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ASPECTS OF MERGER IN THE LAW OF KIDNAPPING

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> And he that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death.
>
> *Exodus, 21:16*

Legal authorities have always seconded the above-quoted Pentateuchal condemnation of kidnapping.[1] Difficulty occurs, however, when a court must decide if kidnapping, with its attendant heavy punishment, has been committed in a particular case. The question whether a kidnapping offense should merge with, and thereby become extinguished in, a murder, robbery, rape, or other felony has received two entirely different answers in the last few years. In New York felonious kidnapping was usually not found unless there was an attempt to collect ransom or reward. At the other extreme, California, and states following its lead, demonstrated little reluctance in punishing, even to the extent of the gas chamber, any violation of the kidnapping laws that exceeded the truly incidental. A statutory change in New York and a new interpretation of the California double punishment law have, in practice, decreased the polarization of viewpoints, but it would be wrong to conclude that the previously existing problems have been eliminated. A detailed examination of the old problems suggests that the current approach—one of legislative and judicial fiat—has not solved the problems and that they may well reoccur.

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1 Kidnapping, a common law misdemeanor, was defined by Blackstone as "the forcible abduction or stealing away of a man, woman, or child, from their own country and sending them into another." W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 219 (8th ed. 1778). Early in the statutory development of the law, kidnapping was raised to a felony. Later, the requirement that the victim be carried out of the country was eliminated, and kidnapping came to be defined as "the stealing and carrying away of any person." E. EAST, PLEAS OF THE CROWN 429 (London ed. 1803).

Kidnapping to obtain a reward or ransom is not dealt with in this article. Instead, emphasis will be placed upon those cases in which the act of kidnapping occurs (whether by design or not) in conjunction with the commission of a separate and distinct felony. Only the substantive aspects of the problem are covered. As with many other crimes, sentencing practices in this area tend to be confusing, and a detailed coverage of sentencing would necessitate the introduction of concepts and considerations extraneous to the matter at hand.

I

THE BACKGROUND OF NEW YORK'S APPROACH

One night in 1950 Michael Florio mounted the steps of a Manhattan brownstone and enticed a girl visiting in the house to come outside to meet a friend of hers, who allegedly was sitting in the car. Although she recognized none of the occupants, all of whom were male, the girl entered the vehicle. Against her will, she was driven to a remote spot in the neighboring borough of Queens and raped by all four occupants.

Reviewing the four defendants' convictions, the New York Court of Appeals found "true kidnapping in the popular understanding as well as the legal 'spirit and intent' of the law."[2] The court began with the basic kidnapping definition and established that there was a willful detention for an unlawful purpose against the victim's will and without authority of law. Once this was done, it was a simple step to sustain the kidnapping conviction under the statute then in effect.

The defendants' argument that their purpose was to commit first degree rape and that the act of kidnapping was incidental and should not form the basis of a felony conviction fell on deaf ears. Judge Conway pointed out in support of the court's holding that if the Court of Appeals accepted the defendants' argument, there was a real danger that in future cases a defendant might circumvent the harsher punishment received for kidnapping by raping his female victim. The Court of Appeals also cited with approval *People v. Hope*,[3] in which the victims were forced to drive one mile before they were rescued, and *People v. Small*,[4] in which the quick-thinking victim drove his car into a traffic signal at an intersection within one minute of his seizure. In each case kidnapping convictions were upheld because, as stated in *Hope*:

> The object of the statute and of the common law on the subject was the same, to secure the personal liberty of citizens and to secure to them the assistance of the law necessary to release them from unlawful restraint.[5]

The Court of Appeals continued this line of reasoning in *Florio* and left no doubt that New York would take a hard-line approach in cases

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2 People v. Florio, 301 N.Y. 46, 49, 92 N.E.2d 881, 882 (1950).

3 257 N.Y. 147, 177 N.E. 402 (1931).

4 274 N.Y. 551, 10 N.E.2d 546, 294 N.Y.S. 347 (1937).

5 257 N.Y. at 152, 177 N.E. at 404.

involving both a technical act of kidnapping and the commission of a separate felony.[6]

The kidnapping aspects of *Florio* were not examined until 1965, when *People v. Levy*[7] unobtrusively arrived on the scene. The facts in *Levy* were unremarkable. A wealthy couple returning home by car to their Fifth Avenue apartment house were confronted by two gunmen, who pushed them back into their car as they attempted to alight. In the next twenty minutes, the gunmen forced them to drive twenty-seven blocks through upper Manhattan while robbing the woman's earrings and two finger rings, as well as three-hundred dollars from her husband.

On first appraisal, *Levy* does not appear noteworthy. Although the force used and the time and distance of confinement are not as substantial as in *Florio*, unquestionably the concept of kidnapping is more fully developed in *Levy* than in *Hope* and *Small*, in which kidnapping convictions were sustained even though almost immediate capture frustrated the plans of the criminals. On review, however, the Court of Appeals decided that the twenty-seven blocks and twenty minutes of confinement in *Levy* were incidental to the underlying crime of robbery and dismissed the kidnapping charges. The court reasoned that since the New York kidnapping statute was broadly

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6 Judge Desmond, dissenting in *Florio*, made the interesting argument that abduction rather than kidnapping should have been charged. At one time these crimes appeared side-by-side in the Penal Code and were punishable by the same sentence (2 Rev. Stat. of N.Y. [1829], pt. I, ch. I, tit. II, §§ 25, 28), but at the time of *Florio* they were not together and the maximum penalty for kidnapping was twice that for abduction (N.Y. PENAL LAW §§ 70, 1250 (McKinney 1967)). Judge Desmond's most significant arguments were, first, that to prosecute abduction as kidnapping would defeat a legislative policy as to "other evidence." A kidnapping conviction could rest on the uncorroborated testimony of the victim alone, but such testimony was insufficient to sustain a rape conviction. Second, he argued that defendants could not be found guilty of both kidnapping and abduction, since to do so would deprive the legislature of its power to specify different punishments for distinct crimes. The majority did not agree. Citing People *ex rel.* Howey v. Warden of City Prison, 207 N.Y. 354, 101 N.E. 167 (1913), the majority suggested that the seizing of a female for a single act of intercourse did not constitute abduction. In any case, it thought it perfectly acceptable, under People v. Hines, 284 N.Y. 93, 105, 29 N.E.2d 483, 489 (1940), to charge kidnapping instead of abduction. Arguments based on Judge Desmond's dissent were subsequently rejected in two New Jersey cases. State v. Gibbs, 79 N.J. Super. 315, 191 A.2d 495 (1963) (abduction limited to forced taking for marriage or "defilement," presumably the forced taking of a female to accomplish a forced marriage to the taker or another or forced intercourse with one other than the taker); State v. Johnson, 67 N.J. Super. 414, 170 A.2d 830 (1961) (abduction and kidnapping overlap, but prosecution has moral obligation not to charge kidnapping unless offense warrants the harsh punishment). For an explanation of this subject see 1 C.J.S. *Abduction* §§ 1-15 (1936).

7 15 N.Y.2d 159, 204 N.E.2d 842, 256 N.Y.S.2d 793 (1965).

drafted in order to encompass every conceivable case of "true" kidnapping, not every act falling within the statute's terms should be treated as felonious kidnapping.[8] It was apprehensive that the act of kidnapping might technically occur during commission of the felonies of rape, robbery, and in some instances assault, since detention and sometimes confinement accompany an assault. To emphasize this point, the fourteen-year-old case of *Florio* was explicitly overruled in order to "limit the application of the kidnapping statute to 'kidnapping' in the conventional sense in which the term has now come to have acquired meaning."[9]

Since in 1965 a majority of states would have held the events in *Levy* to constitute kidnapping, *Levy* is a clear departure from the traditional notion of the crime. It is unfortunate that Judge Bergan, writing for the *Levy* majority, did not define the court's idea of "kidnapping in the conventional sense" in 1965. A definition can be attempted, however, beginning with what the Court of Appeals says is not felonious kidnapping. First of all, a detention of twenty-seven blocks and twenty minutes in order to rob—the *Levy* situation—is not felonious kidnapping. Second, a detention from Manhattan to Queens in order to commit rape—the *Florio* situation—is not felonious kidnapping. On the other hand, the court approves the findings of kidnapping in *Hope* and *Small*. It thus appears that whether there was a kidnapping cannot be determined from time and distance alone. In both *Hope* and *Small*, less than two minutes and a quarter of a mile elapsed before capture. The fact that distinguishes *Hope* and *Small* from *Florio* and *Levy* is that no conceivable felony other than kidnapping appears from the facts in *Hope* and *Small*, whereas the felonies of robbery and rape appear as separate crimes in *Levy* and *Florio* respectively. This conclusion indicates that the technical act of kidnapping will often merge into an underlying felony. Felonious kidnapping will be found, however, when the purpose of the seizure is to collect a ransom. By deduction it appears that the only time the kidnapping charge will be subjected to severe judicial scrutiny is when another felony is also committed. So long as no felony other than kidnapping appears on the facts, it is immaterial whether apprehension occurs before any possible attempt to collect a reward.

8 In basic concept the crime of kidnapping envisages the asportation of a person under restraint and compulsion. Usually the complete control of the person and the secrecy of his location are means of facilitating extortion. But since the control may be accomplished in a variety of ways, the New York statute has been drafted in very broad terms.

Id. at 164, 204 N.E.2d at 843-44, 256 N.Y.S.2d at 795.

9 *Id.* at 164-65, 204 N.E.2d at 844, 256 N.Y.S.2d at 796.

Levy does not stand for the proposition that there is an automatic merger and extinguishment of the felony of kidnapping in any case in which a conviction for a separate felony will lie. The decision goes on to state that it is possible for situations to arise in which kidnapping could be sustained along with a conviction for a separate underlying felony. However, the case chosen by the court to illustrate this principle, *People v. Black*,[10] is so incredibly bizarre that one must wonder whether the court is saying, in effect, that where defendant is found guilty of a separate felony, only one case in a thousand will support an additional conviction for kidnapping:

> [D]efendant [Black] had entered as a burglar the home of his victims (a husband and wife) and had shot the husband in the head twice as he lay sleeping; . . . when the pregnant wife appeared from another part of the house to investigate, defendant at point-blank range shot at her but missed; . . . defendant then tore out all the telephone wires and bound the wounded man, rifled the room for valuables and fled in his victims' car, forcing the wife to accompany him and leaving the wounded man and an infant in a crib despite the wife's pleas that she be permitted to care for them or to make a call to a doctor to try to save her husband's life.
>
> Defendant was apprehended in Connecticut several hours later after he had crashed the stolen car during a chase in which, with his hostage beside him, he drove at speeds up to 100 miles an hour.[11]

If the facts of *Black* exemplify the aggravation necessary to constitute a double felony in this area, it is abundantly clear that merger was generally applicable in New York at that time.[12]

New York courts followed *Levy* until the revised New York Penal Law and Criminal Code became effective on September 1, 1967. In the two and one-half years that *Levy* dominated the kidnapping scene, New York was most reluctant to find the felony of kidnapping in cases in which a separate underlying felony was also committed. An apt illustration of this statement is provided by *People v. Lombardi*,[13] the most important case on the point during this period.

Lombardi's resemblances in fact pattern to *Florio* are truly star-

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10 18 App. Div. 2d 719, 236 N.Y.S.2d 240 (2d Dep't 1962).

11 *Id.* at 720, 236 N.Y.S.2d at 242.

12 Writing for the three dissenting judges in *Levy*, Judge Burke pointed out:

> The [kidnapping] statute was designed to provide additional punishment for and thus reduce the usage of the professional criminal practice of detaining the victim of a crime in order to assure the safety of the flight of the criminal by preventing an outcry by the victim and the possibility of pursuit. This decision encourages such a practice.

15 N.Y.2d at 167, 204 N.E.2d at 845-46, 256 N.Y.S.2d at 798.

13 20 N.Y.2d 266, 229 N.E.2d 206, 282 N.Y.S.2d 519 (1967).

tling. As in *Florio*, a woman was enticed to enter the defendant's car in Manhattan and driven to Queens where sexual assault occurred. In this case, Lombardi, a combination pharmacist-travel agent, had on separate occasions ordered three of his female employees to travel with him from Manhattan to attend parties in Queens in order to stir up business for his travel agency. On each occasion, before entering the car, he gave the girl a pill which he claimed was a nail-hardening pill. Actually, the pill contained a drug that caused a state of euphoria in users. While the woman was in this condition, he took her to a motel in Queens and sexually molested her. In one case he attempted to rape the unfortunate employee. Lombardi made the mistake of distributing his "nail-hardening pill" a fourth time. This time the recipient was a plainclothes policewoman.

Lombardi was convicted on three counts of kidnapping, three counts of actual and one count of attempted assault in the second degree, and one count of attempted rape in the first degree. The case reached the Court of Appeals after the appellate division had upheld the convictions below. Extending the rationale of *Levy* almost to its breaking point, the Court of Appeals in another four to three decision dismissed the kidnapping charges.

If this case had occurred before the *Levy* decision, there is little question that the kidnapping conviction would have been upheld. Even after *Levy*, it is surprising that kidnapping was not treated as a separate felony in this case in view of the lengthy time during which the female employees were detained forcibly, ranging from ten hours in one instance to a period of over twelve and closer to fifteen hours in the other two instances. It does not appear to be overly cynical, at this point, to suggest that the majority on the Court of Appeals subscribed more in theory than in fact to the proposition that there were circumstances in which they would sustain a conviction for kidnapping as well as a conviction for the underlying felony.

As in *Levy*, Judge Bergan wrote the majority opinion in *Lombardi*.[14] The major contention of the *Lombardi* majority was that the

14 Judge Bergan's opinions in *Levy* and *Lombardi* are similar; in each he begins by agreeing that defendant technically violated the kidnapping laws. Having conceded this point, he notes the trend in kidnapping cases to limit the felony to true kidnapping situations, but no attempt is made to substantiate the asserted trend by citing specific cases from other jurisdictions.

In the interim between the decisions in the *Levy* and *Lombardi* cases, Judge Desmond and Judge Dye left the Court of Appeals. One new member, ex-United States Senator Kenneth Keating, voted with the *Lombardi* majority. The other new member, Judge Breitel, voted with the dissenters. This left the outcome the same as in *Levy* since the five remaining members voted as they had in *Levy*. Judge Desmond voted with the majority in *Levy* and Judge Dye with the dissent.

confinement of the victims for periods of from ten to fifteen hours did not play a significant part in the crime. The court argned that defendant's intent was to molest his victims and that the time and method employed was of secondary importance, of itself not sufficient to sustain a conviction for the independent felony of kidnapping. To support his conclusion Judge Bergan observed that "[h]ad defendant drugged his victims and taken them to a room in the back of the pharmacy and there attempted to rape them or make sexual advances, the crimes would appear more clearly to be attempted rape or assault."[15] Had the rape occurred in the back room, however, the time and distance of confinement would be short, and the kidnapping aspects would not be flagrant when compared with the underlying felony of rape.[16]

The result in *Lombardi* could lead one to suggest that a criminal would be well advised to incapacitate his victim by pill, drug, or chloroform before raping her. The resulting charge of assault in the second degree would appear to be a fair trade for eliminating the chance of an outcry by the victim. In addition, this would allow the assailant more time to effect an escape since the unfortunate woman might not be discovered until she returned to consciousness. As an alternative idea, the rapist could utilize the ten- to fifteen-hour time period permitted in *Lombardi* to drive the woman halfway across the state and back. Any remote spot that was found during the trip would suffice as the actual place for the rape. Granted the cynicism of this example, the state would be hard pressed to sustain a kidnapping charge in view of the language used in *Lombardi*.

Judge Burke wrote the dissenting opinion for the three-man minority in *Lombardi*, as he had in *Levy*. Since the majority in *Lombardi* based their decision on what they had held in *Levy*, it was necessary for Judge Burke to review that case. With a burst of optimism, he suggested that the majority in *Levy* sought only to overrule the rationale that led to the decision in *Florio*, not to criticize the result. The legally incorrect rationale of *Florio* was suggested to be that "[t]he confinement and detention in the automobile for a short time, coupled with the intent, brings the case within the purview of the statute."[17] In support of his conclusion, Judge Burke cited the *Levy* escape clause: "There may well be situations in which actual kidnapping in this sense

15 20 N.Y.2d at 270-71, 229 N.E.2d at 208, 282 N.Y.S.2d at 521.

16 It should be noted that Judge Bergan, with his strong concern for trends in kidnapping cases, ignored completely People v. Langdon, 52 Cal. 2d 425, 341 P.2d 303 (1959), discussed at text accompanying notes 38-39 *infra*.

17 20 N.Y.2d at 273, 229 N.E.2d at 210, 282 N.Y.S.2d at 524, *quoting* People v. Florio, 301 N.Y. 46, 50, 92 N.E.2d 881, 883 (1950).

can be established in connection with other crimes where there has been a confinement or restraint amounting to kidnapping to consummate the other crime."[18]

Having determined that felonious kidnapping could be upheld in *Florio* without contradicting the holding in *Levy*, it was a simple process to decide that felonious kidnapping should be sustained in *Lombardi*. Judge Burke coined the phrase "*Levy* de minimis"[19] to characterize those cases in which the kidnapping aspects are incidental and secondary to the other felony that was committed. He did not want felonious kidnapping sustained in this type of case. However, Judge Burke urged that kidnapping convictions be sustained in those cases in which the forced confinement and detention exceed the amount present in *Levy* (*i.e.*, "*Levy* de minimis"). If twenty-seven blocks and twenty minutes had become, as Judge Burke urged, the line at which kidnapping merges with the underlying felony, felonious kidnapping convictions should have been upheld in both *Florio* and *Lombardi*.

From a standpoint of convenience, it would be advantageous if a "*Levy* de minimis" rule could be sustained. If the *Levy* majority intended to overrule the rationale of *Florio* alone, however, it is logical to assume that they would have said so. The precise phrase employed was: "We now overrule *People v. Florio* . . . ."[20] In addition, if a properly reasoned *Florio* would have supported convictions for both kidnapping and the underlying felony, it is strange that the *Levy* majority did not mention a properly reasoned *Florio* as an example when enunciating the exception to the merger rule. Finally, if the *Levy* majority had intended that a well reasoned *Florio* should support independent convictions via a "*Levy* de minimis" rule, it is highly unlikely that in *Lombardi* kidnapping charges would have been dismissed without an explanation as to why the "*Levy* de minimis" rule had been abandoned. The conclusion that there never was a "*Levy* de minimis" rule is inescapable. Once it is conceded that a detention in excess of the one which occurred in *Lombardi* would be necessary to constitute both the independent felony of kidnapping and the separate underlying felony, the likelihood of encountering such a situation becomes remote, *People v. Black* notwithstanding.[21]

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18 20 N.Y.2d at 274, 229 N.E.2d at 210, 282 N.Y.S.2d at 524, *quoting* People v. Levy, 15 N.Y.2d 159, 165, 204 N.E.2d 842, 844, 256 N.Y.S.2d 793, 796 (1965).

19 20 N.Y.2d at 274, 229 N.E.2d at 210, 282 N.Y.S.2d at 524.

20 People v. Levy, 15 N.Y.2d 159, 164, 204 N.E.2d 842, 844, 256 N.Y.S.2d 793, 796 (1965).

21 *See, e.g.*, People v. Hatch, 25 App. Div. 2d 606, 267 N.Y.S.2d 651 (4th Dep't 1966).

On January 16, 1969, the New York Court of Appeals handed down what almost undoubtedly is their final word on pre-September 1, 1967, kidnapping merger cases,[22] *People v. Miles*.[23] The four defendants in the *Miles* case attempted to murder an epileptic, mentally defective drifter by injecting lye into his bloodstream with a homemade hypodermic needle. The victim had incurred the enmity of the defendants by disposing of heroin he was supposed to keep for them. In addition, he had witnessed a murder in which two of the present defendants were implicated. The bizarre and unsuccessful injection occurred in a Newark, New Jersey, apartment around 10 p.m., after which the victim was placed in a car trunk.[24] The first stop for the car was the Jersey City Meadows. The intent appeared to be to pour gasoline on the victim and set him afire, but the sound of oncoming pedestrians scared the defendants. So they placed the body back in the trunk and drove to New York. At 2:40 a.m., while the defendants were in a Harlem bar, a policeman passing by the car heard thumping sounds from the trunk and investigated. Arrest of the defendants followed shortly.

After affirming the kidnapping conviction, Judge Breitel employs *Miles* as a vehicle to discuss the *Levy-Lombardi* cycle of cases, but it does not appear that he has at all clarified the problems posed by these cases.[25] If anything he leads the issue into further obscurity by his rationalization for the decision affirming the kidnapping conviction in *Miles*:

> Brooks [the victim] testified to an extensive trip, first, presumably to the Jersey City Meadows and then to upper Manhattan. The more complicated nature of the asportation, with changes in purposes and direction, first to a place in New Jersey, and then to New York, for purposes connected with but not directly instrumental to the attempt to kill Brooks, removes this case from the exception of the *Levy-Lombardi* rule.[26]

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22 It is unlikely that any more cases of this type, occurring before the new statute was enacted in New York, will reach the New York Court of Appeals at this late date.

23 23 N.Y.2d 527, 245 N.E.2d 688, 297 N.Y.S.2d 913, *cert. denied*, 395 U.S. 948 (1969).

24 There was much controversy at the trial as to whether the defendants knew that their murder attempt had failed, since one cannot "kidnap" a dead body. The fact that they bound and gagged the victim before placing him in the car trunk would indicate they knew that he was alive.

25 Judge Breitel's discussion concludes:

> In short, the *Levy-Lombardi* rule was designed to prevent gross distortion of lesser crimes into a much more serious crime by excess of prosecutorial zeal. It was not designed to merge "true" kidnappings into other crimes merely because the kidnappings were used to accomplish ultimate crimes of lesser or equal or greater gravity. Moreover, it is the rare kidnapping that is an end in itself; almost invariably there is another ultimate crime.

23 N.Y.2d at 540, 245 N.E.2d at 695, 297 N.Y.S.2d at 922.

26 *Id.* at 539, 245 N.E.2d at 694, 297 N.Y.S.2d at 921.

This reasoning ignores the absence of any felony committed in New York with which kidnapping can merge. Certainly felonies were committed in violation of federal and New Jersey laws, but except for the extraneous felony of carrying firearms without a license, nothing other than kidnapping occurred in New York. Once this fact is ascertained and given full weight, kidnapping can be affirmed in *Miles* for either, or perhaps both, of two reasons. First, the case may come under the authority of *Hope* and *Small*, since nothing other than kidnapping appears from the facts. Second, there may have been a violation of Penal Law section 1250(3),[27] which until later repealed provided that kidnapping occurs when a person is abducted without the state and detained within it, although there is the problem whether one can "abduct" a male. The only reason that will not justify kidnapping as a felony in *Miles* is the one proposed by Judge Bergan; the case appears to come to the right decision by the wrong means.

It is necessary to terminate the chronological treatment of New York's kidnapping merger problems with crimes committed as of September 1, 1967. The new kidnapping statute[28] that became effective on that day cannot be evaluated effectively without reference to the group of cases that have dealt with this question in California and those states subscribing to California's view on kidnapping merger. Before ending discussion of the New York situation, however, a few observations are in order concerning the problems that bothered the New York Court of Appeals.

It would be incorrect to characterize the *Levy* majority as willing to minimize true kidnapping. The Court of Appeals has acted without reluctance both when ransom, reward, or murder appears to be the motive for the forced detention and when no motive appears and from the facts it is reasonable to conclude that some form of kidnapping was the motive for the forced detention. Only in those cases in which another felony such as rape or robbery is present, in addition to a possible kidnapping, does the *Levy* majority become skitterish and tend to balk at a double conviction for kidnapping and the separate, underlying felony.[29]

The reluctance of the *Levy* majority can be understood. It is true that technical acts of kidnapping occur in many rapes, robberies, and forcible assaults, but often the criminal is not aware of this fact

27 N.Y. Laws 1965, ch. 321, § 3 (repealed 1967).

28 N.Y. PENAL LAW § 135 (McKinney 1967).

29 Kidnapping is not the only area in which New York is having merger problems. Judge Bergan has also been struggling with this problem in rape cases. *See* People v. Moore, 23 N.Y.2d 565, 245 N.E.2d 710, 297 N.Y.S.2d 944 (1969).

and did not intend a kidnapping as such. The criminal's intent is not controlling[30] but is a factor when the kidnapping aspects of the case are minimal. We are not dealing with a situation in which the criminal will not be punished if the kidnapping conviction is reversed; he still must pay the penalty for the underlying rape, robbery, or forcible assault that was committed.[31] Considering the broad discretion given to jurists to assess prison terms, paroles, suspended sentences, and consecutive sentences, it is not necessary to stretch the application of the kidnapping statutes merely to assure that the criminal is sentenced to a prison term commensurate with the gravity of his offense. A maximum sentence for rape, robbery, or forcible assault should suffice if this is essentially the only crime committed. But it is questionable whether good judgment is being used when residents of the state can be confined against their will for periods ranging from twenty minutes to fifteen hours; or driven for distances ranging from twenty-seven city blocks to a trip from Manhattan to Queens; or arguably driven half way across the state and back, at the sole discretion of their captors, without added criminal liability attaching. The *Levy* majority usurped the power of the New York Legislature. In effect, the court by judicial interpretation wrote a new kidnapping statute for New York.[32]

II

The California Approach to Merger

Historically, California's approach to the problems occurring when an act of kidnapping and an underlying felony are present in the same case resembles the "hang them high" theory so popular with vigilantes in that state a century before. Unlike New York, California has a separate,

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30 Since 1960, the intent of the criminal controls on the possibility of consecutive sentencing in California but not in New York. For a detailed discussion on this point, see the dissent of Justice Schauer in People v. McFarland, 58 Cal. 2d 748, 763, 376 P.2d 449, 464, 26 Cal. Rptr. 473, 488 (1962). *See also* Neal v. State, 55 Cal. 2d 11, 19, 357 P.2d 839, 843, 9 Cal. Rptr. 607, 611 (1960); *In re* Hayes, 70 Cal. 2d 604, 451 P.2d 430, 75 Cal. Rptr. 790 (1969); People *ex rel.* Maurer v. Jacksou, 2 N.Y.2d 259, 140 N.E.2d 282, 159 N.Y.S.2d 203 (1957).

31 Where conviction for the underlying felony is doubtful because of evidentiary problems, the prosecution may find a kidnapping charge appealing. The question remains as to when it is unethical to use the higher charge to cure a deficiency in proof of the underlying felony.

32 The more appropriate judicial response was set forth by Justice Cardozo in Anderson v. Wilson, 289 U.S. 20, 27 (1933): "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it."

distinct law dealing with crimes that encompass both an act of kidnapping and an act of robbery. Section 209 of the California Penal Code provides in part that "any person who kidnaps or carries away any individual to commit robbery" will be sentenced to death or life imprisonment without the possibility of parole if the victim receives bodily harm. If the victim does not receive bodily harm, the mandatory penalty is life imprisonment with the possibility of parole. It is essential to note that it is the intent to rob, and not the commission of bodily harm, that is the essential element of this offshoot of the standard kidnapping statute. Therefore, section 209 does not apply if the underlying felony is rape or assault without the added element of robbery. No matter how flagrant the attack, if there is no robbery, section 209 does not apply.

So long as the element of robbery is present, California courts have not hesitated to affirm section 209 convictions in cases in which the kidnapping aspects were of a minimal enough nature to give the *Levy* majority nightmares. In *People v. Raucho*[33] it was held, as an alternate ground for the decision, that forcing victims to cross a street and enter an automobile constituted "kidnapping and carrying away." In *People v. Cook*[34] the dragging of a victim from a sidewalk into an adjacent house constituted kidnapping. In *People v. Melendrez*[35] a forced walk of fifty to seventy-five feet constituted kidnapping. In *People v. Shields*[36] evidence that the defendant carried a child from the front of a house to the roof supported a conviction for kidnapping. In *People v. Oganesoff*[37] evidence that the defendant forcibly carried the victim into his house from an autombile in front of the house supported a kidnapping conviction.

People v. Langdon,[38] a case similar to *Lombardi* in fact pattern, typifies the difference in the approaches of New York and California to the problem of merger. In *Langdon*, California found kidnapping when a saleswoman was dragged into the back room and rape was attempted after defendant had robbed her cash register. In *Lombardi* the New York Court of Appeals thought that if the employee had been dragged into the back room and raped, the kidnapping aspects should be ignored despite drugging and a period of confinement. It is plain from the tenor of the *Lombardi* opinion that if the added element of robbery were present in *Lombardi*, as it was in *Langdon*, the Court of Appeals would

33 8 Cal. App. 2d 655, 47 P.2d 1108 (1935).
34 18 Cal. App. 2d 625, 64 P.2d 449 (1937).
35 25 Cal. App. 2d 490, 77 P.2d 870 (1938).
36 70 Cal. App. 2d 628, 161 P.2d 475 (1945).
37 81 Cal. App. 2d 709, 184 P.2d 953 (1947).
38 52 Cal. 2d 425, 341 P.2d 303 (1959).

have been even more confident that the kidnapping aspects of the case were secondary and did not merit an independent conviction.[39]

People v. Knowles[40] is an even more extreme example of the polarity existing between New York and California on this issue. A fair reading of the facts in *Knowles* establishes without a doubt that any movement of the detained victims of the robbery was very slight and occurred only to obtain easier access to the money sought. The California Supreme Court indicated that it was powerless to reverse the kidnapping conviction, since, under section 209 as it read in 1950, mere detention without movement was sufficient to constitute kidnapping. This meant that so-called "standstill kidnapping" could be found in any robbery case; detention at least for the instant necessary to rob the victim always occurs. A district attorney could thus recommend to the grand jury that a count for a violation of section 209 be added to any robbery indictment to which he desired to add further punishment.

The California Supreme Court in *Knowles* did not attempt to usurp the function of the legislature by refusing to apply the clear words of the statute. It sustained the kidnapping conviction but made it clear that it felt that the district attorney had abused the trust of his office by prosecuting the defendant on kidnapping charges. The court extended an invitation to the legislature to amend section 209 to make both movement and detention essential elements of the offense, and the legislature quickly adopted the suggestion.[41] This effectively eliminated the possibility of "standstill kidnapping" under section 209.

By the time Knowles's accomplice, the notorious Caryl Chessman, came to trial, the revised section 209 had become law. Both Knowles and Chessman benefited from this change. Since Knowles's section 209 conviction was still in the appeal process, the "standstill kidnapping" charge was dismissed. Chessman never was tried on this charge. Chessman was tried on seventeen other felony counts, including two charges of violations of section 209 in which movement did occur. In a dramatic, often raucous trial in which Chessman acted as his own attorney, the jury returned a guilty verdict on each of the indictments. It is often alleged that Chessman went to the gas chamber for dragging a woman twenty-two feet. Those who bemoan Chessman's fate solely for the short distance involved lose sight of the fact that in the other case upon which

39 As recently as May 1969, the California Supreme Court affirmed the authority of *Langdon* and demonstrated that § 209 is alive and well by applying it in People v. Coogler, 71 A.C. 165, 454 P.2d 681, 77 Cal. Rptr. 790 (1969).

40 35 Cal. 2d 175, 217 P.2d 1 (1950).

41 *See* CAL. PENAL CODE § 209 (West 1955).

the death sentence could be predicated, the victim was driven a considerable distance.[42] In both violations of the amended section 209, all three elements necessary to satisfy that statute were present. Chessman robbed both victims, detained and moved them against their will, and, as to the element that permits the death sentence, subjected his victims to bodily harm (*i.e.*, rape). The definitive statement concerning the amount of movement necessary to constitute kidnapping under the California school of thought is contained in the *Chessman* case: "it is the fact, not the distance, of forcible removal which constitutes kidnapping in this state."[43]

This rule from the *Chessman* case was not diluted until 1960, when *Neal v. State*[44] was decided. The decision had a profound effect on section 209 even though the case had nothing to do with kidnapping. *Neal* involved the interpretation of a sentencing statute, section 654 of the California Penal Code, and restricted severely the power of California courts to impose sentences running consecutively for multiple crimes arising from the same transaction. It proclaimed that, in the future, the intent and motive of the actor would control on the question whether the sentences imposed for the violation of specified criminal statutes should be served one after the other, or alternatively, whether some or all of those sentences should be served at the same time as the longest sentence. As explained in a 1969 motor vehicle case:

> The key to application of section 654 is in the phrase "act or omission": a defendant may be punished only once for each distinct "act or omission" committed. There have been numerous attempts in the cases to define a single "act," with varying degrees of clarity. Section 654 has been held to apply, for example, where the multiple violations are "necessarily included offenses" . . . and where there is a single "intent and objective" underlying a course of criminal conduct . . . .[45]

Consequently, a man convicted in California for the felonies of robbery and kidnapping with the intent to rob (section 209) will be obliged to serve only the time prescribed in the more severe sentence (section 209) unless it is proved that there was a specific intent to rob and, in addition, a specific intent to kidnap the victim in order to facilitate the robbery.

Where the victim receives bodily harm, or where defendant had a multiple intent and objective, the multiple sentencing statute has no practical effect on section 209. In the first case, defendant must be

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42 People v. Chessman, 38 Cal. 2d 166, 238 P.2d 1001 (1951).

43 *Id.* at 192, 238 P.2d at 1017.

44 55 Cal. 2d 11, 357 P.2d 839, 9 Cal. Rptr. 607 (1960).

45 *In re* Hayes, 70 Cal. 2d 604, 605-06, 451 P.2d 430, 431, 75 Cal. Rptr. 790, 791 (1969).

sentenced to at least life imprisonment without the possibility of parole; in the second, consecutive sentencing is allowed. But where defendant pursues a single intent and objective and no harm results to his victim, the multiple sentencing statute greatly mitigates his punishment. Defendant can be sentenced only for the most serious crime of which he is convicted;[46] assuming the section 209 violation is the most serious, the only sentence he can be given is life with the possibility of parole. Since no other sentences intervene to extend the time, parole is possible after seven years.[47] Thus, despite California's rigorous application of section 209, the multiple sentencing statute often makes the consequences of kidnapping and robbery not much more serious in California than they were in New York before the 1967 statutory change.

States that follow the so-called "California approach" to kidnapping merger cases have remained more faithful to the hard line on this subject than their prototype. In *State v. Brown*,[48] a 1957 Kansas case, a young man who forced a woman to drive out of a parking lot into an alley where he raped her was convicted of kidnapping. Ten years later, in *State v. Ayers*,[49] the Kansas Supreme Court sustained a kidnapping conviction for which eleven feet of movement before a rape was the only basis. The *Ayers* case is the only high court case in a different jurisdiction that has reviewed the *Levy* case. The defense in *Ayers* cited *Levy* as a ground for discarding the *Brown* case in Kansas, but the court rejected this argument. Noting that *Levy* was a four to three decision, the court reaffirmed its support for both the *Florio*[50] case and the California rule that it is the fact of forceful removal of the victim, not the distance involved, that constitutes kidnapping. The court in *Ayers* observed that if there was dissatisfaction with the Kansas kidnapping statute, it was the duty of the legislature, not the courts, to rectify the unsatisfactory parts.

Arizona also interprets its kidnapping laws strictly. *State v. Taylor*[51] indicates that the State of Arizona is so concerned about forced deten-

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46 A statement in the *Neal* case could be read as allowing sentencing for one of the lesser convictions: "If all of the offenses were incident to one objective, the defendant may be pnnished for *any one* of such offenses but not for more than one." 55 Cal. 2d at 19, 357 P.2d at 843-44, 9 Cal. Rptr. at 611-12 (emphasis added). It is now clear that the most stringent sentence must be imposed. *In re* Ward, 64 Cal. 2d 672, 414 P.2d 400, 51 Cal. Rptr. 272 (1966).

47 CAL. PENAL CODE § 3046 (West Cum. Supp. 1968).

48 181 Kan. 375, 312 P.2d 832 (1957). The conviction was reversed on other grounds. *Id.*

49 198 Kan. 467, 426 P.2d 21 (1967).

50 People v. Florio, 301 N.Y. 46, 92 N.E.2d 881 (1950). *See* text at notes 2-6 *supra.*

51 82 Ariz. 289, 312 P.2d 162 (1957).

tion of its citizens that it would not object to a kidnapping conviction even in a "standstill kidnapping" case. In a more recent Arizona case, *State v. Jacobs*,[52] defendant surprised the victim in the bathroom of her house trailer and forced her to go out to the porch. He then brought her back through the house to the cabana where he raped her. The Arizona Supreme Court sustained separate rape and kidnapping convictions. The statement in the *Chessman* case that "it is the fact of forcible removal, not the distance, that establishes the crime of kidnapping"[53] is mentioned as authority.

III

New York's Current Approach to Merger

The 1967 revision of New York's kidnapping statute by the Temporary Commission on Revision of the Penal Law and Criminal Code was part of a much larger, even more ambitious enterprise. Although a cogent codification of New York kidnapping law would be, in itself, a herculean task, the Temporary Commission was established in order to facilitate the passing of "a revised, simplified body of substantive laws relating to crimes and offenses in the state, as well as a revised, simplified code of rules and procedures relating to criminal and quasi-criminal actions and proceedings."[54] Since the Commission was involved in a detailed consideration of a multitude of criminal statutes,[55] it was not realistic to expect that it would be able to devote a sufficient amount of time to the kidnapping statutes to ensure a definitive statement on the law of kidnapping merger.

The basic framework of the new kidnapping statute is discussed in the practice commentary to article 135 of the revised Penal Code:

> This article materially revises the crime of kidnapping and presents a new scheme of offenses designed to distinguish between various types of "kidnapping" conduct. . . .
>
> . . . .
>
> Basically, this is accomplished by creating a "kidnapping" crime divided into two degrees and flanking it by two new and lesser if somewhat similar offenses, entitled "unlawful imprison-

52 93 Ariz. 336, 380 P.2d 998 (1963).

53 People v. Chessman, 38 Cal. 2d 166, 192, 238 P.2d 1001, 1017 (1951), *cited in* State v. Jacobs, 93 Ariz. 336, 341-42, 380 P.2d 998, 1002 (1963).

54 N.Y. Laws 1961, ch. 346, § 2.

55 In addition to changes in the kidnapping statute, the Temporary Commission recommended substantial changes in the sentencing laws, abolishing the crime of adultery, changing the habitual offenders provision, eliminating the second-degree murder statute, and many other changes in the New York Penal Law and Criminal Code.

ment" and "custodial interference," each of which is also defined in two degrees.[56]

By establishing six kidnapping categories and attempting to fit all the various species of false imprisonment into these six categories, the statute does not confront directly the problem of merger. This is unfortunate, because kidnapping cases are troublesome principally when another crime is involved as well; the effectiveness of a kidnapping statute depends principally on its usefulness in cases of this type. Had the Commission been assigned no task other than to rehabilitate the kidnapping laws, it might have been able to establish the genus of the crime and then set up a group of categories to encompass all the conceivable varieties. Of necessity, this could not be done by the present Commission. The paucity of references to kidnapping problems in other states indicates that no attempt was made to define the genus of the crime. Since the Commission did not attack the roots of the problem, it is unlikely that the new statute will provide a total remedy in this field. Already it has been necessary to amend the statute in a couple of instances,[57] and, as will be demonstrated, difficulties remain.

Surprisingly, second-degree kidnapping, rather than first-degree kidnapping, is now the basic kidnapping offense in New York.[58] The definition of second-degree kidnapping is simplicity itself: "A person is gnilty of kidnapping in the second degree when he abducts another person."[59] For the purpose of this new kidnapping statute, the phrase "to abuct" is defined to mean: "to restrain a person with intent to prevent his liberation by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use physical force."[60] Part (b) of this definition seems fatally broad. If a mere threat of physical violence constitutes an abduction satisfying the second-degree kidnapping requirements, New York has unwittingly mired itself in the legal quicksand to which California fell victim in the *Knowles*[61] case. Second-degree kidnapping is a class B felony under the new statute, carrying with it a maximum possible sentence of twenty-five years in prison. It is next to impossible to conceive of a rape, assault,

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56 N.Y. PENAL LAW art. 135 (McKinney 1967) (practice commentary).

57 N.Y. Laws 1967, ch. 681, § 78; N.Y. Laws 1967, ch. 791.

58 Kidnapping in the second degree embraces the entire spectrum of genuine kidnapping conduct, including the three more heinous forms selectively predicated as a basis for first-degree kidnapping (§ 135.25) and many more. N.Y. PENAL LAW § 135.20 (McKinney 1967) (practice commentary).

59 *Id.* § 135.20.

60 *Id.* § 135.00.

61 People v. Knowles, 35 Cal. 2d 175, 217 P.2d 1 (1950). *See* text at notes 40-41 *supra.*

or armed robbery in which physical force is not used or threatened. In each of these instances, the district attorney is now free to press the grand jury for a second-degree kidnapping indictment. Only the district attorney's discretion and moral responsibility stand between the criminal and this unjust fate.[62]

"Standstill kidnapping" is another problem. Although it seems clear from the general tenor of the new statute and its accompanying commentary that it was not intended to create such a crime, the definition of "abduction" makes no reference to movement. New York ought to amend its statute as California amended section 209 after the *Knowles* case. In this manner it will be made clear that movement, as well as forced detention or the threat or use of force, is prerequisite to a kidnapping violation.[63] The amendment should also treat the problem of how much movement is required; this problem remains to some extent in California and will undoubtedly haunt New York until it is faced directly.

A backhanded attempt at solving the problem of merger was made in section 135.25 of the new statute. This subsection sets forth three situations in which the twenty-five year maximum sentence for second-degree kidnapping is considered an inadequate deterrent. It is only in these three instances that first-degree kidnapping will be found under the new statute in New York. They are kidnappings for reward or ransom, kidnappings during which the victim dies, and most abductions of more than twelve hours duration. First-degree kidnapping is a class A felony under the new sentencing scheme, carrying with it a sentence of life imprisonment unless the death penalty is prescribed.

In the problem of merger, the twelve-hour provision is most important. The practice commentary for this section makes it clear that the choice of twelve hours as the dividing line was purely arbitrary,[64] but twelve hours appears to be rather high. *Levy*, *Florio*, *Black*, and at least one of the attacks in *Lombardi* would not qualify as first-degree

62 A recent law review case note has suggested that *Levy* and *Lombardi* still control kidnapping merger questions in New York. 42 ST. JOHN'S L. REV. 604 (1968). The unambiguous wording of the new statute and the history of trouble that California encountered with a similar statute, however, indicate that *Levy* and *Lombardi* are no longer controlling in New York. The Court of Appeals passed up an opportunity to clarify this point when it decided *Miles*. Another approach would be for the court to call for a legislative amendment spelling out the time and distance requirements for merger in second-degree kidnapping cases. *See, e.g.*, People v. Knowles, 35 Cal. 2d 175, 180, 183, 217 P.2d 1, 4 (1950), where Chief Judge Traynor said that legislative action rather than judicial interpretation was the remedy if § 209 were regarded as too harsh.

63 Of course, the secreting of a person with the requisite intent will constitute kidnapping even if the accused does not move the victim.

64 N.Y. PENAL LAW § 135.25 (McKinney 1967) (practice commentary).

kidnapping under this interpretation. Although the dividing line must be substantial in order to separate cases with a genuine kidnapping flavor (to use the words of the practice commentary) from cases that are little more than robbery or rape, it is hard to believe that there is not a genuine kidnapping flavor in *Florio, Black, Lombardi,* and even *Levy*. Certainly the terrified victims in *Levy* had no idea that they were to be released after twenty minutes. During this period they felt that they were being kidnapped.

In view of New York's liberal parole regulations it is questionable whether second-degree kidnapping affords adequate punishment in the major cases listed above. Defendants will, however, be sent to prison for a substantial length of time. The more serious problem occurs on the other end of the ladder. At what point is the detention and movement of the victim such a minor consequence of the underlying felony that it should not be punished as second-degree kidnapping? The line must be drawn short of truly incidental movement. Until this is done, the New York statute will be seriously deficient. If the New York Legislature merely follows the example of the revised section 209 in California and adds movement of an unspecified amount as a prerequisite for kidnapping, it will have provided a stop-gap solution. Unfortunately an excellent opportunity to make a definitive statement on the element of merger in the law of kidnapping will have been lost.