

See: Commission Minutes
6/17/69, p. 1. Vol. IX, Tapes #67 & 68
and
Minutes of Subcommittee No. 2
4/24/69, p. 1, Vol. XI, Tape #74

CRIMINAL LAW REVISION COMMISSION
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ARTICLE 12. KIDNAPPING AND RELATED OFFENSES

Preliminary Draft No. 4; April 1969

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Subcommittee No. 2

ARTICLE 12. KIDNAPPING AND RELATED OFFENSES

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Section 1. Kidnapping and related offenses; definitions. As used in _____, except as the context may require otherwise:

(1) "Without consent" means that the taking or confinement is accomplished by force, threat or deception, or, in the case of a person who has not reached his sixteenth birthday or who is otherwise incapable of giving consent, that the taking or confinement is accomplished without the consent of his lawful custodian.

(2) "Lawful custodian" means a parent, guardian or other person responsible by authority of law for the care, custody or control of another.

(3) "Relative" means a parent, ancestor, brother, sister, uncle or aunt.

COMMENTARY - KIDNAPPING DEFINITIONS

This section sets out definitions of three basic terms which are used in the article. The terms "restrain" and "abduct" which were employed in previous drafts have been eliminated (See, Commentary, P.D. #3; Feb. 1969) and a definition of "lawful custodian" has been added. The definitions, as well as the sections that follow, have been revised to attempt to incorporate the recommendations made by the Commission at its meeting of March 20, 1969.

Subsection (1) "without consent" is similar to the definition that appeared in P.D. No. 3, except that the phrase "an incompetent person and the parent, guardian or other person having lawful control or custody of him has not acquiesced in the movement or confinement" has been replaced by the new language "who is otherwise incapable of giving consent, that the taking or confinement is accomplished without the consent of his lawful custodian".

The main purpose of the change is to delete the reference to "an incompetent person" which seemed to be troublesome because of its apparent restrictiveness. The words "or who is otherwise incapable of giving consent" are intended to focus upon the issue of whether the person, because of mental incompetency or other disability, is unable to effectively consent to the taking or confinement. "Incapable" is to be given its generally accepted meaning and should not require further definition. Webster's New Collegiate Dictionary defines the word as meaning "lacking in capacity, ability, or qualification, incompetent, unqualified; lacking legal qualification or power; disqualified, ineligible."

Subsection (2) "Lawful custodian" is necessary to both kidnapping and custodial interference. It allows a shorter statement of those crimes in sections 2 and 4.

Subsection (3) "Relative" is carried over from the previous draft, except that the language relating to adoptive relatives has been dropped as surplusage. The relationship between a child and his adoptive parents, as a matter of law, is the same as between a child and his natural parents, therefore, the adoptive parents would have the same rights to custody and control of the child. (See ORS 109.041, 109.050.) The term appears in subsection (2) of Section 2 in connection with the defense to kidnapping in the second degree, and also, in subsection (2) of Section 4 in connection with the crime of custodial interference.

Section 2. Kidnapping in the second degree.

(1) A person commits the crime of kidnapping in the second degree if, with intent to interfere substantially with another's personal liberty, and without consent or legal authority, he:

(a) Takes the person from one place to another; or

(b) Secretly confines the person in a place where he is not likely to be found.

(2) It is a defense to a prosecution under subsection (1) of this section if:

(a) the person taken or confined has not reached his sixteenth birthday; and

(b) the defendant is a relative of that person; and

(c) his sole purpose is to assume control of that person.

COMMENTARY - KIDNAPPING IN THE SECOND DEGREE.

This section embodies the same rationale as its counterpart in the earlier drafts, (See, Commentary, P.D. No. 3, Feb. 1969) but does not use the term "abduct", nor the term that was incorporated therein, "restrain".

The language that appears in subsection (1) and (1)(a) is taken from the definition of "restrain" that was suggested in the former draft, with the minor changes recommended by the Commission.

Subsection (1)(b) appeared earlier as part of the definition of "abduct".

Subsection (2) sets out the three elements that must co-exist in order to constitute a defense to a prosecution under subsection (1). If any of the three requirements is absent, then the defense will not lie. The purpose of the defense is to exempt from kidnapping the case involving a relative (in most cases it probably would be a parent) who takes or confines a child with the sole purpose of assuming control of the child. It is intended to provide a defense to kidnapping in the second degree only and if any of the aggravating factors delineated in Section 3 were present the defense would not apply and the actor would be guilty of first degree kidnapping. Even without the first degree Kidnapping factors, the relative still might be guilty of custodial interference under the provisions of subsection (1) of Section 4 or Section 5.

Section 3. Kidnapping in the first degree. A person commits the crime of kidnapping in the first degree if he violates section 2 of this Article with any of the following purposes:

- (1) To compel any person to pay or deliver money or property as ransom; or
- (2) To hold the victim as a shield or hostage; or
- (3) To cause serious physical injury to the victim; or
- (4) To terrorize the victim or another person.

COMMENTARY - KIDNAPPING IN THE FIRST DEGREE.

The definition of the aggravated crime of kidnapping in the first degree, is changed slightly, but the reasoning on which it is based is identical to the previous draft. (See, Commentary, P.D. No.3, Feb. 1969). As in section 2, the term "abducts" has been removed.

The noun "hostage" in subsection (2) and the verb "terrorize" are retained without further definition. Both words have precise dictionary definitions and are intended to have the same meanings, as used in the Draft. The word is used presently in ORS 163.635 which covers the crime of prisoners in the penitentiary or CCI taking or holding "hostages"; and subsection (2) is intended to include that type of conduct, as well as the situation in which the actor uses another person as a shield or for bargaining with police to facilitate the commission of another crime or to attempt to avoid arrest or escape afterwards. Webster's defines hostage as meaning "State of a person given or kept as a pledge, as for the fulfillment of a treaty; hence, a person in such a state or position; as, held as hostage."

"Terrorize" is defined as "to impress with terror; to coerce by intimidation". Terror is the "state or instance of extreme fear; violent dread; fright." The word seems particularly apt to use in a kidnapping statute; and the A.L.I. indicates that the term was employed to cover "vengeful or sadistic abductions accompanied by threats of torture, death, or other severely frightening experience." (Commentary, MPC, T.D. No. 11, p.18 (1960)). The Draft section adopts this view and is concerned with the intent of the actor and not with the subjective effect of his actions upon another.

Section 4. Custodial interference in the second degree.

A person commits the crime of custodial interference in ~~the~~ second degree if:

(1) Being a relative of a person who has not reached his sixteenth birthday, and ^{that} knowing or having reason to know that he has no legal right to do so, he takes, entices or keeps ^a (the) person from his lawful custodian with intent to hold him permanently or for a protracted period ^{for}

(2) Knowing or having reason to know that he has no legal right to do so, he takes, entices or keeps a person from his lawful custodian.]

Section 5. Custodial interference in the first degree.

A person commits the crime of custodial interference in the first degree if he violates section 4 of this Article and;

(1) Causes the person taken, enticed or kept from his lawful custodian to be removed from the state; or

(2) Exposes that person to a substantial risk of illness or physical injury.

COMMENTARY - CUSTODIAL INTERFERENCE.

Sections 4 and 5 are intended to cover the "child-stealing" situations and to protect the rights of a person having legal custody of another against invasion by those having no right to custody. (See, Commentary, P.D. No. 3, Feb. 1969.)

Section 4 is derived from New York Revised Penal Law Section 135.45; Section 5 is based on Section 135.50 of that code.

Subsection (1) of section 4 is directed at the typical child-stealing offense that is committed by a relative. It contains three elements not present in subsection (2):

- (a) the actor is a relative of the person taken;
- (b) the person is less than 16 years of age; and
- (c) the actor intends to hold the child permanently or for a protracted period. This would help to keep the less serious cases of "family" custody fights out of the prosecution office and leave the parties to their civil remedies such as contempt proceedings.

Subsection (2) is broader in its application and is intended to reach interference by a non-relative with the rights of a lawful custodian. Its coverage would not be limited to child custody situations, but would cover incompetents or others who are entrusted by authority of law to the custody of another person or institution.

Section 5, Custodial interference in the first degree is basically the same as section 6 in P.D. No. 3, except that it now requires "a substantial risk of illness or physical injury" to the person taken instead of "a risk that the person's safety will be endangered or that his health will be materially impaired." It is submitted that the new language has a clearer meaning; also, recognizing that there is some risk in almost any situation, it does not impose first degree sanctions unless the risk to the person taken or kept is "substantial". For example: The person taken is an infant who requires a special formula or medication and is deprived of it by the actions of the defendant.

[Section 6. Coercion

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A person commits the crime of coercion when he compels or induces another person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will:

- (1) Cause physical injury to some person; or
- (2) Cause damage to property; or
- (3) Engage in other conduct constituting a crime; or
- (4) Accuse some person of a crime or cause criminal charges to be instituted against him; or
- (5) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
- (6) Cause or continue a strike, boycott or other collective action¹¹ injurious to some person's business; except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act; or
- (7) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
- (8) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
- (9) Inflict any other harm which would not benefit the actor.]

[Section 7 Coercion; defense

In any prosecution for coercion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is a defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of the threatened charge.]

COMMENTARY---COERCION

A. Summary

Coercion consists of compelling a person by intimidation to commit or refrain from committing an act. Coercion as an offense embraces broad categories of threats and is, therefore, separated from the offense of terroristic threats. The offense of terroristic threats is intended to cover a narrowly defined type of threat, such as may arise from letters or anonymous phone calls threatening death, kidnaping or bombing. Coercion is also separated from the offense of theft by extortion. Extortion is basically a form of coercion in which the act compelled is the payment of money. The proposed draft defines coercion in terms similar to theft by extortion and the kinds of threats which form a basis for the offense of coercion are equated with those contained in the theft by extortion draft. The following discussion of the kinds of threats which comprise the offense of theft by extortion are also applicable to the coercion draft:

"As recommended by the Model Penal Code, subsection (1) covers threats to injure anyone, on the theory that if the threat is in fact the effective means of compelling another (to act or refrain from acting,) the nature of the relationship between the victim and the person he chooses to protect is immaterial. The issues are whether the threat is intended to intimidate and whether it is effective for that purpose.

"Subsection (2) is aimed at the threat to cause damage to someone's business, home or other property.

"The provisions of subsection (3) are taken directly from New York Revised Penal Law and are similar to the Model Penal Code which employs the language "commit any other criminal offense."

"Subsection (4) resembles closely the language now appearing in ORS 163.480.

"Subsection (5) amounts to a threat to defame. Unlike defamation actions, the truth of the matter threatened to be exposed would not constitute a defense to a prosecution under this subsection. It is emphasized, however, that the subsection is not intended to make it criminal to conduct legitimate negotiation or to agree to settlement of an asserted claim as consideration for a promise to forbear from civil litigation.

" The provisions of subsection (6) are aimed at racketeering, but do not in any way jeopardize the collective bargaining process, since even menaces are not criminal if the benefits are to be received by the group on behalf of which the "bargaining" is conducted.

" Subsection (7) is self-explanatory.

" Subsection (8) is aimed at extortion committed under cover of public office and is close to the "bribery" type of crimes now incorporated in ORS 162.230, 162.240 and 162.510."

(Theft T.D. #1, April 1968 p.9)

Section 9 is a statement of the general principle on which other threats are to be included within the coercion section. This broad provision is necessitated by the impossibility of comprehensively defining coercive conduct by a list of more specific threats of the kind contained in the first eight subdivisions. This provision penalizes conduct such as the demand for a favor upon a teacher's threat to flunk a pupil.

Coercion as defined by the proposed draft requires successful intimidation: the victim must actually act or refrain from acting. A mere threat or attempt failing of its coercive purpose would constitute attempted coercion.

The proposed draft is based on the premise that the forceful compulsion by means of a threat to act or forbear from acting, ought to be recognized as a crime even though the offense committed cannot be measured by monetary standard. The problem arises in coercion as to how to measure the gravity of the actor's misconduct since the act sought to be compelled may be of slight significance such as threatening to call the police unless the victim ceases seeing the defendant's daughter or the act may be as serious as attempting to compel the victim to leave town. The Model Penal Code, section 212.5(2) attempts to measure the gravity of the defendant's misconduct on the basis of whether the threat is to commit a felony or the actor's purpose is felonious. New York Revised Penal Law section 135.65 raises the offense a degree on the basis of (1) the kind of threat specified and (2) the kind of conduct which he compels the victim to perform.

The proposed draft adopts neither of these measures but defines only one degree of coercion. This affords some protection against such threats but avoids imposing additional penalties on the basis of artificial distinctions. This is in accord with the Committee Commentary (Sec. 2125) to the Michigan Revised Criminal Code which states as follows:

" The committee is not persuaded that the utility in subjecting some persons who commit coercion to extended prison terms outweighs the difficulties inherent in classifying the particular threats made."

Section 7 is the counterpart of the exemption in coverage in the theft by extortion draft (Theft, T.D. #1, April 1968, p.18 subsection 9(3)). This section provides a defense to a defendant charged with coercion committed by one particular kind of threat, namely, a threat to "accuse some person of a crime or cause criminal charges to be instituted against him," and where the defendant's coercive action is undoubtedly an attempt to compel or induce the victim to take reasonable steps to make good the wrong perpetrated by him. As an example, a defendant accused of coercion for having compelled a youth, under threat of charging him with criminal mischief, to paint defendant's fence which the youth had marked up in an act of vandalism would have this defense available to him.

B. Derivation

Section 6 of the proposed draft is adopted from section 135.60 of the New York Revised Penal Law and section 212.5 (1) of the Model Penal Code.

Section 7 is adopted from section 135.75 of the New York Revised Penal Law.

C. Relationship to Existing Law

Under present Oregon law "any person...who threatens any injury to the person or property of another...or threatens to accuse another of any crime with intent thereby to extort any pecuniary advantage or property from him, or with intent to compel him to do any act against his will, shall be punished..." (ORS 163.480). The crime is committed when the threat is made and there is no requirement that property be obtained. The proposed draft follows the present law but separates the offenses of theft by extortion and coercion.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 212.5. Criminal Coercion.

(1) Offense Defined. A person is guilty of criminal coercion if, with purpose unlawfully to restrict another's freedom of action to his detriment, he threatens to:

- (a) commit any criminal offense; or
- (b) accuse anyone of a criminal offense; or
- (c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or
- (d) take or withhold action as an official, or cause an official to take or withhold action.

It is an affirmative defense to prosecution based on paragraphs (b), (c) or (d) that the actor believed the accusation or secret to be true or the proposed official action justified and that his purpose was limited to compelling the other to behave in a way reasonably related to the circumstances which were the subject of the accusation, exposure or proposed official action, as by desisting from further misbehavior, making good a wrong done, refraining from taking any action or responsibility for which the actor believes the other disqualified.

(2) Grading. Criminal coercion is a misdemeanor unless the threat is to commit a felony or the actor's purpose is felonious, in which cases the offense is a felony of the third degree.

Text of New York Revised Penal Law

§135.60 Coercion in the second degree

A person is guilty of coercion in the second degree when he compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will:

1. Cause physical injury to a person; or
2. Cause damage to property; or
3. Engage in other conduct constituting a crime; or
4. Accuse some person of a crime or cause criminal charges to be instituted against him; or
5. Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or
6. Cause a strike, boycott or other collective labor group action injurious to some person's business; except that such a threat shall not be deemed coercive when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act; or
7. Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
8. Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
9. Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

Coercion in the second degree is a class A misdemeanor.

§135.65 Coercion in the first degree

A person is guilty of coercion in the first degree when he commits the crime of coercion in the second degree, and when:

Text of New York Revised Penal Law (Cont'd.)

1. He commits such crime by instilling in the victim a fear that he will cause physical injury to a person or cause damage to property; or
2. He thereby compels or induces the victim to:
 - (a) Commit or attempt to commit a felony; or
 - (b) Cause or attempt to cause physical injury to a person; or
 - (c) Violate his duty as a public servant.

Coercion in the first degree is a class D felony.

§135.70 Coercion; no defense

The crimes of (a) coercion and attempt to commit coercion, and (b) bribe receiving by a labor official as defined in section 180.20, and bribe receiving as defined in section 200.05, are not mutually exclusive, and it is no defense to a prosecution for coercion or an attempt to commit coercion that, by reason of the same conduct, the defendant also committed one of such specified crimes of bribe receiving.

§135.75 Coercion; defense

In any prosecution for coercion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is an affirmative defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge.

Text of Michigan Revised Criminal Code

§2125 [Coercion]

Sec. 2125. (1) A person commits the crime of coercion if he compels or induces a person to engage in conduct that the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by instilling in him through use of a threat a fear that, if the demand is not complied with, the actor or another will bring about the harm threatened.

- (2) "Threat" as used in this section includes:

Text of Michigan Revised Criminal Code (Cont'd.)

(a) threatening the imminent use of force against any person who is present at the time; and

(b) threats as defined in section 3201 (1).

(3) The actor does not commit coercion by instilling in a person a fear that he or another person will be charged with a crime, if the actor honestly believes the threatened charge to be true and his sole purpose is to compel or induce the person to take reasonable action to correct the wrong which is the subject of the threatened charge. The burden of injecting the issue is on the defendant, but this does not shift the burden of proof.

(4) Coercion is a Class A misdemeanor.

§3201 (1) "Threat" means a menace, however communicated, to:

(i) Cause physical harm in the future to the person threatened or to any other person; or

(xi) Do any other act which would not in itself substantially benefit the actor but which is calculated to harm substantially another person with respect to his health, safety, business, calling, career, financial condition, reputation, or personal relationships.

Text of Illinois Criminal Code

§ 12-6. Intimidation

(a) A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:

- (1) Inflict physical harm on the person threatened or any other person or on property; or
- (2) Subject any person to physical confinement or restraint; or
- (3) Commit any criminal offense; or
- (4) Accuse any person of an offense; or

Text of Illinois Criminal Code (Cont'd.)

- (5) Expose any person to hatred, contempt or ridicule; or
- (6) Take action as a public official against anyone or anything, or withhold official action, or cause such action or withholding; or
- (7) Bring about or continue a strike, boycott or other collective action.

(b) Penalty.

A person convicted of intimidation shall be fined not to exceed \$500 or imprisoned in a penal institution other than the penitentiary not to exceed 6 months, or both.