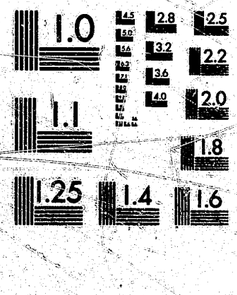

The Prevention and Control of Robbery
Volume Five

THE HISTORY AND CONCEPT OF ROBBERY

By

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The Prevention and Control of Robbery

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Chapter One

INTRODUCTION

From the time that it was first heard in the 1964 presidential campaign to the present, "crime in the streets" has been one of the most persistent public issues of the last decade. Fear of sudden attack affects ghetto dwellers, middle-class businessmen, liberals, conservatives, old and young alike. The violent acts which engender this fear involve a number of different crimes, but by far the largest single legal category--larger than all others involving attacks in the open by strangers--is that of robbery.

Because the legal category of robbery encompasses such a large percentage of a kind of crime that strikes hard at the ability of the everyday citizen to go about his business without concern for his personal safety, important consequences attach to whether a given act is labeled "robbery" or not.

Legislatures, courts and the public tend to take robbery seriously and to have rather strong views about punishment of the robber. Penalties for robbery are high. In Alabama, until a recent U. S. Supreme Court decision outlawed capital punishment, the death sentence was among the penalties prescribed for simple robbery.[1] In three other states the death penalty was prescribed for certain aggravated robberies.[2] Much use is made of the indeterminate sentence for robbery. Actual sentences imposed for robbery are correspondingly high. A survey of proba-

tion officers and federal district court judges in California showed that of some 25 demographic factors used in sentencing and probation, the offense committed was ranked first by the probation officers and third by the judges. The use of weapons and violence, on the other hand, were ranked sixteenth and fifteenth respectively.[3] The label, then is viewed as a more significant factor than the existence of violence. Moreover, robbers spend more time in jail before release on parole than do most other offenders. In 1964, the median time served in state prisons for all offenses was 21 months. The median time served for robbery was 36 months, second only to homicide.[4] In California the median time served for all offenses in both 1966 and 1967 was 30 months. The figures for those years, however, for first degree robbery were 43 and 47 months; for second degree robbery, 36 months; and, for attempted robbery, 38 and 37-1/2 months respectively.[5]

To the extent that acts which are not highly threatening to the public order come within the legal definition of robbery, individuals found guilty of these acts are likely to be punished far more severely than they would otherwise be. To the extent that robbery-like acts of violence do not come within the category these public concerns are not met.

Furthermore questions of inclusion and exclusion are not the only important questions about the robbery category. Even more basic is the question, implicit in all categorization, but particularly pertinent to robbery, of whether the category has a unifying principle--whether the varieties of conduct which it

embraces are sufficiently similar to warrant a single label and a single method of treatment or whether they are so diverse that they should be treated as separate crimes.

The answer to this, of course, depends on the purpose of the label. The category "robbery" however, was not formulated in so rational a way as to have a clearly defined purpose. It is basically an historical category, with roots that go back to antiquity. Today it performs a number of functions. It defines an important area of illegality. This function necessarily focuses on the event rather than the perpetrator. It constitutes an important sentencing category. This function theoretically focuses on the perpetrator rather than the event. And in a non-legal but nevertheless very important function the category serves as a statistical and sociological category. This function also focuses principally on the event rather than the person responsible.

The purpose of this paper is to examine robbery as a concept: its history, its definition, and its utility.

Robbery is today typically defined as

> ...the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of fear. [6]

This means that robbery involves not just one but two of the most elemental interests protected by the criminal law: those of personal safety and those of property rights.

Jerome Hall, a distinguished legal writer, discussing his own monumental analysis of the law of theft states well the difficulty of analyzing a fundamental legal category such as robbery.

> A...history of crimes against the person would present much more difficult problems than did that of crimes against property. So far as this writer is aware, such a history has thus far escaped adequate presentation. The reasons are sufficiently apparent: the interests involved are elemental in the sense of being represented in all societies, however primitive. Accordingly, the underlying motives, values, and rationalizations are so deeply rooted in the history of the race as to defy easy exploration. [7]

Ralph Linton, an anthropologist, writing on universal ethical principles states that "violence, allowing for the cultural differences in definition of that term, is everywhere condemned and that techniques are present to prevent its outbreak and minimize its consequences." [8]

Leaving aside those "primitive" societies where scarcity of resources and other factors make the acquisition of many goods impossible, Linton also finds theft universally punished. "In societies where accumulation is possible, theft is everywhere regarded as a crime and severely punished." [9] Even the most primitive societies, notes Linton, "recognize personal property in tools, utensils, ornaments, and so forth," and that

> Societies living under conditions that preclude any large accumulations of property nearly all have patterns for sharing food and lending surplus tools and weapons. This is quite different from genuine communal ownership, since the owner of the things shared gains prestige and expects reciprocal favors. Under such conditions theft becomes ridiculous and is so regarded. It is said that the Eskimos do not punish thieves but whenever a thief's name is mentioned everybody laughs. [10]

Given the fact that primitive people almost universally give protection to the interests of person and property, it is not

surprising to find that conduct which embodies both violence and theft would be punished in more advanced legal systems. It is less obvious, however, that this type of conduct would be treated as something involving a new category which is neither wholly assault nor wholly theft. It takes some mental gymnastics to amalgamate theft and violence into one category. And yet robbery developed early and continues today to be a widely-used legal category. The early development and continued existence of a robbery category attests to the recognition by our ancestors that robbery-like behavior is especially dangerous. This may be due not only to the recognition that such behavior affects both person and property, but also to the fact that robbery in the early days was often a sudden ambush against a helpless victim on the open road.

How other times and other legal systems have dealt with the kind of behavior today called "robbery" is some indication of the universality of the use of the criminal penalty for this kind of behavior and of the differentiation of this kind of crime from other forms of theft or assault.

Although "it is by no means certain that in Scripture a sharp distinction was always made between robbery and larceny,"[11] there was a special word for robbery, "Asher Gazai". This was dealt with less harshly in some cases.

> Hebrew law did not deal severely with robbery but remained content with the restitution of the chattel plus one fifth of its value and a religious expiation...Larceny was dealt with more severely...The ordinary penalty was restitution to the owner together with payment of one-hundred to four-hundred percent of the value.[12]

Thus, the ancient Jewish law focused on restitution of the property by the robber. Accordingly, Lev. 5, 23 reads: "He shall restore the robbed thing which he has taken away by robbery."[13]

The disparity in treatment between robbery and larceny may have been due to the fact that a sneak thief was considered more dishonorable than an open thief. The distinction is by no means unique; it was also made in early English law.

It seems that robbery was treated less harshly than theft only when the offender took property from the victim without the use of violence. A robbery in which the victim suffered injury usually subjected the offender to the severe punishments set out for violently inflicted injuries.

> Originally, the victim was entitled to inflict the same injury upon the attacker "a life for a life, an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, burning for burning, wound for wound, stripe for stripe". ...In practice, however, the accused could make good the injury by paying a penalty fixed by the aggrieved party.[14]

In Roman law, robbery, or "rapina", was considered a form of theft.[15] "Rapina" was a private wrong and the action could be brought only at the request of the victim. It was a praetorian penal action called "actio vi bonorum raptorum". If the action was brought within one year after the robbery, the defendant would have to restore to the owner four times the value of the property stolen. This compared with a penalty of only twice the value for ordinary theft. If the action was brought more than one year after the robbery, only simple damages were allowed. In addition, the convicted defendant was labelled with infamy,

a status which denied him certain civil rights. The robber or thief caught in the act or with stolen property could be capitally punished.[16] Additionally, as in the Jewish law, the robber who inflicted bodily injury on his victim could be liable to the victim for compensation or, in the discretion of the judge, to corporal punishment.[17]

The robbery category is also widely used in the criminal codes of modern countries. The Turkish Criminal Code punishes robbers with imprisonment from five to fifteen years. Larceny, however, brings only six months to three years.[18] The Korean (Republic) Criminal Code punishes ordinary robbery with a minimum of three years imprisonment. Larceny, on the other hand, has no minimum. "Aggravated" robberies such as robbery in a habitation (qualified robbery), robbery-kidnaps, robbery-murders and robbery-rapes are punished more severely than ordinary robbery.[19] The German (Federal Republic) Penal Code punishes robbery with confinement in a penitentiary from one to fifteen years. Larceny brings a term of imprisonment from one day to five years.[20] The Russian Code (R.S.F.S.R.) classifies crimes against ownership in two categories: crimes against socialist ownership and crimes against personal ownership of citizens. Three types of robbery-like behavior are punished in each category. The three types are: (1) open stealing (grabiozh) committed without force; (2) open stealing combined with force that is not dangerous to the life or health of the victim; and (3) open stealing combined with force that is dangerous to the life or health of the victim (razboi). Penalties for these crimes vary from imprisonment not to exceed

three years for open theft of personal property without violence to imprisonment for six to fifteen years for razboi committed in pursuance of a conspiracy, with arms, causing grave bodily injury or by a recidivist. On the contrary, secret stealing subjects the offender to imprisonment not to exceed two years.[21] The French do not have a category labelled robbery but punish as "aggravated larceny" what in effect is robbery behavior. Thus, the French penalize larceny committed with arms by death, larceny with violence by hard labor and larceny in which a wound is inflicted by hard labor for life.[22]

The wide use of a robbery category in both ancient and modern times may give a false impression of uniformity in both the concept of the crime and the punishment. Just as there are today wide differences in the way the crime is defined and punished, there is an even greater disparity between our ancestors' early concepts and treatment of robbery and of ours. These differences--among modern states and countries and between the ancient and modern view of robbery--raise issues as to the purpose and utility of robbery as a criminal category.

Chapter Two

THE DEVELOPMENTS OF THE LAW OF ROBBERY IN ENGLAND AND AMERICA

I. ORIGINS: DEVELOPMENTS TO HENRY II

A. Anglo-Saxon Criminal Law

> Legal history is a story which cannot be begun at the beginning. However remote the date at which we start, it will always be necessary to admit that much of the still remoter past that lies behind it will have to be considered as directly bearing upon the later history.[23]

England was part of the Roman Empire from 43 A.D. to about 410 A.D. In the latter years, because of invasions of England by Saxons and Picts and because of invasions and troubles in other parts of the Empire, the Romans withdrew their protection from England. During the next two centuries, from about 400 to 600 A.D. England underwent a series of invasions by tribes of Anglos, Saxons and Jutes. Though some writers have argued the contrary[24], it seems clear that the invasions virtually extinguished any remaining Roman influence.[25] Thus, despite Plucknett's sound admonition that legal history has no beginning, Anglo-Saxon England is a good place to start the history of the common law crime of robbery.

The invading tribes set up a number of different kingdoms. In 597 A.D. St. Augustine began the process of re-establishing Christianity in England. King Ethelbert of Kent was converted

and became the first Christian king of Anglo-Saxon England. In 600 he promulgated the earliest known Anglo-Saxon code. From that date, the history of Anglo-Saxon England is one of the consolidation of the small tribal units into larger kingdoms. The political history of Anglo-Saxon England for the next five hundred years can be briefly traced as follows:[26] In 878 King Alfred of Wessex successfully halted Danish invaders and England was partitioned between the Anglo-Saxons and the Danes by treaty. In 1017 the Danish under Cnut succeeded in conquering all of England. In 1043 the crown reverted to an Anglo-Saxon, Edward the Confessor. In 1066, twenty-three years later, William the Conqueror invaded England and put an end to Anglo-Saxon rule.

During this long period, the "criminal" was treated in varying ways. At times injuries to a person or his property were not a matter for any formal action by the community and redress was considered solely a concern of the victim and his family. This system of private redress or vengeance generally focused its attention on both the offender and his family and was called the "blood-feud." At times a system of payments to the state and to the victim replaced this private violence. This system was called "compensations." More infrequently the kings attempted to impose a nonmonetary punishment against the offender. Cutting across all these lines was an additional system in which the offender was declared outside the law and his life and property subject to destruction at the hand of any man. This was known as "outlawry."[27]

The chronology as to when one or some of these methods were in existence is difficult to establish. Rulers varied in strength and in their determination or ability to minimize the anarchical consequences of the feuds. Neither will logic help us.

> It is tempting at first to make a neat plan of the progress from warfare--the feud between the two kin of the criminal and the injured--to money compensation. One would expect the early laws to say more about fighting, and the later ones more about payment. The sources, however, do not align themselves so easily as this. Our earliest laws (Ethelbert's) are mainly tariffs of payment; our later ones say much about feuds. In the middle of the tenth century Edmund is still laying down rules for the feud, and Canute is still legislating on it just before the Conquest.[28]

We can, however, trace the elements and consequences of each method and when each is known to have been in practice.

Blood Feuds.- This method of dealing with crime appears in many tribal societies.[29] The blood feud was private warfare waged by the victim and his kin against the alleged offender and his kin. The presence of blood feuds in a society presupposes either no system for dealing with disorder or a very weak system which cannot control private vengeance, or self-help. An essential feature of this system is that each man determines when he has been wronged and takes action accordingly. Throughout the Anglo-Saxon period, kings made attempts to regulate or to prohibit the feuds. We know, however, that blood feuds, prohibited or not, were common throughout the period. "This system of vengeance and feud occupied a large place in Anglo-Saxon laws, as well

as in other German Codes; but many attempts were made to control it."[30]

Compensations.- In order to check the anarchy resulting from private vengeance, to gain revenue, to establish hegemony, and, perhaps to implement some higher principles of morality, the Anglo-Saxon kings developed a system of "compensation" or money payments. Instead of the eye-for-eye rules of the blood feud, the victim and his family were asked to accept money damages. Injuries were elaborately and with great detail "priced" in advance, and the offender who inflicted an injury had to pay the victim or his family the price fixed in the schedule. This compensation was based on the victim's rank in society and the extent of his injury, and was known as bot. The king also received a payment, called wite, for the breach of his "peace".[31]

The establishment of such a system of compensations by the Anglo-Saxon kings was an important development in the history of English criminal law. The mere setting up of such tariffs is an indication that the crown was beginning to take responsibility for the punishment of "criminal" acts and the establishment of "wite" gave the crown a financial stake in the criminal process. The assertion of such "royal rights" to punish certain criminal behavior is the beginning of what medieval lawyers were to call pleas of the crown.

The rationale for the establishment of "wite" was based on the Anglo-Saxon concept of "peace". "The old folk community, as a confederacy bound to peace, was among the Anglo-Saxons held together by the king; and what was originally folk-peace became

king's peace without materially changing its meaning.[32] Thus Anglo-Saxon kings by either enlarging the concept of their own peace or by absorbing what was previously the community, or folk-peace, set out to control dangerous behavior.

The scope of such peace was limited and the assertion of royal rights and jurisdiction was to occur gradually. The systems of tariffs did not universally cover all places, people or activities. "It only covered deeds of violence done to persons, or at places, or in short seasons that were specially protected by royal power."[33] Some of the places protected were "the king's own household and his officers and the few great roads of England, 'the King's Highway', and it reigned everywhere on the great festivals of the Church."[34]

At first the behavior for which compensation could be had was limited. As the concept of king's peace grew, however, and as the crown undertook a more active role, more and more types of behavior were covered.

> Gradually more and more offenses became emendable; outlawry remained for those men who would not or could not pay. Homicide, unless of a specially aggravated kind was emendable; the bot for homicide was the wergild [family property] of the slain.[35]

Despite the fact that the system of compensations developed in part to mitigate blood feuds, the relationship between the two is less than clear. We know that blood feuds were common throughout the Anglo-Saxon period and into the Norman period. And yet, as early as Ethelbert (about 600) and certainly by the time of Alfred in the 9th century, the compensation system was well

established. Two views concerning this relationship are stated by Pollock and Maitland:

> Some writers, while not doubting that blood feuds were vigorously prosecuted, seem disposed to believe that within the historic time the feud was not lawful, except when the slayer and his kinfolk had made default in paying the dead man's wergild, the statutory sum which would atone for his death. Others regard the establishment of these statutory sums as marking an advance, and speak of an age when the injured was allowed by law the option of taking money or blood.[36]

The former view is probably the correct one, since in Alfred's time it was unlawful, except in exceptional cases, to begin a feud until the offender had been shown to be unwilling or unable to pay the stated compensation.[37]

> Also, we decree that the man who knows his foe to be home-sitting shall not fight him before he asks satisfaction...If he have power to surround and besiege his foe, let him watch him during seven days, and not attack him, if he [foe] wish to remain there. If he wish to surrender and give up his arms, let him guard him unhurt thirty days and announce it to his kinsman and friends (i.e. in order that they might make compensation for him)...If he have not the power to besiege him within, let him go to the ealdorman and ask aid; if he be unwilling to aid him, let him go to the king before he attack his foe...If any one comes on his foe unexpectedly,...if his foe be willing to give up his arms, let him be held thirty days, and announce it to his friends. If he be unwilling to give up his arms, then may he fight him."[38]

Similar statutes were common throughout this period but "... [their] decrees were practically nugatory in regard to vengeance ..."[39] As late as half a century after the Norman conquest,

an oft-cited decree reads as follows:

> If anyone kill another in revenge, or self-defense, let him not take any of the goods of the slain, neither his house nor his helmet, nor his sword nor his money; but in the customary way let him lay out the body of the slain, his head to the west and feet to the east, upon his shield, if he has it. And let him drive in his spear (into the ground), and place round it his arms and tether to it his horse. Then let him go to the nearest vill and declare it to the first one he meets, and to him who has soc [jurisdiction over the place]; thus he may have proof and defend himself against the slain's kin and friends.[40]

Thus, it is apparent that in the Anglo-Saxon period official and private means of coping with crime existed in parallel.

Outlawry.- To further complicate the scheme is the institution of outlawry. This was a system under which one breaking the collective or folk-peace was placed outside of that peace, or "outside the law". Since he was an "enemy both of the king and the folk, no one might harbor or support the outlaw, this, if done, itself constituted a great crime."[41] The community, in effect, would wage war against the outlaw. The outlaw was declared a wolf, "lupinum caput." As such, he was to be pursued and hunted down. As an incentive to pursue the outlaw, a price was sometimes set on his head.[42] The outlaw's land was forfeited to the crown and he was excommunicated from the Church.

Outlawry was invoked by going to the local court, either the hundred or shire court, and stating the charge against the offender. These courts "were...in the nature of public meetings which assembled to transact any public business there was to be done, including incidentally the judging of cases".[43] A court

decree of outlawry was thus "...the permission of the community form(ing) an enlarged right of vengeance"[44] in that it was now the community as well as the victim or his kindred who could take action against the offender. It was probably also a way in which what would otherwise be a blood feud and unsanctioned would now be a legitimated means of vengeance.

Although some Scandinavian codes of this period declared outlawry "for many even of the smaller deeds of violence," the Anglo-Saxons "when they were first writing down their customs... reserved outlawry for those who were guilty of the worst crimes."[45] As the kings began to assert more jurisdiction and as more offenses became compensable, outlawry was invoked only against those who were unwilling or unable to pay the stated sum or against those who committed those particularly aggravated, "botless," or uncompensable offenses. Outlawry was beginning to be viewed as a means of compelling submission to the crown's criminal processes. As such it was used only "against the criminal who stubbornly opposed the usual course of the law."[46] As late as the 14th century, outlawry was still used to compel attendance at courts.[47]

Punishments.- The crown gradually began to assert a right of punishment as well as compensation. This process is particularly significant as it is the origin of the modern idea that a crime is a wrong against not only the victim but against society and that the state, in the name of society, may punish the offender rather than exact compensation from him. Though at first hindered by the Church, which was adverse to bloodshed and

in favor of "atonement", and, no doubt hindered by the long history and continuing practice of private vengeance, the royal cognizance over "bot-less" offenses, gradually increased in number. "From the time of Alfred, the offenses multiply for which no compensation could be received; and even crimes for which compensation could be received were also threatened with punishment."[48] Since the crown had the power to declare an offender an outlaw, it could also give him a lesser punishment. From the time of Cnut to the time of William the Conqueror the punishment varied from mutilation to death[49] for uncompensable offenses.

The first such punishments were for crimes such as desertion and treason which to a warlike people seemed particularly disgraceful.[50] However, by Cnut's time many other crimes were, at the discretion of the crown, subject to punishment or outlawry: "Housebreaking and arson, and open theft, and 'openmorth' a type of aggravated homicide, and treason against a lord are by the secular law bot-less,"[51] and therefore subject to punishment by the crown.

B. Treatment and Conception of Theft-like and Robbery-like Behavior

Like other crimes, both theft and robbery-like behavior during this period were treated in the general ways discussed above. The attempt to bring these kinds of crime under peaceful control is illustrated by two early codes. These codes also illustrate the degree to which robbery-like behavior was conceived as a separate crime even in the earliest days.

The Lex Salica (c. 450-511) is one of the earliest known Germanic codes. A folk-code of the Salian Franks, a Teutonic group who settled in Gaul (France) and written during the decline of the Roman Empire, the code "is very free from Roman taint."[52] It has been called "one of the fountains of English law."[53]

The code punished both theft and robbery-like behavior by a system of compensations. The most heavily punished was the theft of a bull belonging to the king. Such an offense subjected the offender to a fine of 90 shillings. The next most serious theft was the theft of a flock of sheep over 25 in number. This brought a fine of 62 shillings. Other serious thefts and their punishment were as follows: theft of hunting animals, 45 shillings; thefts of bulls in certain circumstances, 45 shillings; theft within a house after forcible entry, 45 shillings plus the value of the article stolen; theft outside the house of over 40 denars, 35 shillings; and, theft inside a house of over five denars, 35 shillings.

Robbery-like behavior was treated more severely than all except the most serious kind of theft, the taking of the king's bull.

TITLE XIV. CONCERNING ASSAULT AND ROBBERY

1. If any one have assaulted and plundered[54] a freeman, and if be proved on him, he shall be sentenced to...[pay] 63 shillings.
2. If a Roman have plundered a Salian Frank, the above law shall be observed.
3. But if a Frank have plundered a Roman, he shall be sentenced to 35 shillings.[55]

The punishment for robbery was comparable to all other serious crimes except murder: arson with the burning of an occupant, 63 shillings; assault with intent to kill, 63 shillings; and wounding so that the brain or entrails appeared, 30 shillings. In contrast, the code, in general, punished murder of all types with much higher monetary fines, ranging from 63 shillings for the killing of a Roman to 1800 shillings for the drowning of a free Frank in a well and covering it to conceal him.

The earliest Anglo-Saxon Code, the Code of Ethelbert (c. 600) also distinguishes robbery-like behavior from ordinary theft. The provisions concerning theft included the following compensation requirements.

> 1. The property of God and of the Church, twelve-fold; a bishop's property, eleven-fold; a priest's property, nine-fold; a deacon's property, six-fold; a clerk's property, three-fold; "church-frith", two-fold; "m...frith", two-fold.
> 4. If a freeman steal from the king, let him pay nine-fold.
> 9. If a freeman steal from a freeman, let him make three-fold "bot"; and let the king have the wite and all the chattels.[56]

The code imposed separate compensations for "weg-reaf"[57], a type of robbery. Weg-reaf was probably a premeditated assault, made in public for the purpose of obtaining property.

> 19. If "weg-reaf"[58] be done, let him make "bot" with VI shillings.
> 20. If the man be slain, let him make "bot" with XX shillings.

The relative seriousness of weg-reaf to simple theft and other crimes is difficult to determine. While the code punished

simple theft by a multiple of the amount stolen, it punished weg-reaf by a fixed compensation. No reason has been found for this distinction. It is interesting to speculate whether the distinction was due to the fact that the value of stolen property was viewed as being easily ascertainable but that it was early recognized that weg-reaf involved more than losing a piece of property. As weg-reaf involved physical or mental damage, the victim was seen as entitled to the type of award most commonly used in Ethelbert's Code for those injuries to persons considered most difficult of ascertainment: fixed compensation.

The code set out fixed compensation for almost every conceivable injury. As an example of this observation is the following:

> 38. If a shoulder be lamed, let "bot" be made with XXX shillings.
> 39. If an ear be struck off, let "bot" be made with XII shillings.
> 43. If an eye be (struck out), let "bot" be made with L shillings.
> 53. Let him who stabs (another) through an arm, make "bot" with VI shillings.
> 61. If the belly be wounded, let "bot" be made with XII shillings; if it be pierced through, let "bot" be made with XX shillings.[59]

Whether or not a robbery victim who suffered one of the enumerated injuries could recover the stated sum for weg-reaf as well as for his injuries is an open question. If so, the basic compensation for weg-reaf coupled with compensation for any physical injury done would make the offense a serious one.

In addition to compensations and the other general methods of dealing with crime two special methods for dealing with theft date to very early times: the right of the victim to kill the robber or thief caught in the act; and the institution of infangthief.

The right of the victim to slay the robber or thief caught in the act was in the form of justifiable homicide. If the thief opposed his capture, the victim could kill him. In order to avoid punishment or payment of the compensation to the thief's kin, the victim would have to take an oath that the thief refused to submit to capture or arrest. "The laws show...that if the slayer could not make oath that he slew the thief trying to escape, he had no defense, and must pay the thief's wergild."[60]

The right of local lords to execute thieves was more institutionalized. The institution was known as infangthief.

> The law of summary execution, or infangthief, was a short step nearer to the regular administration of justice [than feuds]. It consisted in the privilege conceded to the lords of townships of putting to death in a summary way people who committed theft or robbery in their bounds. This privilege was common, and was frequently used, certainly till the reign of Edward I as appears by the Hundred Rolls...[61]

Infangthief probably was in practice a supplement to the victim's right to summarily execute a thief or robber who resisted capture. Infangthief it seems could be invoked to execute a known or notorious thief or one who had successfully resisted capture but could be identified.

The two methods of summarily executing thieves were sanctioned for three apparent reasons. First, it was difficult enough in this period to allay private warfare and that when such a clear case arose private or quasi-private vengeance by the victim or in the name of the lord should be permitted. Secondly, since the thief or robber was caught in the act, the necessity of proof could be dispensed with. Lastly, the methods of treating robbers lay deep in the Anglo-Saxon tradition. The Romans made the distinction between manifest and non-manifest theft, allowing the summary execution of the manifest thief.[62] Later writers made the same distinction by using an open-secret theft category. Also, "there is something approaching direct evidence that infangthief was one of the rights which had belonged to the greater magnates of pre-Alfredian England."[63]

Thus, with special reference to robbery, we must place infangthief and the victim's right to kill a resisting offender alongside of outlawry, blood feuds, compensation, and punishment as the Anglo-Saxon methods of dealing with crime. That the two methods for dealing with open thieves have elements of outlawry and blood feuds should be apparent. It must be remembered, however, that the other methods of compensations and punishment also existed and later were to predominate.

Bracton used the manifest-nonmanifest distinction and it is unclear if it was taken directly from Roman law or the social conditions giving use to the distinction were so similar as to give it an independent origin in England (Stephen, V. 3, H.C.L.E. 132). The text writers also speak of open theft (Stephen, V. 1,

58;Plucknett, 446-7) and it appears that the meaning is similar. A manifest thief, then, would be one captured in the act or "hand having" (those with stolen goods). Thus, by definition the robber was a manifest or open thief, but the category was by no means limited to robbery.

Probably the earliest formalized instance of direct state punishment for robbery-like behavior was the claim of the Danish conqueror, Cnut, to the exclusive right to punish the crime of forsteal. Forsteal was an ambush, way-laying or premeditated assault. It could include robbery but robbery was not essential to make out a case of forsteal, the emphasis being lying in wait rather than the taking of property by force or intimidation. Cnut also asserted a right to punish two other crimes which are analagous to robbery: hamfare and hamsocn. Hamfare was an assault on a person in a private house. Hamsocn was a forcible breaking into a house.[64] Despite the fact that theft was not specifically mentioned in Cnut's rights, his laws provided that open theft was uncompensable.[65]

Even after the development of forsteal and the royal rights of punishment, infangthief and the right of the victim to slay the robber or thief caught in the act continued. The development of forsteal as a crime punishable by the crown meant that if the crown had not granted infangthief to the local lord, if the victim was not justified in killing the offender, and if assault took place in an area protected by the king's peace, punishment would be either death or mutilation at the hand of

the crown. Since the robber could also be declared an outlaw, the king could use discretion as to his punishment.

> The outlaw forfeits all, life and limb, lands and goods. This, as law and kingship grows stronger, puts the fate of many criminals into the king's hands. The king may take life and choose the kind of death, or he may be content with a limb; he can insist on banishment or abjuration of his realm or a forfeiture of chattels. The man who has committed one of the bad crimes which have been causes of outlawry is not regarded as having a right to just this or that punishment.[66]

This discretion as to "life and limb" continued until the Norman Conquest.

Conception.- Although the Anglo-Saxons punished robbery-like behavior separately and had a word for robbery (reafian or reaf), it is doubtful whether they had any clear-cut conception or definition of the elements of the offense as we know it today. The wide types of behavior over which the crown was attempting to assert jurisdiction, the heritage of self-help and blood feuds, and the "ethical distinction" being made between open and secret theft, all point to the conclusion that the Anglo-Saxon conception of robbery was vague and indefinite.

Stephen states that although the Anglo-Saxons had a word for robbery, they had no definition of it.

> Of offenses against property theft is the one most commonly referred to. I have found no definition of it in any of the laws, though I think it may be said to be the subject to which they refer most frequently. Some aggravated forms of the offense are, however, distinguished. Robbery, roberia[67] is frequently mentioned; but I think no definition of it is given.[68]

As late as the end of the 12th century robbery, as will be seen, was still being treated as violent acquisitive behavior without regard to any elements which in the future are required to constitute the offense. There is no reason to suppose that the Anglo-Saxons administered their criminal codes with a more discriminating hand. There are three apparent reasons why the Anglo-Saxons did not formulate a robbery category as we view the category today.

With the Anglo-Saxon kings attempting to assert jurisdiction over certain types of behavior, the definitions of such behavior were of necessity vague, such as king's peace or forsteal. Behavior of a certain type deemed serious enough for the crown to punish had to be defined broadly. Also, the administration of the crown's rights depended on a broad and easily ascertainable standard of criminality.

Secondly, the open-secret theft distinction probably blurred the conception of robbery. Robbery is by definition an open theft since it takes place in the presence of the victim. However, there are some types of open theft which are not robbery such as theft from the person without force or fear. Thus, the open and secret distinction cannot be said to be so much a definition as a distinction as to when summary execution was justifiable.

Thefts of all types were viewed by primitive people as very serious behavior and dealt with severely.[69] As in later times, since the punishment for even simple theft carried a great penalty there was little reason to differentiate between types of thefts.

To further confuse the area between robbery and other types of thefts was the fact that the robber was seen as more honorable than the thief. "There is an ethical distinction between them; theft is far more dishonorable than robbery."[70] Likewise, Perkins states that "the primitive view was that the robber, who acted in the open, was not quite so low in the anti-social scale as the thief who committed his depredation secretly."[71]

Lastly, with the long heritage of self-help and with the crown constantly attempting to allay blood feuds, the Anglo-Saxon laws could not be concerned with the mental state of the offender. The most that can be said is that forsteal with its emphasis on lying in wait and premeditation, supplied a type of specific intent when applied to theft or robbery. Even this rough standard probably disappeared in practice. Indeed, in a violent age where private vengeance was widespread and the kings were attempting to gain jurisdiction over broad types of behavior, more precise definitions of criminal behavior may have been impossible.

> When the main object of the law is to suppress the blood feud by securing compensation to the injured person or his kin, it is to the feelings of the injured person or his kin that attention will be directed rather than to the conduct of the wrongdoer...The main principle of the earlier law is that an act causing physical damage must, in the interest of peace, be paid for.[72]

Thus, although the Anglo-Saxons had a conception of acquisitive behavior which is part of theft and robbery, because of the

conditions peculiar to their age they did not have any definition of what constituted such behavior and focused instead on the result of an act on the victim.

C. Criminal Law Under the Normans

William, Duke of the Normans, conquered England in 1066. The substantive criminal law which he administered was primarily Anglo-Saxon. "The chief suitors of the court were now no doubt Normans and not Anglo-Saxons, but they gave judgments of the court in the old way and according to the old customary law, assessing the 'bot' or 'wite' to be paid and fixing the appropriate mode of proof."[73] In a similar vein, Pollock and Maitland state that the Norman kings "seem to have made no very serious endeavour to force new law upon the conquered kingdom."[74]

Criminal cases were still heard in the old shire and hundred courts but William strengthened their contact with the crown by removing the local "earl" and "bishop" and by appointing the sheriff to them as the sole representative of the king. The sheriff would collect revenues and forfeitures assessed against offenders. Thus, the sheriff, or old shire reeve, became a position of great power as the local representative of the king. In addition, William instituted a "frankpledge" system of community responsibility for crime. This was an extension of the old Anglo-Saxon system of borh, or security.[75]

To replace the Anglo-Saxon ordeal as the method of proof in criminal cases, William instituted trial by battle. Since, as we have seen, blood feuds were still common in this period,

perhaps William thought this to be a less anarchical substitute. "Of private war...the Conqueror...regarded trial by battle as a modified form of it."[76] When the king had jurisdiction to punish an offender, William substituted mutilation rather than death.[77] "Under William the Conqueror the punishment of death was almost entirely replaced by mutilation."[78]

After the Norman Conquest, the Doomesday Survey (1081-1086) was undertaken in order to "provide a new basis of assessment for the levy of a direct tax imposed upon the land."[79] The result of this survey showed much more about this transitional period. The Doomesday Book contained a summary of "royal rights" being asserted. Forsteal, the Anglo-Saxon plea concerning a way-laying assault, was included in Doomesday as one of these rights.[80]

The "royal rights" to punish certain behavior soon acquired a new name in the Norman period: placita spatae, placita gladii, or Pleas of the Sword. These were rights of punishment which the sheriff could enforce in the king's name in the local court or rights of punishment which the king could delegate to local lords.[81]

Of the pleas of the sword, whether held by the sheriff in the name of the king or as a franchise given by the king to a local official, the Norman counterpart to the English forsteal was the plotted assault, assultus excogitatus de vereri odio, guet-apens.

The 12th century was one of great change in the administration of criminal law. Henry I (1100-1135) continued the process begun by William of involving the state more and more

in the punishment of criminals:

> In local government Henry I was equally active; eleven untrustworthy sheriffs were dismissed in 1129; justiciars were sent on circuit to look after the pleas of the crown (and they soon usurped for their master immense jurisdiction by asserting that any matter which concerned the King's peace could be treated as a plea of the Crown), while it is clear that the Norman sheriffs were still administering in the county what was essentially Anglo-Saxon law.[82]

The Leges Henrici (c. 1120), written during the time of Henry I lists open theft, a part of forsteal, as a crime, as it had been since the days of Cnut.[83] Further, "by the reign of Henry I the list of Pleas of the Crown had been extended considerably beyond the new offenses mentioned in the laws of Canute."[84]

D. Criminal Law Under Henry II

Henry II, one of the great lawmakers of all English history, continued the work of his Norman predecessors in asserting direct jurisdiction over serious crimes. He consolidated the Norman Pleas of the Sword and the Anglo-Saxon rights of punishment. His Pleas of the Crown was a list of specific types of punishable behavior rather than the rights of previous kings to punish vague and ill-defined behavior.

Glanvill, writing during the reign of Henry II, lists the following as Pleas of the Crown:

> The crime which civil lawyers call lise-majeste, namely the killing of the lord king or the betrayal of the realm or the army; fraudulent concealment of treasure trove; the plea of breach of the lord king's peace; homicide; arson; robbery;

> rape; the crime of falsifying and other similar crimes: all these are punished by death or cutting off of limbs.[85] [Emphasis added.]

This listing of robbery is the first mention of robbery as a specific offense punishable by the state. Formerly, in aggravated cases, robbery may have been punishable under the general heading of breach of the king's peace or, in proper cases, under the plea of forsteal, but by the time of Henry II, robbery was a distinct offense.

In addition to establishing specific criminal pleas of his own, Henry II began the process of taking away from local sheriffs the right to punish serious crimes in the king's name. The system had created many abuses and local nobility was jealous of the power which the sheriffs had acquired. Instead of the sheriff instituting action in the king's name, the Assize of Clarendon (1166) placed a duty on 12 representatives of each hundred and four in each shire of "presenting" to the authorities those persons suspected of committing serious crimes.

> 1. Inquiry shall be made throughout the several counties and throughout the several hundreds through twelve of the more lawful men of the hundred and through four of the more lawful men of each vill upon oath that they will speak the truth, whether there be in their hundred or vill any man accused or notoriously suspect of being a robber or murderer or thief, or any who is a receiver of robbers or murderers or thieves...And let the (itinerant) justices inquire into this among themselves and the sheriffs among themselves.[86]

The offender was then incarcerated until a royal judge, or justice itinerant, came to the locality to try the case or impose punishment.

The 12th century, then, marked the beginning of the state taking an active role in the initiation of criminal cases and the punishment of offenders. A few major crimes including robbery became pleas of the crown and were punishable by representatives of the king. Lesser offenses, including theft, were still being tried in the local courts but the system of compensations gave way to "discretionary money penalties which have taken the place of the old pre-appointed wites, while the old pre-appointed bot has given way to 'damages' assessed by a tribunal."[87] Also, the process of removing the sheriffs from jurisdiction to punish major crimes which were pleas of the Crown continued. This reform culminated in the 24th clause of the Magna Charta (1215) providing that "no sheriff, constable, coroners, or others of our bailiffs shall hold pleas of our pleas of the crown."[88]

Punishment at This Time.- As previously seen, William the Conqueror replaced the punishment of death with mutilation. He also instituted trial by battle as a mode of proof, regarding it as a modified form of the blood feud. By the time of Henry II, Glanvill writes that the processing of the suspect for robbery depended upon whether or not there was a specific accuser. When there was no specific accuser, an inquest was held. After the inquest, the accused had to purge himself by ordeal. If the ordeal "convicted" him "then judgement both as to his life and to his limbs depends on royal clemency, as in other pleas of felony."[89] Where there was a specific accuser, such as the victim, the accuser had to give security and take an oath. The parties then confronted each other and if the accused denied the act, "the plea [was to] be settled by battle."[90]

On the other hand, the latro, or non-robber, thief, during Glanvill's time was punished by local authorities. "The crime of theft is not included [as a plea of the crown] because this belongs to the sheriffs, and is pleaded and determined in the counties."[91] Pollock and Maitland state that "only by slow degrees was larceny becoming a plea of the crown."[92]

Despite the fact that larceny was still treated locally, there is much evidence that the crown was beginning to take an active interest in the punishment of thieves. Henry I declared that thieves caught in the act should be hanged[93] and there are indications that larceny was included in the indictment procedure set up by Henry II.[94] Thieves were singled out for special mention in the Assize of Clarendon (c. 1166) which made it the duty of the 12 men of the hundred and four of the shire to "present" murderers, robbers and thieves to the royal representatives.[95] And there is evidence larceny was being punished under a charge of breach of the king's peace.[96]

Blackstone summarized the development of punishment of theft as follows:

> Our ancient Saxon laws nominally punished theft with death, if above the value of twelvepence; but the criminal was permitted to redeem his life by a pecuniary ransom; as, among their ancestors the Germans, by a stated number of cattle. But in the ninth year of Henry I, this power of redemption was taken away, and all persons guilty of larceny above the value of twelvepence were directed to be hanged; which law continues in force to this day...the inferior species of theft,

> or petit larceny, is only punished by whipping at common law, or by statute 4 Geo. 1. c. 11 may be extended to transportation for seven years.[97]

Even at this late date the manifest thief was subject to more peremptory punishment than the non-manifest thief. Thus, not only did the remnants of the open-secret theft distinction remain at the time of Henry II but also the punishment of outlawry. S. 12 of the Assize of Clarendon reads as follows:

> 12. And if anyone shall be taken in possession of the spoils of robbery or theft, if he be of evil repute and bears on evil testimony from the public and has no warrant, let him have no law.[98]

E. Conception of Robbery at the Time of Henry II

Despite Glanvill's distinction between the treatment of theft and robbery, the former being punished at the local level, the latter by the crown, and despite the fact that for the first time robbery was specifically singled out by the crown for punishment, there is considerable evidence that robbery was still in a developmental state as far as any clear-cut definition of the crime was concerned. Glanvill gave no definition for robbery. In discussing the various pleas of the crown, Glanvill stated the following of robbery: "Similarly, the crime of robbery need not be discussed for it raises no special problems."[99] The difficulty of formulating specific definitions for specific offenses was due to five primary factors.

First, we are still in the period where self-help has a strong heritage. A characteristic of this type of system is

strict liability for acts which injure another. The act is looked at rather than the culpability of the actor. Thus, the mental elements in presentday definitions of theft and robbery were overlooked. Though half a century after Henry II's time, Bracton (c. 1220-1268) considered specific intent, or animus furandi, an essential element of the offense of robbery,[100] "the difficulty of proving this intent sometimes led at this period to the neglect of this essential element."[101] In a similar vein, Plucknett states the following: "There has been some doubt whether contemporary English (or Norman) law really did look for animus furandi, 'intent to steal'. There are dicta by judges, statements by text writers, and even miracles, attesting the rule that a man who takes another's chattel, even without intent to steal, may be held guilty of theft."[102]

Secondly, although the consolidation of the Anglo-Saxon kings' royal rights of punishment and the Norman Pleas of the Sword into Henry II's Pleas of the Crown was designed to eliminate self-help, the custom continued. Thus, there was a confusion of the two methods of dealing with robbers. "Appeals of robbery were common, and some of those against whom they were brought, though guilty, would hardly have been called thieves. Often enough their motive has been no desire for dishonest gain, but vengeance or the prosecution of a feud, and the horse or sword or cloak was seized in a scuffle."[103]

Third, the heritage of the open-secret theft distinction continued to combine certain types of theft and robbery. As seen in section 12 of the Assize of Clarendon, the distinction was

still being made. Since robbery was a type of open theft but there are open thefts which are not robberies, the emphasis placed on the open-secret theft categories obscured conception of the line between robbery and open theft not amounting to robbery.

Fourth, the treatment of robbery and theft by different jurisdictions, robbery punished by the crown and theft by local officials, probably hindered the development of a specific robbery definition. The treating of the two crimes as distinct for punishment purposes would naturally impede any conception of their relationship. Furthermore, the treatment of theft by numerous and diverse local units hindered any unifying trend or definition for theft. The reason for the treatment distinction between theft and robbery is that the crown only gradually extended its criminal processes and it naturally punished those offenses first which created the greatest disorder.

Lastly, and most importantly for the future, no definite conception was formed because it didn't make any difference. Since most theft and all robbery was capitally punished, there was no incentive to distinguish between them. This remained true through the 18th century. It will be seen that when robbery was made non-capital the English began the process of distinguishing between types of robbery, punishing more harshly those robberies considered the most serious. But in this age there was no reason to distinguish between theft over twelvepence and robbery and between types of robbery because all were lumped in the same category of capital crimes.

Despite the lack of a requirement, in practice, of a specific intent and despite the consolidation of certain types of theft and robbery in the 12th century, robbery did have some independent meaning during this period. As a descendant of forsteal and of the Norman plotted assault, robbery was an assault for the purpose of acquiring property, with actual violence to the person. The Fourth Report of the Commissioners on Criminal Law (1839) states that "formerly the offense seems to have been confined to cases of actual violence to the person."[104] Though, as we have seen, the practice of enforcing the pleas of the crown was confused for various reasons, it is safe to state that conceptually robbery was regarded as a violent assault on the person for purposes of acquiring property.

II. DEVELOPMENTS AFTER HENRY II

A. The Medieval Law of Robbery

Bracton (c. 1220-1268), writing a half-century after Glanvill, gives very specific treatment to both theft and robbery. He wrote when the so-called "Twelfth Century Renaissance"[105] was well under way. That movement was characterized by a revival of interest in classical Roman law and literature. His work shows a strong influence and use of Roman law.[106] Despite this familiarity, Bracton's definition of theft differed from the Roman in two very important respects.

Bracton's definition of theft is as follows: "Theft, according to the laws, is the fraudulent mishandling of another's

property without the owner's consent, with the intention of stealing."[107] The Roman law of theft had two important additions: "Theft is the fraudulent mishandling for the sake of gain of the thing itself or the use of it or possession."[108] The Roman law, then, required that the misappropriation be for the sake of gain or profit. Stephen suggests that the requirement of lucri faciendi gratia was omitted by Bracton because "the motives which lead a man to commit theft are immaterial."[109] Also under the Roman law, theft approached the modern concept of conversion by including fraudulent use or possession in the theft category. A possible explanation for this is that theft in Roman law was a private action while in the English law was punished very severely. Thus, the Romans, while having a requirement of intent to deprive, did not require that the intent be to deprive permanently. However, under Roman law an additional mental element was required and that was that the misappropriation be for the sake of gain or profit.

Bracton also gives us a very specific definition of robbery. The growth of principles of criminal liability can be seen in Bracton's urging of a specific intent as a necessary element in robbery. "I say with the intention, for without the intention of stealing it is not committed."[110] The notion of the crime as being a protection of a possessory, rather than an owner, interest was also stated by Bracton. "And it is not of importance whether the thing itself, which has thus been carried away, is the property of the appellant or of another, provided it was in his

keeping."[111] Because the consolidation of certain types of theft and robbery in the open-secret theft distinction had minimized the relationship between the two crimes, Bracton had to argue that the robber was a special type of thief.

> There is also a kind of theft, rapine, which is the same with us as robbery, and it is another kind of handling against the will of the owner, and a like punishment follows each offense, and hence a robber is called a hardened thief, for who handles anything more against the will of the owner than he who carries it off by violence.[112]

Bracton also reflected the ancient distinction between manifest and non-manifest, or open and secret theft. "The kinds of theft are two--for one is open and the other secret that is to say, manifest and not manifest."[113] Stephen states that this is "taken directly from Roman law."[114] However, we have seen that the distinction was made throughout the early English law. Thus, by the time of Bracton, the definition of robbery was formed but the problem area inherent in the classification of thefts into open-secret or manifest-nonmanifest was to continue. This area of open thefts not amounting to robbery is a continuing definitional problem. It shall be treated in its present-day aspects in the section "The 'Borderland' of Robbery".

It is important to set out the elements of the crime of robbery as outlined by Bracton as they are the principles upon which the crime of robbery was to expand and develop. These elements are:

a. Robbery is an offense requiring a specific intent;

b. Robbery is an offense against a possessory interest;

c. Robbery is committed by violence;

d. Robbery is a special type of theft or larceny; and

e. To commit robbery there must be a carrying away.

B. Robbery as a Special Type of Theft

With the growth of the king's justice to include more and more larcenous offenses, Bracton's view that robbery was a special, more serious type of theft became the accepted view. Holdsworth (c. 1909) defined robbery in this period as "larceny aggravated by violence."[115] This view was to survive as the accepted concept. Thus, Blackstone (c. 1770) stated that robbery was an "open and violent larceny from the person."[116] Russell (c. 1826) regarded robbery as an "aggravated species of larceny."[117] And, by 1839, the Commissioners on Criminal Law reported that "the crime of robbery is a species of theft, aggravated by the circumstances of a taking of the property from the person."[118]

Also by the 18th century robbery came to be viewed not only as a type of larceny but as an aggravated larceny. The earlier "ethical distinction" between robbery and secret theft, the latter being considered less ethical, had been reversed and robbery was considered more serious. Coke (c. 1797) stated this in saying that robbery "is deemed in law to be amongst the most hainous felonies...," since "it concerneth not only the goods, but the person of the owner."[119]

III. PUNISHMENT FROM HENRY II

Bracton (c. 1220-1268) spoke of punishment for robbery being either mutilation or death. "According to Bracton the sentence for robbery was sometimes death, sometimes mutilation."[120] However, the "life or limb" aspect of punishment which had been prevalent for so long was soon to be changed, in favor of capital punishment. "Capital punishments were certainly in use in Richard I's time. In the reigns of Henry III and Edward I there is abundant evidence that death was the common punishment for felony; and this continued to be the law of the land as to treason and as to all felonies, except petty larceny and mayham..."[121] Thus, at least by the time of Edward I (1272-1307) death was the punishment for robbery.

Except for cases of manifest theft which was treated in the local courts having the franchise of infangthief, larceny was becoming a plea of the crown and felony by the time of Bracton. "By this time [Bracton's] the robator and the latro were being placed in one class, that of 'felons'."[122] As such, larceny would no longer be treated in the local courts. Petty larceny was punished by whipping or corporeal punishment. Grand larceny, or theft above twelvepence, was a felony punishable by hanging.[123]

Also at the end of the 13th century, with the state taking more interest in the initiation and prosecution of criminals and with the Church refusing to sanction ordeals, the method of proving crimes changed.

For some sixty years after the Assize of Clarendon persons presented in the county court before the

> king's itinerant justices...were normally sent to the ordeal. In consequence...of the decision of the Church...no longer to lend...authority to these 'Judgments of God!' The ordeals soon fell into disuse, and since there could obviously be no trial by battle in the case of persons indicted in the name of the Sovereign by public testimony...some other method of ascertaining guilt or innocence had to be devised.[124]

With initial uncertainty in the 13th century, the alternate means of proof chosen was a second jury after presentment by the jurors of the hundred. This was the origin of the modern jury system and "was a moment of extreme importance in the history of English criminal law."[125]

Thus, by the end of the 13th century, both robbery and grand larceny were capitally punishable. Moreover, the activity of the crown in the initiation and administration of criminal proceedings had progressed very far.

A. Benefit of Clergy and Aggravated Robbery

Despite the fact that robbery and grand larceny were capital crimes from the end of the 13th century through the 18th century, many such crimes were not punished with death. This was due to a procedural step known as benefit of clergy.[126] This step grew out of the conflict between the church and the state over which of the two institutions were responsible for punishing criminal offenses by ecclesiastics. Gradually the privilege of church trial which carried no capital penalty and which was first confined to ecclesiastics, was extended to include even illiterates who could successfully recite the fifty-first psalm. Benefit of clergy thus came to mean a widespread exemption from capital punishment.

(1) Aggravated Robbery - Highway[127] and Dwelling House.- During the same period that captital punishment for robbery and related offenses was being negated by the extension of the benefit of clergy device, some types of robbery were coming to be seen as particularly serious offenses.

The "king's highway" is at the core of much of the ancient criminal law. It has been seen that the king's highway was one of the first places over which the Anglo-Saxon kings extended their protection, or "peace". And, "as early as the eleventh century, all travellers on all highways were clothed in the very real, if intangible, armour of the king's peace, and therefore possessed certain privileges and certain immunities."[128] Cnut's forsteal can be seen as primarily protecting travellers on the highways from ambushes.

The early English highways were in poor shape and were made even less passable because of numerous highwaymen. Holdsworth stated that in the medieval period "both the proclamations and the statutes testify to the boldness with which highwaymen carried on their depredations all over the country."[129] The preamble to a 1692 statute which offered a reward for the apprehension of highway robbers stated the following:

> The highways and roads...have been of late time more infested with thieves and robbers than formerly for want of due and sufficient encouragement given and means used for the discovery and apprehension of such offenders,...so many murders and robberies have been committed that it is become dangerous in many parts of the nation for travellers to pass on their lawful occasions to the great dishonor of the laws of this realm and the government thereof.[130]

This concern for the safety of travel on the highways and for the maintenance of open lines of communication led to the abolition of benefit of clergy for highway robbery, one of the first crimes for which benefit of clergy was abolished. A 1512 statute denied clergy for those, except in holy orders, who robbed on the king's highway.[131] Likewise, a 1531 statute denied clergy for those, except in holy orders of sub-deacon or above, who committed robbery on the highway.[132] A 1547 statute confirmed and extended this legislation.[133]

The development of aggravated robbery depending upon where the robbery is committed can be analytically viewed as an extension of the king's peace concept. When the king's peace was gradually extended to include all crimes whereever and whenever committed, the interest of the crown in maintaining open travelways led to the punishing of highway robberies more severely than the ordinary robbery.

The protection of the home was also a special concern of the law. It had been given early recognition in Cnut's pleas hamfare and hamsocn, hamfare being an assault in a house and hamsocn being a violent entry into a house. Later, when highway robbery was made non-clergable, robbery of "any person or persons in their dwelling places, the owner or dweller in the same house, his wife, his children or servants being within and put in fear and dread by the same"[134] was also made a non-clergable offense.

This distinction between highway and home robberies and all other robberies remained until 1691 when benefit of clergy was abolished for all who should "rob any person."[135] Thus, in

his day, Blackstone could summarize the law as follows:

> This species of larceny is debarred of the benefit of clergy by statute 23 Hen. VIII, c. 1 and other subsequent statutes; not indeed in general, but only when committed in or near the king's highway. A robbery therefor in a distant field, or foot-path, was not punished with death; but was open to the benefit of clergy, till the statute 3 & 4 W. & M c. 9 which takes away clergy from robbery wheresoever committed.[136]

(2) Aggravated Larceny.- Paralleling the developments in robbery, certain types of larceny became non-clergable. Benefit of clergy came to be denied for horse or cattle stealing, larceny from the person without his knowledge, larceny of goods in a shop over the value of 5s, larceny of chattels of a value of 40s from a house, and various other larcenous offenses.[137]

Thus, by 1691, all robbery and many forms of larceny had become non-clergable, capital offenses. The process of making other offenses non-clergable continued until 1827 when it was decreed: "And be it enacted That Benefit of Clergy, with respect to Persons convicted of Felony, shall be abolished..."[138] By this time, however, other statutes and developments had combined to effectively make many felonies non-capital.

B. Abolition of Capital Punishment with Abolition of Benefit of Clergy

The abolition of benefit of clergy for some forms of robbery and many larcenous offenses led to a dilemma for those responsible for administering the criminal law. Prior to its abolition benefit of clergy mitigated the rigor of the criminal law. When benefit of clergy was abolished, people were reluctant

to capitally punish many theft offenses which were, under the law, punishable as such. As a result, "the persons, lay and official, who administered the criminal law, invented and indulged in practices which almost nullified the capital penalty in most non-clergerable felonies." And, "juries, judges, prosecutors, and complainants collaborated."[139] Jerome Hall in his work, Theft, Law and Society, lists many intriguing examples of this collaboration, including fictitious jury verdicts. "The juries returned verdicts which were palpably not findings of fact but such deliberate misstatements of facts as would have been punished by attaint a half century earlier."[140] Of this phenomena Blackstone stated that "this is a kind of pious perjury"[141] but added that this "does not at all excuse our common law in this respect from the imputation of severity, but rather confesses the charge."[142] By his day there were 160 capital offenses and he discussed at length the arguments both for and against such severity.[143]

In response to this dubious administration of the criminal law, Parliament gradually passed a series of statutes making offenses non-capital. Although all robbery continued to be a capital crime until 1837,[144] larceny was made a non-capital offense by 1808.[145]

In 1837 robbery became capital only for those who "at the time of or immediately before or after such Robbery shall stab, cut, or wound any Person."[146] Finally, in the Consolidation Acts of 1861[147] robbery became no longer capital in any case. The Larceny Act of 1916[147] prescribed life imprisonment and

whipping for armed robbery and for robberies or attempted robberies in which violence was employed. Other robberies, where no arms or violence were used, brought imprisonment for 14 years. The English Theft Act of 1968 states simply at §2 that "A person guilty of robbery, or of an assault with intent to rob, shall on conviction on indictment be liable to imprisonment for life." This means of punishment was chosen because "the Criminal Law Revision Committee...pointed out that the aggravating features of past statutes are technical."[149] Thus, the new statute will allow a wide range of discretion in determining punishment and the maximum will "enable the courts to meet the worst cases."[150]

IV. THE ELEMENTS OF ROBBERY AT COMMON LAW[151]

After Bracton's (1270) definition of robbery in the 13th century, the inevitable process of analysis and explanation occurred so that by the 18th century, robbery had been classified under the category of larceny or theft. This categorizing of robbery as aggravated larceny created new problems due to the nature of common law larceny.

A. Larceny

As robbery came to be seen as a type of larceny, the common law insisted that not only the requirements of robbery be satisfied, but also the requirements of larceny.

> Robbery includes larceny, and all the elements that are necessary to constitute larceny are also necessary to constitute robbery. Therefore
> 1) the thing taken must be the subject of larceny;
> 2) there must be both taking and carrying away of the property (a trespass and an asportation);

3) and the taking and carrying away must be with felonious intent, that is, with a fraudulent intent to deprive the owner permanently of his property.[152]

The above elements of larceny will be dealt with in reverse order.

Felonious intent, or animus furandi, was, as seen, a concept developed as early as Bracton. The notion of strict liability for breaches of the king's peace had given way to more modern notions of criminal liability. Blackstone summarizes the requirement of animus furandi as follows:

> This taking, and carrying away, must also be felonious; that is, done animo furandi: this requisite, besides excluding those who labor under incapacities of mind or will...indemnifies also mere trespassers, and other petty offenders. As if a servant takes his master's horse, without his knowledge, and brings him home again: if a neighbor takes another's plough, that is left in the field, and uses it upon his own land, and then returns it: if, under colour of arrear of rent where none is due, I distrein another's cattle, or seize them: all these are misdemeanors and trespasses, but no felonies.[153]

From these examples of Blackstone's come two lasting principles on intent in property offenses. First, the intent to deprive the owner of his property must be to deprive him permanently; mere taking with intention of using and then returning is not larceny. Secondly, the taking of a thing under a bona fide claim, although mistaken, is not larceny; however, under some interpretations of modern law, it is larceny when the claim is contested or unliquidated.[154] Even where the claim is bona fide, modern tort law gives civil redress to those suffering from aggravated means of self-help.

Traditionally this felonious intent must coincide with the act. Speaking of this requirement, Coke stated that "this intent to steale must be when it cometh to his hands or possession; for if he hath the possession of it once lawfully, though he hath animum furandi afterward, and carrieth it away, it is no larceny."[155] Coincidence of intent and act was beginning to be relaxed as a requirement; thus, where an assault occurs, as in a rape, and where there is a subsequent taking of money, it was and is held to be robbery.[156] Furthermore, modern commentators hold that the specific intent to steal can be inferred from the circumstances.[157]

The second element of larceny at common law was that there must be a taking. Blackstone states that "this implies the consent of the owner wanting."[158] If the robber has the requisite intent, once the goods are taken, a subsequent offer to return them will not negate the offense.[159] The 18th century writers distinguished between a taking in fact and a taking in law. A taking in fact was the physical taking of the property at the time of the use of force or fear. A taking in law was described by Russell as follows:

> Not only a taking in fact, but a taking in law is sufficient to constitute a robbery...For where the thief receives money and by the delivery of the party, either while the party is under terror of an actual assault, or afterwards while the fear of menaces made use of by the thief continues upon him, such thief may, in the eye of the law, as correctly be said to take the property from the party, as if he had actually taken it out of his pocket.[160]

A third element of common law larceny is asportation, or carrying away. This does not mean that the thief must escape with the goods. Blackstone states that "a bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation or carrying away."[161] Coke states that "the removing of the things taken, though he carry not them quite away, satisfieth this word asportavit."[162] Modern commentators Clark and Marshall interpret these statements to mean that "to constitute an asportation, the robber, like the thief in larceny, must acquire complete control of the property for at least an instant."[163] The classic common law case on asportation held that this requirement was satisfied when the would-be robber snatched an earring from a lady's ear which caught in her hair.[164]

Despite the relatively clear authority as to the sufficiency of removal which can constitute an asportation, modern cases have, at times, displayed difficulties in applying the rule. Two California cases are illustrative of this difficulty. The first, People v. Melendrez, held, in effect, that in order to complete a robbery, the offenders must escape from the place of the taking with the property: "Robbery...includes, as does larceny, the element of asportation, and this taking away is a transaction which continues as the perpetrators depart from the place where the property was seized."[165] The second case, People v. Clark, held seven years later that removal from possession at the scene was sufficient asportation and that escape with the property was unnecessary. "The crime of robbery is complete when the robber

unlawfully and by means of force or fear gains possession of the movable property of another in the presence of its lawful custodian and reduces it to his manual possession. His escape with the loot is not necessary to complete the crime."[165]

At common law, only certain types of property could be the subject of larceny and, hence, robbery. The value of the property stolen was considered irrelevant. "It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery."[167] Likewise Coke stated that "though it be under the value of twelve pence, that is taken; (as to the value of a penny or two pence) it is robbery, but somewhat must be taken..."[168]

Some things with value, however, were not considered the subject of larceny. Blackstone notes that property is not subject of larceny which is, or is identified with, land. "This felonious taking and carrying away must be of the personal goods of another: for if they are things real, or favour of the realty, larciny at the common law cannot be committed of them."[169] He enumerated those exemptions at common law: land, tenements, hereditaments, crops and plants, minerals, choses in action, and wild animals (ferae naturae). Coke stated that deeds cannot be the subject of larceny. "So it is of a box or chest with charters, no larciny can be committed of them because the charters concern the reality..."[170] Wharton suggests that though choses in action were not subject to larceny, "being mere rights of action having no corporeal existence,"[171] an action would lie "for stealing the paper on which they were written."[172]

The reason for distinctions as to what type of property could be the subject of larceny is that the value to men of certain objects changed, as did their conceptions as to the nature of the property.

> If an explanation for this bizarre and apparently irrational state of affairs is sought, in what directions shall inquiry be pursued? An intimate relationship between the law of larceny and the things that men value is clear. The whole body of the substantive criminal law, insofar as it concerns the so-called crimes against property, has been designed for the protection of possessions. Its shape has been modified and directed to conform with the desire to protect the numerous forms of wealth which were produced as the economic organization of society changed.[173]

Another reason which has been suggested for the technicality of the rules as to what type of property is capable of being stolen is suggested by Stephen. "Perhaps these rules were made to evade the severity of the common law punishment of theft."[174]

The uncertainty and technicality of these rules concerning what property was the subject of larceny resulted in a long list of English statutes bringing certain types of property under the protection of the larceny statutes.

Thus, the elements of larceny must be present in a robbery at common law. Since robbery is an aggravated or compound larceny, two additional elements must be present to constitute robbery. It must be larceny (1) from the person, (2) by force or intimidation.[175]

B. <u>From the Person</u>

The older law of robbery insisted on an actual taking by

violence from the person. Later the concept of "from the person" expanded to include cases of property taken by force or fear in the person's immediate presence. Thus, Coke stated that "if the true man had cast off his surcote, or other uppermost garment, and the same lying in his presence, a thief assault him, &c. and take the surcote, this is robbery; for that which is taken in his presence, is in law taken from his person..."[176] It is robbery stated Blackstone, "whether the taking be strictly from the person of another, or in his presence only; as where a robber menaces and violence puts a man in fear and drives away his sheep or his cattle before his face."[177] Likewise, Russell stated that "the taking need not be immediately from the person of the owner: it will be sufficient if it be in his presence."[178]

It should be noted that the concept of "from the person" or "presence" is interrelated with the concept of "taking". Thus, when common law writers such as Coke and Hale speak of a taking in law, they are also speaking of a situation where the taking is not directly from the person. Both these concepts had to be expanded to cover instances which were rationally indistinguishable from the medieval concept of robbery. The expansion of the rules on taking and presence, however, did not cover the situation where the robber forcibly removed the victim from the place of the taking. As late as 1965 the English courts were still arguing in common law terms over this type of situation.[179]

Two other developments expanded the requirement of "from the person." By a 1552 statute a taking in a house, with someone within, denied the offender of benefit of clergy.[180] This brought

"a kind of constructive robbery, by supposing the violence committed on the house, and not on the person."[181] Secondly, it was the rule that "property received from a third person for the master was in the servant's possession, and he was therefore not guilty of felony if he converted it."[182] This rule was subject to modification in the situation where the servant once obtaining the goods from a third party was travelling with his master. If the servant violently escaped from his master with the goods, he would be guilty of robbery in taking goods from the owner's "constructive possession."[183]

C. By Force

Force was originally the only means of committing robbery under the older law. By Blackstone's time, either force or putting in fear was sufficient. Blackstone wrote that robbery could be committed by "force, or a previous putting in fear"[184] whereas Coke noted that robbery is "committed by a violent assault, upon the person of another, by putting him in fear."[185] Though Coke's definition implied that both force and fear are necessary, his examples show that either one would suffice. Russell definitely states that either element is sufficient: "violence or putting in fear; and it appears, that if the property be taken by either of these means, against the will of the party, such taking will be sufficient to constitute robbery."[186]

With regard to the amount of force necessary to commit robbery, "it appears to be well settled that a sudden taking or snatching from a person unawares is not sufficient."[187] However, if the victim resists and the robber overcomes that resistance,

the requirement of force is satisfied. "But if any injury be done to the person, or there be any struggle by the party to keep possession of the property before it be taken from him, there will be a sufficient actual 'violence.'"[188] Likewise, Clark and Marshall state that force is sufficient if "there is any struggle to retain possession, or if there is any injury or actual violence to the person of the owner in the taking of the property."[189]

There are numerous 18th century cases illustrating these rules. Both their number and discussion indicate that the conception as to the sufficiency of force necessary for robbery was at that time being solidified. In R. v. Moore, the defendant was tried for robbery on facts showing that he "snatched hold of..." jewelry in the complainant's hair, and "tearing it away, together with part of her hair, ran instantly away." The question was whether this was sufficient force for robbery and "the Court [was] of the opinion that it was."[190] Similarly, in the case of R. v. George Mason, the defendant took hold of the complainant's watch "which was fastened by a steel chain...[a]round his neck, and [which] prevented the prisoner from immediately taking the watch; but by pulling and two or three jerks he broke the steel chain and made off with the watch." The question again was whether the facts showed enough force for robbery. "The judges were unanimously of the opinion that the conviction was right for the prisoner could not obtain the watch at once, but had to overcome the resistance the steel chain made and actual force was used for the purpose."[191]

In contrast are two cases finding insufficient force for robbery. In R. v. Macauley, "the prisoner ran past [the victim] and snatched [the property] suddenly away; but on the boy crying out 'Stop Thief' the offender was apprehended." The court held that the "evidence in this case does not amount to a robbery, for although the prisoner snatched this bundle from the boy, it was not with that degree of force and terror that is necessary to constitute this offense."[192] The earliest case which can be found illustrating the rule exempting pursesnatching from robbery is Stewart's Case in 1690 where "a gentleman's hat and wig were snatched from his head without force" and it was held to be larceny only.[193]

Thus, throughout the 18th century, the rules as to the sufficiency of force necessary for robbery were being developed and applied to diverse fact situations.

Where property is acquired without violence or fear and where force is used to keep it, at common law there was no robbery.[194] This rule has been criticized and diluted by many modern authorities[195] and was altered by the English as early as 1837.[196] Modern commentators state that administration of a drug to overcome resistance is violence.[197] Lastly, the violence need not be initiated for the purpose of taking the property as long as property is taken at the time of the violence and providing the requisite intent is present. "Though violence be used for a different purpose than that of obtaining the property of the party assaulted; yet if property be obtained by [it] the offense will...amount to robbery: as where money was offered to a party endeavoring to commit a rape, and taken by him."[198]

D. Fear or Intimidation

If force is used, intimidation, need not be employed.[199] Blackstone embodies this rule in an example. "Thus, if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be put in fear, yet this is undoubtedly a robbery."[200] The converse is also true; that if intimidation is employed, force need not be applied. "Or, if a person with a sword drawn begs alms, and I give it him through mistrust and apprehension of violence, this is a felonious robbery."[201]

Blackstone also dealt with the quantum of intimidation necessary to constitute robbery and his analysis is surprisingly modern and is used by modern commentators.[202] "...[T]his putting in fear does not imply, that any great degree of terror or affright in the party robbed is necessary to constitute a robbery: it is sufficient that so much force, or threatening by word or gesture, be used, as might create an apprehension of danger, or oblige a man to part with his property without or against his consent."[203] Even at this time, the law would not look at the victim's mind to determine if he in fact was put in fear, but would presume fear if reasonable grounds for it existed. "It is not necessary that actual fear be proved: as the law will presume fear, where there appears to be a just ground for it."[204]

Fear or intimidation, like violence, must precede or accompany the actual taking.[205] "This previous putting in fear is the criterion that distinguishes robbery from other larcenies. For if one privately steals sixpence from the person of another, and after-

wards keeps it by putting him in fear, this is no robbery, for the fear is subsequent."[206] This rule, like the similar one for force, has been criticized and changed in some instances.[207]

When threats of violence, as opposed to actual violence, came to be included in the robbery category is difficult to determine with exactness. It seems to have dated back at least to the time of Edward III (c. 1376). Once threats were included in the robbery category, however, questions as to their nature and sufficiency for robbery arose. It seems that at first the nature of the threat sufficient to constitute robbery was broad. Whereas now the threat must be of immediate bodily injury, the early law of threats did not seem to set out the amount of time which could elapse between the prior threat and the taking. In R. v. Donally, the Court criticized this early rule of threats as follows:

> Sir Mathew Hale, 532, cites a case which carries this doctrine still farther. "If thieves come to rob a man, and finding little about him, enforce him by menace of death to swear on a book to fetch them a greater sum, which he doth accordingly, this is a taking by robbery (Staundforde, 276)": and yet when he fetches the money, he is removed from all terror but the fear of breaking his oath, and is out of the reach of violence.[208]

Coke explains this result as follows: "This is a taking in law by them, and adjudged a robbery: for fear made him to take the oath, and the oath, and fear continuing, made him bring the money, which amounteth to a taking in law.[209] By the 18th century, however, this rule of "continuing fear" was on its way to obsolescence, soon to be taken over by the extortion category.

Sufficient intimidation for robbery was found where the circumstances were such as to render resistance by the victim useless. An example of this is Hughes' and Wellings' Case where a group of people surrounded the victim and took his watch and money without force or actual threat. However, the Court stated that "if several persons so surround another as to take away the power of resistance, this is force,"[210] and the convictions were therefore affirmed. Although the opinion used the word "force" it seems clear that intimidation is what prevented resistance.

If a robber threatened the victim with death or injury to his children if money was not delivered, intimidation was found at common law.[211] "It seems that the fear of violence to the person of a child of the party from whom property is demanded will fall within the same consideration as if the fear were of violence to the person of the party himself."[212]

By the 19th century this putting in fear, intimidation, or constructive violence[213] meant not only fear of bodily injury, but also fear of injury to character and to property. Fear of injury to character sufficient to constitute robbery was confined to one type:

> The cases of robbery in which the property has been obtained by means of a fear being excited of injury to the character of the party robbed appear to be all of one description. Indeed it has been said, that the terror which leads a party to apprehend an injury to the character has never been deemed sufficient to support an indictment for robbery, except in the particular instance of its being excited by means of insinuations against, or threats to destroy the character of the party pillaged by accusing him of sodomitical practices.[214]

The threat of accusing the victim of an unnatural crime need not have had the affect of creating a fear of punishment, but rather the threat need merely to produce a reasonable fear of loss of character.[215] The rationale of including threats to accuse of sodomy in robbery is stated by the Court in R. v. Donnally

> That this is a threat of personal violence, for the prosecutor had everything to fear in being dragged through the streets as a culprit charged with an unnatural crime...It is equivalent to actual violence; for no violence that can be offered could excite a greater terror in the mind, or make a man sooner part with his money...What can operate more powerfully on the mind than a menace to do that, which, in its consequences, would blast the fairest flame, and ruin forever the brightest character.[216]

Cases in which robbery was committed by instilling in the victim the fear of property damage were confined, in the main, to mob threats to burn down the house of the victim.[217] These cases have been questioned. East asked if "the threat of burning down a man's dwelling-house by a mob do not in itself convey a threat of personal danger to the occupiers."[218] The reason for the extension of robbery to cover mob threats to property was due, according to one writer, to a technicality. "It may be conjectured that when the law of robbery was thus extended it was not far from the minds of the judges that rioters, if the Riot Act had not been read, could only be punished with imprisonment, while robbers, being guilty of felony, could be punished capitally or by transportation."[219] The situation of mob threats may thus be said to be antiquated.

Other threats made to obtain property would probably have come into the robbery category if the separate category of

extortion had not developed. The reason for the development of a separate category, extortion, rather than including such threats in the robbery category was a reluctance to make such threats capital. "Had robbery not carried the penalty of death, it might have had a substantial development along such lines..."[220] "This left an important area to be covered by statute...."[221] It will be seen how extortion originated and developed to complement the interests protected in robbery.

The next inquiry will be how modern English statutes altered the common law of robbery as has been outlined.

V. STATUTORY ROBBERY - ENGLAND

THE 1861, 1916 and 1968 ACTS

During the past century and a half, England has enacted three major statutes dealing with robbery: the Consolidation Act or Larceny Act of 1861,[222] the Larceny Act of 1916,[223] and the Theft Act of 1968.[224] The two former statutes made no attempt to define the crime.[225]

A. The 1861 Act

As long as all robbery was at least in theory a capital offense, there was little need to confront the question as to whether some robberies should be punished more severely than others. All were subject to the extreme penalty. By abolishing the death penalty for robbery the

Larceny Act of 1861 did, however, raise the question. The issue was not altogether new even in the English law. Much the same question had been faced earlier in the Statute of 1512 (23 Ham. 8, c. 2) when benefit of clergy was denied in the case of highway robbery but not for other forms of robbery. Likewise, the creation of the crime of forsteal and weg-reaf were in essence moves to impose special penalties for conduct that included some robberies but not all. Thus, with the abolition both of benefit of clergy and of the death penalty for robbery, questions of grading of aggravating circumstances became more pertinent. The 1861 Act was an attempt to classify and to punish robbery according to its seriousness.

The 1861 Act concluded that robbery in which arms were carried, accomplices were involved or violence inflicted should be dealt with more seriously than other robberies.

> Whosoever shall, being armed with any Offensive Weapon or Instrument, rob or assault with Intent to rob, any Person, or Shall together with One or more other Person or Persons, rob, or assault with Intent to rob, any Person, or shall rob any Person, and at the Time of or immediately before or immediately after such Robbery, shall wound, beat, strike, or use any other personal Violence to any Person shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life, or for any Term not less than Three Years...[226] [Emphasis added.]

The punishing more harshly of the offender who merely carried arms during a robbery is significant since this is the most universal aggravated robbery. This was the first time that the carrying of a weapon in robbery, or armed robbery, was singled

out for special treatment. An earlier statute[227] punished capitally those who stabbed, cut or wounded their victims during a robbery. However, it did not punish the offender for simply carrying or displaying arms or weapons during a robbery but only punished the use of arms in bringing about certain enumerated results. An even earlier statute of 1740[228] stated that "persons convicted of assaulting others with offensive weapons and a design to rob, shall be transported for seven years." This should be considered an assault or an attempt statute, however, rather than a robbery statute. Since even simple robbery was capital in this period, to treat the statute as dealing with armed robbery would mean that armed robbery carried a lesser penalty than did simple robbery. Blackstone mentions the statute only in connection with attempts to rob and never discusses armed robbery as a separate category. Thus the 1861 Act was the first to punish more harshly the mere carrying of arms in a robbery.

The 1861 Act also attempted to bring into the definition of property capable of being taken certain types of property previously excluded by the common law.[229]

B. The 1916 Act

The 1916 Act was also concerned with the classification and punishment of aggravating circumstances. It prescribed life imprisonment and whipping for those committing a robbery with arms, confederates or violence resulting in injury. Any other type of robbery subjected the offender to a 14 year sentence of imprisonment. An attempted robbery brought five years imprisonment. The

Act too was concerned with the classification and extension of various types of property which could be capable of being stolen.

C. The 1968 Act

Neither the 1861 Act nor the 1916 Act attempted any definition of robbery. The English courts as a consequence continued to deal with robbery under the common law rules. This led one author to comment that "it says little for our law when issues of contemporary criminal liability are dealt with by discussing the writings of Staunford, Coke, Hale, Hawkins and others, however eminent they may have been in their own time."[230]

The 1968 Act had as one of its important purposes a review of the rules defining the crime. One primary change in the new statute is the departure from the common law rule that the taking must be from the victim or in his immediate presence. The difficulty with the common law concept of presence was illustrated in a recent case which reached the House of Lords, Smith v. Desmond.[231] In this case a maintenance engineer and a nightwatchman were attacked by the defendants and were bound, blindfolded and left in a room while the defendants broke into the cash office 33 yards away. For three hours the two victims could hear loud sounds of the defendants breaking into the safe. The trial judge ruled that these facts were sufficient to constitute robbery in the presence of the victims. The Court of Appeal reversed on the grounds that "presence" should be confined to "cases in which the victim through fear permits the taking from his person or in his presence in the sense that but for the fear he could and would exercise immediate control of the property..."[232] The House

of Lords reversed the Court of Appeal and reinstated the convictions, stating that the question should be "whether the safe... was in the immediate care and protection of [the victims] when they were attacked..."[233]

The new Act's definition of robbery does not restrict robbery either to property in the "immediate and personal care and protection" or to "stealing from the person or in the presence of the person, against whom force is used or threatened."[234] Instead, the definition of robbery is as follows:

> 8.-(1) A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

The Act also provides a new definition of theft--substituting the concept of "dishonest appropriation" for "taking." Since robbery under this statute is recognized as a type of theft, the Act's expanded definition of theft will create new areas of possible robbery. The Act's basic definition of theft is as follows:

> 1.-(1) A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it, and "thief" and "steal" shall be construed accordingly.

One commentator on the Act has stated that "an appropriation is not as rigid a thing as a taking. This is its advantage in avoiding the fictions which have had to be attached to the concept of taking, but it might confuse the issue of robbery."[235] As an example of possible confusion, he poses the case of an

originally innocent finder of a watch who violently refuses to return it upon a demand from its true owner. Since the retention in such a case would clearly be a theft,[236] its aggravation by violence or a placing in fear may amount to a robbery. The effect of such a holding would be to "abolish the rule that the intention to steal [in robbery] must be at the time of the taking..."[237]

The 1968 Act also attempts to abolish all the remaining ancient distinctions surrounding the type of property capable of being stolen:

> 4.-(1) Property includes money and all other property, real or personal, including things in action and other intangible property.

This section is followed by three subsections limiting its broad language by exempting such things as raw land and exclusively wild creatures.

The Act excludes from the definition of robbery threats to accuse of unnatural crimes or threats of damage to the victim's property. Also, threats to third persons, such as the victim's spouse or children, are robbery only if the offender used force against them or put them in fear.

VI. ROBBERY IN AMERICA

A. Early Law

The American colonies and young states accepted the English framework in treating robbery.[238] Most of the states developed written statutes but these made no attempt at defining the

offense, leaving robbery to be defined under the English common law and statutory concepts. For example, an 1815 New Hampshire statute prescribed capital punishment for those who "rob and take from another person any money..."[239] An 1801 New York robbery statute refers in the margin to the English statutes. Thus, robbery was probably capitally punishable in New York at this time also.[240] However, some states had already begun the trend of abandoning capital punishment for simple robbery and had done so prior to the English abolition in 1861.[241]

These early American statutes, in accordance with the English practice, punished more heavily highway robbery and robbery in a dwelling-house. Illustrative is Delaware's robbery statute:

> If any person shall feloniously take from the person of another by violence, or by putting in fear, any money, or other property, or thing, which may be the subject of larceny, he shall be deemed guilty of robbery and felony; and, if such robbery be committed on or near the highway, or in a dwelling-house, he shall be fined not less than three hundred nor more than five hundred dollars, shall be whipped with forty lashes and shall be imprisoned not exceeding twelve years; and if such robbery be committed in any other place than on or near the highway, or in a dwelling-house, such person shall be fined not less than one hundred, nor more than five hundred dollars, shall be whipped with twenty lashes and shall be imprisoned not exceeding three years.[242]

Despite the early enumeration of highway robbery and robbery in a dwelling-house, no current American statutes specially punish these.[243]

B. Modern Statutes and Grading

Today, most American jurisdictions have codified robbery

basically in terms of the common law definition. "The statutory definitions of robbery restate in essence the common law definition: the felonious and forcible taking of property from the person of another or in his presence, against his will, by violence or putting in fear."[244] An example of this restating of the common law of robbery is seen in California's robbery statute[245] providing that "[R]obbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." This type of statute leaves to the state courts the burden of interpreting the common law rules of robbery.

Despite the use of the common law definition by most American jurisdictions, there is a wide variety between the states in the way types of robberies are distinguished.[246] Aggravating circumstances are numerous. Among the more common of such categories are the use of actual violence, the use of a motor vehicle and the use of a confederate. Also, robberies on certain places are treated more severely by some states than the ordinary robbery. Bank robberies are set out for special punishment by the federal government, as well as by some states. Robberies on public conveyances are often set out for special treatment.

Statutes grading robbery according to aggravating circumstances generally reflect the value judgment that certain types of robberies create a more serious risk of societal disorder or harm to the victim than do others. In viewing the varieties of aggravated robberies, it is to be wondered if the numerous

distinctions made are rational classifications or are impulsive responses to specific instances of flagrant behavior.

Juxtaposed to the many aggravated robbery categories are numerous sentencing categories for robbery and aggravated robberies. Although in general penalties for robbery are among the highest of all crimes, there are considerable differences among robbery penalties as set out in the statutes. It is also questionable whether the differences among states in the penalties set out for various types of robberies rest on rational differences among states.

C. Armed Robbery

Probably the most widespread and important aggravated robbery is the use of or carrying of weapons during a robbery, commonly called armed robbery. In many American jurisdictions, the armed offender is punished more harshly than his unarmed counterpart.[247] For example, California makes first degree robbery those robberies committed "by a person being armed with a dangerous or deadly weapon."[248]

The California courts, in construing this section, have like the courts of most states[249] ruled that the dangerousness of the weapon does not depend on whether it was used, but how it might have been used.[250] For robbery of the first degree, the weapon may be either "dangerous" or "deadly"; it need not be both.[251] The California courts have classified deadly weapons as "those instrumentalities which are weapons in the strict sense of the word"[252] such as guns, knives, and blackjacks. Where the offender was armed with such a deadly weapon, he is guilty as a

matter of law and his intended use and present ability are of no relevance.[253]

Dangerous weapons, on the other hand, are those instrumentalities which are not weapons in the strict sense of the word, "but which may be used as such..."[254] such as razors, canes, and hammers. The use of a weapon classified as dangerous does not as a matter of law come within the first degree robbery statute, according to the California courts.[255] A dangerous weapon must be shown to be capable of producing death or causing great bodily injury.[256] It must also be shown that the offender used or intended to use the weapon should the occasion arise.[257] Thus, in a recent California Supreme Court case, the accused kicked the victim during a robbery with his shoe with sufficient force that the victim was killed. The case was reversed because the lower court did not instruct the jury properly on the question of the type of weapon and the intent of the offender.

> The issue then turns on whether the instrument was one which, under the control of the perpetrator of the robbery, could be used in a dangerous or deadly manner and whether the perpetrator intended to use it as a weapon. In the absence of an instruction explaining the requisites for a finding that the defendant was "armed with a dangerous or deadly weapon," the jury could not rationally apply the language of Penal Code section 211a to the facts of this case.[258]

Other California cases have decided that the following were used as or intended to be used as dangerous weapons: a whiskey bottle, an ice pick, a brick, a kit of car tools, and a metal toy pistol.[259]

D. New Proposals

The American Law Institute in its Model Penal Code has proposed a new definition of robbery:

> Section 222.1 **Robbery.**
>
> 1) Robbery Defined. A person is guilty of robbery if, in the course of committing a theft, he:
> a) inflicts serious bodily injury upon another; or,
> b) threatens another with or purposely puts him in fear of immediate serious bodily injury, or,
> c) commits or threatens immediately to commit any felony of the first or second degree.
> An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

Theft is defined in the Code in the following way:

> Section 223.2. Theft by Unlawful Taking or Disposition.
>
> 1) Movable Property. A person is guilty of theft if he takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof.

The Code also grades robbery, making all robbery a felony in the second degree except those in which "the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury,"[260] which makes the robbery a first degree felony. Second degree felonies are punishable by a discretionary minimum of one to three years and a maximum of ten years. First degree felonies are punishable by a discretionary minimum sentence of one to ten years and a maximum of life.[261]

The proposed draft, then, redefines robbery as a type of theft, extends intimidation to threats to commit a felony, retains

the common law specific intent and grades the punishment. It also extends the period in which force or fear can be employed to a time subsequent to the taking. It seems that the force or fear used to obtain the property must be more serious than that necessary at common law since "serious bodily injury" must be inflicted or threats of "immediate serious bodily injury" must be made. The requirement of a taking and an asportation seems, however, to have been relaxed as the Code requires the offender merely to "exercise(s) unlawful control" over the property.

The Model Penal Code's enumeration of a single aggravating factor seems to result from a desire to remove technicality from grading schemes. This desire is in accord with the new English robbery statute which does not list any aggravating circumstances, leaving the court with a wide range of discretion in sentencing. This listing of serious bodily injury as the sole aggravating factor seems to be rational and sound. Regardless of the other facts of a robbery the infliction of serious bodily harm on the victim, sets the robbery apart from others in seriousness. Other aggravating factors are less accurate in discriminating in seriousness between robberies. For example, the use of accomplices, a common aggravating circumstance, may justifiably punish more harshly commercial robberies but might be unjust in the case of a street robbery by young adults because of the group nature of delinquency. Furthermore, the carrying of a "weapon" may set the robbery apart in seriousness from others but this is not universally true. For example, the use of a firearm is much more serious than the carrying of a pocket knife or the displaying of a toy pistol.

To the extent that the draft widens robbery to include violence subsequent to the taking and relaxes the requirement of a taking and asportation, it is in accord with the modern view. However, the Code still categorizes robbery in terms of theft and still retains many of the traditional theft requirements.

The most serious objection to the formulation is the requirement that force be such as to produce serious bodily injury upon the victim. This is a departure from the common law view of the extent of injury necessary to constitute robbery, it being sufficient that "any injury" be inflicted on the victim. It also leaves open a wide area of "open thefts" with insufficient violence to constitute robbery.

The Study Draft of a new federal criminal code prepared by the National Commission on Reform of the Federal Criminal Laws defines robbery as follows:

> Section 1721. Robbery
>
> 1) Offense. A person is guilty of robbery if, in the course of committing a theft, he inflicts or attempts to inflict bodily injury upon another, or threatens another with imminent bodily injury.

The draft defines "in the course of committing a theft" as an act which "occurs in an attempt to commit theft, whether or not the theft is successfully completed, or in immediate flight from the commission of, or an unsuccessful effort to commit, the theft."[262] Theft is defined as follows:

> Section 1732. Theft of Property
> A person is guilty of theft if he:

a) knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another with intent to deprive the owner thereof.

This proposed formulation of robbery is in accord with modern approaches. It includes attempts in robbery. Violence subsequent to the taking would be robbery. The proposed formulation relaxes the requirement of asportation by specifying that "unauthorized control" is sufficient. The draft, unlike the Model Penal Code, specifies that the inflicting or attempted infliction merely of "bodily injury" is sufficient to constitute robbery.

Perhaps the most noteworthy attempt of the draft is its grading scheme. Instead of indiscriminately treating all armed robbery as aggravated robbery, the draft attempts to distinguish between types of armed robbery:

Section 1721. Robbery

2) Grading. Robbery is a Class A felony if the actor fires a firearm or explodes or hurls a destructive device or directs the force of any other dangerous weapon against another. Robbery is a Class B felony if the robber possesses or pretends to possess a firearm, destructive device or other dangerous weapon, or menaces another with serious bodily injury, or inflicts bodily injury upon another, or is aided by an accomplice actually present. Otherwise robbery is a Class C felony.

This grading scheme is the result of a recognition that some armed robberies are more serious than others. The draft's attempt to distinguish between them is sound and rational. Actual use of a weapon brings a more serious penalty than possession. Furthermore, the infliction of bodily injury on the victim brings a greater penalty than a simple robbery.

VII. SUMMARY OF CHAPTER TWO

A. England

Two major trends in the development of the law of robbery in England have been discussed: 1) the extension of robbery to cover not only violent assault, but also to cover forms of particularly aggravated larceny; and 2) the attempt to make the punishment fit the crime.

Originally being characterized as a violent assault, robbery came to include the taking of property by threats of bodily injury, by threats to character, by accusing of sodomy, and by mob threats to property. The development of the statutory law of extortion froze the growth of robbery and added punishment for other threats made with the purpose of obtaining property. Other lines of development culminated in the passage of the English Theft Act of 1968 which widened the concept of presence, increased the type of property capable of being stolen, replaced taking as a requirement by appropriation, and which switched the time of the requirement of specific intent from the moment of taking to the time of appropriation.

The abolishment of capital punishment for robbery in 1861 spurred the attempt to make the punishment fit the crime. Under the English Larceny Acts of 1861 and 1916 various aggravating circumstances brought heavier penalties. Among the many aggravating circumstances enumerated in these statutes were use of arms, use of violence, and infliction of injury, whether attempted or completed. Also, robbery in places such as highways or dwelling-places were traditionally subject to heavier penalties. The English

Theft Act of 1968, in contrast, did not enumerate aggravating circumstances because of the many factors involved in each robbery and because of the technicality and artificiality involved in enumerating such factors. Instead, the Act imposed a maximum penalty of life imprisonment for robbery or attempted robbery and thust left the sentencing court free to determine the sentence by considering the totality of circumstances surrounding the crime.

B. America

The American states adopted the English definition of robbery. Some states originally provided capital punishment for robbery but the trend away from the death penalty for robbery occurred earlier than in England. The American states at first adopted the English aggravated circumstances of robbery on a highway and in a dwelling-house but no states currently punish these as exceptional factors. Instead, most states have codified the common law definition of robbery but classify the offense into degrees depending on the means used, the result achieved, or the harm done to the victim. Of these aggravating circumstances armed robbery is the most widespread. However, the category of armed robbery has created many definitional problems as shown by California case illustrations.

The American Law Institute's Model Penal Code attempts to re-define robbery along rational lines by extending types of threats sufficient to constitute robbery, grading the punishment and by widening the time during which a specific intent to steal can be formed. Its major shortcoming is that it insists on serious bodily injury as an element of robbery.

The study draft of a new federal criminal code has set out the best American definition and treatment of robbery. It includes attempts and violence subsequent to the taking in robbery. The requirement of asportation is relaxed. The draft makes it clear that bodily injury or threat thereof is sufficient for robbery. Its proposed formulation distinguishes among armed robberies, punishing more harshly those offenders who actually use weapons during the course of a robbery.

[Insert Figure I]

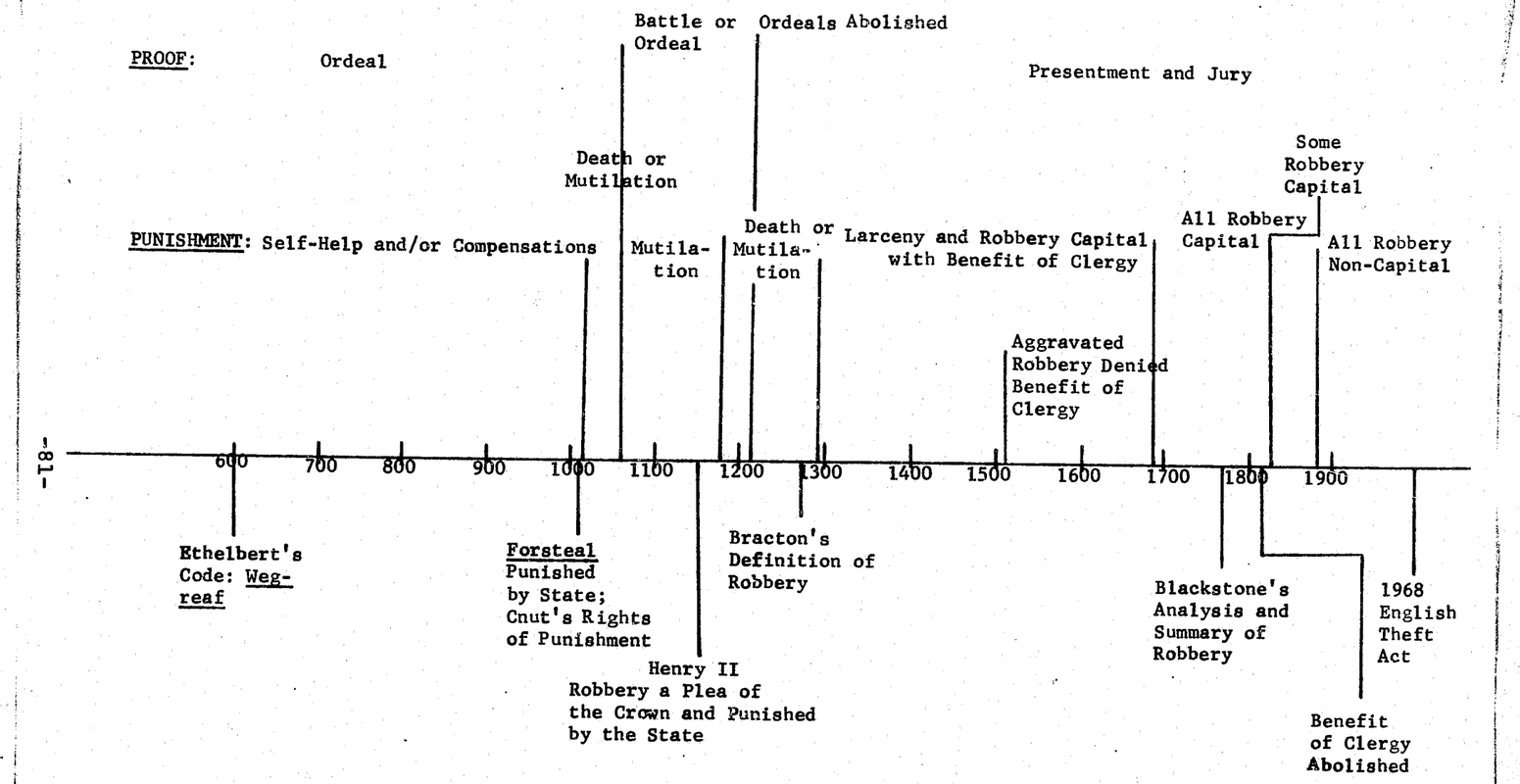


Figure 1

The History of Robbery in England

Chapter Three

THE CONCEPT OF ROBBERY

I. DEFINITIONAL QUESTIONS - THE "BORDERLAND" OF ROBBERY

Theft directly from the person takes many forms in today's world. Perhaps the most familiar is the "hold-up" or "stick-up" in which the thief, generally threatens the intended victim, either an individual or a proprietor, with a gun. Another major type of theft from the person is the "mugging", "yoking", or "strongarm" robbery. In this form the thief uses his own physical strength rather than a weapon to accomplish his objective. Often the tactic is a sudden, surprise attack from behind, involving a blow on the head, a grabbing around the neck or some similar maneuver. Still another form is known as "pursesnatching" in which the purse of the victim, often an elderly woman, is suddenly snatched from the grasp of the victim by the offender who then runs rapidly away. Still another form of theft from the person involves the taking of property from one who has been drinking and is either lying incapacitated or stumbling in a stupor on the street. This is known as a "drunk roll."

These kinds of theft are not legal categories. Rather they are descriptions of situations that frequently occur in real life. In some instances there is a significant question into which legal category they belong. This is called the "borderland" of robbery. It includes conduct which falls on the line between robbery and larceny in the case of pursesnatches, drunk rolls and

shoplifters who are caught in the act but who resist, or use force to escape and on the line between robbery and burglary in the case of the burglar who is discovered in the act and who then completes either his escape or the theft by means of force.

A. Pursesnatching

As a general rule, pursesnatching without prior violence or intimidation, like pickpocketing, is not robbery in most American jurisdictions[263] and at common law.[264] The rule is often stated in such terms as "mere snatching is insufficient violence to constitute robbery." The Uniform Crime Reporting Handbook, although not a statute itself, is typical in defining robbery. "[Robbery] is like larceny but is aggravated by the element of force of threat of force. Where these elements do not appear, as in...pursesnatching, the offense should be reported in the larceny theft class."[265]

A snatching, however, may be accompanied by violence sufficient for robbery. Where the pursesnatcher encounters resistance on the part of the victim and he overcomes that resistance, it is robbery.[266] Or, if during the snatching, the offender jostles, hits, pushes, or uses any accompanying force besides the snatching, it is robbery.[267] When the property is snatched and the victim immediately takes active physical steps to regain control over the property, some authorities depart from the general rule that the force must precede or accompany the taking and not be subsequent, and hold it robbery.[268]

Now suppose that there is no accompanying force besides the snatching but the victim's hand is cut or reddened or her fingernail

is painfully broken as a result of the snatching. At common law[269] and in many American jurisdictions[270] the "fingernail breaker" is a robber, but his brother who snatches but does not disturb the fingernail is a mere thief. The rule by which this result is reached is as follows: "Robbery is committed if there is any struggle to retain possession, or if there is any injury or actual violence..." [Emphasis added.][271] "[T]he degree of force used is immaterial...any struggle to obtain the property, any injury to the victim...is ordinarily regarded as sufficient..."[272] The classic common law cases on the borderland area of robbery illuminate this point. It was held robbery when a thief snatched an earring from a lady's ear drawing blood; similarly, it was held robbery to snatch a watch from around a man's neck thus forcing the chain against it.[273] In each case the culpability of the offender was the same. In each case the offender created the same risk of harm; in each the object of the attack was the same; and in each the means employed were the same. Yet because of the above rules, one offender would be a robber while the other would be considered a thief.

The next question to be considered in connection with snatching is the amount and type of intimidation necessary to aggravate the snatch to robbery. Cases have held that verbal intimidation accompanied by snatching is robbery.[274] The more normal case, however, does not involve any verbal component. The methods of thieves vary widely, but oftentimes the thief will run from behind and snatch the purse or will walk swiftly by the victim and, when ahead of her, will abruptly turn and run full speed at her and snatch the purse. Consider the case of an elderly lady walking down

the street, in a high crime area where pursesnatches are common, who hears running footsteps behind her or who sees the offender turn and run straight for her. Is the lady not reasonably put in fear? Is the situation not likely to create in the victim the belief that she is being attacked, that resistance is useless and that to do so would result in physical injury? At the very least there is an implied threat of harm. Implied threats have been found sufficient to constitute robbery.[275] Surely the silent gunman who has money handed over to him would be considered a robber. The case of a pursesnatch where the victim is aware of the offender running from behind or towards her should be treated similarly. In this case, the thief is not saying "your money or your life" but by his actions implies that if resistance is attempted serious injury may result. In large cities today, the pursesnatch is becoming an increasingly common occurrence. Elderly ladies justifiably fear such attacks since actual physical violence so often accompanies them. Thus, not to include in robbery the case where the victim is aware of the offender or a possible offender and where she allows the purse to be snatched in order to avoid a more violent attack, is really to exclude a taking of property from the person by a threat of physical injury.

Remaining are the "pure" snatch situations where there is no violence other than the snatch, where there is no resistance on the part of the victim, where there is no inadvertant physical injury to the victim, where there is no accompanying verbal intimidation, and where there is no awareness on the part of the victim until the actual snatching that a pursesnatch is about to occur.

There are at least three possible ways of dealing with this problem: 1) the common law approach which treats this as a larceny; 2) a middle ground, which treats this as a special kind of larceny, theft from the person which is punished more severely; or 3) include pursesnatches in robbery.

At ancient common law, a taking of property from the person where the only violence involved was the snatching, was only larceny. The only categorized aggravated larceny, was based on the value of the property stolen.[276]

A middle ground is to treat snatches as a specific aggravated larceny.[277] The English, recognizing early the peculiar nature of a taking of property from the person, passed 8 Eliz., ch. 4, sec. 2 (1565) abolishing benefit of clergy for those who stole from the person. This statute was principally aimed at pickpocketing and because of the requirement that the taking be without knowledge of the victim did not cover the case of a sudden snatching. In addition, "this statute did not create a new offense, but merely deprived a person convicted of larceny from the person of the benefit of clergy, and as petit larceny did not stand in need of the benefit of clergy it was considered that the statute did not apply to petit larceny from the person."[277]

Blackstone ignored this difficult area between larceny and robbery. "Larceny from the person is either by privately stealing; or by open and violent assault, which is usually called robbery."[279] Hence, his discussion only covered private stealings and open assault but did not cover the area under discussion, namely open assaults without the requisite violence to amount to robbery at common law.

Later English cases and statutes showed the difficulty of drawing a clear line between larceny from the person and robbery. By Geo. 3, (c. 1808) all thefts from persons without their knowledge under circumstances not amounting to robbery were made punishable by transportation from seven years to life. The statute left open the area of takings from victims with their knowledge but without sufficient force or intimidation to constitute robbery. A later statute, 24 and 25 Vict., c. 96, s. 40 (1861), attempted to fill this void and punished stealing "from the person of another" whether with their knowledge or not. This statute ratified what the English courts were already doing--treating sudden snatching as a secret or private taking under the statute.[280] A taking from a sleeping or druken person was generally considered to fall within the aggravated larceny statute,[281] though some cases held the contrary[282] because property was not "under the protection" of the victim.

The English aggravated larceny concept initially created some confusion in American jurisdictions. Some states followed the English statutes and decisions and applied the concept only to those takings in which there was a lack of knowledge.[283] Courts in other states held that the nonforceful taking of property from the person whether with or without his knowledge fell within the aggravated larceny statute.[284] This is the pure middle ground position where a snatching with or without the knowledge of the victim is singled out specially both from larceny and from robbery. Illustrative of this position is California's grand theft statute which states simply that "grand theft is theft

committed in any of the following cases...[2] When the property is taken from the person of another."[285]

The final means of coping with the "pure" snatch phenomena is to include it in the category of robbery. Two American jurisdictions have done this by statute. The Georgia robbery statute provides as follows:

> A person commits robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another (a) by use of force; or (b) by intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another; or (c) by sudden snatching. A person convicted of robbery shall be punished by imprisonment for not less than one nor more than 20 years.[286] [Emphasis added.]

Congress decided to go further in broadening the traditional definition of robbery and enacted the following robbery statute for the District of Columbia:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than two years nor more than fifteen years.[287] [Emphasis added.]

Another jurisdiction, Kentucky, has by judicial interpretation incorporated sudden snatching into robbery.[288] The courts in that jurisdiction have held that snatching is sufficient force in and of itself to be robbery. Affirming a conviction for robbery, the court of appeals, in Jones v. Commonwealth,[289] stated the following:

> It is true that the witness did not state that he was put in fear, nor that he tried to hold onto the pocket-book; he does not appear to have been asked specifically on these points; in fact, the snatching or grabbing and jerking of the pocket-book out of the witness' hand was probably done so quickly that he had no chance to actively resist; and, if this be true, we think such taking or snatching must be construed as taking by violence or force.[290]

Although the drafters of the Model Penal Code, in their definition of robbery, did not include pursesnatching, accompanied by other violence in their robbery definition[291] the comments to the section illustrate the rationale for including pursesnatches in the robbery category, and thus treating them more seriously.

> The violent petty thief operating in the streets and alleys of our big cities, the "mugger," is one of the main sources of insecurity and concern of the population. There is a special element of terror in this kind of depredation. The ordinary citizen feels himself able to guard against surreptitious larceny, embezzlement, or fraud, to some extent, by his own wits or caution. But he abhors robbers who menace him or his wife with violence against which he is helpless, just as he abhors burglars who penetrate the security of his home or shop. In proportion as the ordinary man fears and detests such behavior, the offender exhibits himself as seriously deviated from community norms, requiring more extreme incapacitation and retraining. In addition, the robber may be distinguished from the stealthy thief by the hardihood which enables him to carry out his purpose in the presence of his victim and over his opposition--obstacles which might deter ordinary sneak thieves.[292]

Because of the traditional confusion between robbery and open thefts not amounting to robbery, because of the vulnerability of women in cities to pursesnatchers, because of the various ways in which pursesnatching is committed (the least common being by stealth) and because of the serious injuries and risks of harm

which accompany snatches, it is suggested that it be expressly recognized that sudden snatching in itself creates a sufficient risk of harm to warrant treatment as a robbery. To discriminate between types of pursesnatches, including some in robbery because the victim held on to her purse, or suffered a jerked arm or heard or saw the victim running toward her and excluding others because these factors were not present would be overtechnical and create unnecessary difficulties of proof. Instead, it should be recognized that such attacks are dangerous and that all of them should be included in robbery. Aggravating factors, judicial discretion and a form of indeterminate sentencing can be used to discriminate among those pursesnatches which are more serious and those which are less serious.

B. "Rolling" Drunks

Robbery is defined as the wrongful taking and carrying away from the person of property by means of force or fear. Historically force was the first and only means of committing robbery and if force is applied, there is no requirement that the victim's fear be shown.[293] The contrary is also true: if fear is proven, force need not be shown.[294]

What constitutes fear, however, is another question; one issue is the amount of fear required. Blackstone indicates that this is not much, stating that robbery "does not imply...any great degree of terror or affright in the party robbed." It is enough that the threat "might create an apprehension of danger, or oblige a man to part with his property without or against his consent."[295] A second issue is whether actual fear on the part of the victim

must be shown or whether fear will simply be assumed if the circumstances are sufficiently threatening. This issue is particularly pertinent to the taking of property from such persons as drunks, sleeping persons and drugged persons where the victim, if he were fully cognizant would likely have been afraid of the means employed by the offender.

The courts have not dealt extensively with the question of whether there must be actual fear but one major text writer and some court holdings indicate that it is not necessary to look into the victim's actual state of mind but rather when the circumstances warrant fear, fear will be presumed.[296]

If fear is normally presumed from the circumstances, is it open to the defendant to prove that the victim actually had no fear? Some courts have held that fear may be inferred despite the testimony of the victim that he was not afraid. Thus, in a California case, the accused entered a liquor store and demanded money with a gun; the victim complied with the demand. At trial, the victim testified he had no fear of the accused and was never in fear for his safety. The court held that it was unreasonable to assume no fear existed and that fear was inferred from the possibility of harm in the event of noncompliance.[297] Likewise, in a Texas case, the offender produced a gun and demanded money of a laundry clerk which she promptly handed over. At trial, the woman clerk testified she was never in fear of serious bodily harm and was not afraid of the offender. Disregarding this testimony, the appellate court affirmed the conviction on the grounds of sufficiency of evidence to constitute fear.[298] The rule thus promulgated by

the courts seems akin to Russell's presumed fear and is something like "from [fearless]...compliance, fear of noncompliance may normally be inferred."[299]

It seems clear that what the court is saying in these instances is not that the victim was actually afraid, but that under these circumstances it does not matter whether the victim was afraid or not-- that the danger to the person of the victim was great enough to bring the offense within the robbery category. This result could be explained either on a reasonable man theory of fear or on the idea that whether there was fear or not the unlawful act created the kind of risks that robbery was devised to protect against.

If violence is inflicted on an unconscious or drunken victim in the course of a theft, the offense is robbery.[300] This is because either force or fear can be employed and if force is used fear needn't be shown. This follows the line of reasoning of Blackstone that where the victim receives a blow and property is taken from him while he is unconscious, it is robbery even though the victim is not put in fear.[301]

Similarly, if the victim is drugged or induced into intoxication for the purpose of facilitating the theft or minimizing resistance, it has been held that this is sufficient force to constitute robbery.[302] Thus, it has been held robbery where the offender took money from a cash register while the clerk was unconscious from a drug administered by the offender.[303] Also it has been held, contrary to the much criticized general rule[304] that the use of force subsequent to the taking is not robbery, that when the victim

awakes after the taking and is slugged by the offender the offense was robbery since the slugging occurred during the res gestae of the offense.[305]

A difficult area is where one attempts to commit a theft by intimidation on a drunken person who is conscious but not fearful or whose fear is diminished because of his intoxication. In this case it has been the general rule of the courts considering the question that a taking of property, without violence,[306] from a drunk who is unaware or dimly aware that he is being "rolled" is not robbery even if means are employed which would arouse fear in an ordinary man.[307] "Where a thief steals from one who is voluntarily drunk..., it has been held to be only larceny from the person."[308]

Assuming that enough fear to arouse an ordinary man is present, there should be no reason in this instance for departure from the rule that the law will presume fear where circumstances reasonably warrant it. No rational distinction exists between the case of the drunk roll and the case of those who are too stupid, courageous, insensitive, or fearless to be put in fear where the circumstances reasonably warrant it. If a rule is to be made, it should be applied evenly whereever possible. In the drunk roll situations where the offender uses means calculated to produce fear and thus compliance with his demands, his culpability is just as great as if the victim was actually put in fear. One possible argument against this objective approach is that robbery is a crime against both persons and property and that there should be both a taking of property and the creation of fear or the use of violence in order for the offender to be liable. This argument,

however, runs against the whole idea of presumed fear rather than supporting the exception from liability of the drunk roller. In other words, if fear is to be presumed because the actor used means calculated to produce fear, it should be applied when circumstances warrant it, even if the victim is too stupid, courageous or drunk to realize such fear.

The rule of presumed fear is based on a sound rationale. The rationale is that the state of the victim's mind cannot be looked into with any certainty. Thus, when the conduct of an offender would raise a reasonable apprehension of danger to a reasonable person, fear will be presumed. The obtaining of property from the victim is evidence of fear. The rule should not be departed from in the cases of drunk rolls without violence but with sufficient threat to raise a reasonable apprehension of danger.

C. Three Other "Borderland" Areas

Upon looking through numerous police crime reports, one is struck with the similarity to robbery of three types of behavior: resisting shoplifters, surprised and resisting burglars and fights among family or "friends" over property.

The first two categories can be dealt with together in the situation where the burglar and the shoplifter are in possession of wrongfully taken property, are approached by the dweller or the store detective, and use violence to keep the property. For example, many police reports state the following: "Offender seen putting [property] in coat pocket; store detective followed him outside and apprehended suspect; suspect forcibly resisted

but taken into custody; police called." The issue which these situations raise is whether force used subsequent to the taking should be considered robbery. The commentators to the Model Penal Code state that the "thief's willingness to use force against those who would restrain him in flight strongly suggests that he would have employed it to effect the theft had there been need for it."[309] Accordingly, the Model Penal Code, as we have seen, classifies as robbery, situations where the thief uses force after the taking. The English Theft Act has a similar provision. Although the two codes remove a technical and arbitrary distinction in the common law of robbery, it seems that use of force subsequent to the taking should not be classified as robbery per se. Rather, it should be shown that the offender used force to retain the property and not merely from fear of arrest or apprehension.

A second situation in the surprised and resisting burglar category is where the burglar is surprised by the victim prior to any misappropriation but uses means of force or fear to effect the theft anyway. For example, a police report would state the following: "Complainant came home and saw Suspect in bedroom; Suspect knocked Complainant to floor, took jewelry and fled." In this case the Model Penal Code's rationale is even stronger as there is no question that the force is used to gain property rather than to escape. The situation is unlikely to occur in the case of a shoplifter since store detectives will not apprehend a suspect unless there is some reason to believe a theft has already occurred.

A third situation in the surprised and resisting shoplifter and burglar category is where the shopowner or home-dweller is

aware of the offender and the theft but out of fear will not protest or attempt to prevent the theft. As an example of this type of situation the following was derived from a police report: "Complainant states four girls came in store after school; they had been in many times before and taken articles. Complainant states that she has never approached Suspects or phoned police for fear she would be beaten up." In this situation, if the shopkeeper's fear was reasonable and not irrational and if the taking was in the shopkeeper's presence, there would be a robbery. However, police reports uniformly categorize this type of activity as petty theft.

The latter category, that of fights among "friends" over property, has almost universally been classified as battery in the less serious situations and as assault with a deadly weapon in the more serious cases. There seems to be an unwillingness by police to categorize as robbery acts which are either analagous to the crime or fit the definition of the crime but which occur among friends or relatives. Robbery is considered serious in part because it is a face-to-face confrontation among strangers. However, it seems that if the other elements of robbery are present, there should be no barrier to classifying acts as such merely because the victim and the offender are related or are friends. An example of a case which definitionally fit robbery and should have been classified as such is the following taken from a police report: "Suspect, who is a neighbor of Complainant, came to Complainant and asked to borrow a wrench; Complainant told Suspect he could not since Suspect never returned things on time or in good condition; Suspect became enraged and hit Complainant;

Suspect took wrench and refuses to return it." This case was classified by police as a battery.

Most such cases are analagous to robbery but do not fit its definition. For example, many cases exist in which a friend forcibly "borrows" an item and returns it. This would not be robbery since there was no intent to deprive the owner of his property permanently. Also, fights among co-owners over the use of the property owned would not be robbery since each had a bona fide claim of right or claim of title to the property. As noted, a bona fide claim of right to property is a defense to a robbery prosecution since such a claim, made in good faith, negates the required larcenous intent. The last example of behavior among friends or relatives which is analagous to robbery is that of violent fights over alimony or child support. This would not be robbery since there cannot be a "taking" and since such intangible rights are not considered "property" capable of being stolen.

Thus, common law doctrines in cases of fights among friends and relatives over property keep liability in these cases within reasonable bounds. However, if conduct definitionally fits the robbery category, police should not be reluctant to classify it as such merely because the offender and victim are known to each other.

II. THE RELATIONSHIP OF ROBBERY TO OTHER CRIMES AND THE PLACE OF ROBBERY IN THE STATUTORY SCHEME

The following section will deal with two related general areas. The first area will deal with the relationship of robbery to specific crimes and statutorily related offenses. The second

area will deal with the general statutory scheme and its consequences for the concept of robbery.

A. The Relationship of Robbery to Specific Offenses

(1) Lesser Included Offenses.- When a robbery has been committed, what other crimes has the defendant "automatically" or "necessarily" committed? Historically,[310] and at present[311] a person may be convicted of larceny as a lesser included offense if he is found not guilty of robbery. This is because of the ancient concept that robbery is a type of theft or larceny, rather than distinct from it, and because a robbery includes all the elements of larceny, with the added elements of force or fear.

The California courts have held that theft from the person, is necessarily included in robbery even though the robbery statute (Cal.Pen. C. 211) speaks of a taking from the person or his "immediate presence" whereas the grand theft statute (Cal. Pen. C. 487 [2]) speaks only of a taking "from the person"[312] implying that theft from the immediate presence of the person is not strictly included. Ignoring the distinction, the court in People v. Stanton[313] stated that "the evidence...is sufficient to support a finding of guilty of the greater offense, and is also sufficient to support a finding of guilty of the lesser offense because it is the very nature of the greater offense that it could not have been committed without the defendant having the intent and doing the acts which constitutes the lesser offense..."[314]

Also "necessarily" included in robbery is the statutory offense of assault with intent to rob.[315] This offense consists of an attempt to rob and all the requirements of an assault.[316]

Thus, it has been held that common law assault is necessarily included in assault with intent to rob.[317] "The evidence was sufficient to warrant a conviction of simple assault [Pen. Code, See 240]. It has been held that the offense of simple assault is included within the offense of assault with intent to commit robbery..."[318] The same court further stated that "it follows that the offense of simple assault is also included within robbery..."[319] Therefore, common law assault is included in both robbery and assault with intent to rob and the latter offense within robbery.

"The act of violence relied upon for conviction of robbery will not support a separate conviction of assault, or assault with a deadly weapon."[320] This quote raises the problem of divisibility.[321] An offender cannot have offenses cumulated against him for the same indivisible act. Thus, a gunman who demands and takes money from his victim and then departs cannot be convicted of assault, assault with intent to rob, and robbery.[322] However, if after the taking the robber slugs his victim, convictions of assault and battery as well as robbery will stand.[323] The problem is as follows:

> Robbery may be mixed in its commission with other offenses, such as burglary or kidnapping, so that it becomes necessary in some cases...to distinguish the various offenses shown by a given set of facts. The crucial question is whether a single indivisible act involved the commission of more than one offense, or whether there was a series of related acts whereby separable offenses are committed.[324]

This problem will be considered more extensively in the sections on the relationship between robbery-kidnapping and robbery-rapes.

Let it suffice to be said here that there is a problem, because of the multifarious ways in which robbery can be committed and because of the numerous statutes designed to punish many evils, in singling out or separating those acts which are punishable in and of themselves, apart from the robbery prosecution.

(2) Related Offenses.- The California legislature has provided, along with the vast majority of jurisdictions, that attempts to commit certain crimes, conspiracies to commit certain crimes, and solicitation to commit certain crimes are punishable.[325] The rationale for making these "inchoate" crimes punishable is that while the state of mind of the offender is not itself culpable, the act constituting the related offense demonstrates that the offender has gone beyond mere thought. Thus, since there is a policy of stopping an actual crime before it has been committed, these incomplete criminal acts are made punishable.

An attempt is found where the offender takes some overt act, beyond mere preparation, towards the commission of the crime and would have completed it if not interrupted.[326] Since, as has been seen, the statutory offense of assault with intent to rob includes common law assault and attempt, attempt is a lesser included offense in a prosecution for that offense.[327]

There is a particular analytical difficulty with attempts in connection with robbery. Consider the case of a mugger who walks away after going through his victim's pockets and not finding any money. Or the case of an armed robber demanding money from a victim who has none. In both cases the offender has committed all the elements of the offense except the taking of property. The

offender has created the same risk of harm punishable by robbery and his intent or culpability is just as great as a more fortuitous robber. Yet the mere fact that the victim had nothing of value or interest to the robber makes the offense an attempted robbery. If robbery protects both a property and a personal interest, the distinction makes sense. If, however, the goal of robbery is to punish the actual culpability of the actor, the scope of the risk that he creates, as well as descriptively similar behavior, the distinction is meaningless. Many cases have gone to great lengths to find a taking. For example, a recent California case found robbery where the offender tore the victim's pocket off when searching for his wallet.[328]

The commentators to the Model Penal Code state that the statutory offense of assault with intent to rob originated because attempt was not sufficient to constitute robbery. They condemn the lack of inclusion of attempts in robbery with the following reasoning:

> Since common law larceny and robbery required asportation, however slight, the severe penalties for robbery were avoided if the crime was interrupted before the accused laid hold the goods, or if it developed that the victim had no property to hand over. The much milder sanctions for attempt were deemed inadequate; so legislatures developed the offense of assault with intent to rob or redefined robbery to include assault with intent to rob, often preserving some distinctions in penalty. There is no penological justification for treatment distinctions on this basis. The proposed text makes it immaterial whether property is or is not obtained.[329]

The Model Penal Code approach, it seems, is the correct one. The severe penalties which stimulated the technical common law

requirements for larceny and robbery have been, in large part, eliminated. The inclusion of attempts in robbery would eliminate the present phenomena of having a criminal classification turning on a fortuitous circumstance--the obtaining of property. The inclusion of attempts in robbery would take away from courts the burden of finding a taking and an asportation. Lastly, the inclusion of attempts in robbery would remove some of the overtechnicality which will be seen to exist in the present statutory scheme.

In a prosecution for conspiracy to commit robbery, the actual crime need not have been committed since the purpose of the statute is to prevent combinations formed for illegal purposes.[330] Generally, when a robbery is attempted or committed pursuant to a conspiracy, each conspirator is bound by and punishable for the act of his co-conspirators.[331]

The offense of solicitation to commit a crime is complete once the solicitation is made, and unlike attempt and conspiracy, no overt act or agreement is required. However, two witnesses need to testify in order to attain a conviction for solicitation.[232]

The offenses of conspiracy and solicitation have been criticized on independent grounds but pose no analytical difficulties in relationship to robbery. Attempts, however, create considerable analytical difficulties, the solution to which should be the inclusion of attempts in the robbery category.

(3) The Relationship of Robbery to Extortion.- At common law threats made to a person in order to get that person to give up his property were not punishable unless the threat was suffi-

to amount to a robbery. Thus, Lord Ellenborough stated in Regina v. Southerton:[333]

> The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats. Money obtained in the former cases under the influence of such threats may amount to robbery, but not so in cases of threats of other kinds.[334]

There was at common law an offense known as "extortion," but it was limited to abuses "of public justice." It consisted of "any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him or more than is due, or before it is due."[335] Virtually no sanctions were available to prevent or to punish private extortion.[336]

The limitation of the types of threats in the robbery category to those serious enough to move "a man of common firmness" to part with his money "left an important area to be covered by statute..."[337] Threats to third persons were generally not recognized,[338] threats for the purpose of obtaining unasportable property did not come under the robbery category, threats to accuse of crimes other than sodomy were not actionable, threats to character other than the threat to accuse of sodomy were likewise remediless, and, in the main, threats of future violence were not covered.

The realization that threats to reputation or harm to others could effectively compel an involuntary transfer of property and a feeling that this kind of pressure was improper and akin to out-

right theft or robbery led to the development of a statutory crime of extortion. "Experience has shown that other types of threats are equally effective."[339] One writer has noted that some extortionate threats can do much more harm to the victim than threats constituting robbery.

> Ordinarily a threat of physical harm is more likely to lead both to a successful misappropriation and serious psychic injury than is a threat to property or to the reputation. But if the property threatened is the business of the victim, or if the reputation threatened that of an eminent personality the converse may be true. Many a man will prefer a sound thrashing than to lose that which he has built up during the course of a lifetime, whether it be a business or a reputation.[340]

The early extortion statutes were narrow, covering written threats to accuse of crimes if property were not delivered.[341] Thus, extortionate letters rather than verbal threats were proscribed. Later English statutes[342] enlarged on and superceded the earlier ones. The development culminated in the Larceny Act of 1916.[343] The Act was a consolidation of earlier libel, extortion and assault with intent to rob statutes.[344] It punished unauthorized and unprivileged threats to accuse persons of crimes, to reveal contents of letters accusing of crimes, and to publish libelous materials. Section 30 of the Act definitely shows the intention to extend robbery through the extortion category:

> Every person who with menaces or by force demands of any person anything capable of being stolen with intent to steal the same shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding five years.

In the United States extortion or "blackmail"[345] statutes have developed toward two general types.[346] In one type the threat itself is made punishable,[347] while in the other the extortion as a whole is punishable.[348] Where the threat itself is punishable it is unnecessary to find an actual misappropriation. On the other hand, where the extortion as a whole is emphasized, an actual misappropriation of the demanded property is necessary. While for robbery, a taking from the person is important, even under statutes emphasizing the extortion as a whole, the place of the taking is immaterial.[349]

The types of illegal threats are frequently set out in American statutes. For example, the California extortion statute lists the threats sufficient to constitute extortion as follows:

> Section 519. Fear induced by threat.
> Fear, such as will constitute extortion may be induced by a threat, either:
> 1) to do an unlawful injury to the person or property of the individual threatened or of a third person; or,
> 2) to accuse the individual threatened, or any relative of his or member of his family, of any crime; or,
> 3) to expose, or to impute to him or them any deformity, disgrace or crime; or,
> 4) to expose any secret affecting him or them.[350]

The drafters of the Model Penal Code adopted this type of statute enumerating the types of threats which constitute extortion. The statute, however, is appropriately entitled "Theft by extortion"[351] rather than blackmail, demanding by menaces, threatening letters, and the like. This formulation follows modern trends in treating all attempts to illegally gain property as thefts and, thus, like the consolidation of the ancient theft offenses, adds considerably

more certainty and clarity into the law of property offenses. The Model Penal Code section covers threats to injure anyone "on the theory that if the threat is in fact the effective means of complelling another to give up property, the character of the relationship between the victim and the person whom he chooses to protect is immaterial."[352]

Though robbery statutes are frequently divided into degrees depending upon how the crime is committed, or its results, extortion statutes do not generally follow this pattern, but allow flexibility in sentencing. Those jurisdictions which attempt to classify types of extortion for punishment purposes distinguish in the main, between oral and written threats.[353]

Having traced the development of extortion statutes and the different ways extortion is punished, the substantive elements of extortion and their relationship to robbery will be analyzed.

While felonious intent is a necessary ingredient in robbery, "there is a conflict as to whether larcenous intent is an essential element of extortion."[354] If a person in good faith has a bona fide claim of right in or title to property his obtaining of that property by force or threat of force is a successful defense to a robbery prosecution.[355] However, if one has a bona fide claim in or title to property which he attempts to collect by a threat such as will constitute extortion, some courts have found that his bona fide claim will not be a defense to a prosecution for extortion. Thus, in finding that a threat to accuse of a crime if payment of a bona fide claim was not forthcoming was extortion, a California court stated that "the law does not contemplate the use

of criminal process as a means of collecting a debt."[356] Other cases have held to the contrary.[357] This, however, is the only exception to the general rule that the truth of the threat is no defense to a prosecution for extortion.[358] The rationale for the general rule is stated by Bishop as follows:

> One of the most familiar forms of the statutory threat is to accuse a person of crime with the intent to extort money or other valuables from him. Not the accusation, but the threat to make it, constitutes the offense. And by construction of most of our statutes, it is immaterial whether the person threatened is guilty or not; for in either case there is an attempt to pervert justice.[359]

Another rationale is suggested by Clark and Marshall. "Use of improper influence is the essence of the offense, and consequently, a threat to accuse one of crime or to disclose alleged facts concerning such person, constitutes extortion whether or not the threatened person is guilty of the crime or the alleged facts are true."[360]

In robbery, only asportable property may be stolen. Is there any similar limitation on the type of property capable of being misappropriated by extortion? While some writers have indicated that as long as the threat is one which would constitute extortion, the scope of property should be extended to cover anything of value, tangible or intangible; other commentators have not been in agreement. In People v. Robinson,[360] the court found that a receivership is not property within the meaning of the extortion statute. Commenting on this case, a writer stated that "the nature of the crime of extortion requires that the term 'property' should be used in an unrestricted sense" because "this crime was

created to punish indirect forms of appropriation that would not be punishable as robbery."[362] This appears to be the better reasoned view since the object of the extortion statutes is to protect the threatened individual from unauthorized threats and the nature of the property demanded, as long as of some value, should be immaterial. Therefore, it should be the rule that as long as the threat is sufficient to constitute extortion, the nature of the property demanded, whether tangible or intangible, asportable or nonasportable, as long as of some value, should be irrelevant.

As seen in the California extortion statute set out above, only certain types of threats can constitute extortion. Threats to the person and to his reputation by accusing him of a crime or imputing to him disgrace are relatively straightforward and require no special discussion. What constitutes a threat to injure property is far more complicated and controversial. Not all property is so protected. The reason for this is stated by the drafters of the Model Penal Code. "A law which included all threats made for the purpose of obtaining property would embrace a large portion of accepted economic bargaining."[363] For example, threats to break a contract, to engage in a strike, to boycott, may injure the good will or credit of a business yet they are all, in the main, part of "accepted economic bargaining."

The governing criteria of the type of threat to property which should be proscribed is stated as follows by one writer. "Once determined that the harm threatened is an injury to 'property' further inquiry is necessary to decide whether the threat is of the kind which is forbidden by the criminal law."[364] While this

criteria depends upon a shifting societal view as to what property should be protected by the criminal law, it at least is a good criteria from which to honestly start. Some threats to property are clearly regarded as extortionate. Threats to commit acts criminal or tortious are generally regarded as extortionate.[365] Also, threats to property by the abuse of properly delegated power should be punished.

> [T]he modern crime of extortion departs from this restriction [of a tangible res] in penalizing certain threats to interfere with business relations. As instanced by the demanding of funds for one's personal benefit on pain of instigating a strike or of causing an employer to discharge his employee, the prohibited threats are those which fall outside the pale of conduct that may be justified as an incident of economic competition.[366]

The final element of extortion and its relationship to robbery is the factor of consent. Frequently, robbery statutes speak of the absence of consent while extortion statutes require its presence. For example, the California robbery statute reads as follows:

> Section 211. (Robbery) Defined.
> Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and <u>against his will</u>...[Emphasis added.]

Whereas the extortion statute states the following:

> Section 518. (Extortion) Defined.
> Extortion is the obtaining of property from another, <u>with his consent</u>...[Emphasis added.]

The consent rule was stated as follows in a recent California case. "To constitute extortion the victim must consent, albeit it is coerced and unwilling consent, to surrender of his property; the wrongful use of force or fear must be the operating or controlling cause compelling the victim's consent to surrender the thing to the extortionist."[367] Consent is found when "money or property is obtained from a person with his consent if he with apparent willingness gives it to the party obtaining it with the understanding that thus he is to save himself from some personal calamity or injury, notwithstanding that within himself he may still protest against the circumstances requiring him to dispose of his money in that way or for such a purpose.[368] The rationale for the distinction based on consent between robbery and extortion is stated by Perkins. "In [extortion] the victim consents to part with his money or property, although his consent is induced by the unlawful threat, whereas in robbery the intimidation is so extreme as to overcome the will of the victim and cause him to part with his money or property without consent."[369]

The consent distinction poses many difficulties and has been termed by numerous commentators to be meaningless. "The analytical difficulties of the distinction as applied to robbery by threats are obvious. In such cases, as much as in cases of extortion, the victim is confronted with a choice of evils."[370] Further illustrating the difficulty of the distinction is the following: "But the willingness to surrender the property in any case is only an apparent willingness since in both instances the victim must choose betwen alternative evils, namely, the

surrender of his property or the execution of the threat. Only if the taking is accompanied by violence to the person of the victim is this apparent consent precluded, for then the victim is presented with no choice."[371] It has also been observed that "the concept of consent which is apparently one of the most important distinctions between extortion and robbery is worthless for all practical purposes since the consent is obtained by duress..."[372] Lastly, on a very abstract level, the problem raised by the consent distinction has been said to be as follows: "Freewill has been much discussed in the region of metaphysics, and lawyers might be content that the discussion should not extend to the realm of law."[373]

It should be evident that the supposed distinction between robbery and extortion based on consent is at least confused, if not meaningless. A man, threatened at the point of the gun with immediate injury, who delivers property to the offender with apparent willingness has been robbed; a man who in response to a letter threatening future injury to his child, delivers property with apparent willingness to the offender has been the victim of extortion. Both men apparently "consented" to avoid greater harm, yet two different crimes with two opposing concepts of consent have been committed.

Perhaps it was inevitable that such close relatives have become confused in terminology and practice. As stated by one writer, "the definitional distinctions between robbery and extortion are extremely tenuous" and "on the verbal level, there is considerable overlap between the two crimes."[374] Often there is a conviction for robbery where the facts seemingly constitute extortion; the

converse is also true. Coke's example of continuing fear, in which robbers demand that a victim go and get property and come back and hand it over would probably now be extortion. The following fact situation was found by a California court to be sufficient to uphold a conviction for extortion:

> [D]efendant armed himself with a loaded rifle and went to the residence of Elmer L. Carlton and Robert Hayes and demanded the payment of $10.55; that the two men did not have the money; that defendant threatened them verbally and with his rifle; that Carlton told defendant he could get the money from his employer; that defendant marched the two men to the home of the employer, firing one shot over their heads about the time of their arrival there, that Carlton obtained the money from his employer and paid it to defendant; that this was done because of the threatening attitude and verbal threats of defendant which placed the two men in fear of their lives.[375]

In conclusion, it has been seen that the law of statutory extortion, or blackmail, had a relatively late beginning and was designed in great part to complement and extend the rationale of robbery. In this connection, it has been observed that extortion is "but one degree removed from the crime robbery"[376] and that "modern legislation has extended the substantive content of aggravated theft, complementing robbery with the crime of extortion."[377]

In order to formulate the extortion category so as to really complement robbery, the following things must be done. First, the distinction between verbal and written threats should be abolished. Early extortion statutes were partly derived from the law of libel. That law viewed written matter as creating a more serious risk to the defamed person because of its permanency. However,

the threat which constitutes extortion whether written or oral is what prompts action and not the mode of communication. A verbal threat is more like a robbery threat since the victim is personally confronted by the offender. Such a confrontation is very likely to cause more harm to the victim than his reading of the threat in a letter.

Secondly, the threat alone should be punished and an actual misappropriation should not be required. Extortion, unlike robbery, does not have included within it larceny despite the fact that extortion is clearly related to larceny. But the harm done to the victim, the anguish he goes through in deciding whether or not to submit to the threat, should be the principal concern of the law rather than technically relying on a misappropriation. The unsuccessful extortionist should also be punishable. The unsuccessful extortionist in his intent and his act of making the threat is just as culpable as the successful one. Also, those who are bold enough to resist an extortionist should not have to see their tormentor go unpunished. Though actual delivery of the demanded property is some evidence of the effect of the threat on the mind of the victim, it should not be the only means of measuring the seriousness of a threat.

Third, it should be more expressly enumerated what types of property interests are protected by the extortion laws. While some types of intangibles should be protected in order to extend extortion past the technical larceny requirements of the type of property capable of being stolen, care must be taken to avoid including in the extortion category intangibles which are the subject of economic bargaining such as contract rights.

Last, the consent distinction between robbery and extortion should be abolished. The law approaches metaphysics when determining whether the threat gave the victim no choice or some choice. Other distinctions in the current law allow one to discern the difference between the crimes such as the nature of the threat and the place of the taking.

(4) Robbery - Kidnap.- Unlike the close relationship and development between robbery and extortion, the common law crimes of kidnapping and robbery grew up quite apart and distinct. Blackstone defined kidnapping as "the forcible abduction or stealing away of man, woman, or child from their own country, and selling them into another..."[378] The drafters of the Model Penal Code state that "a very substantial displacement was contemplated, one that was significant not only because of distance and difficulties of repatriation, but especially because the victim was removed beyond the reach of English law and effective aid of his associates."[379]

Following this general conception of kidnapping, California, in 1872, passed a kidnapping statute reading as follows:

> Section 207. Definition
> Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or county, or who forcibly takes or arrests any person with a design to take him out of this state...for the purpose and with the intent to sell such person into slavery or involuntary servitude...is guilty of kidnapping. [Cal. Stats. 1961 C. 83, P. 98.]

Later, the statute departed from the common law conception of kidnapping with the addition of the words "or into another part of

the same county."[380] This and similar state statutes originally did not include the now-familiar detention of a person for ransom.

In 1901, the California legislature passed an additional kidnapping statute, section 209, reading as follows:

> Section 209.
> Every person who maliciously, forcibly, or fraudulently takes or entices away any person with intent to restrain such person and thereby commit extortion or robbery or exact from relatives or friends of such person any money or valuable thing [shall be punished for a minimum of ten years or a maximum of life.]

This new kidnapping statute was passed in reaction to a series of kidnappings for ransom culminating in the 1900 Cudahy kidnapping. Robbery, as well as extortion, was included in the new statute because of the confusion of the consent distinction between extortion and robbery. "Robbery was included because at that time, the Code definition of 'extortion' was limited to a taking with consent. Apparently the legislature felt that the kidnapping statute should cover not only kidnapping which involved taking things from the victim with his consent, but also kidnapping which involved taking things of value from the person against his will."[381]

In 1933, section 209 was amended to read:

> Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever, with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing [shall be punished by life imprisonment or, if the victim suffers bodily harm, life imprisonment without possibility of parole or, death at the discretion of the jury.]

This amendment was passed in the aftermath of the Lindbergh kidnapping and was based on the Federal Kidnapping Statute[382] also passed in reaction to that event. There was one important variance between the California and federal statutes. "[I]n the federal statute, the words 'seize, confine, inveigle, etc.' are prefaced by the phrase, 'Whoever shall knowingly transport or cause to be transported, or aids or abets in transporting...'"[383] Despite the argument of some writers that the statute was not designed to change the requirement of asportation but only to increase the punishment, to include accomplices, and to omit the requirement of malice[384] the statute's literal wording was now open to another interpretation.

Prior to 1933, prosecutions under section 209 had required a substantial asportation.[385] It was now possible to interpret that section to mean that any detention of the victim during a robbery was a kidnap and hence subjected the offender to a much harsher penalty even though his dominant purpose was merely to rob. In People v. Tanner,[386] the court held that a robbery with any movement of the victim was kidnapping and subsequent cases followed this holding.[387] The strictest literal interpretation of section 209 was reached in People v. Knowles[388] where the California Supreme Court held, that a stationary robbery was kidnapping within the statute. "Movement of the victim is only one of several methods by which the statutory offense [§ 209] may be committed." And, "...under a statute providing that the victim be seized or abducted, a defendant who has seized a victim cannot claim exemption from the statute because he has not also abducted him."[389] The court, in determining under which statute the defendant could be punished,

stated that since the robbery and "kidnapping" were part of one indivisible transaction or occurrence, the defendants could only be punished for one crime, either robbery or kidnapping for the purpose of robbery. It held that "in view of the fact that the legislature prescribed greater punishment for the violation of section 209 it must be deemed to have considered that the more serious offense" and hence "the convictions thereunder must be the ones affirmed."[390]

In thus holding that a robbery was, in effect, a kidnapping under the statute, the court, as one commentator put it "...would virtually eliminate the crime of armed robbery in California."[391] Also, in so holding, the court had a great effect on punishments meted out for convictions under this doctrine. Whereas the minimum punishment for first degree robbery is five years with no stated maximum, the punishment for violations of section 209 is life imprisonment with possibility of parole if no bodily harm[392] is suffered by the victim. If the victim suffers bodily harm, the punishment is life imprisonment without possibility of parole or death.

The Knowles case and the criticism that it evoked[398] was probably at least partially responsible for the 1951 amendment to section 209. As amended, that section reads as follows:

> Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom...or any person who kidnaps or carries away any individual to commit robbery [is guilty of kidnapping under this section.]

The new wording of the amendment presumably shows that the legislature intended to introduce an element of asportation or forcible removal into the aggravated kidnapping statute. In People v. Chessman[394] the California Supreme Court had its first opportunity to review the 1951 amendment. While noting that mere detention was not enough, the court held that the facts of this case wherein the defendant after robbing the victims, forcibly moved a victim 22 feet from her escort's car and raped her, were sufficient to constitute kidnapping under section 209 as amended. The court, presumably not wishing to place any artificial limit on the type and distance of removal, stated that "it is the fact, not the distance, of forcible removal which constitutes kidnapping in this state."[395]

Until recently, subsequent California decisions have reaffirmed the holding in Chessman and affirmed convictions of aggravated kidnapping when the victim was moved slight distances during a robbery.[396] As stated in People v. Monk, "the offense of kidnapping for the purpose of robbery was thus complete when defendant forced [the victim] to walk several feet to his car..."[397] Moreover, the California courts have held that when a robbery occurs during the course of a kidnapping, the crime becomes kidnapping for the purpose of robbery from its beginning.[398] A specific intent to rob, however, must be shown although it need not be present at the beginning of the kidnapping or removal.[399]

Many jurisdictions have kidnapping statutes similar to California's. Some of these jurisdictions have been reluctant to find a technical kidnapping in connection with what most would consider

a simple robbery or other crime, such as rape or assault.[400] But other jurisdictions have upheld convictions under the kidnapping statute when the dominant and substantial crime incident to the "kidnap" would bring a lesser penalty.[401]

An example of the arbitrary way the aggravated kidnapping statutes are being used in sentencing is provided by the commentators to the Model Penal Code:

> Williams v. Oklahoma, 79 S. Ct. 421 (1959), is another illustration of the paradoxical results achieved when prosecution for kidnapping is resorted to as a means of imposing capital punishment which would otherwise be precluded. Williams, in flight from a robbery, forced his way into an automobile driven by Cooke..., and compelled Cooke to drive him to another county where Williams murdered him. Williams was tried for murder, pleaded guilty, and was sentenced to life imprisonment. He was subsequently tried for kidnapping, again pleaded guilty, and this time was sentenced to death. On certiorari, the Supreme Court of the United States held that it was not a denial of due process for the sentencing court to take the murder into consideration in exercising its discretion under the kidnapping statute.[402]

As the interpretation of the pre-1951 kidnap statute was criticized, so have interpretations of the post-1951 statute, as amended, been criticized. In the comments to the Model Penal Code kidnapping statute, the drafters stated that "it now becomes possible to restrict the scope of artificial 'substantive' crimes like burglary and kidnapping, which are significant chiefly as attempts to commit a variety of other offenses but carry penalties appropriate to the most atrocious of the possible objectives of the offender."[403] Citing the Tanner, Knowles, and Chessman cases, the commentator to the Model Penal Code states that "examples of

abusive prosecution for kidnapping are common" and "among the worst is use of this means to secure a death sentence or life imprisonment for behavior that amounts in substance of robbery or rape in a jurisdiction where these offenses are not subject to such penalties."[404] In punishing a kidnapper, the commentators state the criteria should be substantial isolation, duration of isolation, and the intention of the kidnapper.[405] Accordingly, the proposed kidnap section of the Model Penal Code reads as follows:

> Section 212.1. Kidnapping
>
> A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation [for certain purposes.]

The proposed section then sets out penalties commensurate with other felonies in order to avoid any temptation to prosecute for "technical kidnaps" when in reality the dominant offense and intent of the victim was to commit robbery, rape, assault or the like.

Despite widespread criticism of the use of a technical kidnapping provision to secure harsher penalties for the crime actually committed than would ordinarily be possible, the practice has continued in California until recently. A study of kidnapping prosecutions by the California Department of Justice, Bureau of Criminal Statistics reveals that "of the 333 persons who appeared before the courts in 1966 for kidnapping, there was not one case where the victim was held for ransom."[406] The study notes that

"...the most prominent feature of kidnapping is that it almost always occurs in conjunction with another offense.[407] The most frequent companion offense was robbery, occurring in 202 of the cases."[408] The conviction rate for kidnapping was 24 percent as opposed to over 75 percent for robbery, assault, burglary, auto theft, forgery and rape. The report states that "a possible explanation for the low conviction rate in kidnapping cases might be that the courts are more concerned with the actual motive of the defendant rather than the possibility that a technical kidnapping occurred."[409] The study then concludes with the observation that "the present use of kidnapping charges by law enforcement agencies in California appears to be one of increasing the probable penalty against the defendants who have committed robbery and rape where unusual aggressiveness or hostility was displayed."[410]

In a recent case, the California Supreme Court has reversed itself, overruling People v. Wein, and adopting a new test for interpreting section 209.[411] The court stated that the decision in the 1951 Chessman ruling "that 'it is the fact, not the distance, of forcible removal which constitutes kidnapping in this state,' is no longer to be followed."[412] The court went on to enunciate a new test. "Rather, we hold that the intent of the Legislature in amending Penal Code, section 209 in 1951 was to exclude from its reach not only 'standstill' robberies (e.g. People v. Knowles)...but also those in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that

necessarily present in the crime of robbery itself."[413] The court took note of the justifiable criticism of its earlier cases by stating: "There have been...fresh judicial approaches, far reaching legislative innovations...and considerable analysis of this problem by legal commentators and scholars. Out of this ferment has arisen a current of common sense in the construction and application of the statutes defining the crime of kidnapping."[414] Accordingly, the court held that a robber who moves his victim a slight distance cannot be punished under the kidnapping statute where such movement is merely incidental to and part of the dominant crime and there is not substantial increase in the risk of harm.[415]

Thus, it has been shown that although robbery and kidnapping were quite distinct from each other at common law, they have, in some instances and at some times, become one in the same related to each other in the statutory scheme. These "aggravated kidnapping" statutes were for the most part passed after sensational kidnappings for ransom aroused public opinion. Accordingly, they carry very harsh penalties. The development and continued use of such statutes have been justifiably widely criticized. Many offenders have received unjust and disproportionate sentences merely because they happened to move their victims during the course of a robbery. Finding a technical kidnap where in reality a completely different crime was being committed is to make criminal liability depend on a fortuitous and accidental occurrence. The relating of one crime to another in one statute contributes to the irrationality and overtechnicality which will be seen to

characterize current statutory schemes. Such relationships are at best unnecessary in view of the current wide use of the indeterminate sentence.

It is therefore suggested that such aggravated kidnapping statutes be abolished. The transporting of a victim in order to rob him where such transportation is of a long distance and seriously increases the risk of harm to him could be made an aggravating circumstance within the robbery category itself.

(5) Robbery - Murders.- The common law recognized that killings, either accidental, reckless, or intentional, done in the course of a robbery, were punishable as murder: "At common law, malice was implied as a matter of law in cases of homicide arising where the defendant was engaged in the commission of some other felony; such a killing was murder whether death was intended or not."[416] Coke stated that "if the act be unlawful it is murder."[417] Likewise, Blackstone said that "...if one intends to do another a felony, and undesignedly kills a man, this is also murder."[418] At this time, robbery was a capital offense so it didn't matter to the offender too much whether he was executed for robbery or for murder.

After capital punishment for robbery was abolished, the doctrine was later qualified to some extent. Justice Stephen in Regina v. Serne instructed the jury, in part, as follows: "I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life and likely in itself to cause death, done for the purpose

of committing a felony which caused death should be murder."[420] Perkins states that "such a position has much to commend it" because "it places upon a man who is committing or attempting a felony the hazard of guilt of murder if he creates any substantial human risk which actually results in the loss of life..."[421] Two doctrines were formulated to effectuate the "substantial risk" rule. One held that the killing be a "natural and probable" result of the activity, and not merely accidental.[422] The other held that the felony be malum in se and not merely malum prohibitum.[423]

Despite the above qualifications and despite the observation that "robbery and arson may be committed in different ways and under different circumstances, not all of which are equally dangerous to life and limb and some of which may be only slightly dangerous or not dangerous at all,"[424] many state legislatures[425] have passed felony-murder statutes punishing killings during the course of any robbery, burglary, rape, arson, and other crimes. Thus, felony murder statutes were formulated with no express qualification that the felony engaged in be of the type where a substantial risk of injury or death is created. California's Felony Murder statute is illustrative:

> Section 187. Murder.
>
> Murder is the unlawful killing of a human being, with malice aforethought.
>
> Section 188. Express and Implied Malice.
>
> Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Section 189. Murder of First or Second Degree.

All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary,... is murder of the first degree. [Emphasis added.]

Holmes explained the justification for felony-murder statutes as follows:

> [I]f experience shows, or is deemed by the law-maker to show, that somehow or other deaths which the evidence makes accidental happen disproportionately often in connection with other felonies..., or if on any other ground of policy it is deemed desirable to make special efforts for the prevention of such deaths, the lawmaker may consistently treat acts which, under the known circumstances, are felonious..., as having a sufficiently dangerous tendency to be put under a special ban.[426]

The writers on the Model Penal Code reject Holmes' suggestion that the legislature could reasonably find that murders occur disproportionately in connection with certain felonies. "We know no basis in experience for thinking that homicides which the evidence makes accidental happen disproportionately often in connection with specific felonies. Indeed, so far as we have been able to gauge the indication of available statistics, the number of homicides occurring in the commission of such crimes as robbery, rape, and burglary, is lower than might be thought."[427] The English reacted to numerous criticisms[428] of the felony-murder doctrine with the passage of the English Homicide Act, 1957, 5 and 6 Eliz. 11, c. 11. Section 1 of that Act states that "where a person kills another in the course or furtherance of some other offense, the killing shall not amount to murder unless done with

the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offense."

Some courts have attempted to limit the felony-murder rule by supplying certain requirements[429] such as, the act must be dangerous to human life,[430] the killing must be a natural and probable result of the felony,[431] death must be "proximately caused",[432] the felony must be malum in se,[433] the act must be a common law felony,[434] the killing must occur in the course of committing the felony,[435] or the felony must be "independent" of the killing.[436] It should be noted that California has expressly placed in its statute the requirement that the killing must be "in the perpetration of" the felony and the felonies to which the felony-murder rule is applicable are enumerated.

Until 1965, California was one of a few states whose courts placed almost no judicial restrictions or qualifications on the rule.[437] These jurisdictions affirmed convictions for murder when a victim accidentally killed the defendant's co-felon,[438] a bystander,[439] another potential victim,[440] or a policeman.[441] The way in which the California courts handled the felony-murder rule can be seen in the case of People v. Cabaltero.[442] The facts and results of the case are succinctly stated by one writer as follows:

> Six men robbed a farm payroll office. During the robbery, one of the men shot a co-felon because the latter disobeyed orders. The killing was, in fact, not a part of the robbery transaction insofar as it served no useful function for the robbers. The killing was committed in the perpetration of a robbery only in a temporal sense; yet, the felony-murder rule

was strictly applied and all the surviving robbers were convicted of first degree murder.[443]

In cases where first degree murder was found where the killing was unintentional and in many instances improbable, the California courts spoke of the requirement of causation. Thus, in People v. Harrison[444] where the victim of a robbery shot and killed another potential victim after being wounded by gunfire from a robber, the court, in affirming the convictions stated that the requirement of causation was satisfied.

> [T]he attempted robbery set in motion a chain of events which were, or should have been, within their contemplation when the notion was initiated. It was a normal human response for Jones, one of the victims of the attempted robbery who was shot by Harrison, to return the fire. The shooting at Harrison was the natural result of defendants' acts. The killing of Williams was the natural, foreseeable result of the initial act. The attempted robbery was the proximate cause of the death.[445]

Although one commentator has suggested that a conviction could have stood, not on the felony-murder doctrine, but on the vague implied malice doctrine by facts showing an "abandoned and malignant heart" under section 188, coupled with the doctrine of causation,[446] the case has been interpreted as an "extention" of the felony murder rule[447] and illustrative of court's use of causation.

In the 1965 case of People v. Washington,[448] the California Supreme Court reversed the murder conviction of an unarmed co-felon whose armed accomplice was shot by the victim. Thus, the "in perpetration" requirement was restricted to those killings committed by the felon. The court stated that "the purpose of the felony-

murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for the killings they commit." And that "this purpose is not served by punishing them for killings committed by their victims."[449] Killings not committed by the felons themselves, the court stated, are not done "to perpetrate" the felony and, thus, do not fit the language of section 189.

Despite the recent qualifications of causation and of the "in perpetration" requirement, few other changes of the felony-murder doctrine have been made. It has been suggested that section 189 only determines the degree of murder and negates the premeditation requirement and that malice under section 187 is a necessary requirement. "Thus a statute which on its face would appear to have been designed only to determine the degree of a murder has come to be used to determine whether the killing was a murder in the first place."[450] Yet the California courts have consistently held that malice can be inferred from the fact that the killing occurred during the course of one of the enumerated felonies.[451] As stated in People v. Washington, "the felony-murder doctrine ascribes malice aforethought to the felon who kills in the perpetration of an inherently dangerous felony."[452] And, in a recent case, it was said that "under the felony-murder doctrine, the intent required for a conviction of murder is imported from the specific intent to commit the concomitant felony."[453] Likewise, in another recent lower court opinion the court stated that "...it is now clear that the felony-murder rule is a rule of substantive law in California and not merely an evidentiary short-

cut to finding malice." And that "it withdraws from the jury the requirement that they find 'either express malice or the implied malice'..."[454]

One recent California felony-murder decision is People v. Stamp[455] in which the Court of Appeals affirmed the convictions of three men for the robbery and murder of an owner of an amusement company. Three men came into the offices and ordered the deceased and other victims to lie down on the floor at the point of a gun. After the departure of the robbers, the following occurrences took place:

> [The victim] 15 to 20 minutes after the robbery had occurred...collapsed on the floor. At 11:45 he was pronounced dead on arrival at the hospital. The coroner's report listed the immediate cause of death as heart attack...The employee noted that during the hours before the robbery (the victim) had appeared to be in normal health and good spirits. The victim was an obese, 60-year old man, with a history of heart disease, who was under a great deal of pressure due to the intensely competitive nature of his business. Additionally, he did not take good care of his heart.[456]

The court stated that under the felony-murder rule all killings committed in the perpetration of a robbery are murders of the first degree. It went on to say that this is so regardless of how accidental or unforeseeable the death may be. "The doctrine is not limited to those deaths which are foreseeable. Rather a felon is held strictly liable for all killings committed by him or his accomplices in the course of the felony."[457] Thus, a robber "takes his victim as he finds him."[458]

The drafters of the Model Penal Code propose to change this strict liability or malice per se doctrine as follows:

> ...the draft advances a new approach to the problem of homicides occurring in the course of the commission of felonies. Such homicides will only constitute murder if they are committed purposely or knowingly, or recklessly where the recklessness demonstrates extreme indifference to the value of human life, subject, however, to a presumption of such recklessness if the actor is committing robbery, rape by force or its equivalent, rape by intimidation, arson, burglary, kidnapping or felonious escape.[459]

This formulation has been termed by one writer as "an excellent approach to the malice problem."[460]

Thus, it has been noted that both at common law and in modern penal codes, robbery during which homicide occurs is singled out for special treatment and punishment. Although this doctrine has been the subject of much qualification and criticism, the central core of the doctrine--implied or constructive malice--is very much in force today. The Model Penal Code formulation is much sounder in allowing a presumption of malice when the killing occurs during the course of a robbery. This approach will not allow an automatic finding of malice once the specific intent to commit robbery is shown. Instead, robberies in which a killing occurs will subject the offenders to a murder charge only when the circumstances show reckless indifference to human life. A presumption of such recklessness will exist from the specific intent to commit robbery. This approach is sounder since it embodies the rationale for the felony-murder rule that one who commits a dangerous felony is seriously endangering human life for which he must pay if a homicide actually occurs. But it also allows a showing that such a homicide was fortuitous, accidental and did not occur during behavior which displayed reckless disregard of human life.

(6) Robbery-Rapes.- Although robbery and rape are legally distinct entities, they often occur together. Consider the following case: In People v. Fields,[461] the defendant picked up the victim on a ruse, drove her to a spot, raped her, picked up her clothes and got into the truck, saw her purse lying on the ground, carried it to the front of the truck, examined the contents and took the money. Convictions for kidnapping, rape and robbery were upheld on the ground that the course of conduct was divisible[462] and that for robbery sufficient force and fear was employed.

Aside from the question of divisibility of conduct, the case illustrates a significant departure from a principle of criminal law: that the felonious intent and act must coincide,[463] assuming no fear on part of victim after being raped. The initial force used to rape her was not for the purpose of robbing her. Speaking of this type of situation, one writer has stated that "it would seem that in the case of theft from an incapacitated victim a lack of felonious intent at the time of force or violence would preclude a finding other than larceny. The few cases that have considered this question, however, have indicated that if the force first applied is unlawful, a subsequent theft will be robbery."[464] This rule of "continuing force" is analagous to Coke's example of continuing fear, referred to earlier. In fact, older English cases recognized this principle and where the defendant was attempting to rape his victim and she offered him money to stop, which was accepted, a robbery was found.[465]

There have been other instances besides rape where the doctrine of "continuing force" has been applied. Robbery has been

found where, during a quarrel, the defendant rendered his victim helpless and subsequently took money,[466] where robbers assaulted a nightwatchman to obtain a safe combination and as an afterthought took a key,[467] where defendant, in self defense, incapacitated his victim and took money,[468] and where, after clubbing his landlord, the defendant took money believing he was unconscious when actually he was dead.[469]

Although this doctrine has been criticized as "constructive crime" and "very analagous to the tort principle of trespass ab initio,"[470] it seems that the rule is fairly well established. A possible reason for this partial relaxation of criminal responsibility is the difficulty in determining exactly what is going on in the offender's mind at the time the assault is being committed. The following facts from In Re Ward[471] are illustrative:

> [The defendant] accosted Joseph Coughlin and Sally Gilbert in a park saying, "this is a holdup," and forced the pair, at the point of a gun, to walk some distance in the park. He then said that he did not want their money, that someone had just killed his buddy, and that he was going to kill every white sailor he saw. Mr. Coughlin was a white sailor. Petitioner nevertheless later robbed Miss Gilbert of her purse and $20. Afterward, he forced the couple to walk a further distance, and then bound Mr. Coughlin and raped Miss Gilbert.[472]

A reading of the Ward case gives further support to the notion that Ward was thoroughly deranged and that it is unclear what his principal object of attack was. At times he seemed intent on robbing, at other times intent on killing a "white sailor", and at times rape--though prior to the sexual assault, according to his victim, "he made a remark, he says 'lady I am not going to

hurt you...you don't have to be afraid...it is the sailor that I'm going to go after.'"[473] One can envisage a similar difficulty in proving intent where, during a fight, a person says to himself "I'm going to take all that S.O.B. has after I knock him out," and, upon accomplishing his purpose, he takes his victim's wallet. For this reason, courts state that the specific intent to steal can be inferred from the circumstances.[474]

Robbery-rapes have been examined because they raise problems of divisibility of conduct and because they sometimes compel courts to depart from the general principle that the felonious act and intent must coincide. Although this departure is perhaps not desirable from a criminological point of view since it dilutes the required culpability for robbery, it probably is inevitable because it has a long history and because of the difficulty in determining the exact state of the offender's mind at the time of the assault. A temporal approach might limit further extension of this rule. That is, only to infer the felonious intent when the taking occurs shortly after the applied force and where the victim is really incapacitated, as in the fist fight cases, or where the victim is suffering from extreme mental shock and anxiety, as in the rape cases.

A more honest approach would be to separate the acts, charging rape and simple theft. The combination of penalties for both crimes should allow for adequate punishment of the offender. Robbery could be charged only when circumstances show that the initial assault was both for the purpose of rape and robbery. This approach would be desirable since it eliminates

problems of divisibility of conduct and it forces a return to the principle that the criminal act and intent must coincide.

B. <u>The Complexity of the Statutory Scheme and Its Consequences For Robbery</u>.

It is familiar doctrine that each state is free to punish, through its criminal laws, behavior considered harmful to the public welfare, peace, or decency and is bound only by public opinion and the Constitution in so doing. In the desire to prevent myriad forms of behavior not punishable at common law, to consolidate many offenses known at common law, to designate for punishment specific offenses known at common law, to list as an aggravating circumstance that some other felony was being committed in connection with the felony under which prosecution is occurring, and for many other reasons, the legislatures have created statutory schemes quite different and, in their own ways, as complex as many common-law schemes. In some respects the statutory schemes work quite well and remove many overly technical and meaningless distinctions from the law as, for example, in statutes consolidating the common law theft offenses. In other respects, the drafters of the statutory schemes have not been as successful. Each such law justifiably passed to correct an existing evil, when considered in relation to another pre-existing statutory provision, may become a Frankenstein, haunting the courts and law enforcement officials.

As an example of the complexity of the statutory scheme, the following list was compiled to show the possible statutory violations of the California Penal Code for various types of robbery and

related offenses. The offenses and possible combinations thereof are ranked according to the severity of the minimum sentence.

[Insert Table 1 and Figure 2]

Table 1

The California Sentencing Scheme

Robbery and Related Offenses

Offense	Penal Code Section	Penalty
1. Kidnapping with Bodily Harm	209	Life without parole or death
2. Robbery-Murder (use of firearm in commission of robbery, assault with deadly weapon, murder, rape, burglary, or kidnapping)	187-189	Life plus five years or death
3. Robbery-Murder	187-189	Life or death
4. Kidnapping without Bodily Harm	209 and 12022.5	Life plus five years
5. Kidnapping without Bodily Harm	209	Life
6. Robbery with Great Bodily Harm	213 and 12022.5	Fifteen years to life plus five years
7. Robbery with Great Bodily Harm	213	Fifteen years to life
8. Armed Robbery	211 and 12022.5	Five years to life plus five years
9. Robbery by Torture	211 12022.5	Five years to life plus five years
10. Robbery of Operator of Public Conveyance	211 and 12022.5	Five years to life plus five years
11. Burglary, First Degree	459 12022.5	Five years to life plus five years
12. Robbery, Second Degree	211 and 12022.5	One year to life plus five years
13. Train Robbery	214 and 12022.5	One year to life plus five years
14. Kidnapping	207 and 12022.5	One to twenty-five years plus five years
15. Assault with Intent to Rob	220 12022	One to twenty years plus five years
16. Assault with Intent to Commit Grand Theft	220 and 12022	One to twenty years plus five years
17. Attempted Kidnapping without Bodily Harm	209 and 663-664; 12022.5	One to twenty years plus five years

Table 1 (Continued)

Offense	Penal Code Section	Penalty
18. Attempted Robbery with Great Bodily Harm	213 and 663-664; 12022.5	One year to twenty years plus five years
19. Attempted Armed Robbery	211 and 663-664; 12022.5	One to twenty years plus five years
20. Attempted Robbery by Torture	211 and 12022.5	One to twenty years plus five years
21. Attempted Robbery of Operator of Public Conveyance	211 and 663-664; 12022.5	One to twenty years plus five years
22. Attempted First Degree Burglary	459 and 663-664; 12022.5	One to twenty years plus five years
23. Attempted Second Degree Robbery	211 and 12022.5	One to twenty years plus five years
24. Attempted Train Robbery	214 and 663-664; 12022.5	One to twenty years plus five years
25. Second Degree Burglary	459 and 12022.5	One to fifteen years plus five years
26. Assault with Intent to Murder	217 and 12022	One to fourteen years plus five years
27. Attempted Kidnapping	207 and 663-664; 12022.5	One to twelve and one-half years plus five years
28. Assault with a Deadly Weapon	245 and 12022.5	One to ten years plus five years
29. Attempted Second Degree Burglary	459 and 663-664; 12022.5	One to seven and one-half years plus five years
30. Kidnapping	207	One to twenty-five years
31. First Degree Robbery	211	Five years to life
32. First Degree Burglary	459	Five years to life
33. Second Degree Robbery	211	One year to life
34. Train Robbery	214	One year to life
35. Assault with Intent to Rob	220	One to twenty years
36. Assault with Intent to Commit Grand Theft	220	One to twenty years
37. Attempted Kidnapping with Bodily Harm	209 and 663-664	One to twenty years

Table 1 (Continued)

Offense	Penal Code Section	Penalty
38. Attempted Robbery with Bodily Harm	213 and 663-664	One to twenty years
39. Attempted First Degree Robbery	211 and 663-664	One to twenty years
40. Attempted First Degree Burglary	459 and 663-664	One to twenty years
41. Attempted Second Degree Robbery	211 and 663-664	One to twenty years
42. Attempted Train Robbery	214 and 663-664	One to twenty years
43. Second Degree Burglary	459	One to fifteen years or County Jail
44. Assault with Intent to Murder	217	One to fourteen years
45. Assault with Chemicals	244	One to fourteen years
46. Attempted Kidnapping	207 and 663-664	One to twelve and one-half years
47. Extortion	518	One to ten years
48. Grand Theft	487	One to ten years or County Jail
49. Receiving Stolen Property	496	One to ten years or County Jail
50. Attempted Second Degree Burglary	459 and 663-664	One to seven and one-half years
51. Blackjacks, etc.; Concealed, etc.	12020	One to five years or County Jail
52. Attempted Extortion	518 and 663-664	One to five years
53. Attempted Grand Theft	487 and 663-664	One to five years
54. Attempted Receiving of Stolen Property	496 and 663-664	One to five years
55. Possession of Concealable Firearm by Former Felon or Addict	12021	One to five years or County Jail
56. Carrying Concealed Weapon, Felon	12025	One to five years
57. Solicitation	653f	One to five years or County Jail
58. Battery	242	$1,000 and/or County Jail not more than six months

Table 1 (Continued)

Offense	Penal Code Section	Penalty
59. Petty Theft	484	$500 and/or County Jail not more than six months
60. Assault	240	$500 and/or County Jail not more than six months
61. Wearing Mask	185	County Jail not more than one year
62. Attempted Petty Theft	484 and	$250 and/or County Jail not more than three months

Effect of Prior Convictions:

Habitual Criminal. 644
If convicted of robbery, first degree burglary, burglary with explosives, rape, etc. and have previously suffered such convictions two or more times, sentence is life.

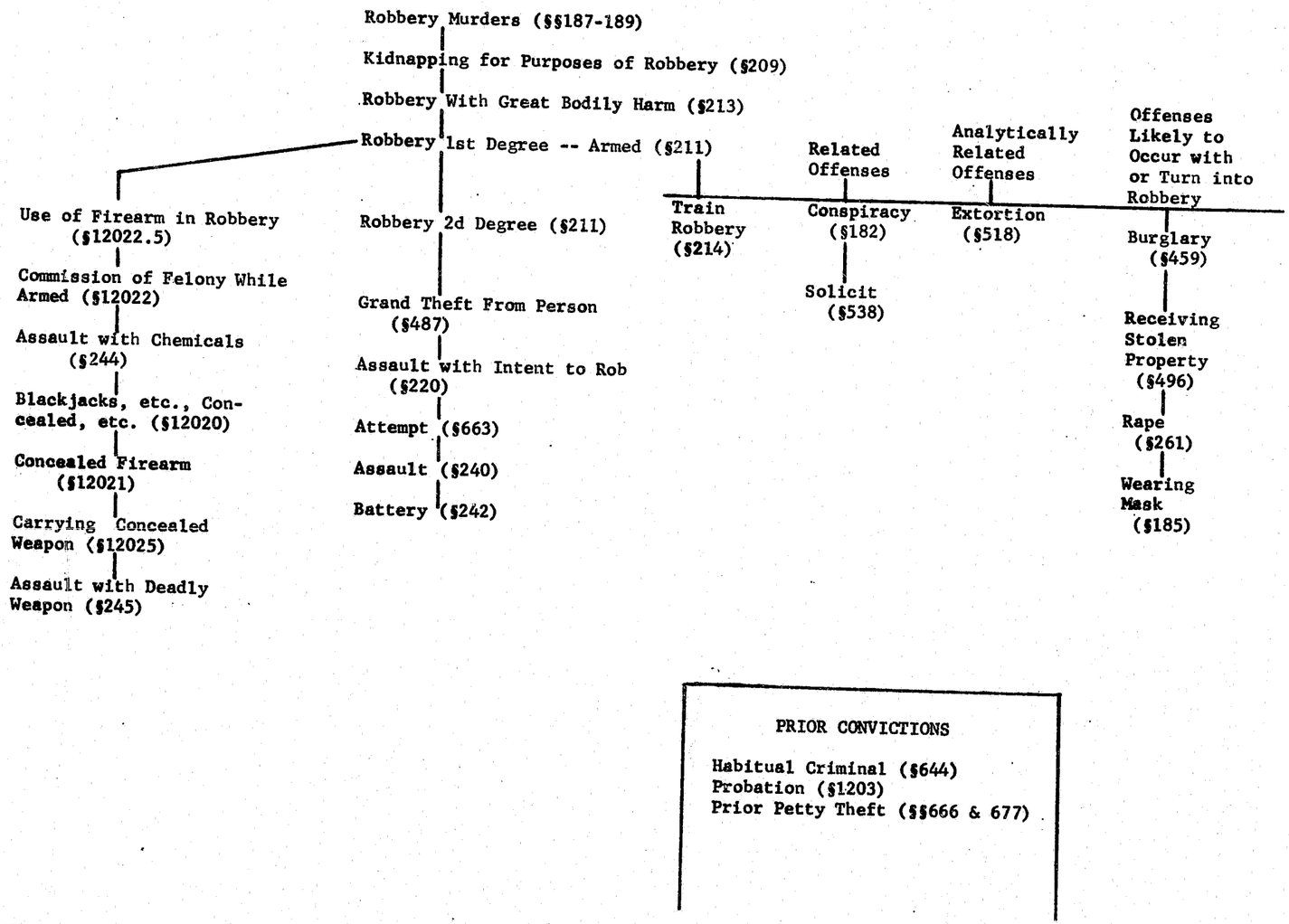
Probation. 1203
If convicted of robbery, first-degree burglary, rape, etc. and was armed or inflicted great bodily injury and has had a prior conviction anywhere, probation shall be denied.

Prior Petty Theft Conviction. 666-667
Increases the punishment for petty theft when the present charge is petty theft and the accused has previously had a felony conviction or when the accused has previously had a felony conviction or when the accused has had a prior petty theft conviction and the charge is a felony or petty theft.

* The list is subject to Cal. Pen. Code 654, discussed infra.

Fig[illegible] 2

Robbery, Lesser Included and Related Offenses in California



The Model Penal Code lists among the purposes for definition of offenses and sentencing of offenders the following:

> (1) The general purposes of the provisions governing the definition of offenses are:
> (d) To give fair warning of the nature of the conduct declared to constitute an offense;
> (e) To differentiate on reasonable grounds between serious and minor offenses.
> (2) The general purposes of the provisions governing the sentencing and treatment of offenders are:
> (c) To safeguard offenders against excessive, disproportionate or arbitrary punishment;
> (d) To give fair warning of the nature of the sentences that may be imposed on conviction of an offense...[475]

Does the list show that the California Penal Code fulfills these purposes? At first glance it shows 25 different sentencing categories if the five year additional penalty for the use of a firearm in connection with certain crimes is counted. If the five year additional sentence is left out, there are still fourteen basic sentencing categories.

The use of numerous sentencing categories with the implication that the legislature can accurately discriminate among the danger of numerous offenses has been severely criticized by modern commentators. Professor Wechsler has commented on the arbitrary nature of such schemes:

> No branch of penal legislation is, in my view, more unprincipled or more anarchical than that which deals with prison terms that may or sometimes must be imposed on conviction of specific crimes... The legislature typically makes determinations of this order not in any systematic basis but rather by according its ad hoc attention to some discrete area of criminality in which there is a current hue and cry. Distinctions are thus drawn which do not have the slightest bearing on the relative harmfulness of conduct and the consequent importance of preventing it so far as possible...[476]

In a similar vein, the commentators to the Model Penal Code state:

> The classification of felonies for purposes of sentence into three categories of relative seriousness should exhaust the possibilities of reasonable, legislative discrimination. The number and variety of the distinctions of this order found in most existing systems is one of the main causes of the anarchy in sentencing that is so widely deplored. Any effort to rationalize the situation must result in the reduction of distinctions to a relatively few important categories.[477]

Accordingly, the Model Penal Code proposed the division of felonies into three sentencing categories, each with a maximum and each with a discretionary minimum within a stated range. In no case does the minimum sentence bring less than a year imprisonment.

Also, speaking of federal penal legislation, Professor Louis B. Schwartz, Director of the National Commission on Reform of Federal Criminal Laws, stated:

> There is not even a pretense of a basis for so complicated a classification...It does not make sense for a legislature to try to make more refined categories. It can indicate in a general way levels of gravity of offenses. But gravity of offense is only one element entering into the actual imposition of sentence by a judge in a particular case, where the individual offender's character and circumstances assume critical importance.[478]

Thus, the study draft of a new federal criminal code proposes that felonies be divided into three types: Class A, B, and C, authorizing maximum terms of thirty, fifteen and seven years respectively. Minimum terms are set by the court or by the parole board at the request of the court.[479]

The widespread use of the indeterminate sentence would seem to extinguish the need for the numerous sentencing categories.

The indeterminate sentence came into use and acceptance for many reasons, among them the promotion of rehabilitation by balancing the legislative function of punishing crimes with the parole board function of individualized treatment. Also important in the origin of the indeterminate sentence was the recognition that one cannot determine in advance the seriousness of a given act in terms of its effect on the victim, the harm to society and the culpability of the offender. Irrespective of the reasons behind the indeterminate sentence and the arguments against its continued existence, one thing is clear. With the general use of an indeterminate sentence and with the wide range of discretion given to parole boards and other administrative agencies, the many technical distinctions in sentencing are unnecessary and often lead to unjust results.

Inherent in the numerous, arbitrary sentencing categories are some patent inconsistencies. Some offenses bring greater penalties than clearly more serious or equally serious crimes. Kidnapping with no bodily harm brings a life sentence but attempted kidnapping with bodily harm carries a one to twenty year sentence; robbery with great bodily harm brings a fifteen year to life sentence whereas attempted robbery with great bodily harm brings a one to twenty year sentence, the great disparity being dependent only on whether property is obtained; assault with intent to rob with a firearm is punishable by a six to twenty year sentence but assault with intent to murder with a firearm is punishable by imprisonment from six to fourteen years; attempted kidnapping without bodily harm but with a firearm subjects the

offender to a six to twenty year sentence whereas attempted kidnapping with bodily harm brings a one to twenty year sentence; assault with a deadly weapon (firearm) subjects the offender to a six to ten year sentence but assault with intent to murder brings a one to fourteen year sentence. Kidnapping is punishable by a one to twenty-five year sentence whereas attempted kidnapping with bodily harm brings a one to twenty year sentence; assault with intent to commit grand theft brings a one to twenty year sentence whereas grand theft brings a one to ten year sentence. Second degree burglary is punishable by a one to fourteen year sentence.

In addition to the numerous sentencing categories and the patent inconsistencies of sentences for various offenses, are the large number of offenses and possible combinations thereof. In respect to robbery the charts show that there are over nine hundred possible combinations of offenses which can be applied to facts which are present in many common robberies.

The consequences of this over-technicality and irrationality are numerous and far reaching. The most obvious and most serious is that some offenders receive punishments either greatly in excess of the gravity of the crime committed or that they receive greater punishment than offenders who have committed more serious crimes. The fact that there are numerous offense categories and possible combinations thereof encourage the current system of "bargain justice" and "plea copping." While the relative benefit of this system is not at issue, such a structure does allow it to flourish. The wide range of offenses with which it is possible to charge offenders inevitably gives charging agencies and parole

boards a wide range of discretion for dealing with offenders. Such discretion may be desirable and necessary but it should be exercised within a rational system. Jerome Hall has observed that "the task for legal reform lies not in the direction of eliminating either law or discretion, but rather in the direction of securing a wiser use of discretion under sound legal controls."[480] It is evident from the discussion thus far that the scheme is not rational and does not provide guidelines or controls for the exercise of discretion in the charging process.

The statutory over-technicality and irrationality is at its worst when applied to robbery. Robbery, consisting of elements of assault and larceny, contains a plethora of offenses with which an offender can be charged. Necessarily included in robbery are assault with intent to rob, attempted robbery, grand theft from the person and simple assault. Also, there is differentiation within the robbery category. In California robberies by certain methods or producing certain results or in certain places or of specified persons are singled out for harsher treatment. The methods singled out are the use of a weapon or torture. The result punished more harshly is the infliction of great bodily harm. Train robbery or robbery of an operator of a public conveyance are treated in California as aggravated robberies.

Not only does robbery contain numerous lesser included offenses and certain types of robberies treated more harshly, legislatures have also created many statutes relating to robbery or separately punishing behavior which in practice occurs with many robberies. Thus differentiation occurs without the robbery category as well as within. Examples of statutes relating to

robbery are the aggravated kidnapping statute, the felony-murder rule and assault with intent to rob. Examples of statutes separately punishing behavior which in practice occurs with many robberies are: assault with a deadly weapon, use of a firearm in the commission or attempted commission of robbery, assault with chemicals, concealed weapons, and possession of concealable firearms by a former felon or addict. Cutting across all these lines are statutory provisions increasing penalties for offenders who have had prior convictions.

Robbery-like behavior can be subject to numerous and inconsistent penalties. Robbery-like behavior involving numerous offenses is subject to a wide range of discretion by the charging agencies. Moreover, the numerous related offenses and included offenses tend to make the robbery category depart from the stated goal of reducing criminal distinctions "to a relatively few important categories."[481]

It is evident that contrary to the goals of the Model Penal Code, the California statutory structure is arbitrary, irrational and overtechnical. There is no rational system in which to exercise discretion. Robbery, being a combination of many offenses, related to others by reference, differentiated within and occurring with other crimes, reflects more than any other category this irrationality. A reformulation of the robbery category should have as its goal the reduction of such overtechnicality and irrationality as well as the elimination of the current definitional problems inherent in the current robbery category.

C. Alternative Formulations of the Robbery Category

Before setting out in detail that reformulation of robbery deemed most desirable by this writer, other suggested approaches will be briefly discussed.

The first and least radical method would be to keep the common law definition of robbery and to formulate rational aggravating factors. Too often aggravating factors are set out for punishment in response to a particular crime or wave of crimes which have inflamed public opinion. As a result, many such factors are merely technical, mechanical or fortuitous. In adopting aggravating factors it should be asked whether they are really designed to meet current robbery behavior considered more dangerous than other robbery behavior.

A second possible solution would be to classify robbery into groupings. For example, commercial robberies, strongarm or armed robbery of individuals and pursesnatching without other violence could be made separate categories, each with its own punishment. Within each could be included aggravating factors which make that type of robbery more socially injurious. For example, the amount taken in a commercial robbery could very well have a smaller impact, because of insurance, than the same amount taken in a personal robbery. Evidence of plans and premeditation might be of greater importance in a commercial robbery than in a personal robbery. Similarly, the use of an automobile or masks or accomplices may make some robberies more dangerous than others. This approach, then, would tailor aggravating factors to specific types of robberies.

This type of formulation would answer the appeal made by many sociologists and criminologists for legal categories with "etiological" significance. Such categories, broken down by type of offender and offense, it is claimed, aid in studying the criminal act and the criminal. Also, such categories are said to be more precise standards for determining illegality. A related benefit of this approach would be in the area of crime analysis. The classification of robbery into groupings would aid crime analysis by providing a total of each specific type of robbery. The drawbacks to this approach are that it fails to reduce definitional problems and it introduces more technicality rather than less.

The next two possibilities raise the question of whether there is a need for a robbery category. As has been seen, robbery includes many common law and statutory offenses. There are many other offenses that are often committed during a robbery. Thus, in a robbery with violence, battery, assault with intent to kill, assault with intent to do great bodily harm, assault with a deadly weapon or mayhem could be charged. In a robbery without violence, grand theft from the person, petty theft or extortion could be charged. The question of whether there is a need for a robbery category becomes even more pertinent in light of the wide use of the indeterminate sentence, the emphasis on individualization of treatment for the offender and the wide latitude of discretion vested in parole boards.

The first possibility would be to include robbery without violence in the theft or larceny category, calling it aggravated theft. This solution is feasible if the basic purpose of robbery

statutes is found to be the protection of property. Following historical developments only, this would seem to be the original reason for the development of robbery laws. Ancient law focused on restitution or compensation to the sovereign and the aggrieved. In addition, robbery has always been thought to be a "species" of theft. An example of this type of formulation can be seen in the French Penal Code which does not have a robbery category but which punishes larceny more harshly when committed with violence.

A second possibility is to accumulate offenses. For example, a street mugger could be charged with assault, battery and grand theft from the person. This approach is made possible because of the varieties of offenses which are included in robbery and because of the many other offenses which are often committed during the course of a robbery.

The commentators to the Model Penal Code rejected the proposal to cumulate offenses and recognized the importance of a robbery category:

> Robbery appears, then, to consist of a combination of theft and actual or threatened injury, each element constituting, at least in our day and under this Code, a separate crime. It might be thought sufficient, therefore, to prosecute for these crimes, cumulating punishment where appropriate. Closer analysis reveals that the premise is not accurate, and that the conclusion does not follow...[E]ven if all threats were subject to minor penalties... the combination of penalties for a petty theft and a petty theft of minor violence by no means corresponds to the undesirability and danger of the offense.[482]

The robbery category is necessary to set out for punishment personal confrontations for the purpose of obtaining property. The

danger of robbery is not that a theft is more likely to be committed because force or the threat of force is used but that a risk of serious personal harm to the victim is created. Coke stated that robbery was a "hainous crime, for...it concerneth not only the goods, but the person of the owner."[483] In a similar vein, the Uniform Crime Reports states of robbery that "while the object of attack is money and personal objects, many victims of muggers and strongarm robbers suffer serious personal injury as a result of attack." Robbery, unlike most other dangerous assaults, is most often committed by an offender who is a stranger. Such attacks by strangers cannot be guarded against and are particularly frightening to the victim.

The proposed reformulations of robbery in this section fail to emphasize the reason for the robbery category. Neither do they solve definitional problems associated with the robbery category nor do they aid in eliminating the technicality and arbitrariness of the current statutory structure. In the following section an attempt will be made to propose a reformulation of robbery which accomplishes all three goals.

Chapter Four

CONCLUSION
A PROPOSAL OF A NEW CONCEPT FOR ROBBERY

One of the basic reasons for broadening the robbery category is to give explicit recognition to the function the robbery concept serves as a protection of the person. Accordingly it is proposed that the emphasis of robbery be changed from a combination of assault and larceny to a category primarily of protection of the person from acquisitive assaults and secondarily of theft. Thus, instead of robbery being called "aggravated larceny" it would be more appropriate to call it "aggravated assault."

The trend of judicial decisions thus far has been to stretch the common law elements as far as possible to protect the person. However, such decisions have been limited by the common law requirements of robbery. The common law viewed pursesnatching as insufficient force for robbery and courts, in the main, have felt compelled to abide by the rule. Also, because constrained by larceny requirements, attempts to rob are not sufficient to constitute robbery. However, in the areas of presumed fear, asportations, sufficiency of threats and constructive force, courts have developed doctrines which emphasize the nature of robbery as a crime against the person.

The desire to protect the person through robbery statutes despite their larceny requirements, has produced theoretical inconsistencies in the application of the law. For example, while

the law allows for presumed fear, it does not include drunk rolls without violence in robbery. While it is legally sufficient that "something of value" has been taken, whether or not it was the object of the attack, attempts, regardless of how violent, are still insufficient to constitute robbery. Thus we see courts stretching the concept of value to punish as a robber an offender who tore the victim's pocket while searching for a wallet and who carried the material a small distance.[484]

Inconsistent results are reached because of a clash between the traditional robbery requirements and the recognition by judges that robbery poses special danger to the person. This judicial realization forces a departure from doctrinal considerations. Instead, other factors are looked to such as the social need for the control and punishment of robbery, the dangerousness of the robber's conduct and the harm done to the victim. As a result, concepts are stretched to fit a social need. Judges, then, realizing the personal danger of robbery tend, where possible, to de-emphasize the property aspects of robbery.

Jerome Hall in Theft, Law and Society noted a similar judicial development in the law of theft. In his introduction, he stated the way legal rules evolve:

> Among the theories which were rather definitely expressed are the following:
> (a) The functioning of courts is significantly related to concommitant cultural needs, and this applies to the law of procedure as well as to substantive law.
> (b) The chronological order of the principal phases of legal change is (1) a lag between the substantive law and social needs; (2) spontaneous efforts ("Practices") of judges, other officials, and laymen to

make successful adaptations; and (3) legislation.
(c) Technicality and legal fiction function both as formal links between the old law and the emerging law and also as indexes to solutions of legal problems.[485]

Professor Hall then convincingly demonstrated these theories by tracing the development, judicial and otherwise, of the concept of possession and property in larceny, as well as the development of the crimes of embezzlement, larceny by trick, false pretenses and receiving stolen property. He also demonstrated that in the areas of receiving stolen property, automobile theft, embezzlement and petty theft then current law was inadequate to rationally cope with social realities.

The same observation is true of robbery. Social needs and realities are at odds with the traditional definition and rationale of robbery. The courts, influenced by such considerations have, by interpretation and technicality, made socially injurious behavior "fit" into the robbery category. Legislatures also have recognized the need to protect persons from acquisitive assaults which for some reason do not amount to robbery and have created categories such as assault with intent to rob for that purpose.

To give explicit recognition to robbery as a category in which the primary function and distinguishing feature is the protection of the person from acquisitive assaults, it is necessary to broaden the current definition and remove it further from the theft category.

Robbery should include all assaults on another person made with the purpose of obtaining property. In order to bring all

such assaults into the robbery category, a new intent requirement could be formulated: an intent to assault another, by force, threats of physical harm, or snatching for the purpose of wrongfully obtaining or retaining another's property. The actus reus would be the act of so assaulting, whether by force, threats of physical harm or snatching, whether or not property is obtained.

The new category would solve most of the definitional questions traditionally associated with the open-secret theft distinction. It would also place rules stretched by judicial interpretation and technicality clearly within the robbery category. Thus, the new category would include pursesnatches without other violence, drunk rolls where fear is employed, attempts and resisting shoplifters and burglars where violence occurs subsequent to the taking. The new definition would remove robbery from the theft category and put it more clearly in the realm of aggravated assaults. The widening of the definition of robbery would be desirable from the aspect of punishing all personal confrontations by which the offender hopes to wrongfully obtain or retain another's property.

The English, in their Theft Act of 1968, adopted this redefinition of robbery. The Act widened the concept of presence, referred to a widened definition of theft (dishonest appropriation), increased the type of property capable of being stolen, replaced taking and asportation as requirements by appropriation and switched the time of the requirement of a specific intent from the moment of taking to the time of appropriation.

A principal drawback to widening the robbery category is that robbery is considered a very serious crime and that impor-

tant consequences attach to the label "robbery." The effect of labeling a person a robber is suggested by penal statistics. It has been seen that robbery is one of the most severely punished of all crimes.[486]

Because a wider robbery category would label as robbery even more varieties of conduct than the current category, and thus would label as "robbers" offenders who previously would not have been labeled as such, it is suggested that the name of the crime be changed. A possible name is "assault with intent to steal." The name would be descriptive of the broader category and would be placed in the class of crimes against the person.

Thus, the broader robbery category would embrace conduct ranging in seriousness from grave to petty. Modern technology and social conditions have changed the types of prevailing robberies and should change the concern of the law.

A broader robbery category makes it even more important to distinguish among the many varieties of assaultive theft and punish more harshly those robberies deemed the most serious to the victim and society. Thus aggravating factors are necessary. However, care must be taken to choose those factors which really should be punished more severely. Different types of robberies carry different incidents and different risks. For example, the listing of the value of property taken may well be an aggravating circumstance in a personal robbery but because of the mitigating effects of insurance is less serious in a commercial robbery. Similarly, the use of accomplices in a bank robbery could rationally be punished as an aggravating circumstance. But when applied

to a street robbery it would be punishing more harshly what is a sociological fact: the group nature of juvenile delinquency.

Keeping in mind that the new formulation is designed to protect the person, the most rational aggravating factor, applying with equal force to all robberies, is that of the infliction of serious bodily injury. The Model Penal Code has adopted the infliction of serious bodily injury as an aggravating factor: "Robbery is a felony of the second degree, except that it is a felony of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury."[487] This approach is sound and rational and the infliction of serious bodily injury should be an aggravating circumstance for all robberies.

As has been noted, armed robbery historically and at present has been and is a widely used aggravating factor. The problem with this factor has been a failure to distinguish between types of arms and a failure to distinguish the manner of use of the weapon. It has been appropriately observed that "while for robbery the presence or absence of a weapon sets the degree, whether the weapon is a machine gun or pocket knife is immaterial."[488] That this observation is pertinent can be seen in a California case which held that kicking with a shoe was a dangerous weapon within the meaning of the first degree robbery statute if the offender intended his shoe to be a weapon. Furthermore, few courts and legislatures have distinguished between the use of weapons, the carrying of weapons or the displaying of weapons. Thus, a robber simulating a weapon by placing his hand in his coat

pocket is punished as harshly as a robber displaying a machine gun. An excellent solution to this problem can be found in Study Draft of the National Commission on Reform of the Criminal Laws. The robbery section of the draft grades the offense into three categories. The most serious robbery, a Class A felony, is one in which "the actor fires a firearm or explodes or hurls a destructive device or directs the force of any other dangerous weapon against another." Robbery is a Class B felony when the offender "possesses or pretends to possess a firearm, destructive device or other dangerous weapon."[489] Thus the draft distinguishes between actual use of a weapon and the carrying or displaying of a weapon.

Armed robbery as an aggravating circumstance, to be rational must limit types of instruments which constitute a weapon. Instruments which are not manufactured as weapons should not be included. The use of such instruments, such as clubs or icepicks, would be punished more harshly if the offender used one to produce serious bodily injury. Secondly, armed robbery as an aggravating circumstance should distinguish between the use of a weapon and displaying or carrying of a weapon, punishing the former more harshly.

Apart from the infliction of serious bodily injury and the use of arms as aggravating circumstances, there should be no other aggravating factors. No statute can precisely fit all the cases or anticipate all the behavior that such a statute is designed to prevent. To try to do so by listing many aggravating factors would be to introduce overtechnicality into a classi-

fication created to remove technicality and arbitrariness. The two suggested aggravating factors set apart the more serious elements in all types of robberies. Even within the suggested aggravating categories there is a range of behavior. Two cases derived from police reports are illustrative. In the first, the offender told a store employee that if the safe did not contain $5,000 that he would shoot him. The employee opened the safe which did not contain the demanded amount and told the offender that he had no control over the amount in the safe or any means to acquire more. Despite this, the offender shot the employee through the temple, injuring him seriously. In the second case, a young offender ran up to a woman victim to snatch her purse. The woman, who was old and weak, held onto her purse and this resistance sent her crashing to the pavement, injuring her seriously. In both cases, serious bodily injury was inflicted and both would be treated as aggravated robberies. However, it would be widely recognized that the first type of behavior is far more serious.

The best approach to deal with these variations within the aggravating circumstances as well as variations among robberies is for the judge to consider them in setting the minimum and/or maximum sentences. Factors such as threatening with a dangerous instrument, the nature of the threat, the use of accomplices, the type of establishment robbed, the number of victims, evidence of plans or premeditation, and the motive for robbing could be set out for consideration. These discretionary guidelines would aid in correlating the sentence to the particular robbery with which the defendant is charged. It would also help to achieve a

proper balance between a legislative predetermination of the seriousness of a wide range of behavior and a judicial and administrative determination of the place within that range of seriousness a particular robbery falls. For example, the legislature could find that robbers should be imprisoned for at least a year but that the judge set the minimum sentence from one to three years. The judge by looking at the robbery guidelines would be able to determine the gravity of the particular robbery and sentence the defendant accordingly within the discretionary minimum sentence.

A current phenomena which needs to be analyzed in terms of sentencing and treatment for robbery is the proliferation of juvenile and young offenders committing this type of crime. Youthful offenders constitute most of the big city robbery offenders. Seventy percent of all arrests for robbery are of persons under twenty five and a good portion of those are persons fifteen to eighteen.[490] A prominent sociologist has written about this phenomena and the pitfalls of using a robbery category to punish and label as robbery, activity very different from the common and traditional conception of robbery.

> Very often the crude legal labels attached to many acts committed by juveniles give a false impression of the seriousness of their acts. For example, a "highway robbery" may be a $100-theft at the point of a gun and may result in the victim's being hospitalized from severe wounds. But commonly, juvenile acts that carry this label and are used for statistical compilation are more minor. Typical in the files of a recent study were cases involving two 9 year old boys, one of whom twisted the arm of the other on the school yard to obtain 25 cents of the latter's lunch money. This act was recorded and counted as "highway robbery". [491]

The Model Penal Code, recognizing this phenomena, sets aside the "youthful offender" for special treatment and sentencing.[492]

Although there is currently a wide range of behavior constituting robbery and it is unfeasible to set out in advance the punishment for all the varieties of robbery, there is indeed a fairly discernible line between "youthful type" robberies and others. Most of the street robberies are by youths. Most of the youthful robberies are characterized by accomplices thus corresponding to the "group" or "gang" nature of delinquency as documented by sociologists. Clearly discernible from this is the "loner" who is older, more experienced and more associated with crime. When an older offender has accomplices, they are usually fewer in number. Older offenders more often rob commercial establishments except that juvenile offenders "hit" some favorite targets such as gasoline stations.

Whether the substantive law of robbery should recognize this line between youthful robbery conduct and more traditional robbery conduct is a perplexing question. To lump youthful robbery behavior into a separate category would provide a wealth of statistical information on a major source of concern--the youthful offender. It would respond to the appeal by sociologists for categories of social, or etiological, significance. Such a category would include approximately half of all the robberies committed. A new such category would be a recognition that although legally the harm done to the victim is the same as in more traditional robberies, because of sociological facts youth robberies are less culpable and deserve the special attention of

the substantive law of robbery as well as of the procedural criminal law. Furthermore, such a category would leave to be punished as robbery behavior more traditionally associated with the crime. The loner, fearless and brash, demanding money from a stranger at the point of a gun or knife or the two highly skilled professionals robbing the proprietor of a commercial establishment would be clearly differentiated from the member of a group of petty muggers or pursesnatchers.

The problems with setting up such a category are three. First, there is respectable authority which denies that a penal classification should be based on sociological considerations and that such considerations, if relevant, should be taken into account only in treatment and sentencing.[493] Secondly, there are definitional problems. There is some doubt whether a classification which is based on sociological considerations can be made definite enough to form an area of illegality. For example, penal classifications have traditionally been based on defining illegal conduct. Setting apart not only conduct but social status as well would involve serious problems of description as well as of constitutionality. Additionally, enforcement problems by the police would be severe. The police would be asked not only to enforce a statute based on very sophisticated and complicated criteria but would be asked to enforce it against a group, the make-up of which is currently protesting against police harassment. A second definitional problem would be bound to occur if such a classification were made. Despite the seemingly clear line between "youthful" and other robberies, there are many robberies

which would probably fall into a middle ground, thus defeating the reason for making the distinction. Third, even if "youthful" robberies were set apart for special treatment and called by a different name, the proscribed conduct being definitionally robbery would still be viewed as very serious.

Thus despite the seeming appeal at first glance of setting aside "youthful" robbers for special substantive treatment, the approach must be rejected because of the very serious enforcement and definitional problems. Instead, the distinctions based on the youthful offender must come at the sentencing and treatment levels.

Thus far, a widened robbery category with primary emphasis of protecing the person has been proposed, the mechanics of setting up such a category has been discussed, aggravating factors have been chosen, discretionary guidelines for sentencing relating specifically to robbery have been suggested, and a proposal to set apart for special substantive treatment "youthful robberies" has been rejected. Remaining to be discussed are the consequences of a broader robbery category. Or, put more specifically, how does the wider robbery category meet the stated goals of solving definitional problems and reducing the technicality and arbitrariness in the current statutory structure?

The wider robbery category would go far toward removing many definitional problems historically associated with the open-secret theft distinction. It would include snatching without other violence in the robbery category as well as drunk rolls and other thefts from persons without violence but with means

which would arouse fear in an ordinary man. A wider robbery category would remove definitional problems associated with the inclusion of larceny in the robbery definition. In keeping with the change of emphasis of robbery toward a personal protection category, attempts would be included in robbery thus eliminating a requirement of finding a taking and carrying away of property. Also included under this rationale would be violence used to retain property wrongfully. This would include "borderland" areas of surprised and resisting shoplifters and burglars. It would be a further departure from the larceny requirement that the trespass occur at the time of the taking. Thus, the wider robbery category would remove many problem areas which have sometimes prompted legislative action but too often have been treated under traditional doctrine.

The wider category would also aid in eliminating much of the current technicality and arbitrariness in the statutory scheme. The inclusion of many open thefts and attempts would make it possible to eliminate such offenses as assault with intent to rob and attempted robbery. Including violence subsequent to the taking in the robbery category would elminate larceny as a lesser included offense and would eliminate problems of divisibility such as charging larceny for the taking and battery for the violence.

In broadening robbery, controversial statutory arrangements such as the felony-murder rule or the aggravated kidnapping rule must be re-examined and revised or abolished. This conclusion is drawn because of the relationship of the robbery category

to other statutory categories. For example, aggravated kidnapping statutes punish kidnapping for the purposes of robbery with severe penalties. A wider robbery category would also widen the liability under the aggravating kidnapping statute. The same holds true for the felony murder rule. Because these arrangements have been controversial under the existing robbery definition, a wider definition would compel re-examination if extremely arbitrary and inequitable results are to be avoided.

A possible consequence of eliminating such offenses would be to decrease the range of discretion in the charging process. For example, the elimination of attempted robbery, assault with intent to rob and larceny from the person as lesser included offenses would take away from the negotiation process some of the alternatives over which to bargain or "cop" a plea. Since fewer categories would be necessary, there would be less categories with which to negotiate. The present concept of robbery as both an assault and larceny category and the plethora of statutorily related offenses make possible multiple count indictments for robbery the parallel of which is not to be found in any other offense category. Studies have shown that guilty pleas increase when there is a wide range of offenses set out in a multiple count indictment.[494] The elimination of some statutory offenses with the broadening of the robbery from larceny, while it would reduce the number of offenses available for plea-bargaining, would not completely eliminate the discretion of the charging agencies. It could have the effect, though, of beginning to direct that discretion along rational lines.

The present law of robbery suffers from definitional problems based on its historical development as an assaultive-acquisitive crime; present statutory schemes are extremely technical and often irrational blends of the common law and ad hoc legislative reactions to particular criminal events. The proposal presented herein would reduce definitional problems and eliminate technicality and irrationality in the legal characterization of, and response to illegal assaultive-acquisitive behavior.

Footnotes

1. Code of Ala. 14:415 (1958).
2. Savitz, "Capital Crimes As Defined in American Law," 41 J. Crim. L. C. & P. S., 355 (1955); Ga. Code Ann. 26-2502 (armed or open force or violence); Ga. Code Ann. 26-1902 (armed robbery); Ky. Rev. Stats., 433.14a (armed robbery); Miss. Code Ann. 2367 (armed robbery).
3. R. Carter and L. Wilkins, "Some Factors in Sentencing Policy," 58 J. Crim. L. C. & P. S., 503 (1967).
4. Federal Bureau of Prisons, "State Prisoners: Admissions and Releases, 1964," National Prisoner Statistics 14, Chart 7 (1964).
5. State of California, California Prisoners 68 (1967).
6. Cal. Pen. Code, Sec. 211.
7. Jerome Hall, Studies in Jurisprudence and Criminal Theory 209 (1958).
8. Ralph Linton, "Universal Ethical Principles: An Anthropological View," in Moral Principles of Action 655 (R. N. Anshen ed. 1952) [hereinafter cited as Linton].
9. Id. at 656; When property is given societal protection by the punishment of thieves, various methods are used to insure such protection. The principle of occupation and use, taboo, magic, morality, custom, religion, as well as of force and punishment all have been found to play a role among early societies in the protection of property. See 2 Kocourek and Wigmore (Eds.), Primitive and Ancient Legal Institutions,

Chap. XXI, "The Law of Property," 361 (1915); see also H. Manheim, Comparative Criminology 65 (1965).

10. Linton, supra Note 8, at 655.

11. 2 B. Cohen, Jewish and Roman Law 497 (1966) [hereinafter cited as Cohen].

12. Ze'ev W. Falk, Hebrew Law in Biblical Times 85 (1964), citing Lev. v. 23, Ex. xxi 37, xxi 3, 6, 11, Sam. xxi 6, Prov. vi 31 [hereinafter cited as Falk].

13. 2 B. Cohen, supra Note 11, at 497; the word for robbed thing was "Ha-Gezelah" while the word for robbery was "Asher-Gazai".

14. Falk, supra Note 12, at 80 citing Ex. xxi 23-25; Lev. xxiv 18-20; Deut. xix 21; Ex. xxi 22, 30.

15. See generally, A. Berger, Encyclopedic Dictionary of Roman Law 667 [hereinafter cited as Berger]; see The Institutes of Gaius: Part II (ed. F. De Zulueta) 97-99 (1963). Theft in Roman law was called "furtum" and was a private wrong called generally "delictum".

16. Berger, supra Note 15, at 480-481. The distinction between manifest and non-manifest theft (furtum manifestum and furtum nec manifestum) was to have a long history. The early English made the same distinction.

17. Id. at 502 and 549. The basic name of the action for personal injuries was "Iniuri" which was a private action ("delictum") and was broken down into types of injuries: e.g., "OS Fractum" (broken bone), "Membrum raptum" (major injuries to the body); "Lex Cornelia De Iniurii" which consisted of various types of injuries including "Pulsare" (beating) and "Verberare" (striking).

18. The Turkish Criminal Codes 495-497, in The American Series of Foreign Penal Codes (1965) [hereinafter cited as American Series].

19. The Korean Criminal Code, arts. 333-339, American Series, supra note 18.

20. The German (Federal Republic) Penal Code, Secs. 242, 243, 249-250, American Series, supra note 18.

21. Soviet Criminal Law and Procedure, The RSFSR Codes, Chap. Two, arts. 89-91 and Chap. Five, arts. 144-146 (H. Berman ed. 1966).

22. The French Penal Code, arts. 379, 381, 383, American Series, supra note 18.

23. Theodore Plucknett, A Concise History of the Common Law 3 (5th ed. 1956) [hereinafter cited as Plucknett].

24. 1 Reeves, History of English Law cxv-cxix (1880).

25. Plucknett, supra note 23, at 7; 1 Stephen, A History of the Criminal Law of England 49 (1883) [hereinafter cited as H.C.L.E.]; Radcliffe & Cross, The English Legal System (4th ed., 1964) [hereinafter cited as Radcliff & Cross].

26. The history is taken from Plucknett, supra note 23 and Radcliffe & Cross, supra note 25.

27. 2 Pollock & Maitland, History of English Law 447-448 (1st ed., 1968) [hereinafter cited as 2 Pollock & Maitland].

28. Plucknett, supra note 23, at 425; C. R. Jeffery, "The Development of Crime in Early English Society," J. Crim. L. C. & P. S. 47:647 (1957) attempts to correlate the various ways of dealing with crime with societal development. The tribal system is associated with the family as the central unit. The

development of "compensation" to the victim of crime is associated with feudalism. And the development of punishment for crime is associated with State Law.

29. Tappan, "Pre-Classical Penology," Essays in Criminal Science, 33-35 (G. O. W. Mueller ed. 1961).

30. J. L. Laughlin, "The Anglo-Saxon Legal Procedure," Essays in Anglo-Saxon Law, 267 (1876) [hereinafter cited as Essays].

31. 2 Pollock & Maitland, supra note 27, at 451-452.

32. Essays, supra note 30, at 271.

33. 2 Pollock & Maitland, supra note 27, at 452.

34. Radcliffe & Cross, supra note 25, at 8.

35. 2 Pollock & Maitland, supra note 27, at 449.

36. 2 Pollock & Maitland, supra note 27, at 448.

37. Id. Stephen, A General View of the Criminal Law 10 [hereinafter cited as General View].

38. Essays, supra note 30, at 268-269.

39. Id. at 269.

40. Plucknett, supra note 23, at 425.

41. Essays, supra note 30, at 271 citing line 30.

42. Id. citing Wihtr 26.

43. Radcliffe & Cross, supra note 25, at 3.

44. Essays, supra note 30, at 270.

45. 2 Pollock & Maitland, supra note 27, at 446.

46. Essays, supra note 30, at 275.

47. 2 Pollock & Maitland, supra note 30, at 447.

48. Essays, supra note 30, at 276. Thus, to say that a crime was "batliss" is to say that it was subject to either official

punishment or private redress. As seen, however, the crown was even eliminating or setting "ground rules" for the right to take private action.

49. Essays, supra note 30, at 282; also 2 Pollock & Maitland, supra note 27, at 459.

50. 2 Pollock & Maitland, supra note 27, at 450.

51. H. C. L. E., supra note 25, at 58; see also 2 Pollock & Maitland, supra note 27, at 455-57.

52. 2 Pollock & Maitland, supra note 27, at 7.

53. A. Kocourket and J. H. Wigmore, 1 Sources of Ancient and Primitive Law, 500 (1915) [hereinafter cited as Ancient and Primitive Law].

54. The word plunder is often given as a synonym for robbery. The Oxford English Dictionary, v. VII (1933) at 1023 states that plunder is "to rob (a place or person) of goods or valuables by forcible means, or as an enemy." Webster's Third New International Dictionary (unabr.: 1966) at 1744 states that plunder is "to take the goods of another by force (as in war) or wrongfully." Webster's New World Dictionary (College Edition, 1964) at 1125 defines plunder as follows: "1. to rob or despoil (a person or a place) by force, especially in warfare; 2. to take property by force or fraud." Black's Law Dictionary (4th ed. West's) at 1314 defines plunder as follows: "To take property from persons or places by open force, and this may be in course of a lawful war, or by unlawful hostility, as in the case of pirates. The term is also used to express the idea of taking property from a per-

son or place, without just right, but not expressing the nature of quality of the wrong done."

Despite its correlation with robbery and its, at times, interchangeability of meaning, the word plunder seems to have an independent linguistic origin. The Oxford English Dict. Vol. VII at 1023: German, plundern; late Middle High German, Middle Low German, and Low German, plunderen (early modern Dutch & Dutch plunderen). Similarly Webster's 3d New Int. Dict. at 1744 gives its origins as: German, plündern, from Middle High German plündern, from plunder, blunder household goods, clothes, from Middle Low German plunder-; akin to Middle Dutch plunder, plonder household goods.

The definitions taken together show that plunder contains elements of robbery but is broader than robbery. Plunder can be robbery but it can also be the taking of property by force from a place, rather than from a person; it can be a taking by force by a gang; or, it can be a taking pursuant to a lawful activity such as a war.

In the case of the Lex Salica, the word plunder probably means robbery. First, the section deals with plundering a person, thus excluding from its meaning the taking of goods from a place. The activity is being made unlawful, thus excluding from its meaning the element of lawful activity. Third, the section punishes "any one" thus excluding from its meaning the applicability of gangs. Last, the title to the section is translated "robbery."

55. The Lex Salica, reprinted from Ernest F. Henderson's Select Historical Documents of the Middle Ages (1912) translated from Gengler, "Germanische Rechtsdenkmaler." 267 Ancient and Primitive Law, supra note 53, at 500.
56. King Ethelbirht's Dooms, from Benjamin Thorpe's "Ancient Laws and Institutes of England," (Vol. 1, Secular Laws) in Ancient and Primitive Law, supra note 53, at 512.
57. The word reaf is linguistically related to the Old High German word roubon which is the ancestor of the word robbery. Reaf was from the o-grade of a pre-Teutonic ablant series, reup-, roup-, rup-. The linguistic relationship is set out by the Oxford Eng. Dict. Vol. VIII (1933) at 217 as follows: Comm. Teutonic: Old English reafian-; Old French ravia, rava; Old Saxon, robon (Middle Low German roven, Middle Dutch roven, Dutch rooven); Old High German roubon (Middle High German rouben, German rauben); Old English reaf. The words have counterparts in Old Norse (raufa, to break up or open), Gothic (biraubon, to rob, strip), Latin (rompere, to break, burst), and Sanskrit (ropayate, break off).

That reaf is related to robbery and the Old High German roubon is shown by the following entry under robbery in Webster's 3d New Int. Dict.: Middle English robben, from Old French rober, of Germanic origin; akin to Old High German roubon, to rob. (More is given at reave). The Oxford Eng. Dict. states that rob is of Teutonic origin, the stem roub- being represented in English by reave.

Reave, an archaic but later form of reaf or reafian is defined as follows: "To commit spoilation or robbery; to

plunder, pillage 2. to despoil or rob (a person); to deprive (one) of something by force." Reif was that which was stolen by the robbery. Bereave is related to the old reaf as connoting a robbing or taking away (bereafian, to deprive).

58. The translator's note sets forth the relationship conceptually of weg-reaf to the later forsteal, robbery and highway robbery. Weg-reaf appears to have been an offense similar to the Longobardic "weg-worte"..., and perhaps the later "fore-steal" when it was attended with robbery. It might be termed a highway robbery, were it not that this offense has acquired a technical sense which can hardly have been required to make out a case of weg-reaf. Ancient and Primitive Law, supra note 53, at 512.

59. Id.

60. Essays, supra note 30, at 275-276, fn. 3.

61. General View, supra note 37, at 9.

62. Bracton used the manifest/non-manifest distinction; it is unclear if it was taken directly from Roman law or if the social conditions giving use to the distinction were so similar as to give it an independent origin in England. H.C.L.E., supra note 25, at 132. The text writers also speak of open theft, Plucknett, supra note 23, at 446. It appears that the meaning is similar. A manifest thief, then would be one captured in the act or "hand having" (those with stolen goods). Thus by definition the robber was a manifest or open thief, but the category was by no means limited to robbery.

63. F. M. Stenton, Anglo-Saxon England 491 (2d. ed. Oxford: 1965) [hereinafter cited as Stenton].

64. 2 Pollock & Maitland, supra note 27, at 451.

65. Meaning the behavior was dealt with by private vengeance (outlawing) or by local authorities (infangthief) or by punishment.

66. 2 Pollock & Maitland, supra note 27, at 459.

67. The word roberia is Latin for robbery. We know that the Anglo-Saxons had their own word, reaf or reafian, for robbery and that it appeared in Ethelbert's Code. Anglo-Saxon laws were primarily written in English (Plucknett, supra note 23, at 254; 2 Pollock & Maitland, supra note 27, at 82). However, due to the influence of Christianity, early contact with the learning of Irish monks and gradually increasing contact with the continent (Stenton, supra note 62, at 178-182; C. H. Haskins, The Rennaisance of the 12th Century) Latin began to be used by English scholars and the English charters and land-books appeared in Latin (2 Pollock & Maitland, supra note 27, at 82). However, reaf and its forms (raeuen, refen, reu, rewe, raaue and reaver) were used through the Sixteenth Century (Oxford Eng. Dict., Vol. VIII at 217). Thus, Stephen was probably correct that roberia was frequently used but forgot the English term which was also frequently used in law until the Twelfth Century.

68. H.C.L.E., supra note 25, at 56.

69. H.C.L.E., supra note 25, at 129; Plucknett, supra note 23, at 446; 2 Pollock & Maitland, supra note 27, at 495.

70. 2 Pollock & Maitland, supra note 27, at 492.

71. R. Perkins, Criminal Law 236 (1957) [hereinafter cited as Perkins].

72. 2 Holdsworth, A History of English Law 50-51 (1923) [hereinafter cited as Holdsworth].

73. Radcliffe & Cross, supra note 25, at 18.

74. 2 Pollock & Maitland, supra note 27, at 45.

75. General View, supra note 37, at 10, Radcliffe & Cross, supra note 25, at 19-20, 28.

76. General View, supra note 37, at 8.

77. 2 Pollock & Maitland, supra note 27, at 459.

78. H.C.L.E., supra note 25, at 458.

79. 2 Holdsworth, supra note 72, at 256.

80. 2 Pollock & Maitland, supra note 27, at 453.

81. Id. at 454: "[The Normans]...confirmed the old franchises of the churches, they suffered French counts and barons to stand in the shoes of English earls...and claim the jurisdictional rights which had belonged to their dispossessed antecessores. In charter after charter regalia were showered on all who could buy them. This practice however must be looked at from two sides: if on the one hand it deprives the king of rights, it implies on the other hand that such rights are his; that he does sell them proves that they are his to sell."

82. Plucknett, supra note 23, at 15.

83. 2 Pollock & Maitland, supra note 27, at 456.

84. Radcliffe & Cross, supra note 25, at 34.

85. The Treatise on the Laws & Customs of the Realm of England

Commonly called Glanvill. 3 (G. D. G. Hall Ed. 1965), "Crimen quod in legibus dicitur crimen lese maiestatis, ut de nece uel seditione persone domini regis uel regni uel exercitus; occultatio inuenti thesauri fraudulosa; placitum de pace domini regis infracta; homicidium; incendium; roberia; raptus; crimen falsi, et si qua sunt similia; que scilicet ultimo (puniuntur) supplicio aut membrorum truncatione." [emphasis added] [hereinafter cited as Glanvill].

86. Cardinal Documents in British History (R. L. Schuyler and C. C. Weston, Eds.), "The Assize of Clarendon, 1166" 22 (1961) [hereinafter cited as Cardinal Documents].

87. 2 Pollock & Maitland, supra note 27, at 457.

88. 1 Holdsworth, supra note 72, at 57: "Nullus vicecomes, constabularius, coronatores, vel alii ballivi nostri, teneant placita coronae mostrae."

89. Glanvill, supra note 85, at 171: "Si uero per huiusmodi legem super tali crimine fuerit quis conuictus, ex regie dispensationis beneficio tam uite quam membrorum suorum eius pendet iudicium sicuti in ceteris placitis de felonia."

90. Id. at 172: "[P]er omnia in curia legitime negante, tunc per duellum solet placitum terminari."

91. Id. at 4: "Excipitur crimen furti qoud ad uicecomites pertinet et in comitalibus placitatur et terminatur."

92. 2 Pollock & Maitland, supra note 27, at 493.

93. Id. at 494.

94. Id. at 493; Bracton, Legibus Angilae 509 (2 Twiss Ed.) [hereinafter cited as Bracton].

95. Section 1 of "The Assize of Clarendon, 1166." Cardinal Documents, supra note 86.

96. 2 Pollock & Maitland, supra note 27, at 493; Plucknett, supra note 23, at 15.

97. 4 Blackstone's Commentaries 238 [hereinafter cited as Blackstone].

98. Cardinal Documents, supra note 86, at 22.

99. Glanvill, supra note 85, at 175: "De Crimine roberie: Crimen quoque roberie sine specialibus intercurrentibus preteritur."

100. Bracton, supra note 94, f. 150b.

101. 2 Holdsworth, supra note 72, at 359; Id. at fin. 8: "Y.B. 33-35 Ed. 1. (R.S. 502 Mallore, J., says, 'I saw a case... where one r., because his rent was in arrear, took his farmer's corn and carried it off, and disposed of it at his pleasure, and he was hung for that deed.' Malbersthorpe- 'It is not to be wondered at'." See also, 2 Pollock & Maitland, supra note 27, at 497.

102. Plucknett, supra note 23, at 447 citing Y.B. 33-35 Edw. 1 (Rolls Series) 503; H.C.L.E., supra note 25, at 79.

103. 2 Pollock & Maitland, supra note 27, at 492.

104. Fourth Report of the Commissioners on Criminal Law (1839) ixvii, ixxi-ixxii quoted in Michael & Wechsler, Crim. L. & Its Admin. 383 (1940) [hereinafter cited, Fourth Report].

105. Charles Homer Haskins, The Rennaisance of the 12th Century (1957).

106. 2 Holdsworth, supra note 72, at 228.

107. Bracton, supra note 94, fn. 150 at 424, (2 Thorne): "Furtum est secundum leges contrectatio rei alienae fraudulenta cum animo furandi, invito illo cuius res illa fuerit."

108. "Furtum est contrectatio fraudulosa lucri faciendi gratia, vel ipsius rei vel etiam usus ejus possessioniave." Instit., iv.1, and Dig. xivii, tit. 11, 1,3. 3 H.C.L.E., supra note 25, at 131 states that although the Roman definition excluded invito illo cuius res, against the will of the owner, and animus furandi, intent to deprive, these requirements were supplied in practice. Perhaps the latter is not present in the definition because the intent to deprive did not need to be to deprive permanently in Roman law.

109. 3 H.C.L.E., supra note 25, at 132.

110. Bracton, supra note 94, at 509 (2 Twissed): "Cum animo duo, quia sine animo furandi non committitur."

111. Id. at 513: "Et non refert utrum res, quae ita subtracta fuit, extiterit illius appellantis proporia vel alterius, dum tamen de custodia sua."

112. Id. at 509-511: "Est etiam quasi furtum, rapina, quae idem est quantum ad nos q robberia, & est aliud gen contractationis contra voluntatem domini, & similis poena sequitur utrumq, delictum, & unde praedo dicitur fur improbus: quis enim magis contractat rem aliqua invito domino, quam ille qui vi rapit?"

113. Bracton, supra note 94 at 425 (2 Thorpe Ed.).

114. 3 H.C.L.E., supra note 25, at 132.

115. 3 Holdsworth, supra note 72, at 368.

116. 4 Blackstone, supra note 97, at 241.

117. 2 W. O. Russell. A Treatise on Crimes and Indictable Misdemeanors 62 (1828) [hereinafter cited as 2 Russell].

118. Fourth Report, supra note 104, at 383.

119. 3 Coke, Institutes 67 (1797) [hereinafter cited as 3 Coke].

120. 2 Pollock & Maitland, supra note 27, at 493.

121. H.C.L.E., supra note 25, at 458.

122. 2 Pollock & Maitland, supra note 27, at 493.

123. Id. at 496.

124. Radcliffe & Cross, supra note 25, at 67.

125. Id.

126. Black's Law Dictionary (4th ed. 1951), 200-201: "In its original sense, the phrase denoted the exemption which was accorded to clergymen from the jurisdiction of the secular courts, or from arrest or attachment on criminal process issuing from those courts in certain particular cases. Afterwards, it meant a privilege of exemptions from the punishment of death accorded to such persons as were clerks, or who could read. This privilege of exemption from capital punishment was anciently allowed to clergymen only, but afterwards to all who were connected with the church, even its most subordinate officers, and at a still later time to all persons who could read (then called 'clerks') whether ecclesiastes or laymen. It does not appear to have been extended to cases of high treason, nor did it apply to mere misdemeanors...As a means of testing his clerical character, he was given a psalm to read (usually, or always, the fifty-first,) and, upon the reading it correctly, he was turned over to the ecclesiastical courts, to be tried by the bishop or a jury of twelve clerks...This privilege operated greatly to

mitigate the extreme rigor of the criminal laws, but was found to involve such gross abuses that parliament began to enact that certain crimes should be felonies 'without benefit of clergy'..."

127. 77 C. J. S., "Robbery", §1: "Highway robbery is robbery committed on or near the highway or other public place; a robbery committed on persons using or traveling a public highway. Highway robbery is not a distinct crime, being a form of robbery. It is a common law offense...Robbery committed in plain view of, and within a reasonable distance from a highway is highway robbery. The fact that neither accused nor prosecutor know of the road constitutes no defense."

Also, Anderson v. Hartford Accident and Indemnity Co., 77 Cal. App. 641, 647, (1926): "[T]here were three sorts of public highways--one called 'iter,' over which the people passed on foot; another called 'actus,' over which they passed on foot or horseback; and a third called 'via,' over which they passed on foot or horseback, or on vehicles with wheels..., and although the statutes use the words 'public highway,' still they do not embrace any but the last kind--the 'via,' or by way of pre-eminence, the highway."

128. "The Highway in Legal History," 165 Law Times 9-11 (1928).

129. 6 Holdsworth, supra note 72, at 405, fn. 5; 4 W. & M. c. 8 (1692).

130. 4 W. & M., c. 8 (1692).

131. 23 Hen. 8, c. 2 (1512).

132. 23 Hen. 8, c. 1 (1531) made perpetual by 32 Hen. 8, c. 3 (1540).

133 1 Edw. 6, c. 12, s. 10 (1547).

134. 23 Hen. 8, c. 1 (1531).

135. 3 W. & M., c. 9, s. 1 (1691).

136. 4 Blackstone, supra note 97, at 243.

137. J. Hall, Theft, Law and Society 356-363 (1935) [hereinafter cited as Hall]. On these pages Hall has an excellent summary of "Statutes on (1) Benefit of Clergy; (2) Non-Clergable Offenses And (3) Transportation and Other Penalties--1276 to 1857."

138. 7 & 8 Geo. 4, c. 28, s. 6 (1827).

139. Hall, supra note 137, at 118.

140. Id.

141. 4 Blackstone, supra note 97, at 239.

142. Id.

143. Id. at 237-239.

144. 7 & 8 Geo. 4, c. 29, s. 7 (1827).

145. 48 Geo. 3, c. 129 (1808).

146. 7 Will. 4 and 1 Vict., c. 87, s. 2 (1837).

147. 24 & 25 Vict., c. 96, s. 43 (1861).

148. 6 Geo. 5, c. 50, s. 23.

149. J. A. Andrews, "Robbery," 1966 Crim. L. R. 524 at 528 (1966) [hereinafter cited as Andrews].

150. Id.

151. This section will deal primarily with the writings of Coke, Blackstone, Hale and Russell, the principal commentators

and summarizers of the common law.

Though the elements of larceny may seem to be given superficial treatment in this section, the relevant problem areas will be discussed.

152. Clark & Marshall, A Treatise on the Law of Crimes 882 (7th ed. 1967) [hereinafter cited as Clark & Marshall].

153. 4 Blackstone, supra note 97, at 232.

154. Clark & Marshall, supra note 152, 883; Perkins, supra note 71, at 237.

155. 3 Coke, supra note 119, at 107.

156. Clark & Marshall, supra note 152, at 883; Rex v. Blackham, 2 East P. C. 711.

157. People v. Jennings, 158 Cal. App. 2d 159 at 165, 292 P2d 897 (4th Dist. 1958).

158. 4 Blackstone, supra note 96, at 230.

159. Id. at 242.

160. 2 Russell, supra note 116, at 64.

161. 4 Blackstone, supra note 96, at 231.

162. 3 Coke, supra note 119, at 108.

163. Clark & Marshall, supra note 151, at 881.

164. Rex v. Moore, 1 Leach C. C. 335 (1784).

165. People v. Melendrez, 25 Cal. App. 2d 490, 494, 77 P. 2d 870 (2d Dist. 1938).

166. People v. Clark, 70 Cal. App. 2d 132-133, 160 P. 2d 553 (2d Dist. 1945).

167. 4 Blackstone, supra note 97, at 242.

168. 3 Coke, supra note 119, at 69.

169. 4 Blackstone, supra note 97, at 232.

170. 3 Coke, supra note 119, at 108.

171. 2 F. Wharton, A Treatise on Criminal Law 1331 (11th ed. Rev. 1912) [hereinafter cited as 2 Wharton].

172. Id.

173. Hall, supra note 136, at 80.

174. H.C.L.E., supra note 25, at 30.

175. This is Perkins' definition; see Perkins, supra note 70.

176. 3 Coke, supra note 118, at 68.

177. 4 Blackstone, supra note 96, at 242.

178. 2 Russell, supra note 116, at 65.

179. Smith v. Desmond (1965) A. C. 960; This case is discussed infra.

180. 5 & 6 Edw. 6. c. 9 (1552).

181. 4 Reeves, History of English Law 432 (1880).

182. Hall, supra note 137, at 35; 4 Blackstone, supra note 97, at 230.

183. 2 Wharton, supra note 171, at 1291.

184. 4 Blackstone, supra note 97, at 242.

185. 3 Coke, supra note 119, at 68.

186. 2 Russell, supra note 117, at 67.

187. Id.

188. Id. at 68.

189. Clark & Marshall, supra note 152, at 890.

190. R. v. Moore, 1 Leach 335 (1784).

191. R. v. Mason, Russ & Ry., 420 (1820).

192. R. v. Macauley, 1 Leach 287.

193. Stewart's Case, 1 Hawk., c. 35, s. 1 (1690).

194. Clark & Marshall, supra note 152, at 890; 4 Blackstone, supra note 97, at 242.

195. See discussion of the 1968 English Theft Act, infra.

196. See 7 Will. 4 & 1 Vict., c. 87, s. 2 (1837).

197. Perkins, supra note 77, at 239.

198. 2 Russell, supra note 117, 70-71; Rex v. Blackham, 2 East, P. C. 711.

199. 2 Wharton, supra note 171, at 1291; Clark & Marshall, supra note 152, at 891; Perkins, supra note 71, at 238.

200. 4 Blackstone, supra note 97, at 242.

201. Id.

202. See e.g., Clark & Marshall, supra note 152, at 891; Perkins, supra note 71, at 239.

203. 4 Blackstone, supra note 97, at 242.

204. 2 Russell, supra note 117, at 72.

205. Perkins, supra note 71, at 239.

206. 4 Blackstone, supra note 97, at 239.

207. See discussion of 1968 English Theft Act and Model Penal Code definition of robbery, infra.

208. R. v. Donally, 1 Leach 193 (1779).

209. 3 Coke, supra note 119, at 68.

210. Hughes' and Willings' Case, 1 Lewis 301 (1825).

211. R. v. Donally, 1 Leach 193 (1779); 2 Wharton, supra note 170, at 1294.

212. 2 Russell, supra note 117, at 72.

213. Id. at 71.

214. Id. at 75.

215. Id. at 76; 2 Wharton, supra note 171, at 1295.

216. R. v. Donally, 1 Leach 193 (1779).

217. 2 Russell, supra note 117, at 72; 2 Wharton, supra note 171, at 1295; Perkins, supra note 71 at 324.

218. 2 East, P. C. at 729 quoted by W. Winder, "The Development of Blackmail," The Modern Law Review, 21 at 29 (1941).

219. Id. at 29.

220. Perkins, supra note 71, at 324.

221. Id. at 325.

222. 24 & 25 Vict., c. 96 et seq.

223. 6 & 7 Geo. V., c. 50 et seq.

224. English Theft Act (1968), c. 60 et seq.

225. Fourth Report, supra note 104, at 386; Andrews, supra note 149, at 524.

226. 24 & 25 Vict., c. 96, x. 43 (1861).

227. 7 Will. 4 and 1 Vict. c. 87, s. 2 (1837).

228. 7 Geo. 2, c. 21 (1740).

229. Sections 12-16, 17, 18-19, 21-23, 24, 27-30, 37, and 39 which included deer; hares or rabbits; dogs; birds or beats in confinement; fish; choses in action; trees; shrubs, fruit and vegetables; and, ore and minerals in the category of property capable of being stolen.

230. Andrews, supra note 149, at 525.

231. Smith v. Desmond (Reg. v. Desmond) A. G. 968 (1965).

232. Id.

233. Id. at 987.

234. Andrews, supra note 149, at 525.

235. Id. at 527.

236. This would amount to a subsequent dishonest retention which specifically is larceny under the new act:
"3-(1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner."

237. E. Taylor, "Theft Act 1968," 65 Law Soc. Gaz. 764, 765 (1968).

238. There is some evidence that the Puritans focused on the Biblical mandate of restitution discussed in the introduction. See G. L. Haskins, "A Rule to Walk By," from Law & Authority in Early Massachusetts (1960).

239. The Laws of the State of New Hampshire, exeter, sec. 11 (1815). Robbery in New Hampshire at this time was a capital offense.

240. New York Laws, 1772-1801, 24th Sess., Chap. LVIII, Kent and Radcliff (1801).

241. Rev. Code, Del. (1915), Source: 4716, s. 20 (1852). The 1852 robbery statute did not even provide capital punishment for aggravated robberies such as highway robbery and robbery in a dwelling-house.

242. Rev. Stats. of Del., 4716, s. 20 (1915); Source: Code 1852; 26 Del. Laws, Ch. 271; 23 Del. Laws, Ch. 213.

243. 2 Bishop, Criminal Law (8th ed.) 678; State v. McCune, 5 R. I. 60 (1857); State v. Wilson, 67 N. C. 456 (1872); State v. Burke,

73 N. C. 83 (1875).

244. Note, "The Law of Aggravated Theft," 54 Colum. L. Rev. 85 (1954) [hereinafter cited as Aggravated Theft].

245. Cal. Pen. Code sec. 211.

246. Aggravated Theft, supra note 244, at 100-101 gives the following summary on how various jurisdictions classify robbery:

"A few states classify robbery into degrees (Kan., Minn., Mo., N. Y., N. D., Okla., S. D.), first degree robbery generally involving the use of actual violence or a threat of immediate injury...Much more common is the pattern followed in other jurisdictions which prescribe severer penalties for an offense called aggravated robbery. The aggravating factors relate to the method of perpetration or the place of commission. Aside from those few jurisdictions which treat robbery committed by violence as aggravated robbery (Cal., Conn., Ga.), there is little similarity to the factors essential to first degree robbery. Typical bases of aggravation are the commission of the crime on a train (Ala., Iowa, Neb., N. C., Pa., S. C.,), or in a bank (Ind., N. M., Tenn.), or the fact that the offender was armed (Mass., Vt., Wyo.), used a motor vehicle (Ind., Mo., N. Y.), or had a confederate (Colo., Ill., Iowa., Minn., N. Y., N. D., Okla., Pa., S. D.).

247. Eg. Mass., Vt., Wyo., N. Y., Mo., Tenn.

248. Cal. Pen. Code sec. 211a.

249. 77 C.J.S. "Robbery," sec. 25, 464-465.

250. People v. Seaman, 101 Cal. App. 2d 302 at 304, 16 P. 2d 37 (1927).

251. People v. Raner, 83 Cal. App. 2d 107, 194 P. 2d 37 (1948); People v. Coleman, 53 Cal. App. 2d 18, 127 P. 2d 309 (1942); People v. Aranda, 63 Cal. 2d 318, 47 Cal. Reptr. 353, 407 P. 2d 265 (1944).

252. People v. Raleigh, 128 Cal. App. 105 at 108, 16 P. 2d 752 at 753 (1st Dist. 1932).

253. Id., 128 Cal. App. 105 at 108.

254. Id., 128 Cal. App. 105 at 108-109.

255. Id.

256. People v. O'Neal, 2 Cal App. 2d 551, 38 P. 2d 430 (1959); People v. Crowl, 28 Cal. App. 2d 299, 82 P. 2d 507 (1938); People v. Linn, 168 Cal. App. 2d 411, 335 P. 2d 964 (1959).

257. People v. Raleigh, 128 Cal. App. 105, 16 P. 2d 752 (1932); People v. Graham, 78 Cal. Rptr. 217, 455 P. 2d 153 (1969).

258. People v. Graham, 78 Cal. Rptr. 217 at 233.

259. 43 Cal. Jur. 2d (Rev.), "Robbery," sec. 11, p. 47.

260. Model Penal Code, sec. 222.1.

261. Model Penal Code: Proposed Final Draft (1) (1961), see 606.

262. National Commission on Reform of the Federal Criminal Laws, Study Draft, sec. 1721(3)(9) [hereinafter cited as Study Draft].

263. Fanning v. State, 66 Ga. 167 (1880); State v. John, 50 N. C. 163, 169 Am. Dec. 777 (1857); Hammond v. State, 121 Tex. Crim. 596, 49 S.W. 2d 779 (1932); Thomas v. State, 91 Ala. 34, 9 So. 81 (1891); Jackson v. State, 114 Ga. 826, 40 S.E. 1001

(1902); Harris v. State, 118 Tex. Crim. 597, 39 S.W. 2d 881 (1931); Terry v. Nat. Surety Co., 164 Miss. 394, 145 So. 111 (1933); Lear v. State, 39 Ariz. 313 6 P. 2d 426 (1931); People v. Jones, 290 Ill. 603, 125 N.E.256 (1919); State v. Parker, 262 Mo. 169, 170 S.W. 1121 (1914); Routt v. State, 61 Ark. 594, 34 S.W. 262 (1896); People v. Young, 214 Cal. App. 2d 641, 29 Cal. Rptr. 595 (1963); State v. Adams, Mo., 406 S.W. 2d 608 (1966); McClendon v. State, Okla. Cr. 319 P. 2d 333 (1957); People v. Chambliss, 69 Ill. App. 2d 459, 217 N.E. 2d 422 (1966).

264. 2 Russell, supra note 117, at 67; The King v. Baker, 1 Leach 290 168 Eng. Rep. 247 (C.C. 1783).

265. U. S. Dep't. of Justice, F.B.I., Uniform Crime Reporting Handbook, 20 (1966).

266. State v. John, 50 N. C. (5 Jones L.) 163; 69 Am. Dec. 777 (1857); State v. Trexler, 4 N. C. (2 Cas. Law R. 90) 188, 6 Am. Dec. 558 (1815); State v. Clemons, 256 Mo. 514, 202 S.W. 2d 75 (1947).

267. Clark & Marshall, supra note 152, at 891; 77 C.J.S., "Robbery," sec. 25, 458; 46 Am. Jur., "Robbery," 146.

268. People v. Chambliss, 69 Ill. App. 2d 459, 217 N.E. 2d 422 (1966); People v. Young, 214 Cal. App. 2d 641, 29 Cal. Rptr. 595 (1963); People v. Brown, 76 Ill, App. 2d 362, 222 N.E. 2d 227 (1966).

269. Rex v. Moore, 1 Leach C.C. 335 (1784); Rex v. Mason, Russ. & R. 419 (1820).

270. Smith v. State, 117 Ga. 320, 43 S.E. 736 (1903); Monaghan v. State, 10 Okla. Crim. Rep. 89, 134 P. 2d 77 (1913); Smith v. Clemons, 356 Mo. 514, 202 S.W. 2d 75 (1947).

271. Clark & Marshall, supra note 152, at 890.

272. 46 Am. Jur., "Robbery," sec. 15, 146.

273. Rex v. Moore, 1 Leach C.C. 335 (1744); Rex v. Mason, Russ. & R. 419 (1820).

274. Evans v. State, 80 Ala. 4 (1885); People v. Jefferson, 31 Cal. App. 2d 562, 88 P. 2d 238 (1939); State v. Clemons, 356 Mo. 514, 202 S.W. 2d 75 (1947).

275. Register v. State, 97 So. 2d 919; Parnell v. State, Okla. 389 P. 2d 370 (1964); State v. Shaw, Oreg., 372 P. 2d 777 (1962); Cooper v. State, Tenn., 297 S.W. 2d 75; Cranford v. State, Tex. App., 377 S.W. 2d 957 (1964);

276. 4 Blackstone, supra note 97, at 241; Bracton, supra note 100, at 511.

277. Aggravated Theft, supra note 244, at 879, fn. 63.

278. Clark & Marshall, supra note 152, at 879, fn. 63.

279. 4 Blackstone, supra note 97, at 241.

280. Stewart's Case, 2 East, P.C. 702; Danby's Case, 2 East, P.C. 702; Reg. v. Walls, 2 C & K 214 (1845).

281. Branny's Case, 1 Leach C.C. 241, n. 168 Eng. Rep. 223, n (1778); Thompson's Case, 1 Leach C.C. 443, 2 East, P.C. 705, 168 Eng. Rep. 323 (1787); Willan's Case, 1 Leach C.C. 495, 2 East, P.C. 705, 168 Eng. Rep. 349 (1788).

282. Rex v. Gribble, 1 Leach C.C. 240, 2 East, P.C. 706, 168 Eng. Rep. 222 (1782); Rex v. Kennedy, 2 Leach C.C. 788, 168 Eng. Rep. 222 (1782); Rex v. Kennedy, 2 Leach C.C. 788, 168 Eng. Rep. 494 (1797).

283. Fanning v. State, 66 Ga. 167 (1880); Clemmons v. State, 399

284. Commonwealth v. Dimond, 3 Cush. (Mass.) 235 (1849); Johnson v. Commonwealth, 24 Gratt. (Va.) 555 (1873).

285. Cal. Pen. Code sec. 487 (2).

286. Ga. Code Ann., sec. 26-[illegible] (1969), formerly Ga. Code Ann., sec. 26-2501 (1953).

287. D. C. Code Ann., sec. 22-2901 (1951), as amended 1967.

288. Brown v. Commonwealth, 135 Ky. 635, 117 S.W. 281, 135 Am. St. Rep. 471, 21 Ann. Cas. 672 (1909); Jones v. Commonwealth, 112 Ky. 689, 66 S.W. 633, 57 LRA 432, 99 Am. St. Rep. 330 (1902).

289. Jones v. Commonwealth, 112 Ky. 689, 66 S.W. 633 (1902).

290. Id., 66 S.W. 633 at 634.

291. Model Penal Code, Tent. Draft No. 11, sec. 222.1 (1960).

292. Id., Comments at 69.

293. 4 Blackstone, supra note 97, at 242; 2 Wharton, supra note 171, at 194; Clark & Marshall, supra note 152, at 891; Perkins, supra note 71, at 238.

294. Id.

295. 4 Blackstone, supra note 97, at 242.

296. 2 Russell, supra note 117, at 72. Long v. State, 12 Ga. 293 (1852); Steward v. People, 244 Ill. 434, 79 N.E. 637 (1906); Davis v. Commonwealth, 21 Ky. 1295, 54 S.W. 959 (1900); Peebles v. State, 138 Tex. Crim. 55, 134 S.W. 2d 293 (1939); Easley v. State, 82 Tex. 183 So. 2d 297 (1966); State v. Norris, 264 N.C. 470, 141 S.F. 2d 869 (1965); People v. Carpenter, 71 Ill. App. 2d 137, 217 N.E. 2d 337 (1966); Harrison v. State, 3 Md. App. 148, 238 A 2d 153 (1968); People v. Laker, 7 Mich. App.

425, 151 N.W. 2d 881 (1967); Flyer v. State, Fla., 189 So. 2d 212 (1966); Haley v. Commonwealth, 210 Ky. 554, 276 S.W. 519 (1925); Torres v. State, 48 Tex. Cr. R. 363, 88 S.W. 217 (1905).

297. People v. Renteria, 61 Cal. 2d 497, 39 Cal. Rptr. 213, 393 P. 2d 413 (Cal. Sup. Ct., 1964).

298. Cassidy v. State, 168 Cr. 254, 324 S.W. 2d 857 (Ct. of Crim. App. Tex., 1959). This case is not exactly apposite since Texas adds, in its robbery statute, the element of assault as well as force and fear; however, assault is usually "necessarily" included in robbery, infra.

299. 43 Cal. Jur. 2d (Rev.), "Robbery," sec. 2, 42.

300. 77 C.J.S., "Robbery," sec. 21, 462; Jennings v. State, 179 P. 2d 639, 84 Okla. Cr. 135; Watson v. State, Tex. Cr. R. 1.

301. 4 Blackstone, supra note 97, at 242; note, "Robbery- Corpse as Victim," 8 Wayne L. R. 483, 439 (1962); Cleary v. State, 33 Ark. 561 (1878); State v. Buche, 73 N.C. 83 (1875); Rex v. Hawkins, 3 Car. & P. 392, 172 Eng. Rep. 470 (1828).

302. State v. Snyder, 41 Nev. 453, 172 P. 363 (1918); Perkins, supra note 71, at 239.

303. State v. Snyder, Id.; Earlier English cases held that this could only be larceny from the person; Branny's Case, 1 Leach. 248, n. 168, Eng. 223 (1786).

304. Clark & Marshall, supra note 152, at 891; 4 Blackstone, supra note 97, at 242.

305. People v. Brown, 76 Ill. App. 2d 362, 222 N.E. 2d 227 (1966).

306. See Bowen v. State, 16 Ga. 110, 84 S.E. 730 (1915), where a

robbery conviction was sustained on evidence showing that the victim passed out and was beaten and property taken from his person.

307. The King v. Thompson, 1 Leach 443, 168 Eng. Rep. 323 (C.C. 1787); The King v. Willan, 1 Leach 495, 168 Eng. Rep. 349 (C.C. 1788); Ramierez v. Territory, 9 Ariz. 177, 80 Pac. 391 (1905); Hall v. People, 171 Ill. 540, 49 N.E. 495 (1898); Brennon v. State, 25 Ind. 403 (1865); People v. Jones, 296 Ill. 603, 125 N.E. 256 (1919); People v. Russell, 118 Cal. App. 2d 136 (1953); 8 A.L.R. 361; 46 Am. Jur., "Robbery," sec. 23, 150; note, "Robbery- Corpse as Victim," 8 Wayne L. R. 438 (1962) [hereinafter cited as "Robbery-Corpse as Victim"].

308. Note, "Robbery-Corpse as Victim," supra note 307, at 439.

309. Model Penal Code (Tent. Draft II: 1960), Comments to Art. 222.1 at 70.

310. 4 Blackstone, supra note 97, at 241; 3 Holdsworth, supra note 72, at 368; 2 Russell; supra note 117, at 62; Fourth Report, supra note 104, at 383; Glanvill, supra note 85, at 505; Clark & Marshall, supra note 152, at 882.

311. 2 Bishop, supra note 243, at 671; Perkins, supra note 71, at 236; People v. Nelson, 56 Cal. 77 (1880); People v. Church, 116 Cal. 300, 48 P. 125 (1887); People v. Covington, 1 Cal. 2d 316, 34 P. 2d 1019 (1934); People v. Chandler, 234 Cal. App. 2d 705, 44 Cal. Rptr. 750 (2d Dist. 1965).

312. Id., 234 Cal. App. 2d 705.

313. Id., 78 Cal. Rptr. 771.

314. Id., 78 Cal. Rptr. 771 at 774-775.

315. Cal. Pen. Code sec. 220; People v. Blue, 161 Cal. App. 2d 1, 326 P. 2d 183 (2d Dist. 1958); People v. Allen, 32 Cal. App. 110, 162 P. 2d 401 (1916).

316. 77 C.J.S., "Robbery," sec. 60, 524.

317. People v. Villarico, 140 Cal. App. 2d 233, 295 P. 2d 76 (1956); People v. Blue, 161 Ca. App. 2d 1, 326 P. 2d 183 (2nd Dist. 1958); People v. Johnson, 57 Cal. App. 271, 207 P. 257 (1922).

318. People v. Foss, 85 Cal. App. 269 at 272, 259 P. 2d 123 (2d Dist. 1927) citing People v. Demasters, 105 Cal. 669, 39 P. 35 (1895); People v. Mallon, 103 Cal. 513, 37 P. 512 (1894).

319. People v. Foss, 85 Cal. App. 269 at 272, 259 P. 2d 123 (1927).

320. Perkins, supra note 71, at 240.

321. Cal. Pen. Code sec. 654 provides:

"An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

This section is designed to prevent any possible double jeopardy claims arising from multiple prosecution for the same act.

322. Id., People v. Logan, 41 Cal. 2d 279, 260 P. 2d 20 (1953).

323. Perkins, supra note 71, at 240; Ex Parte Chapman, 43 Cal. 2d 385, 273 P. 2d 817 (1954).

324. 43 Cal. Jur. 2d (Rev.), "Robbery," sec. 11, 27; see also Comment, "Robbery Becomes Kidnapping," 3 Stan. L.R. 156 (1950).

325. Cal. Pen. Code seccions 664, 182 and 653f respectively.

326. People v. Moran, 18 Cal. App. 209, 133 P. 969 (1912); People v. Robinson, 180 Cal. App. 2d 745; 4 Cal. Rptr. 679 (1960).

327. People v. Griggs, 114 Cal. App. 133, 299 P. 555 (1931); People v. Anderson, 1 Cal. 2d 687, 37 P. 2d 67 (1934); People v. Perry, 143 Cal. App. 2d 374, 299 P. 2d 937 (1956).

328. People v. Graham, 71 Cal. 303, 78 Cal. Rptr. 217, 455 P. 2d 153 (1969).

329. Model Penal Code (Tent. Draft 11: 1960), Comments to Art. 222.1 at 70-21.

330. People v. Bedelion, 206 Cal. App. 2d 262, 24 Cal. Rptr. 19 (1962).

331. People v. Salter, 59 Cal. App. 2d 59, 137 P. 2d 840 (1943); People v. Sorrentine, 146 Cal. App. 2d 149, 303 P. 2d 859 (1956); People v. Anderson, 59 Cal. App. 408, 211 P. 254 (1922).

332. People v. Bell, 198 Cal. App. 2d 557, 17 Cal. Rptr. 811 (1961).

333. Regina v. Southerton, 6 East 126 (1805).

334. Id. at 141, 6 East 126.

335. 4 Blackstone, supra note 97, at 141 quoting 1 Hawk. P.C. 170.

336. People v. Woodward, 11 Mod. 137 (1707) held that obtaining of money by threat to accuse of perjury was an offense at common law and an actual trespass. One commentator stated that "this

seems to be the only authority in the reports and textbooks from the time of Coke onwards for the crime of what may be called private extortion and a narrow interpretation was placed upon it in R. v. Southerton." W. H. D. Winder, "The Development of Blackmail," 5 Modern L.R. 21 at 30-31 (1941) [hereinafter cited as Winder].

337. Perkins, supra note 71, at 325.

338. Threats to third persons were generally not considered sufficient to constitute robbery unless that person was related to the victim and present at the time of the taking; 2 Russell, supra note 117, at 72.

339. Aggravated Theft, supra 244, at 88-89.

340. Id. at 103-104

341. 9 Geo. 1, c. 22 (1722) (The Waltham Black Act); 30 Geo. 2, c. 24 (1757).

342. 7 & 8 Geo. 4, c. 29 (1827); 7 Will. 4 & 1 Vict., c. 87, s. 7 (1837); 10 & 11 Vict., c. 66, s. 1 (1847); 24 & 25 Vict., c. 96, s. 45 and 47 (1861).

343. 6 & 7 Geo. 5, c. 5- (1916).

344. See, generally, Winder, supra note 336.

345. Winder, supra note 336, at 24:

"'Blackmail was originally the tribute exacted by free-booters in the northern border counties to secure lands and goods from dispoilment of robbery,' [quoting 4 Blackstone 244]; Originally by Elizabethan statutes, the person paying this tribute was punished equally with the blackmailer in order to encourage people to seek the protection of the laws."

Perkins, supra at 326: "[B]lackmail (Black rent) was anciently used to indicate 'rents reserved in work, grain or baser money'...It was also employed at one time to refer to 'a tribute formerly exacted in the north of England and in Scotland by freebooting chiefs for protection from pillage'." [quoting the American College Dictionary, 1948].

346. Perkins, supra note 71, at 325; Aggravated Theft, supra note 244, at 85.

347. Eg. Iowa Code Ann., sec. 720 (1949); N. H. Rev. Stat. Ann., c. 572, sec. 46 (1968).

348. Eg. Mont. Rev. Codes Ann., sec. 94-1609 (1947); N. D. Century Code, sec. 12-3701 (1960).

349. Perkins, supra note 71, at 325; Aggravated Theft, supra note 244, at 85.

350. Cal. Pen. Code sec. 519; New York has a substantially similar statute (N.Y. Pen. Law, sec. 850) but adds threats to kidnap and threats to injure the person or property by the use of weapons or explosives.

351. Model Penal Code, Proposed Official Draft (1962), sec. 223.4 (Orig. 206.3) at 169.

352. Model Penal Code, Tent. Draft No. 2, Comment to sec. 206.3 (223.4) at 75-76.

353. Aggravated Theft, supra note 244, at 101.

354. Aggravated Theft, supra note 244, at 87.

355. R. v. Boden 1 C & K, 395 (1844); R. v. Hall 3 C & P., 409 (1828); 4 Le. & Ca. 483 C.C.R. (1864); 77 C.J.S., "Robbery," sec. 22, 464; Bauer v. State, 43 P. 2d 203, 45 Ariz. 358;

Moyers v. State, 197 S.E. 846, 186 Ga. 446.

356. People v. Beggs, 178 Cal. 79 at 84, 172 P. 52 at 154 (1918).

357. State v. Hammond, 80 Ind. 80 (1881); Commonwealth v. Jones, 121 Mass. 57 (1876); State v. Ricks, 108 Miss. 7, 66 So. 281 (1914); State v. Barger, 111 Ohio St. 448, 145 N.E. 851 (1924).

358. Perkins, supra note 71, at 326.

359. 2 Bishop, supra note 243 at s. 1201, p. 693.

360. Clark & Marshall, supra note 152, at 897.

361. People v. Robinson, 130 Cal. App. 664, 20 P. 2d 369 (2d Dist. 1933).

362. Note, "Extortion: Property Within the Meaning of Cal. Pen. Code 518," 22 Cal. L.R. 225 at 226 (1934) [hereinafter cited as Extortion].

363. Model Penal Code, Tent. Draft No. 2, Comment to sec. 206.3.

364. Aggravated Theft, supra note 244, at 90.

365. Id. at 91; N.J. Stat. Ann., sec. 2A: 105-3 (1969) (any civil injury); Tex. Pen. Code Ann., art. 1409 (1953) (some illegal act); People v. Loveless, 84 N.Y. Supp. 1114, 1115 (Ct. Sup. Sess. 1903).

366. Note, "Aspects of Criminal Restraints on Acquisitive Conduct," 38 Colum. L.R. 624 at 640 (1938).

367. People v. Goodman, 159 Cal. App. 2d 54 at 61, 33 P. 2d 536 (2d Dist. 1958).

368. People v. Peck, 43 Cal. app. 638 at 645; 185 P. 881 (3d Dist. 1919).

369. Perkins, supra note 71, at 327.

370. Michael & Wechsler, supra note 104, at 393, fn. 12.

371. Aggravated Theft, supra note 244, at 85-86.

372. Extortion, supra note 362, at 226.

373. J. Peterson in Hodges v. Kebb, 1920, 2 Ch. 70, 86 quoted in Winder, supra note 336, at 47.

374. Aggravated Theft, supra note 244, at 86 and 109.

375. People v. Jacobsen, 11 Cal. App. 2d 728 at 729, 54 P. 2d 749 (4th Dist. 1936); Two other California cases have upheld extortion convictions where property was obtained at gun-point: People v. Turner, 22 Cal. App. 2d 186, 70 P. 2d 642 (1937); People v. Peck, 43 Cal. App. 638, 185 P. 881 (3d Dist. 1919). See also, State v. Wilburn, 219 Iowa 120, 257 N.W. 571 (1934); People v. Vitusky, 155 App. Div. 139, 140 N.Y. Supp. 19 (1st Dep't. 1913).

376. In Re Coffey, 123 Cal. 522, 56 P. 448 (1899).

377. Aggravated Theft, supra note 244, at 84.

378. 4 Blackstone, supra note 97, at 219.

379. Model Penal Code, (Tent. Draft 11), Comments to sec. 212.1 at 1213.

380. Cal. Stat. 1905, ch. 493, sec. 1, at 653.

381. Comment, "Robbery Becomes Kidnapping," 3 Stan. L.R. 156 at 17 (1950); [hereinafter cited as "Robbery Becomes Kidnapping].

382. 47 Stat. 326, 1932 as amended, 48 Stat. 781, 1934; 18 U.S.C., s. 408, 1946.

383. "Robbery Becomes Kidnapping," supra note 381, at 158.

384. Id.

385. People v. Wagner, 133 Cal. App. 775, 24 P. 2d 927 (4th Dist., 1933); People v. Lombard, 131 Cal. App. 525, 21 P. 2d 255

(4th Dist., 1933); People v. Fisher, 30 Cal. App. 135, 151 P. 7 (3d Dist., 1916).

386. People v. Tanner, 3 Cal. 2d 279, 44 P. 2d 324 (Cal. Sup. Ct. 1935).

387. People v. Raucho, 8 Cal. App. 2d 655, 47 P. 2d 1108 (1935); People v. Bean, 88 Cal. App. 2d 34, 198 P. 2d 379 (1948); People v. Valdez, 82 Cal. App. 2d 744, 187 P. 2d 74 (1947); People v. Brown, 29 Cal. 2d 555, 176 P. 2d 929 (1947); People v. Kristy, 4 Cal. 2d 504, 50 P. 2d 798 (1935).

388. People v. Knowles, 35 Cal. 196, 217 P. 2d 1, cert. denied 71 S. Ct. 117 (1950).

389. Id., 35 Cal. 2d 175 at 185.

390. Id. at 189.

391. Note, "Kidnapping- California Penal Code Section 209," 24 S.C.L.R. 310 at 311 (1951).

392. One critic of Knowles stated that "...any technical bodily harm suffices." Note, "Kidnapping for the Purpose of Robbery," 38 Cal. L.R. 920 at 924, fn. 23 (1950), citing People v. Britton, 6 Cal. 2d 8, 56 P. 2d 493 (1936). Recent cases have held, however, that the injury or harm must be the result of "intentional gratuitous aggravation" by the kidnapper or injuries "not inherent in the crime itself but which are gratuitously added by the kidnapper to abuse and terrorize his victim," People v. Jackson, 44 Cal. 2d 511, 282 P. 2d 898 (1955); People v. Baker, 231 Cal. App. 2d 301, 41 Cal. Rptr. 696, 11 A.L.R. 2d 1045 (1964).

393. Note, "Kidnapping- California Penal Code Section 209,"

24 S.C.L.R. 310 (1951); Comment, "Robbery Becomes Kidnapping," 3 Stan. L.R. 156 (1950); Note, "Kidnapping for the Purpose of Robbery," 38 Cal. L.R. 920 (1950).

394. People v. Chessman, 38 Cal. 2d 166, 238 P. 2d 1001, cert. denied 343 U.S. 915 (1951).

395. Id., 38 Cal. 2d 166 at 192, 238 P. 2d 1001 at 1017.

396. People v. Wein, 60 Cal. 2d 383, 326 P. 2d 457 (1958) (5 feet); People v. Monk, 56 Cal. 2d 288, 14 Cal. Rptr. 633, 363 P. 2d 865 (Cal. Sup. Ct. 1961) (several feet); People v. Lara, 67 Cal. 2d 365, 62 Cal. Rptr. 586, 432 P. 2d 202 (1967) (6 feet).

397. People v. Monk, supra note 396, 363 P. 2d 865.

398. In Re Ward, 64 Cal. 2d 672; 51 Cal. Rptr. 273 (1966); People v. Brown, 29 Cal. 2d 55, 176 P. 2d 929 (1947).

399. 29 Cal. Jur. 2d (Rev.), "Kidnapping," sec. 12, 668.

400. Gooch v. U.S., 297 U.S. 455, 66 S. Ct. 233 (1946); dicta in People v. Florio, 301 N.Y. 46, 92 N.E. 2d 881 (1950), rejected stationary robbery as a kidnap but does not compel the conclusion that slight movements such as occurred in Chessman would not be a kidnap. However, in People v. Levy 15 N.Y. 2d 159, 256 N.Y.S. 2d 793, 204 N.E. 2d 842 (1965) the Florio case was overruled and kidnapping was confined to its "conventional" sense.

401. Garton v. Tinsley, 171 F. Supp. 387 (D.C. 1959); State v. Coursey, 71 Ariz. 227, 225 P. 2d 713 (1950); Crum v. State, 131 Tex. Cr. 631, 101 S.W. 2d 270 (1937); State v. Burey, 200 Wash. 495, 93 P. 2d 782 (1939); People v. Small,

249 App. Div. 863, 294 N.Y.S. 347 (1937); People v. Rosenthal, 289 N.Y. 462, 46 N.E. 2d 395 (1943).

402. Model Penal Code (Tent. Draft 11), Comments to sec. 212.1 at 14.

403. Id. at 13.

404. Id. at 13-14.

405. Id. at 15.

406. California Department of Justice, Bureau of Criminal Statistics, "Kidnap Study" 1 (1968).

407. Id. at 5.

408. Id. at 2.

409. Id. at 5.

410. Id. at 11.

411. People v. Daniels, 71 Cal. 1165, 80 Cal. Rptr. 897, 495 P. 225 (1969).

412. Id., 80 Cal. Rptr. 897 at 910.

413. Id.

414. Id. at 901.

415. People v. Ballard, 1 Cal. App. 3d 602, 81 Cal. Rptr. 742 (2d Dist. 1969) held that the Daniels case was not retroactive to cases final on the date of the decision.

416. Clark & Marshall, supra note 152, at 656.

417. 3 Coke, supra note 119, at 56.

418. 4 Blackstone, supra note 97, at 201.

419. Regina v. Serne, 16 Cox Cr. Case 311 (1887).

420. Id. at 313.

421. Perkins, supra note 71, at 34.

422. Reg. v. Horsey, 3 F. & F. 287 (1862); Michael & Wechsler, "A Rationale of the Law of Homicide: 1," 37 Colum. L.R. 700, 713 (1937) (hereinafter cited as A Rationale of the Law of Homicide].

423. A Rationale of the Law of Homicide, supra note 422, at 713-714.

424. Id. at 714.

425. Model Penal Code (Tent. Draft 9), Comments to art. 201.2 at 33-36: Twelve jurisdictions do not differentiate among felony murders; 36 divide felony murders into two or more degrees; 2 have modified or abandoned the rule.

426. Holmes, The Common Law, 59 (1881).

427. Model Penal Code, (Tent. Draft 9), Comments to art. 201.2 at 38.

428. Fourth Report, supra note 104, at xxviiixxix (1839); Macaulay, A Penal Code Prepared by the Indian Law Commissioners, Note M, 64-65 (1837); Report of the Royal Commission on Capital Punishment (1953).

429. A list of these requirements and the states imposing them can be found in the Model Penal Code (Tent Draft 9), Comments to art. 201.2, at 38.

430. People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924); State v. Diebold, 152 Wash. 68, 277 P 294 (1929); People v. Goldvarg, 346 Ill. 398, 178 N.E. 892 (1931).

431. Power v. Commonwealth, 110 Ky. 386, 61 S.W. 735 (1901).

432. Burton v. State, 122 Tex. Cr. 363, 55 S.W. 2d 813 (1933).

433. People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924).

434. Commonwealth v. Exler, 243 Pa. 155, 89 Atl. 968 (1914); State v. Burrell, 120 N.J.L. 277, 199 Atl. 18 (1939); People v. Podolski, 332 Mich. 508, 52 N.W. 2d 201 (1952).

435. State v. Diebold, 152 Wash. 68, 277 P. 394 (1929); People v. Smith, 232 N.Y. 239, 133 N.E. 574 (1921); Huggins v. State, 149 Miss. 280, 115 So. 213 (1928); State v. Taylor, 173 La. 1010, 139 So. 463 (1931); People v. Marwig, 227 N.Y. 383, 125 N.E. 535 (1919).

436. People v. Moran, 246 N.Y. 100, 158 N.E. 35 (1927); People v. Hater, 184 N.Y. 237, 77 N.E. 6 (1906); State v. Fisher, 120 Kan. 226, 243 P. 291 (1926); State v. Soverns, 158 Kan. 453, 148 P. 2d 488 (1944); State v. Shoch, 68 Mo. 552 (1878).

437. People v. Kaye, 43 Cal. App. 2d 802, 111 P. 2d 679 (1941); People v. Rye, 33 Cal. 2d 688, 203 P. 2d 478 (1949); Commonwealth v. Almieda, 362 Pa. 596, 68 A. 2d 595 (1949); Commonwealth v. Bolish, 381 Pa. 500, 113 A. 2d 464 (1955); Commonwealth v. Thomas, 382 Pa. 639, 117 A. 2d 204 (1953); People v. Podolski, 332 Mich. 508, 52 N.W. 2d 201 (1952).

438. Commonwealth v. Thomas, 382 Pa. 639, 117 A. 2d 204 (1953).

439. Commonwealth v. Almieda, 362 Pa. 596, 68 A. 2d 595 (1949).

440. People v. Harrison, 176 Cal. App. 2d 330, 1 Cal. Rptr. 414 (1959).

441. People v. Podolski, 332 Mich. 508, 52 N.W. 2d 201 (1952).

442. People v. Caballero, 31 Cal. App. 2d 52, 87 P. 2d 364 (1st. Dist. 1939).

443. Note, "California Rewrites the Felony Murder Rule," 18 Stan. L.R. 690, 693 (1966) [hereinafter cited as California Rewrites

Felony Murder].

444. People v. Harrison, 176 Cal. App. 2d 330, 1 Cal. Rptr. 414 (2d Dist. 1959).

445. Id., 176 Cal. App. 2d 330 at 345, 1 Cal. Rptr. 414 at 425.

446. California Rewrites Felony Murder, supra note 443, at 694-695.

447. Id. at 694; 10 Vill. L.R. 579 (1965).

448. People v. Washington, 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P. 2d 130 (1965).

449. Id., 62 Cal. 2d 777 at 781, 44 Cal. Rptr. 442 at 445, 402 P. 2d 130 at 133.

450. California Rewrites Felony Murder, supra note 443, at 691.

451. People v. Milton, 145 Cal. 169, 78 P. 549 (1904); People v. Witt, 170 Cal. 104, 148 P. 928 (1915); People v. Caballero, 31 Cal. App. 2d 52, 87 P. 2d 364 (1st Dist. 1939); People v. Harrison, 176 Cal. App. 2d 330, 1 Cal. Rptr. 414 (1959); People v. Ford, 60 Cal. 2d 772, 36 Cal. Rptr. 620, 388 P. 2d 892 (1964).

452. People v. Washington, 62 Cal. 2d 777 at 781, 44 Cal. Rptr. 442 at 445, 402 P. 2d 130 (1965).

453. People v. Fain, 75 Cal. Rptr. 633, 451 P. 2d 65 (Sup. Ct. 1969) citing People v. Sears, 62 Cal. 2d 737 at 745, 44 Cal. Rptr. 330 at 335 (1965) and People v. Cleary, 48 Cal. 2d 301 at 310, 309 P. 2d 431 (1947).

454. People v. Lillicock, 71 Cal. Rptr. 434 at 442, 265 Cal. App. 2d 419 (2d Dist. 1968).

455. People v. Stamp, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (2d Dist. 1969).

456. Id., 2 Cal. App. 3d 203 at 208.

457. Id., 2 Cal. App. 3d 203 at 210.

458. Id., 2 Cal. App. 3d 203 at 211.

459. Model Penal Code (Tent. Draft 9), Comments to sec. 201.2 at 33.

460. California Rewrites Felony Murder, supra note 443, at 697.

461. People v. Fields, 190 Cal. App. 2d 515, 12 Cal. Rptr. 249 (1st Dist. 1961).

462. See discussion of divisibility, supra.

463. U.S. v. Fox, 95 U.S. 670 (1877); Brown v. State, 28 Ark. 126 (1873); Clark & Marshall, supra note 152, sec. 5.02 (6th ed. 1958); Perkins, supra note 71, at sec. 9.

464. Note, "Robbery- Corpse as Victim," supra note 307, at 439-440 citing People v. Jordan, 303 Ill. 316, 135 N.E. 729 (1922); State v. Covington, 169 La. 939, 126 So. 431 (1930); Alaniz v. State, 149 Tex. Crim. 1, 177 S.W. 2d 965 (1944); People v. Winters, 163 Cal. App. 2d 619, 329 P. 2d 743 (1958).

465. Rex v. Blackham, 2 East P.C. 711; Clark & Marshall, supra note 152, at 883; Note, "Robbery- Mental Element at Time of Force or Putting in Fear," 49 Dick. L.R. 119 at 122 (1945).

466. People v. Jordan, 303 Ill. 316, 315 N.E. 729 (1922).

467. Hope v. People, 83 N.Y. 418, 38 Am. Rep. 460 (1881).

468. Diaz v. State, 147 Tex. Cr. 501 and 560, 182 S.W. 2d 805 (1944); Note, "Robbery- Mental Element at Time of Force or Putting in Fear," supra note 465.

469. Carey v. U.S., 296 F. 2d 422 (D.C. Cir. 1961), subject of Note, "Robbery- Corpse as Victim," supra note 307.

470. Note, "Robbery- Mental Element at Time of Force or Putting in Fear," supra note 465.

471. In Re Ward, 64 Cal. 2d 672, 51 Cal. Rptr. 272, 414 P. 2d 400 (1966).

472. Id., 414 P. 2d 400. The court denied petitioner's writ of habeas corpus and affirmed convictions of four counts of rape, five for kidnapping for the purpose of robbery, and all but two of the six counts of robbery.

473. Id., 414 P. 2d 400 at 404.

474. People v. Jennings, 158 Cal. App. 2d 159, 322 P. 2d 19 (1958).

475. Model Penal Code, (Proposed Final Draft 1: 1961) sec. 102(1)(e).

476. Wechsler, "Sentencing, Correction and the Model Penal Code," 109 Univ. of Pa. L.R. 472-3 (1961).

477. Model Penal Code (Tent. Draft 2: 1954), Comment to sec. 601 at 10-11.

478. Study Draft, supra note 262, at xxxiii.

479. Id., sec. 3201, p. 279.

480. Hall, Theft, Law and Society, supra note 137, at 151.

481. Model Penal Code (Tent. Draft 2: 1954), Comment to sec. 601 at 10-11.

482. Model Penal Code (Tent. Draft 11: 1960), Comments to sec. 221.2 at 69.

483. Coke, supra note 119, at 69.

484. People v. Graham, 78 Cal. Rptr. 217, 455 P. 2d 153 (1969).

485. Hall, supra note 137, at xii-xiii.

486. See discussion of median time served for offenders, supra in introduction. National Prisoner Statistics (1967).

487. Model Penal Code (Tent. Draft 11: 1960), Comments to sec. 221.2 at 68.

488. David Sudnow, "Normal Crimes" in Richard Quinney (Ed.), Crime and Justice in Society 315 (1969).

489. Study Draft, supra note 262, sec. 1721 (2).

490. Marshall Clinard, Sociology of Deviant Behavior at 248, 250, table 8.3 (3d. Ed., 1968).

491. M. E. Wolfgang, "The Culture of Youth," in Task Force Report: Juvenile Delinquency and Youth Crime, U.S. President's Commission on Law Enforcement and Administration of Justice, 145, 150 (1967).

492. Model Penal Code (Tent. Draft 3: 1955); Model Penal Code (Tent Draft 7: 1954); Model Penal Code (Proposed Final Draft: 1961), sections 4.10, 6.05.

493. This would be the "legalist" or "positivistic" school the proponents of which range from philosophers to sociologists.

494. Ohlin and Remington, "Sentencing Structure: Its effect upon Systems for the Administration of Criminal Justice," 23 Law and Contemp. Probs. 495 (1958); Comment, "The Influence of the Defendant's Plea on Judicial Determination of Sentence," 66 Yale L.J. 204 (1956); Newman, "Pleading Guilty for Considerations: A Study of Bargain Justice," 46 J. Crim. L., C. & P.S. 780 (1956).

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