsequently declined to issue a UFAP warrant, the outstanding state criminal warrant still would need to be resolved.

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<sup>167</sup> See *Beach v. U.S. Department of Justice*, 743 F.2d 1303 (9<sup>th</sup> Cir. 1984) (citing the history of such a guideline, although the case was overruled subsequently on other grounds). At present, the Department of Justice does not appear to utilize any screening process for the issuance of UFAP warrants, but simply issues warrants in response to state or local requests.

<sup>168</sup> U.S. Attorney Manual, 9-69.420 Prerequisites to Issuance of Federal Complaint in Aid of States (March 2001).

Therefore, on the federal level, the guidelines simply should be revised to prohibit the issuance of UFAP warrants in parental kidnapping cases until the state or local authorities investigate and determine whether there was a history of domestic violence against the fleeing parent or the children. To obtain a UFAP warrant, the requesting state official would need to make a showing that such an investigation had been conducted prior to submitting the request for a UFAP warrant to federal authorities.

***On the federal level, the guidelines should be revised to prohibit the issuance of UFAP warrants in parental kidnapping cases until state or local authorities investigate and determine whether there was a history of domestic violence against the fleeing parent or the children.***

To implement such a change, federal law (the PKPA or the UFAP offense) could be amended legislatively or the guidelines for U.S. Attorneys could be revised. Such amendments could provide a list of factors that state actors should review when conducting such investigations, such as the following:

- Is there a history of domestic-violence related convictions against the left behind parent?
- Did the fleeing parent seek protection orders from local courts?
- Did the fleeing parent seek medical treatment for frequent injuries?
- Did the fleeing parent seek help from local domestic violence programs or shelters?
- Were child protective services workers aware of allegations of abuse against children or the fleeing parent?
- Were family members, neighbors, friends, teachers, co-workers or other witnesses aware of a history of abuse against the parent who fled or against the children?
- Did the parent who fled seek help from local victim advocacy organizations, law enforcement, or prosecutors' offices?
- Was abuse one of the motivating factors for the flight?

There may be some cases in which such evidence is unavailable to local law enforcement officers or prosecutors. At a minimum, however, if state law enforcement officers and prosecutors conduct this type of investigation prior to involving federal authorities – and provide documentation to federal officers – this practice will ensure that many domestic violence victims are not pursued unwisely across state lines.

This proposal to require screening for domestic violence prior to the issuance of UFAP warrants in parental kidnapping cases would help ensure that the UFAP law is used for the purpose for which it was intended. The proposed practice is analogous to other cases in which state authorities and federal authorities work together. For example, when state or local prosecutors request that U.S. Attorneys investigate cases involving interstate domestic violence or stalking crimes, federal prosecutors screen such cases to be certain that federal involvement is appropriate.<sup>169</sup>

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<sup>169</sup> See 18 U.S.C. §§ 2261, 2261A, 2262.

***This proposal to require screening for domestic violence prior to the issuance of UFAP warrants in parental kidnapping cases would help ensure that the UFAP law is used for the purpose for which it was intended.***

At present, it appears as if UFAP warrants are being issued in some inappropriate cases. Federal prosecutors generally do not have an opportunity to evaluate charges before federal law enforcement pursues defendants in the parental kidnapping context. While Congress intended to make federal warrants available when felons flee “to avoid prosecution,” in cases in which domestic violence victims flee with children, they are attempting to escape abuse, not to avoid prosecution. Requiring states to investigate any history of domestic violence and child abuse prior to requesting UFAP warrants could help ensure that this jurisdictional device only is being used in appropriate cases.

The following suggestions also could improve federal responses to interstate parental kidnapping cases involving domestic violence:

- 1) *Require domestic violence training for staff posting cases on the parental kidnapping section of the FBI website*

If state law enforcement officers are required to screen for domestic violence prior to requesting a UFAP warrant, the likelihood that a domestic violence victim’s profile will be posted inadvertently on the FBI website should decrease. As a supplemental measure, however, it may be useful to provide specialized training on domestic violence to FBI staff responsible for posting profiles on the Internet. Then, if they spot “red flags” suggesting that the abducting parent is a domestic violence victim, they can refrain from posting the profile. This will provide an opportunity for the FBI to confirm that the state authorities conducted the mandatory investigation of domestic violence prior to requesting the issuance of a federal warrant.

- 2) *Require domestic violence training for staff at the National Center on Missing and Exploited Children as a special condition of receiving federal funding*

The National Center on Missing and Exploited Children (National Center) receives federal funding to serve as a clearinghouse for issues involving missing children. Since a majority of parental kidnapping cases involving missing children implicate domestic violence, it would be helpful for staff at the National Center to be trained to identify domestic violence issues. This would help ensure that the National Center could continue to serve its critical function of locating missing children, without diverting its resources when batterers attempt to use the National Center as another tool to locate and harass their former victims.

- 3) *Train Assistant United States Attorneys and FBI investigators about the impact of domestic violence on parental kidnapping cases*

At present, federal law enforcement officers and prosecutors do not receive specialized training about the impact of domestic violence on parental kidnapping cases. A short

training component could be developed for federal law enforcement and incorporated into existing training institutes that address federal domestic violence issues. Such training would allow federal law enforcement to more readily identify domestic violence cases, providing an additional level of support to state authorities. In addition, a small number of specially trained FBI staff could be assigned to serve as national points of contact for victims experiencing difficulty with UFAP warrants in parental kidnapping cases.<sup>170</sup>

## ***Conclusion***

At present, parental kidnapping laws do not protect adequately many victims of domestic violence who are compelled to flee for their own safety or to protect their children. Legal protections would be more accessible to victims if all actors in the state and federal criminal justice system understood the connection between domestic violence and this type of parental flight flight. With training and legislative improvements, however, parental kidnapping laws and practices could be strengthened to protect communities and families. This would allow victims of abuse to escape from the violence while ensuring that they do not suffer criminal sanctions or a loss of their children.

For additional information please contact the

**National Clearinghouse for the Defense of Battered Women**  
125 S. 9<sup>th</sup> Street, Suite 302  
Philadelphia, PA 19107;  
Tel: 215/351-0010 or 800/903-0111, ext. 3.

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<sup>170</sup> For example, if state authorities failed to conduct the new mandatory investigation of a history of domestic violence prior to requesting the issuance of a UFAP warrant from federal authorities, and a victim had an advocate or an attorney in the home state who was aware of the situation, such persons could contact the FBI point person for assistance.

**Appendix A**  
**Citation List of State Parental Kidnapping Statutes**  
**Compiled by National Clearinghouse for the Defense of Battered Women**  
**125 S. 9th Street, Suite 302, Philadelphia, PA 19107 tel: 215/351-0010**  
**Last updated August 2005**

The following citation list is intended to serve as a starting point for information gathering on state parental kidnapping statutes. Independent research on a specific state's criminal and evidentiary codes, case law, and legislative history is necessary for a complete and accurate understanding of these laws.

Please note that this may not be an exhaustive list of applicable offenses. Individual jurisdictions may have other related offenses with which parents can be charged. For example, some general kidnapping statutes may apply. Also, while the statutes listed may contain some very specific offense-related defenses, they do not include general defenses from other sections of a state's criminal code that could be applicable. For instance, the defense of "necessity" may be available in some jurisdictions.

Whether a state's parental kidnapping statute contains a "defense" versus an "exemption" for a parent fleeing domestic violence is not always apparent and can be a matter of statutory interpretation. Please consult case law and/or legislative history to help determine whether exemption-like language creates either an actual exemption from prosecution (i.e., no crime is committed) or a defense to the crime at trial.

In the statute citations, parenthetical references to the year indicate when, as of the date of our research, the statute was last updated by Lexis. These references do not indicate the date the statute was enacted. We have included these dates in order to distinguish any subsequent revisions or amendments and to facilitate future comparative research.

<b>State</b>	<b>Citation</b>
<b>AL</b>	
	ALA. CODE § 13A-6-45 (2004).
<b>AK</b>	
	ALASKA STAT. § 11.41.320 (Michie 2004). ALASKA STAT. § 11.41.330 (Michie 2004).
<b>AZ</b>	
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