

# CALIFORNIA'S AGGRAVATED KIDNAPPING STATUTE —A NEED FOR REVISION

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## I. INTRODUCTION

Under existing California law, one who demands money from a female victim, and who thereafter "helps" her upon a bed and criminally assaults her, has committed the crime of aggravated kidnapping.<sup>1</sup> As such, the activity so described is, and has been held, sufficient to warrant the imposition of the death penalty. Section 209 of the California Penal Code provides:

Any person who . . . kidnaps . . . any individual to commit robbery . . . shall suffer death or shall be punished by imprisonment . . . for life without possibility of parole . . . in cases in which the person . . . subjected to such kidnaping suffers . . . bodily harm, or shall be punished by imprisonment . . . for life with possibility of parole in cases where such person or persons do not suffer bodily harm.<sup>2</sup>

It is difficult to conceive a situation in which the victim of a robbery does not make some movement under the duress occasioned by force or fear. In their interpretation of this statute, the California courts have stated that it is the fact of forceful movement, not the distance moved, which constitutes the statutory kidnapping. Hence, the coerced movement of a robbery victim, no matter how slight the distance, would conceivably be sufficient to place the typical robbery within the scope and provisions of the aggravated kidnapping statute.

Then too, the simple taking of any article of personal property at any time before, during or after a sexual or other type of assault by its perpetrator, accompanied by movement of the victim, has been held sufficient to constitute kidnapping-for-robbery, thus bringing into play the penalties of death or life imprisonment without the possibility of parole. This would be true even though the robbery

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<sup>1</sup> CAL. PEN. CODE § 207 (West 1955) (*enacted* 1872, *as amended*, 1905 Stat. 653, ch. 493, § 1) [hereinafter cited as § 207].

<sup>2</sup> CAL. PEN. CODE § 209 (West 1955) (*added* 1901 Stat. 98, ch. 83, § 1, *as amended*, 1933 Stat. 1757, ch. 685, § 1; 1933 Stat. 2617, ch. 1025, § 1; 1951 Stat. 4167, ch. 1749, § 1) [hereinafter cited as § 209].

was ancillary to a more dominant purpose; *i.e.*, a mere afterthought in the mind of the actor. Furthermore, if bodily harm is suffered by the victim, the death penalty may be invoked at the discretion of the jury or trial judge. Since rape has been construed by the courts to be within the definition of bodily harm, section 209 permits giving the death penalty to one who has committed rape, if this same person took, or attempted to take some de minimus article of personal property. Yet, if this same person were charged under the rape statute, his sentence could be as short as one year (five years if the victim is under eighteen).<sup>3</sup>

Admittedly, such a statute goes beyond the common law definition of kidnapping. In its present form, section 209 becomes a potent weapon in the arsenal of the district attorney when he evaluates his options in any robbery or rape prosecution. As pointed out by Justice Carter:

The prosecuting attorney is given the sole and arbitrary power to determine whether a person shall suffer life imprisonment without possibility of parole or even death on one hand, or, in the case of robbery in the second degree, as little as one year's imprisonment. It all depends on the charge he chooses, at his whim or caprice, to make against the accused. If he charges both robbery and kidnapping and the defendant is convicted of both crimes, he must suffer the greater punishment provided for kidnapping, or, if he wishes, he may charge kidnapping alone and likewise obtain the extreme penalty. However, he may charge robbery alone, and, in case of a conviction, lesser punishment would follow. All these things could occur on the identical set of facts which establish only robbery . . . . It is not to be supposed that the Legislature intended to place any such drastic and arbitrary power in the hands of the district attorney.<sup>4</sup>

A worthwhile inquiry can be made whether this law as it exists now, as it has been interpreted, and as it is now being enforced, genuinely reflects the intent of the legislature and seeks justice in our society. Should the slight movement of robbery victims within their residence, or place of business or employment by the perpetrators of a robbery constitute aggravated kidnapping in California? On many occasions, the California Supreme Court has held that it does. Should a simple civil assault, *i.e.*, an unconsented to touching, constitute "bodily harm"? Some of the cases lend themselves to

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<sup>3</sup> CAL. PEN. CODE § 264 (West 1955) (*enacted* 1872, *as amended*, 1913 Stat. 213, ch. 123, § 1; 1923 Stat. ch. 271, ch. 130, § 1; 1952 Stat., 1st Ex. Sess., ch. 23, § 1).

<sup>4</sup> *People v. Knowles*, 35 Cal. 2d 175, 203-04, 217 P.2d 1, 18 (1950) (Carter dissenting).

such an interpretation. Is this statute and all of its ramifications necessary, reasonable and desirable within the overall context of our penal system? A critical analysis of the current state of the law and a concrete proposal to remedy this situation would seem in order.

## II. LEGISLATIVE HISTORY

Preliminary to an historical evaluation of section 209, it is helpful to look to the history of kidnapping in general. Simple kidnapping is defined in California by section 207:

Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or county, or into another part of the same county, or who forcibly takes or arrests any person, with a design to take him out of this state, without having established a claim, according to the laws of the United States, or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this state, or to be taken or removed therefrom, for the purpose and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free will and consent of such persuaded person; and every person who, being out of this state, abducts or takes by force or fraud any person contrary to the law of the place where such act is committed, and brings, sends, or conveys such person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnaping.<sup>5</sup>

The punishment established for simple kidnapping and set forth in section 208 is imprisonment in the state prison for not less than one nor more than 25 years.<sup>6</sup>

The "aggravated" kidnapping statute, the subject of this article, is expressed in section 209:

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, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases

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<sup>5</sup> CAL. PEN. CODE § 207 (West 1955).

<sup>6</sup> CAL. PEN. CODE § 208 (West 1955) (*enacted* 1872, *as amended*, 1923 Stat. 486, ch. 238, § 1).

in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm.

Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole.<sup>7</sup>

California has also enacted section 236 of the Penal Code concerning false imprisonment, defining this crime as "the unlawful violation of the personal liberty of another."<sup>8</sup> The maximum penalty for a violation of this statute is a 500 dollar fine, or one year in jail, or both. If either "violence, menace, fraud or deceit," is employed, the maximum sentence increases to two years, with a minimum sentence of one year.<sup>9</sup>

Section 207, enacted in 1872, codified the common law definition and principle of kidnaping. California, prompted by legislation in other states and by a series of aggravated state-wide kidnappings, enacted Penal Code section 209 in 1901, to punish specifically kidnaping for ransom or extortion. Robbery was also included because at that time the code definition of extortion was limited to taking with consent.<sup>10</sup>

Historically, the crime of kidnaping has existed from before the time of Christ. The Old Testament defined kidnaping as the stealing and the selling of a man, and fixed the penalty at death.<sup>11</sup>

<sup>7</sup> CAL. PEN. CODE § 209 (West 1955).

<sup>8</sup> CAL. PEN. CODE § 236 (West 1955) (enacted 1872). Similar legislation dealing with a related problem of child stealing may be found in CAL. PEN. CODE § 278 (West 1955); CAL. PEN. CODE § 279 (West Supp. 1966).

<sup>9</sup> CAL. PEN. CODE § 237 (West 1955) (enacted 1872, as amended, 1901 Stat. 53, ch. 49, § 1).

<sup>10</sup> CAL. PEN. CODE § 518 (West 1955) (enacted 1872, as amended, 1939 Stat. 2017, ch. 601, § 1).

<sup>11</sup> *Exodus* 21:16; see *Deuteronomy* 24:7. Blackstone in his discussion of the crime makes direct reference to the Roman *plagium* and the Jewish biblical law. Kidnaping,

being the forcible abduction or stealing away of man, woman or child from their own country, and selling them into another, was capital by the Jewish law. "He that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death." So likewise, in the civil law, the offense of spiriting away and stealing men and children, which was called *plagium* and the offenders *plagiarii*, was punished with death. This is unquestionably a very heinous crime, as it robs the king of his subjects, banishes a man from his country, and may in its consequences be productive of the most cruel and disagreeable hardships; and therefore the common law of England has punished it with fine, imprisonment and pillory.

4 BLACKSTONE COMMENTARIES 219 (Dawson, First Edition Reprint, 1966).

As it developed in English common law, kidnapping involved the offense of taking a person out of the country. It was distinguished from false imprisonment where the subject was removed from the jurisdiction of the King, thereby depriving the Crown of one of its subjects and the accompanying feudal obligations and incidents pertaining thereto. Whereas, if the perpetrator merely confined the subject, a different offense and a lesser penalty was prescribed. Therefore, all the elements of false imprisonment were present in common law kidnapping plus the additional element of removal from the country.<sup>12</sup>

The original enactment of section 207 embodied the common law concept of kidnapping but expanded the scope of the asportation element to include removal to a different county. This was further modified in 1905 when the phrase "or into another part of the same county" was added to counteract the decision of *Ex parte Keil*.<sup>13</sup> In that case, the victim had been taken 26 miles from Los Angeles to Catalina Island. Although the island was outside the territorial waters of the United States, it was considered to be part of Los Angeles County, therefore the victim had not been taken out of the "same county." The legislature added the new phrase, indicating that it considered the substantial movement in the *Keil* case sufficient to constitute kidnapping. Nevertheless, the legislature failed to indicate the extent of this movement. It should also be noted that at the time of this amendment, section 236, dealing with false imprisonment, was not modified in any manner. Since false imprisonment is the unlawful violation of the personal liberty of another and calls for a lesser punishment than simple kidnapping, it would appear that the legislature intended section 236 to provide a punishment for transgressions which were not encompassed by the provisions of section 207. In the *Keil* case, since the victim had been taken more than 20 miles across ocean waters and held on an island for several days, it is understandable that the legislature would intend the kidnapping statute to cover this type of factual situation.

Section 209 was enacted in 1901 and, as differentiated from section 207, it had no basis in the common law and was thought to be an aggravated false imprisonment statute. Prior to its amendment in 1933, asportation was considered a necessary element of the offense and the few cases tried under this section prior to the

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<sup>12</sup> *Doss v. State*, 220 Ala. 30, 123 So. 231 (1929).

<sup>13</sup> 85 Cal. 309, 24 P. 742 (1890).

amendment fulfilled this requirement. In 1933, however, utilizing almost the entire language as contained in the federal kidnapping statute, which subsequently became known as the Lindbergh Law, the California legislature used the words "seized, confined, inveigle" to describe the nature of the offense, but omitted the language required by the federal statute of "whoever shall knowingly *transport* or cause to be *transported*, or aid or abet in the transporting . . ."<sup>14</sup> Thus, it may be that California in amending section 209 attempted to eliminate the requirement of asportation, although the federal statute upon which it was based did not include such nonmobile conduct within its purview. For the first time, therefore, any stationary robbery could be considered violative of the kidnapping statute. Such a result was probably never intended by the legislature. Thus, Penal Code section 209, prior to 1951, was violated by "[e]very 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 and detains, such individual for ransom, reward or to commit extortion or robbery . . ."<sup>15</sup> Hence, mere detention during a robbery appeared to be actionable under the statute. The California Supreme Court so held in *People v. Knowles*,<sup>16</sup> decided in 1950. There the defendant had merely detained his victim in order to rob a clothing store, but this detention was held a sufficient act and no movement of the victim was necessary to complete the crime of kidnapping. The court held that the 1933 amendment abandoned the requirement of moving the victim to characterize the offense,<sup>17</sup> and if bodily harm in fact thereafter occurred, the defendant was susceptible to the death penalty or life imprisonment without the possibility of parole. The furor raised by this decision, coupled with the forceful dissenting opinion of Justices Edmonds and Carter, prompted the enactment of the 1951 amendment.

The amended portion deleted the language relative to the "holding and detaining" of the victim and inserted the phrase "or any person who kidnaps to commit robbery." It thereafter became the court's duty to analyze the effect of this amendment. Among the cases in which the California Supreme Court interpreted the new

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<sup>14</sup> Act of June 22, 1932, ch. 271, 47 Stat. 326. This statute was subsequently amended by the Lindbergh Act, ch. 301, 48 Stat. 781 (1934). The language quoted, however, remained the same.

<sup>15</sup> CAL. PEN. CODE § 209 (West 1955) (historical note).

<sup>16</sup> 35 Cal. 2d 175, 217 P.2d 1 (1950).

<sup>17</sup> *Id.* at 180, 217 P.2d at 4.

amendment were *People v. Chessman*<sup>18</sup> and *People v. Wein*.<sup>19</sup> Rather than utilize the authorities describing the classic definition of asportation as enumerated in common law kidnapping, the court held in both the *Chessman* and *Wein* cases that "[i]t is the fact, not the distance, of forcible removal which constitutes kidnapping,"<sup>20</sup> thereby virtually undoing the intended effect of the amendment. In the author's view therein lies the prime difficulty attending the enforcement of section 209. The decision in the *Chessman* case provided the prosecutors a latitude not contemplated by the legislature, that is, enabling prosecutors to charge the accused with a crime of robbery which carries a minimum penalty of one year,<sup>21</sup> or with section 209 which carries a maximum punishment of death or a minimum penalty of life imprisonment on approximately the same facts. The California Supreme Court admitted that mere detention alone would no longer be sufficient but that *any* movement whatsoever would still bring the perpetrator within the purview of the section. The *Wein* case further crystalized the *Chessman* decision and thus the amendment, instead of obviating the problems raised by the *Knowles* case, actually had little practical effect.

### III. DEFECTS OF PENAL CODE SECTION 209

Preliminary to any logical proposals, it is necessary to identify and examine the individual problems involved in the present form of section 209. These can generally be broken down into four problem areas:

- A. The problem of asportation.
- B. The problem of the requisite intent and when it must arise.
- C. The problem of the scope and definition of "bodily harm."
- D. The problem of penalties.

Appropriate to this discussion, each of the above problems will be treated separately, examining the present wording of the statute and how the courts have interpreted it.

#### A. *Asportation*

One of the initial considerations involved in any kidnapping situation is the removal of the victim. In order to discuss the element

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<sup>18</sup> 38 Cal. 2d 166, 238 P.2d 1001 (1951).

<sup>19</sup> 50 Cal. 2d 383, 326 P.2d 457 (1958).

<sup>20</sup> 38 Cal. 2d at 192, 238 P.2d at 1017; 50 Cal. 2d at 400, 326 P.2d at 466.

<sup>21</sup> CAL. PEN. CODE § 213 (West 1955).

of asportation required for a violation of section 209, it is necessary to look also to the simple kidnapping statute, section 207. As the statute was originally enacted it required an asportation "into another country, state, or county," which in most cases would probably amount to a *substantial* distance. However, the statute was amended in 1905<sup>22</sup> and the words "or into another part of the same county" were added. The question then arose as to what constituted movement into another part of the same county. The argument that the legislature intended that the 1905 amendment required "movements over considerable distances" was rejected in *People v. Phillips*,<sup>23</sup> where the court stated "that to read those words into the 1905 amendment would import into the statute a hazardous element of uncertainty. What is a 'considerable' distance?"<sup>24</sup> In the *Phillips* case the defendant had taken a child from her bedroom, along a corridor, down fourteen steps to a back door, and then fifteen feet into the back yard. The court held that this was sufficient asportation under section 207, and cited *People v. Loignon*,<sup>25</sup> for the statement, "it is the fact, 'not the distance, of forcible removal which constitutes kidnaping in this state.'" In the *Loignon* case the defendant pulled a seven year old boy into his car and started the motor, at which point the boy leaped from the car and escaped. The defendant argued this conduct could not constitute the crime of kidnapping. He contended that there was no proof of any attempt to remove the alleged victim from one part of the county to another, that the words "other part" of the county as used in the statute are "'too vague, indefinite and uncertain,'" and that it could not be determined whether this means "'a few inches away, across the street, around the corner, or into another political subdivision of the county.'"<sup>26</sup> The court stated that the defendant misconceived the issue and cited *People v. Chessman*<sup>27</sup> for the statement that it is the fact, "not the distance, of forcible removal which constitutes kidnaping in this state." Since the *Chessman* case was decided under section 209 and not section 207, the court in effect said that there is no distinction between the element of asportation required for kidnapping-for-robbery and simple kidnapping. This presents the question whether there should be such a distinction, and whether the legislature intended such a distinction to exist.

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<sup>22</sup> 1905 Stat. 653, ch. 493, § 1.

<sup>23</sup> 173 Cal. App. 2d 349, 343 P.2d 270 (1959).

<sup>24</sup> *Id.* at 352, 343 P.2d at 272.

<sup>25</sup> 160 Cal. App. 2d 412, 325 P.2d 541 (1958).

<sup>26</sup> *Id.* at 421, 325 P.2d at 546.

<sup>27</sup> 38 Cal. 2d 166, 192, 238 P.2d 1001, 1017 (1951).



An affirmative answer to both of these questions was advanced by the defense in the *Phillips* case. The defendant claimed that since the legislature in 1933 had "broadened" the provisions of section 209 and did not amend section 207, it meant that these should be treated separately, and that there was no intent to "broaden" section 207. This argument was rejected by the court. However, weight can be added to the above argument by noting the fact that the legislature directly modified the asportation element of section 209 in 1951, while not making any reference to section 207. The problem area which developed because of the *Chessman* case will be discussed after a comment on the more recent decisions under section 207.

In *People v. Rich*,<sup>28</sup> the defendant put forth the theory that there could be no kidnapping because the transportation was within the area in which the victim himself was intending to travel. The court rejected this contention by stating that "under section 207 only forcible taking and carrying is necessary without regard for distance, route taken, or area covered."<sup>29</sup> For this rule the court cited *Chessman*, decided under 209, and also *Phillips* and *Loignon*, both of which had quoted *Chessman* for their authority.

The broad language used in the above cases to describe the element of asportation has been severely limited in the 1961 supreme court case of *Cotton v. Superior Court*.<sup>30</sup> Here, the defendants, members of a labor union, went to a bracero work camp to induce its residents to join the labor union. A riot ensued during which several of the defendants chased a number of the braceros out of their houses at knife point, beating up some and ordering others out of the camp. At the trial level, the defendants were convicted of kidnapping; however, the California Supreme Court held that the requisite asportation necessary for conviction was lacking.

The prosecution relies principally on *People v. Rich*. In that case, the victims, under threat of a knife attack, were forced to accompany defendant for 10 or 12 blocks in an automobile while he attempted to escape following the burglary of a market. Certain broad language used in that case should be confined to the facts therein which manifestly demonstrate a commission of the offense denounced by section 207 of the Penal Code, and such language cannot reasonably be held applicable to the factual background and evidentiary features of the case with which we are here concerned.<sup>31</sup>

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<sup>28</sup> 177 Cal. App. 2d 617, 2 Cal. Rptr. 600 (1960).

<sup>29</sup> *Id.* at 621, 2 Cal. Rptr. at 602 (citations omitted).

<sup>30</sup> 56 Cal. 2d 459, 364 P.2d 241, 15 Cal. Rptr. 65 (1961).

<sup>31</sup> *Id.* at 464, 364 P.2d at 244, 15 Cal. Rptr. at 68.

The court went on to give a standard by which asportation can be established in a given set of facts:

That section [207] would have no application at all, but for a 1905 amendment adding ". . . into another part of the same county." This amendment was added in view of *Ex parte Keil*, where it was held that the forcible removal of a person from San Pedro to Santa Catalina Island, both in Los Angeles County, could not constitute kidnapping under the statute as it existed at that time. A review of those cases in which the statute was applied since 1905 reveals that *each asportation was for the accomplishment of an illegal purpose*, such as in the *Rich* case. . . . In the instant case, the only movements that occurred were those natural in a riot or assault. The evidence reveals that persons were pushed to the ground, dragged around, chased, and assaulted. All "asportation" in the instant case would appear to be only incidental to the assault and rioting.<sup>32</sup>

In addition, the court stated that to apply section 207 to the type of fact situation involved in the *Cotton* case would lead to an unreasonable result:

Such a holding could result in a rule that every assault could also be prosecuted for kidnapping under Penal Code section 207, as long as the slightest movement was involved. Where the movement is incidental to the alleged assault, Penal Code section 207 should not have application, as the Legislature could not reasonably have intended that such incidental movement be a taking ". . . from one part of the county to another."<sup>33</sup>

The court then quoted *People v. Oliver* for the statement:

All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice or oppression or an absurd consequence. It will always be presumed that the legislature intended exceptions to its language which would avoid results of this character.<sup>34</sup>

Turning to the *Chessman* case we find what is possibly the source of the more recent difficulties with the asportation element of kidnapping. Not only have the statements made in *Chessman* as to what constitutes asportation been used to define that element in a statute not involved in the case, but the case also reached an illogical result under its own statute.

In *Chessman* the defendant was convicted of violating section 209. The fact situation involved is quite pertinent to the problem.

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<sup>32</sup> *Id.* (citation omitted) (emphasis added).

<sup>33</sup> *Id.* at 465, 364 P.2d at 244, 15 Cal. Rptr. at 68.

<sup>34</sup> 55 Cal. 2d 761, 767, 361 P.2d 593, 12 Cal. Rptr. 865 (1961), quoting from *Ex parte Lorenzen*, 128 Cal. 431, 439-40, 61 P. 68, 71 (1900).

On one occasion the defendant stopped his car near a parked car occupied by Lee and Regina. He displayed a 45-calibre automatic pistol, and during the ensuing events repeatedly threatened his victims in order to intimidate them to obey his commands. The defendant took the man's wallet, the keys to the car and the woman's purse. He then forced the woman to walk 22 feet to his car; after entering the car he sexually assaulted her. When another automobile approached, the defendant took \$5.00 from Regina's purse, returned the purse and keys to her, and allowed her to leave his car. On the second occasion, the defendant approached a parked car occupied by Hurlburt and Mary, and, pushing a 45-calibre automatic pistol through the window, said, "this is a stick-up." Both victims replied they did not have any money, whereupon the defendant forced Mary to enter his car, drove to an isolated place and compelled her to submit to sexual acts.

The fact that Regina in being kidnaped or carried away was forced to move only 22 feet does not make her abduction any the less kidnaping within the meaning of the statute. She was taken from the car of her chosen escort, and from his company, to the car of defendant and into the latter's company and there detained as a virtual prisoner and forced to submit to his demands. It is the fact, not the distance, of forcible removal which constitutes kidnaping in this state.<sup>35</sup>

The illogical result in the *Chessman* case becomes obvious when the 1951 amendment to section 209 is considered. Due to the cases resulting in convictions for violation of 209 when the asportation involved was merely the detention of the person while he was being robbed, the legislature removed the words "hold" or "detain" from the statute. This was a reasonable change because the wording of the statute had resulted in the very crime of robbery also being a

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<sup>35</sup> *People v. Chessman*, 38 Cal. 2d 166, 192, 238 P.2d 1001, 1017 (1951). See *People v. Oganessoff*, 81 Cal. App. 2d 709, 711, 184 P.2d 953, 954 (1947) (forcibly carrying victim from automobile into house upheld as kidnaping); *People v. Shields*, 70 Cal. App. 2d 628, 630, 161 P.2d 475, 479 (1945) (carrying child from front of house to roof supported conviction of kidnaping); *People v. Melendrez*, 25 Cal. 2d 490, 494, 77 P.2d 870, 872 (1938) (forcing victim to walk 50 to 75 feet held "an act of kidnaping"); *People v. Cook*, 18 Cal. App. 2d 625, 627, 64 P.2d 449, 450 (1937) (shoving victim into house from sidewalk constituted kidnaping); *People v. Raicho*, 8 Cal. App. 2d 655, 665, 47 P.2d 1108, 1112 (1935) (forcing victims to cross street and enter automobile constituted "kidnaping and carrying away"); *State v. Taylor*, 70 N.D. 201, 209, 293 N.W. 219, 224 (1940) (defendant compelled victim to drive for a very short distance, held "where asportation is charged, the distance removed is not material"); *Cox v. State*, 203 Ind. 544, 550, 177 N.E. 898, 900, *aff'd*, 181 N.E. 469, 472 (1932) (forcible carrying of child 90 feet was held to be within the kidnaping statute).

kidnapping-for-robbery. As pointed out earlier, the first case after the amendment was *Chessman*, in which the court stated that asportation was established by the fact that a victim was actually moved, regardless of the amount of the movement, and held 22 feet to be a sufficient distance to constitute asportation. If the statements in *Chessman* are carried to a more or less typical robbery situation, it is discernible that this was not the legislature's intent. Hypothetically, A enters a liquor store and orders the clerk, who is stocking shelves, to go to the cash register and hand over the money. The clerk moves ten feet to the cash register and turns over the money to A. Applying *Chessman*, A may have violated section 209. It is doubtful that the legislature intended that this standard robbery situation should lead to a prosecution for kidnapping, or that the prosecutor should have an unlimited option to charge either robbery or kidnapping-for-robbery, or both, or mere false imprisonment. As noted by Justice Carter in *People v. Wein*,<sup>36</sup> "as a result of the *Chessman* and the instant decision while robbery is not per se a violation of section 209, if the robber moves his victim one inch he is subject to the death penalty" and this observation, vigorously made, must be said to accurately reflect the law of California today.

### B. *Specific Intent*

The principal case defining the specific intent required by section 209 is *People v. Brown*,<sup>37</sup> wherein the defendant entered his female victim's car and forced her to drive to a remote area where he then sexually assaulted her. Upon completion of this act, the defendant questioned her as to how much money she had, and when she replied that she only had \$1.50, he struck her on the chin. The defendant took her watch and purse containing the \$1.50 and fled in her car. The defense claimed that there had been no violation of section 209 for the defendant robbed his victim only as an afterthought; his principal and primary intent was to commit rape. The court in ruling against this argument stated:

This section makes it unnecessary to determine whether the kidnaper intended to commit extortion or robbery at the time of the original seizure or carrying away. It is sufficient if the extortion or robbery was committed during the course of the abduction. Thus, whatever may have been the original motive of the kidnapping, he

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<sup>36</sup> 50 Cal. 2d 383, 326 P.2d 457 (1958).

<sup>37</sup> 29 Cal. 2d 555, 176 P.2d 929 (1947).

"holds or detains" his victim "to commit extortion or robbery" within the meaning of section 209.<sup>38</sup>

There is apparently some confusion in the courts as to whether the above statement in the *Brown* case is still the law in California. In *People v. Smith*,<sup>39</sup> the court points out that both the *Brown* and the *Knowles* cases were decided before the 1951 amendment to section 209, when "detention" alone was sufficient to establish kidnapping-for-robbery, and there was no requirement of asportation. The court states that the amendment changed the "intent" element of the statute:

Accordingly, an additional effect of the change in the statute is to make it necessary for the trier of fact to determine whether the kidnaper intended to commit robbery at the time of the original seizing. In this respect the crime is similar to burglary where it is necessary to show that the entry was with intent to commit larceny or any felony. An illegal entry but without such an intent is not a burglary. . . . [S]imilarly since the 1951 amendment to section 209, kidnapping without intent to rob constitutes kidnapping but not kidnapping for purpose of robbery; and a robbery during a kidnapping where the intent was formed after the asportation is a robbery and not a kidnapping for purpose of robbery.<sup>40</sup>

The 1964 case of *People v. Lindsay*,<sup>41</sup> follows the *Smith* case. The factual situation in *Lindsay* is typical of many of the cases which have resulted in convictions for violation of section 209. The defendant had raped his victim and then robbed her. He claimed that his whole effort was devoted to satisfying his sexual desires, and that any robbery which occurred was merely an afterthought. The instruction given by the trial court was essentially the same as the language of the *Brown* case in saying that it was unnecessary to determine whether the kidnapper intended to commit robbery at the time of the original seizure and carrying away. The *Lindsay* court, in following the *Smith* case, ruled that the instruction was error:

We agree with the interpretation placed by *Smith* upon section 209. We are satisfied that when the Legislature, in 1951, inserted

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<sup>38</sup> *Id.* at 558, 176 P.2d at 931. This statement has been followed in *People v. Knowles*, 35 Cal. 2d 175, 185, 217 P.2d 1 (1950); *People v. Hernandez*, 100 Cal. App. 2d 128, 133, 223 P.2d 71 (1950); *People v. Bean*, 88 Cal. App. 2d 34, 37, 198 P.2d 379 (1948).

<sup>39</sup> 223 Cal. App. 2d 225, 233-34, 35 Cal. Rptr. 719, 723-24. Petition for hearing by the California Supreme Court was denied on February 5, 1964.

<sup>40</sup> *Id.* at 234, 35 Cal. Rptr. at 724.

<sup>41</sup> 227 Cal. App. 2d 482, 38 Cal. Rptr. 755 (1964).

the words "or any person who kidnaps or carries away any individual to commit robbery" . . . in said section, it was the legislative intent that robbery be premeditated as part of the kidnapping. The phrase "to commit robbery" obviously means with the intent or purpose of committing a robbery.<sup>42</sup>

In 1966, the California Supreme Court, in deciding *In re Ward*,<sup>43</sup> reaffirmed the *Brown* rule by stating that "where a robbery is committed during the course of a kidnaping the crime becomes kidnaping for the purpose of robbery from the beginning, regardless of the kidnaper's intention."<sup>44</sup> The court made no mention of the *Smith* and *Lindsay* decisions in upholding the language of the *Brown* case. One explanation for the apparent contradiction in the above cases may center around the fact that in the *Ward* case the defendant was appealing by way of habeas corpus from a conviction handed down 20 years earlier, at which time the law may have been that as stated in the *Brown* case.

Thus it would seem at this juncture that a substantial question remains concerning the point in time at which the specific intent to rob must be formed.<sup>45</sup> What the California Supreme Court will do at this point is problematical, although the rationale of the *Smith* and *Lindsay* cases seems to be more consistent, in the author's view, with the basic framework of the legislation.

It seems certain that in any modification of the law, and even without any modification, only the dominant intent of the kidnapper should be considered. In its present form the statute refers to kidnaping "for the purpose of robbery;" however, the defense that the

<sup>42</sup> *Id.* at 509, 38 Cal. Rptr. at 772-73.

<sup>43</sup> 64 Cal. 2d 672, 414 P.2d 400, 51 Cal. Rptr. 272 (1966).

<sup>44</sup> *Id.* at 677, 414 P.2d at 404, 51 Cal. Rptr. at 276.

<sup>45</sup> A collateral problem concerning the area of intent is developed in the case of *People v. Oliver*, 55 Cal. 2d 761, 765, 361 P.2d 593, 597, 12 Cal. Rptr. 865, 867 (1961). Here the supreme court set forth what it considered to be the absurd result of a strict interpretation of the intent element of kidnapping.

If I find a young child alone on the highway and take him into my automobile, whether he resist or goes with me passively, intending to transport him to a police station or to his home; if I find such a child at the edge of a body of water in which he might drown or at the edge of a precipice over which he might fall and seize him even brusquely, whatever his resistance, and forcibly carry him to a place of greater safety; if I find such a child on the sidewalk and take his hand and walk along with him out of friendliness or a fondness for children or any other innocent or innocuous reason with no malign or evil purpose, nobody could reasonably believe that it was the intention of the Legislature that for any of these acts I could be convicted of the crime of kidnaping.

Based upon this reasoning the court held that an illegal purpose or intent was necessary and must accompany the overall act involved.

actor kidnapped his victim for another purpose, *i.e.*, rape, and only incidentally robbed her, has not been recognized. By not recognizing such a defense the California courts are in effect allowing a defendant to be charged with a capital offense when the principal crime he committed was a lesser one such as rape.

### C. Bodily Harm

Perhaps the most crucial issue which confronts the defendant charged with violating section 209 is whether his victim has suffered bodily harm. If the victim has remained unscathed, the defendant will face life imprisonment, but with the possibility of parole. On the other hand, if it is resolved at the trial that the victim has suffered bodily harm the defendant may be subjected to the more extreme penalties of death, or imprisonment without parole. Thus, a critical issue invariably arises: has the victim met with harm of such magnitude to be categorized as "bodily harm"?

Unfortunately, there is no statutory definition of bodily harm. Not uncommonly, the indefiniteness of a key phrase has called forth a wide variety of judicial pronouncements and refinements. Recently, the California courts have retreated to a certain extent from some of the earlier, excessively broad definitions given to bodily harm. However, a number of considerable problems remain, and the need for a statutory definition may be clearly illustrated by a review of the case law in the area.

Until 1955 the principal case concerning "bodily harm" was *People v. Tanner*,<sup>46</sup> in which the court chose to define it as:

"any touching of the person of another against his will with physical force in an intentional, hostile and aggravated manner, or projecting of such force against his person." 8 C.J. 1134; *People v. Moore*, 50 Hun (N.Y.) 356, 3 N.Y. Supp. 159; 1 Words and Phrases, First Series, page 817; *King v. Hostetter*, 7 Canadian Criminal Law, 221.<sup>47</sup>

This latitudinal statement far exceeded what was necessary for the disposition of the issue.

In *Tanner*, the defendant and an accomplice lay in wait for the victim, Henry G. Bodkin, a prominent attorney, outside his house, and seized him as he approached the garage. After forcing the victim

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<sup>46</sup> 3 Cal. 2d 279, 44 P.2d 324 (1934).

<sup>47</sup> *Id.* at 297, 44 P.2d at 332.

to return to the house and locking his young son and maid inside a closet, the defendants attempted to convince Mr. and Mrs. Bodkin to tell them where certain large sums of money were concealed. In order to overcome his victims' reluctance to speak, defendant Tanner formed a torch from a heavy magazine cover and proceeded to apply the flame to Mr. Bodkin's bound hands. While this did cause the victim to cry out in pain, he did not divulge the whereabouts of any money. Finally, when the torch had been consumed, the defendants decided that they must have been given a "bum steer," so after taking the maid and boy from the closet and tying them up, the defendants fled.<sup>48</sup> At the trial level, Tanner and his accomplice, Brooks, were found guilty of the kidnapping-for-robbery charge and were sentenced to death.

In its opinion, the California Supreme Court first observed that the phrases "*actual* bodily harm," "*great* bodily harm," or "bodily harm," had not been used by the drafters of the statute. Thus, the court reasoned that since the legislature did not utilize one of those phrases, the term "bodily harm" must denote something less. The court then sought the individual meanings of "bodily" and "harm" and ascertained that bodily was synonymous with physical, and harm with "hurt; injury; damage; (2) grief, pain, sorrow; (3) evil; wrong; wickedness." (Webster's International Dictionary, 2d ed.)<sup>49</sup> The court concluded that:

There can be no doubt that applying fire to the hands of a person in the manner described by the witnesses in the instant case to the degree that it causes such person to suffer acute pain, is to do bodily harm. *To bind persons in the manner in which the Bodkins were bound is to do them bodily harm.* Mrs. Bodkin, while not subjected to the ordeal of fire, was imprisoned in a close and overheated closet, three by five feet in dimension, with two other persons for quite a period, and was finally left bound with the other members of the household. *These acts unquestionably amount to bodily harm.*<sup>50</sup>

Thus, in a loosely worded opinion the *Tanner* court determined that tying a victim's hands constituted "bodily harm," and was thereby the determining factor between the more severe penalties of death or life imprisonment without parole, and the lesser one of life imprisonment.

Three years later in *People v. Britton*,<sup>51</sup> where the victim was

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<sup>48</sup> *Id.* at 286-87, 44 P.2d at 327.

<sup>49</sup> *Id.* at 297, 44 P.2d at 332.

<sup>50</sup> *Id.* (emphasis added).

<sup>51</sup> 6 Cal. 2d 1, 56 P.2d 494 (1936).



robbed, blindfolded, bound, and struck over the head, the court quoting from *Tanner*, reaffirmed its previous definition of bodily harm by stating that the "appellants' criminal acts constituted 'bodily harm' within the meaning of section 209 . . . ." <sup>52</sup> While it may be accurate to hold that striking a person on the head and binding him with copper wire constitute "bodily harm" when that phrase is used in the abstract, this amount of harm approaches insignificance when used as the fulcrum for a decision in which the defendant's life hangs in the balance. The fact of bodily harm disqualifies the defendant from any hope of parole, and at the very least commits him to prison for the rest of his natural life.

Several years later, the California Supreme Court experienced little difficulty in concluding that rape would also qualify as "bodily harm." In *People v. Brown*, <sup>53</sup> the defendant had forced his victim to drive her car to a secluded area and walk up a hill where he then raped and robbed her. Prior to raping the victim, the defendant struck her on the chin (which remained bruised and discolored for several days), knocking her to the ground. Under the *Tanner* definition, a blow to the chin would be adequate for a finding of the requisite "bodily harm." Nevertheless, the court went on to say by way of dicta that the forcible rape itself was to be considered bodily harm. Moreover, the court specifically disapproved a Second District Court of Appeals opinion in an earlier case, implying that rape should not be considered bodily injury. <sup>54</sup> There the defendant had challenged the sentence he had received for the crimes of rape, and assault by means of force likely to produce great bodily injury, as being double punishment, arguing that the latter crime was included within the rape conviction. In discounting that argument the appellate court had stated:

If it be suggested that the act of sexual intercourse is itself one likely to produce great bodily injury there are several obvious reasons why that argument is beside the point. First and foremost is the fact that the act of intercourse is not the force by which resistance is overcome. Again, in rape, the penetration need be only infinitesimal and may cause not the slightest injury. It is no more reasonable to say that the act of sexual intercourse committed by force constitutes an assault by means of force likely to produce great bodily injury than to say it is an assault with a deadly weapon. <sup>55</sup>

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<sup>52</sup> *Id.* at 3-4, 56 P.2d at 495.

<sup>53</sup> 29 Cal. 2d 555, 176 P.2d 929 (1947).

<sup>54</sup> *Id.* at 560, 176 P.2d at 931.

<sup>55</sup> *People v. McIlvain*, 55 Cal. App. 2d 322, 332, 130 P.2d 131, 136 (1942).

While rape is certainly more injurious than bound hands, it does not automatically follow that the interests of society uniformly demand more extreme penalties as a consequence. Rape itself carries a substantial penalty. If this is inadequate, the rape statute should be changed rather than have the judiciary extend the applicability of section 209.

In 1951 the supreme court added the violation of California Penal Code Section 288a<sup>56</sup> to the scope of "bodily harm," and also re-affirmed its decision in *Brown*, when it decided the case of *People v. Chessman*.<sup>57</sup> Here the trial court had instructed the jury utilizing the *Tanner* definition of bodily harm, and further instructed that both attempted forcible rape, and a compelled violation of section 288a, were "bodily harm." Chessman argued that the trial court's instructions were erroneous, but the supreme court affirmed saying:

In the *Brown* case we . . . declared that "The forcible rape itself was bodily harm." We note that the facts of the *Brown* case differ from those of defendant's case in that *Brown* actually struck his victim as well as raping her, but we hold that the rule of the *Brown* case is equally applicable here. It would belie sensibility and defame the *mores* of our age to hold that such treatment as the female victims received here is not the infliction of "bodily harm" within the meaning of section 209 of the Penal Code.<sup>58</sup>

Until 1955 the California Supreme Court had been content to minimize the quantity of harm necessary to constitute "bodily harm." However, in *People v. Jackson*,<sup>59</sup> the court reexamined the *Tanner* definition. In a thorough opinion the court ostensibly determined that "bodily harm" meant "serious bodily injury." In *Jackson*, it appeared that the only injuries suffered by the victim were superficial marks—similar to those made by an expansion wrist-watch band—which were the result of his wrists being bound tightly by chains. The opinion states that "[w]hen released, [the victim] stated that he felt 'wonderful.' No physical examination was given him at that time and there appeared to be no necessity for one."<sup>60</sup>

In *Jackson*, the trial court held that there was sufficient evidence to sentence one of the defendants to death and the other to life imprisonment without possibility of parole. However, the supreme

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<sup>56</sup> CAL. PEN. CODE § 288a (West 1955).

<sup>57</sup> 38 Cal. 2d 166, 238 P.2d 1001 (1951).

<sup>58</sup> *Id.* at 185, 238 P.2d at 1013.

<sup>59</sup> 44 Cal. 2d 511, 282 P.2d 898 (1955).

<sup>60</sup> *Id.* at 516-17, 282 P.2d at 901.

court was reluctant to affirm, since the injury here, while technically "bodily harm," was obviously slight or no injury at all.

The *Jackson* court noted that section 209 had been patterned after the Federal Lindbergh Law which, though also imposing the maximum penalty if the victim is not released unmolested, uses the term "unharmed" rather than "without bodily injury." Reference was then made to *Robinson v. United States*,<sup>61</sup> which had interpreted "unharmed" as "uninjured." The *Jackson* court drew extensively from the United States Supreme Court's analysis of the rationale behind such a provision:

Two possible reasons suggest themselves . . . as to the motivation of Congress in making the severity of a kidnapper's punishment depend upon whether his victim has been injured. The first reason is the old belief that the severity of the injury should measure the rigor of the punishment. If this be the reasoning implicit in the statute, it would appear that Congress intended that for a kidnapper to obtain the benefit of the proviso he must both liberate and refrain from injuring his victim. Congress may equally have intended this provision as a deterrent, on the theory that kidnappers would be less likely to inflict violence upon their victims if they knew that such abstention would save them from the death penalty. This assumption finds some slight support in the legislative history, is not contested by the government, [and] has been accepted in one case [*United States v. Parker*, 19 F. Supp. 450, 103 F.2d 857] . . . .

. . . The quality of the injury to which Congress referred is not defined. It may be possible that some types of injury would be of such trifling nature as to be excluded from the category of injuries which Congress had in mind.<sup>62</sup>

The California Supreme Court conceded that there had been similar uncertainties with the California statute, and, citing the *Tanner* case, determined that the state courts had chosen to adopt the traditional meaning given the words "bodily harm" in the context of an action in tort for a battery. While recognizing the lip service given to the *Tanner* definition in *Britton*, *Brown* and *Chessman*, this court now reasoned that in all those cases there had been "serious bodily harm," rather than mere "bodily harm." Justice Edmonds, writing for the court, expressed doubt as to the applicability of the *Tanner* definition:

If the more serious penalty may be imposed when the only injury is of a nature similar to that shown by the present record, which con-

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<sup>61</sup> 324 U.S. 282 (1945).

<sup>62</sup> *Id.* at 283-85 (footnotes omitted).

cededly is almost necessarily an incident to every forcible kidnaping, neither the purpose of enhancement of the penalty for the more heinous crime nor the intention of deterring the kidnaper from killing or injuring his victim is subserved. On the contrary, if there necessarily be bodily injury in almost every kidnaping sufficient to warrant imposition of the more serious penalty, the kidnaper might well reason that the better course for him would be to kill the victim to minimize the probability of identification.<sup>63</sup>

Justice Edmonds believed that the legislature could not possibly have contemplated applying the aggravated kidnaping statute to a case of the nature of that before the court. In this decision, the California Supreme Court finally drew a line as to the quantum of injury, below which it would refuse to find bodily harm. Since the *Jackson* case there have been three cases in which the facts reported are sufficient to ascertain the current post-*Jackson* meaning of "serious bodily harm."

In *People v. Langdon*,<sup>64</sup> the court affirmed the defendant's death sentence under section 209. The defendant had robbed a Western Union office and forced a clerk into a back room where he attempted to sexually assault her. Meeting resistance with several blows of a pipe wrench; the defendant, while not accomplishing rape, beat the victim to the extent that she required medical treatment for three deep lacerations on her head. This evidently constituted "serious bodily harm," although the court did not specifically discuss this point.

Subsequently, in the 1961 case of *People v. Monk*,<sup>65</sup> the court affirmed the death penalty on two counts of section 209. One victim had been raped, subjected to a violation of Penal Code section 288a, and her nose and jaw had been broken in the course of a severe beating. The other victim had received a number of cuts and bruises. The court summarily concluded that both victims had been subjected to bodily harm.<sup>66</sup> Granted, the first victim did suffer the degree of harm characterized as serious bodily harm by the *Jackson* court; nevertheless, a similar conclusion as to the second victim is highly questionable. Can there be any real justification for a holding that minor cuts and bruises are in most instances serious bodily harm?

Of even more significance is the issue of causation presented by

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<sup>63</sup> 44 Cal. 2d at 517, 282 P.2d at 901.

<sup>64</sup> 52 Cal. 2d 425, 341 P.2d 303 (1959).

<sup>65</sup> 56 Cal. 2d 288, 363 P.2d 865, 14 Cal. Rptr. 633 (1961).

<sup>66</sup> *Id.* at 296, 363 P.2d at 868, 14 Cal. Rptr. at 636.

the case. It should be noted that the defendant never physically touched the second victim. After she had been forced into the defendant's car, and had thrown her wallet containing \$16.00 into the back seat pursuant to the defendant's directions, the victim was threatened with rape. Considering such a prospect undesirable, she leaped from the moving vehicle as it slowed for a red light. The court held that even though this woman was not touched, her fear, occasioned by Monk's threats, caused the leap which produced the injury and therefore Monk had been responsible for the victim's bodily harm. In the court's words:

While no cases have been found involving kidnaping for the purpose of robbery where the bodily harm was not directly inflicted by the accused upon his victim, we are persuaded that the doctrine of proximate causation is applicable in a case such as the present one where the defendant's threats of bodily harm caused his victim to receive injuries in an attempt to escape therefrom.<sup>67</sup>

However, in *People v. Baker*,<sup>68</sup> the Second District Court of Appeals reached a different result on similar facts. There the victim, driving a truck loaded with whiskey, was held up and then confined in the rear of the truck. After a lengthy period of time, the victim managed to open the rear door of the moving vehicle. An accomplice of the defendant, riding in a following vehicle, warned the defendant who then slowed the truck. At this juncture, the victim jumped from the vehicle, injuring himself in the process.

The defendant argued, and the court agreed, that such injuries were not within the contemplation of the framers of section 209. Relying on the *Monk* decision, the prosecution maintained that the injuries received were proximately caused by the defendant's threats of harm. In reaching its conclusion, the court held that *Monk* should be construed in light of *Jackson*, which had differentiated

between those injuries that are inherent in a forcible kidnaping and those injuries not inherent in the crime itself, but which are gratuitously added by the kidnaper to abuse and terrorize his victim.

. . . .

. . . [T]here would be no deterrent to killing the victim of a kidnaping if there were no distinction between injuries inherent in a crime and gratuitous physical abuse which are in no respect inherent in the crime but are separate and apart from it.<sup>69</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> 231 Cal. App. 2d 301, 41 Cal. Rptr. 696 (1964).

<sup>69</sup> *Id.* at 303-05, 41 Cal. Rptr. at 697-98.

Counterbalancing this, the *Baker* court pointed out that any victim of a crime may attempt to resist or escape, and if the defendant thwarts this attempt by killing the victim, or if the victim suffers injuries which cause his death, the defendant may be prosecuted for murder. Likewise, if the victim suffers bodily harm not amounting to death, the defendant may be charged with some form of assault and battery. However, in *Baker* the defendant was charged only with robbery (Penal Code Section 211) and kidnapping-for-robbery, and was not charged with assault or battery. Recognizing that the victim had been injured as a direct result of the robbery-kidnapping, the *Baker* court explained that:

If they [defendant's injuries] had been inflicted directly or proximately caused by appellant by threats or bodily harm as in *Monk*, . . . instead of self-inflicted as a result of the victim's attempt to escape, such injuries could be considered a gratuitous aggravation of a completed crime. . . . [T]he evidence in the case at bench is completely lacking even remotely of any act by the kidnaper of bodily harm to the victim or any gratuitous threat of bodily harm made by the kidnaper to the victim before he jumped from the truck, thus aggravating an already completed crime. The bodily harm suffered by the victim in the case at bench was *not* the result of any intentional gratuitous aggravation of the completed crime by the kidnaper, nor was it suffered as a consequence of an *actual threat of gratuitous* aggravation of the completed crime.

. . . In respect of the charged crime of kidnaping, we do not believe that "bodily harm" within the meaning of section 209 of the Penal Code is intended to include as an aggravation of the specific crime of kidnaping self-inflicted injuries suffered by a victim as a consequence of an escape or an attempt to escape.<sup>70</sup>

The court here validly distinguished between the situation where the victim reacts to the defendant's threats, as in *Monk*, and the situation in which he is injured as a result of his choice to risk an escape. The former facts will allow section 209 to be applied, while the latter facts call for no more than an additional count of battery in conjunction with a section 207 prosecution. Therefore, it may be premature to suggest that *Baker* has imposed any firm judicial limitation on causation within the concept of bodily harm. There is, however, little doubt that the decision reflects a significant trend to take a more cautious approach to the broad, and sometimes harsh, literal interpretation of the bodily harm element of section 209 which has prevailed over the years.

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<sup>70</sup> *Id.* at 306, 41 Cal. Rptr. at 699 (emphasis added).

Another case in line with this trend is *People v. Gilbert*,<sup>71</sup> which reached the California Supreme Court in December of 1965. The court was confronted with a unique and unusual aspect of the traditional defense argument on bodily harm. In the course of a bank robbery perpetrated by Gilbert and an accomplice, a woman teller had been used as a momentary shield or cover. At trial the teller described the defendant's grip on her arm as "firm," and explained that she had "'felt the impressions on that arm for sometime,'" yet she was unsure whether she had fallen to the sidewalk or been thrust there during the defendant's escape.<sup>72</sup> Gilbert had also killed a policeman during the escape. At the trial in which his client was charged with first degree murder, as well as kidnapping-for-robbery, Gilbert's attorney contended that the jury should be instructed as to the bodily harm provision of section 209. The judge refused the proffered instruction, finding that the kidnapping victim, the woman teller, had received no serious bodily harm. The jury sentenced Gilbert to death for the murder of the policeman. On appeal, the defense attorney argued that the trial court's failure to give the instruction prevented the jury from recommending life imprisonment without possibility of parole as an alternative to death or simple life imprisonment. The California Supreme Court upheld the trial court's findings and went on to elaborate:

Gilbert contends, however, that "any touching of the person of another against his will with physical force in an intentional, hostile and aggravated manner, or the projecting of such force against his person" constitutes bodily harm within the meaning of section 209. We rejected this definition in the *Jackson* case, however, and pointed out that in the *Tanner* case and the cases following it the kidnaping victim suffered serious bodily injury.<sup>73</sup>

In summary, while "bodily harm" is by no means clearly defined, it has now been construed to mean at least "serious bodily harm." However, within "serious bodily harm" is included:

[F]orcible rape [*Brown*]; sex perversion [*Chessman*]; burning the victim's hands to such a degree as to cause acute pain [*Tanner*]; blindfolding the victim, striking him over the head, and binding him with copper wire [*Britton*]; hitting the victim on the head with the barrel of a pistol [*Knowles*]; binding the victim's hands and feet with ropes and wire [*Tanner*]; and imprisoning the victim in a close

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<sup>71</sup> 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965).

<sup>72</sup> *Id.* at 711, 408 P.2d 377, 47 Cal. Rptr. 921.

<sup>73</sup> *Id.* (citations omitted).

and overheated closet with 2 other persons for almost an hour [Tanner].<sup>74</sup>

While this enumeration may seem too inclusive, it is nonetheless a valid one. It must be recognized that the *Jackson* court rejected the *definition* used in the prior decisions, while approving the findings that "bodily harm" or "serious bodily harm" had occurred.

#### D. *Penalty*

More than a century ago, Thomas Jefferson said that he would favor the death penalty when the infallibility of man had been demonstrated to him. Although the imposition of the death penalty has traditionally been a matter of concern to every United States citizen, it may be of particular interest to the legal profession when considered in the context of section 209. Since the penalties prescribed in that section exceed the sentences imposed for premeditated murder—death or life imprisonment *with* the possibility of parole<sup>75</sup>—a valid question may therefore be raised as to whether or not such punishment is disproportionate to the crime involved.

Under existing law, as it pertains to the kidnapping-for-robbery section, Justice Carter makes a strong argument that the penalty itself constitutes cruel and unusual punishment and is therefore violative of the constitutional mandate. Certainly, as a matter of legislative history, no enactment has been passed in California which indicates that the punishment for either rape or robbery is death. Yet when a rape occurs, accompanied by an incidental robbery, the death penalty has been invoked. It would seem that the chance movement of the victim during the course of the robbery would not justify the imposition of such a severe sentence. In the *Wein*<sup>76</sup> case, the movement of five different victims from 4 to 75 feet invoked a demand for the death penalty from the district attorney, not because the defendant had moved his victim, but for the sexual assaults he made upon them. As Justice Carter indicated, the district attorney, in order to buttress his argument,<sup>77</sup> relied upon the military law which decrees death for rape. Obviously, if rape is in fact a crime to be so severely punished, appropriate legislation could be enacted; but to permit such grievous consequences to flow from

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<sup>74</sup> 29 CAL. JUR. 2d *Kidnapping* § 15 at 672 (citations omitted).

<sup>75</sup> CAL. PEN. CODE §§ 190-190.1 (West 1955).

<sup>76</sup> *People v. Wein*, 50 Cal. 2d 383, 326 P.2d 457 (1958).

<sup>77</sup> *Id.* at 424, 326 P.2d at 481.



the incidental movement alone makes a mockery of our penal sanctions. If such penalty, viewed in the context of section 209, is thought to be a deterrent, so also may torture be viewed as a deterrent. Even aside from the moral implications, however, torture is so disproportionate in its consequences to the harm we seek to prevent, that it is not utilized.

If the punishment is being imposed for rape, it would seem inappropriate to impose death in a case where robbery occurs, and be unable to similarly treat a like case wherein nothing whatsoever is taken from the victim. It has been pointed out by some that kidnapping for ransom inherently presents a combination of factors creating a substantial risk of bodily harm. In the ransom situation, "forcible control is necessary to effect secret confinement; the offense requires a protracted concealment; the confinement becomes more difficult to maintain when the kidnapper's flight ultimately becomes necessary; and the victim's release grows increasingly dangerous with the passage of time."<sup>78</sup> Accordingly, a demand for ransom generally involves an express or an implied threat of death or great bodily harm. On the other hand, kidnapping-for-robbery does not present these risk-aggravating circumstances inherent in an attempt to obtain ransom. Forcible control is not always necessary; the victim need not even be seized; and if he is, he may immediately affect his release through compliance with the unlawful demand.

In the author's view, the punishments in California under the indeterminate sentence procedures insure by and large sufficient confinement to protect not only the interests of society but also to effect the desired rehabilitation of the individual. To impose the supreme penalty when a life has not been taken, and to deny the actor any possibility in his natural life of affecting proof of his rehabilitation, not only brutalizes the society that demands it, but also demeans the very purposes and philosophy of the Adult Authority<sup>79</sup> which regulates and supervises the concept of the indeterminate sentence. It appears that over the years section 209 is the only penal enactment completely depriving the Adult Authority, which is charged with the responsibility of executing the purposes of our penal sanctions, from discharging any obligation or exercising any control whatsoever over those convicted. To take from this authority the

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<sup>78</sup> Comment, *Room-to-Room Movement: A Risk Rationale for Aggravated Kidnapping*, 11 STAN. L. REV. 554, 555 (1959).

<sup>79</sup> CAL. PEN. CODE §§ 5075-5081 (West 1955).

powers entrusted to it by the State of California in one particular type of case, as different from all others, would seem to be an arbitrary distinction finding no precedence or rational basis. It is not the author's intention to debate the merits of capital punishment. That discussion has been presented in comprehensive detail in other forums.<sup>80</sup> However, a memorable position taken by Clarence Darrow in the "Loeb-Leopold" case may be of some interest in this context. In response to the argument advanced by the prosecutor that the defendants should receive the same treatment as the victim, Darrow commented:

Give them the same mercy as Bobby Franks [the victim]. Is that the law? Is that justice? Is that what this court should do? Is that what a state's attorney should do? If the state in which I live is not kinder, more humane, more considerate, more intelligent than the mad acts of these two boys, I am sorry that I have lived so long.<sup>81</sup>

It is the view of the author that the mere presence of this penalty within the enactment has created abuses in the criminal process and has given powers to prosecutors not contemplated by either the legislature, the courts, or the people. The mere declaration of a prosecutor at the onset of a jury trial, that this case may be an appropriate one for the infliction of the death penalty, is sufficient under existing law to activate the problem of death-qualified juries. By that simple pronouncement a substantial number of otherwise qualified jurors are eliminated from serving on the case. Although they do serve on other extremely serious and significant criminal cases, those jurors would be disqualified for cause due to their strong dislike of capital punishment. Their opinions can be revealed in the street but not in the jury room. Their opponents, however, can express their views in both places. Significantly, it has been variously estimated that from 25 to 75 out of every 100 Americans are thus eliminated from serving in an area involving the gravest responsibility in our criminal law. It is questionable whether such an existing jury composition accurately reflects the cross-section of our national and community life.

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<sup>80</sup> See Jewel, *The Death Penalty*, 36 CALIF. S.B.J. 228 (1961); *ACLU Attacks Capital Punishment*, *The Christian Century*, Sept. 22, 1965, at 32; *Capital Punishment*, *The New Republic*, June 8, 1963, at 5; *Is The Death Sentence Dying?*, *Newsweek*, Feb. 11, 1963, at 31; McBee, *Edging Away From Capital Punishment*, *The New Republic*, Jan. 30, 1965, at 11; Oliver, *The Death Penalty and Fair Trial*, *The Nation*, April 6, 1964, at 342; *On The Way Out*, *The Nation*, Nov. 23, 1964, at 367; Star, *The Bitter Battle Over Capital Punishment*, *Look*, May 7, 1963, at 23.

<sup>81</sup> WEINBERG, ATTORNEY FOR THE DAMNED 38 (1957).

At the option of a prosecutor, a defendant who has moved his victim during a robbery may be encouraged or even coerced to enter a plea of guilty to a robbery charge with a view to avoiding the more serious consequences of a conviction under 209. The possibility that a jury may consider factors such as those in *People v. Morse*<sup>82</sup> (i.e., that a person sentenced to life might be released before he may safely be returned to society, because of a weakness in the parole system) is an additional disadvantage. A jury may be encouraged to compensate for possible future release by imposing a harsher penalty than the evidence warrants.

Under the present interpretation of section 209, it would seem, as Justice Carter feared, that at the whim or caprice of a prosecutor simple robbery may become, if incidental movement of the victim is present, a kidnapping from which most assuredly flow consequences never contemplated by the legislature. It is suggested that to lessen such sanctions would in no way impede or prevent the imposition of the substantial penalties that flow from related substantive offenses.

#### IV. REVISED AND PROPOSED STATUTES

While it may be adequate to point out the defects of an existing statute, certainly a more constructive course of action would be to propose a statute which would eliminate the problems previously discussed and which, hopefully, would not be open to attack on the grounds that it creates more problems than it solves. This is the task which is undertaken in this section.

First, it would seem appropriate to delete from the present statute certain language which has become superfluous. Some of these deletions do not change the import of the statute since the obsolete language adds nothing to the meaning, but rather tends to cloud the statutory purpose. Second, a few additions have been deemed necessary. As the statute appears below, the deletions are enclosed in brackets and the additions are in italics.

#### § 209. PUNISHMENT OF KIDNAPPING FOR RANSOM, REWARD, ETC.

ANY PERSON WHO [seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps, or carries away] *KIDNAPS (AS DEFINED IN SECTION 207)*, ANY INDIVIDUAL BY ANY MEANS WHATSOEVER WITH INTENT TO HOLD AND DETAIN, OR WHO HOLDS OR DETAINS, SUCH INDI-

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<sup>82</sup> 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964).

VIDUAL FOR RANSOM, REWARD OR TO COMMIT EXTORTION OR TO EXACT FROM RELATIVES OR FRIENDS OF SUCH PERSON ANY MONEY OR VALUABLE THING, [or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act,] IS GUILTY OF A FELONY AND UPON CONVICTION THEREOF SHALL [suffer death or shall] BE PUNISHED BY IMPRISONMENT IN THE STATE PRISON FOR LIFE [without possibility of parole, at the discretion of the jury trying the same] IN CASES IN WHICH THE PERSON OR PERSONS SUBJECTED TO SUCH KIDNAPPING SUFFERS OR SUFFER BODILY HARM OR SHALL BE PUNISHED BY IMPRISONMENT IN THE STATE PRISON FOR [life with possibility of parole] *NOT LESS THAN FIVE YEARS* IN CASES WHERE SUCH PERSON OR PERSONS DO NOT SUFFER BODILY HARM. [Any person serving a sentence or imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole.]

The first change merely eliminates a number of surplus synonyms and replaces them with a reference to Penal Code Section 207. Since for many years the definition of "kidnapping" in section 207 has been judicially applied to section 209, it seems logical to clearly and specifically state that fact in the revised section 209.

There would also seem to be no necessity for the inclusion of the language dealing with "aiding and abetting" since Penal Code section 31<sup>83</sup> provides in its definition of principals that those who "aid and abet in its commission . . . are principals in any crime so committed." This general section applies to all crimes enacted in the Penal Code and encompasses section 209 as well; therefore, the inclusion of this language is unnecessary and this surplusage could well be stricken without loss of meaning to the section itself.

The first substantive modification occurs where the penalty is changed from death, or life imprisonment without possibility of parole, to the lesser penalty of life imprisonment with a minimum sentence of five years. As discussed in the previous section, this change is warranted in order to align the crime of kidnapping for ransom with the rationale that the punishment imposed under a statute should bear some relation to the harm caused by the defendant.

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<sup>83</sup> CAL. PEN. CODE § 31 (West 1955).

Another change which logically follows from the recent case law involves the provision for the jury's discretion in the penalty proceedings. Under a strict interpretation of the language contained in the present statute, the jury, rather than the court, has the exclusive province of adjudicating punishment in those cases involving bodily harm. On its face, the phraseology of this provision in 209 seems to imply that if the defendant waives a jury trial he in effect waives the possibility of receiving anything other than the death penalty, because the judge apparently has no discretion to decree a sentence of a lesser magnitude than the extreme penalty. California dealt with this problem in the recent opinion handed down in *People v. Langdon*,<sup>84</sup> where the defendant had waived a jury and was thereafter sentenced to death. The California Supreme Court held that the trial judge has the same discretionary powers with regard to sentencing as is given the jury. The court further held that notwithstanding the phrase "at the discretion of the jury," the trial court could in fact impose the death sentence where there has been an effective jury waiver. The court relied on Penal Code section 190.1<sup>85</sup> which provides that in cases where the penalty is in the alternative, either death or imprisonment for life, the "trier of fact" shall then hear further proceedings "on the issue of penalty." This reasoning, of course, must be engrafted onto the specific language of section 209 to achieve the result reached by the court. Similar wording in the federal kidnapping statute,<sup>86</sup> has also caused concern, and there is authority reaching a result different from that of the California Supreme Court. In *United States v. Jackson*,<sup>87</sup> it was held that that portion of the federal statute would be violative of the sixth amendment right to trial by jury because a different result may be achieved if the defendant exercises his option and requests a jury trial. Such difficulties would be obviated if the language were eliminated.

Lastly, it should be noted that the 1951 amendment to section 209 which added the second paragraph, was seemingly included to prevent a disproportionate penalty to those convicted under the pre-1951 "standstill robbery" concept. This situation, of course, has been fully discussed in *People v. Knowles*.<sup>88</sup> At the present time, all

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<sup>84</sup> 52 Cal. 2d 425, 341 P.2d 303 (1959).

<sup>85</sup> CAL. PEN. CODE § 190.1 (West 1959).

<sup>86</sup> 18 U.S.C. § 1201(a) (1964).

<sup>87</sup> 262 F. Supp. 716 (1967).

<sup>88</sup> 35 Cal. 2d 175, 217 P.2d 1 (1950).

such persons to whom this addition would be applicable most probably have had their rights adjudicated, and such language would no longer be necessary to the purposes of this section. Therefore, if modification is contemplated or desired in connection with the aggravated kidnapping section, language such as that described herein should be omitted in any future statutory scheme, since it adds little but confusion to the section.

In addition to the deletions from the current statute, two new sections are necessary to correct the remaining defects.

#### § 209.1 KIDNAPPING FOR ROBBERY—PUNISHMENT.

Any person who kidnaps any individual to commit robbery is guilty of a felony and upon conviction thereof shall be punished as provided in section 209 of the Penal Code.

(a) Kidnapping for robbery as used in this section means any movement of the victim of the robbery, or of any other person present at the scene and not a perpetrator therein, against his will and accomplished by means of force or threats to such person or another where such movement extends a substantial distance,<sup>89</sup> which distance exceeds movement within a stationary structure or physical entity and which is intended to effect or aid in the commission of the robbery or the escape of any of the perpetrators.

#### § 209.2 DEFINITION OF BODILY HARM.

Bodily harm means that bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.<sup>90</sup>

Essentially, such provisions would at least eliminate the problems of the present kidnapping-for-robbery portion of section 209. Specifically, part (a) would avoid the issue as to whether any movement, no matter how slight, would constitute kidnapping when coupled with a robbery. By requiring movement over a substantial distance and defining this distance to be at least out of the structure in which the action begins, the standard robbery situation is eliminated from the purview of the kidnapping statute. If the victim is not moved out of the "structure or physical entity" but such entity is moved (*e.g.*, a trailer, boat or car), the substantial distance rule would be the only test. Admittedly, it is impossible to define "substantial distance" in exact terms, such as a given number of feet, but it would at least consist of a distance greater than that normally

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<sup>89</sup> See MODEL PENAL CODE § 212.1 (Tent. Draft No. 11, 1960).

<sup>90</sup> *Id.* at § 211.4(3).

incident to the lesser offense of robbery. Incidental movement associated with the crime adds nothing to its severity, thus, to increase the punishment solely because of that fact would seem to be arbitrary and unreasonable.

A further addition is the section defining bodily harm. As previously indicated in this article, the *Tanner* case had all but equated bodily harm with civil battery. Currently, the standard jury instruction in California requires the bodily harm to be "substantial,"<sup>91</sup> and the *Jackson* case would seem to lend judicial support to this addition. Substantial injury, if that be the law, is not enough. In this author's view, the definition of bodily harm should be much akin to that of mayhem wherein the victim is deprived of some method or means of bodily function. The definition presented in the proposed section 209.2 attempts to exclude from the statute's purview sexual intercourse or other sexual misconduct, and simple assaults. I believe that the existing penalties for rape and sexual misconduct are adequate to meet the ends of justice under existing law. Section 209.2 for example, would prevent a rape without serious bodily injury from being raised by a zealous prosecutor to a kidnapping charge with the more extreme penalty than that delineated for rape.

While such statutory revision might not solve all the problems, I think it would alleviate what must be a formidable problem confronting our courts in the fair, efficient and prompt administration of criminal justice.

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<sup>91</sup> CAL. J.I.C. § 655 (1958).