

See: Minutes of Subcommittee on
Grading and Sentencing
4/5/70, p. 52, Vol. X
Tape #57

CRIMINAL LAW REVISION COMMISSION
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ARTICLE 17

ROBBERY

Tentative Draft No. 1; November 1968

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Subcommittee No. 1

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ROBBERY

Tentative Draft No. 1, November 1968

Section 1. Robbery in the third degree. A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft he uses or threatens the immediate use of physical force upon another person with the intent of:

- (1) Preventing or overcoming resistance to his taking of the property or to his retention thereof immediately after the taking; or
- (2) Compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft.

Section 2. Robbery in the second degree. A person commits the crime of robbery in the second degree if he violates section 1 and he:

- (1) Represents by word or conduct that he is armed with what purports to be a dangerous or deadly weapon; or
- (2) Is aided by another person actually present.

Section 3. Robbery in the first degree. A person commits the crime of robbery in the first degree if he violates section 1 and he:

- (1) Is armed with a deadly weapon; or
- (2) Uses or attempts to use a dangerous weapon; or
- (3) Causes or attempts to cause serious physical injury to any person.

COMMENTARY - ROBBERY

A. Summary

This Article provides for three ascending degrees of robbery. Section 1 contains the basic statement of the crime, with sections 2 and 3 adding one or more of certain aggravating factors to the crime.

A person commits robbery in the third degree if "in the course of committing or attempting to commit" theft he uses or threatens the immediate use of physical force upon another for the purpose of either (1) preventing or overcoming resistance to the taking of the property or its retention immediately thereafter or (2) forcing another to deliver up the property or to do any other act which might aid in the commission of the theft. This covers the "unarmed" type of robbery. By prohibiting the threat of "immediate use" of physical force, this section is distinguishable from theft by extortion. (See Theft, T. D. #1, June, 1968)

Section 2 raises the crime to robbery in the second degree if the robber creates the impression that he is armed, or if he is "aided by another person actually present." Subsection (1) is intended to cover the type of robbery in which the actor is, in fact, unarmed, but conveys to the victim the impression that he has a weapon. While such a threat may not create any greater risk to the person of the victim, it does heighten the terror in the victim's mind and also, is persuasive in overcoming resistance to the robbery. This subsection would make it second degree robbery if the robber uses a note, a "hand-in-pocket" technique or a fake weapon to convey the impression that he is armed with a "dangerous or deadly weapon."

The primary rationale behind subsection (2) of section 2 is the increased danger of an assault on the victim when the robber is reinforced by another criminal who is actually present. Furthermore, when two or more persons commit the crime, it indicates greater planning and more likelihood that they are professional criminals. In earlier drafts the conduct proscribed constituted robbery in the first degree, however, the Commission was of the opinion that the accomplice circumstances, while aggravating the crime, is less serious than the others specified in section 3. It is important to note, however, that inclusion of the factor of actual aid by another person does not affect the doctrine of vicarious responsibility of accomplices for the criminal acts of the principal. This matter is handled in the general provisions of the draft covering complicity. The language employed is intended to include only those situations in which the accomplice is in such proximity of the victim that he is in a position to assist in exerting force upon the victim. This will be a question of fact to be determined from the total circumstances in each individual case. In most instances the victim probably will know that more than one person is committing the crime, however, the victim's awareness of the presence of the other person is immaterial. The issue is whether the actor is aided by another person actually present and not the subjective effect of his presence on the victim.

Section 3 provides for the three most serious aggravating factors, any of which, if present, elevates the crime to robbery in the first degree. Those factors are: (1) being armed with a "deadly weapon" (i.e., a gun), (2) using or attempting to use a "dangerous weapon" (i.e., a club) or (3) causing or attempting to cause serious physical injury to any person. Any of these elements, of course, represents the greatest threat to the victim and is graded accordingly.

The terms "deadly weapon" and "dangerous weapon" are not defined in the Article; however, they will be defined in the general definitions for uniform application throughout the proposed code. It is assumed that such definitions will distinguish between an instrument that ordinarily has no other purpose except as a weapon and a thing which is not necessarily intended to be a weapon but becomes such because of its use. New York Revised Penal Law, for example, defines the terms as follows:

"12. 'Deadly weapon' means any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switch-blade knife, gravity knife, billy, blackjack, or metal knuckles.

"13. 'Dangerous instrument' means any instrument, article or substance, including a 'vehicle' as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury." (Section 10.00).

The Michigan Revised Criminal Code employs definitions that are almost identical to New York's, but adds "bludgeon" and "slungshot" to its list of deadly weapons. (Final Draft 1967, s. 135).

The term "serious physical injury" will be significant also in the assault article, and it is anticipated that the definition will be substantially the same as that set forth in Model Penal Code section 210.0 (3):

" 'serious bodily injury' means 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,"

B. Derivation

Section 1 is a combination of Model Penal Code s. 221.1, New York Revised Penal Law s. 160.00, and Michigan Revised Penal Code s. 3307.

Section 2, subsection (1) embodies, in somewhat different language, the provisions of Michigan's s. 3305. Subsection (2) is derived from New York s. 160.10.

Section 3 combines language from Model Penal Code s. 221.1, New York s. 160.15 and Michigan s. 3305.

C. Relationship to Existing Law

Common law robbery was the felonious taking of goods or money from the person or presence of another by means of force or intimidation. The offense has four elements. First, there must be a taking of personal property or money from the person or presence of another. Second, there must be a use of actual or constructive force. Third, the force used must negate consent to the taking on the part of the victim. Fourth, there must be an intent to steal on the part of the offender. C. J. S. Robbery, ss. 1, 2, pp. 446-450.

The Oregon court has defined robbery succinctly as "open and violent larceny from the person." State v. Broom, 135 Or 641, 297 P. 340 (1931). In Merrill v. Gladden, 216 Or.460, 337 P.2d 774 (1959), the court commented that "robbery can only be consummated through an assault" and defined an assault as "an intentional attempt by one person by force or violence to do an injury to the person of another coupled with the present ability to carry the intention into effect." Id. at 463.

The two basic existing statutes are assault and robbery while armed with a dangerous weapon (ORS 163.280) and robbery while not armed with a dangerous weapon (ORS 163.290). There is a counterpart assault with intent to rob statute (ORS 163.270) which has been held to include both the intent to commit armed and unarmed robbery. Merrill v. Gladden, supra. There is a special statute covering train robbery (ORS 163.330).

The Robbery Draft retains the rationale of the present statutes, i.e., the prohibition against forcible taking of property from another; however, the scope of the basic concept of the crime is altered markedly. As the Michigan reporters observe, the present approach is that unless property is actually taken from the person or presence of the victim, there is no robbery. If the actor tries to rob and is prevented or is otherwise unsuccessful, the matter must be treated as attempted robbery or assault with intent to rob. This emphasizes the property aspects of the crime and treats it as an aggravated form of theft. If, however, the primary concern is with the physical danger to the victim and his difficulty in protecting himself from sudden attacks against his person or property, then the actual taking of property becomes less important. (Michigan Revised Criminal Code, Final Draft 1967, p. 257). The Draft follows this line of reasoning and adopts the view that repression of violence is the principle reason for being guilty of robbery. The language of "in the course of committing or attempting to commit theft" is not further defined, but is intended to extend from the attempt state through the phase of flight.

The policy reasons underlying the shift of emphasis in the fundamental concept of robbery is well stated by the Reporters of the Model Penal Code:

"The thief's willingness to use force against those who would restrain him in flight strongly suggests he would have employed it to effect the theft had there been need for it." (Tent. Draft No. 11, p. 68 (1960)).

This proposal also eliminates the question of what is a lesser-included offense to a charge of robbery because it makes it immaterial whether property is or is not obtained. The maximum penalty under existing law for assault with intent to rob is the same as for the greater crime, so the Draft will not change the net result in the situation wherein no property is obtained by the robber, except to label the crime as "robbery" instead of "assault with intent to rob."

As provided by ORS 163.280, the single factor that aggravates robbery is that of being armed with a dangerous weapon. As noted previously, that factor is retained, but in terms of a "deadly weapon" and four new factors are added. The crime becomes second degree robbery if the actor represents that he is armed or if he is aided by an accomplice actually present. The crime is enhanced to first degree status if the actor is armed with a "deadly weapon", or uses or attempts to use a "dangerous weapon", or if he causes or attempts to cause serious physical injury to any person.

The use of the verb "attempts" in the phrases "attempts to use a dangerous weapon" and "attempts to cause serious physical injury" is meant to indicate an act by the defendant that goes beyond a mere threat. If the defendant "tries" to use a dangerous weapon or "tries" to cause serious physical injury to any person, then the first degree robbery sanctions would apply. As it is used in section 3, the word "attempts" should not be confused with the noun "attempt" as that word is employed to denote an incomplete or attempted crime.

Examples:

1. A, who is in fact, unarmed, tells V that he, A, has a gun in his pocket and to hand over his money. A is guilty of second degree robbery under section 2 (1).

2. A, who is in fact unarmed, displays a toy gun to V and tells V to hand over his money. A is guilty of second degree robbery under section 2 (1).

3. A and his accomplice B, who are both unarmed, accost V and demand his money, while B remains behind V. Both A and B are guilty of second degree robbery under section 2 (2).

4. A and B together decide to rob V's store. A, who is unarmed, goes into the store while B waits in the get-away car. A tells V to hand over his money or A will beat him. Both A and B are guilty of third degree robbery under section 1 (1). Section 2 (2) is not violated because B, although he is a principal to the crime, is not "actually present" so as to present an added threat to V's safety.

5. A, with a loaded revolver concealed under his coat, tells V to hand over his money. A is guilty of first degree robbery under section 3 (1).

6. A tells V to hand over his money. V refuses. A takes a 6-inch piece of lead pipe from his pocket, and holding it in his hand, tells V he "means business." A is guilty of first degree robbery under section 3 (2).

7. Same facts as No. 6 above, except that A strikes V a sharp blow on the head with the pipe, rendering V unconscious and fracturing his skull. A is guilty of first degree robbery under both section 3 (2) and section 3 (3).

8. A tells V to hand over his money. V refuses, and A strikes V in the face with his fist, knocking him down. A then kicks V numerous times in the ribs and stomach. V, who is very durable, is not seriously injured. A is clearly guilty of third degree robbery under section 1 (1). Whether A is guilty of first degree robbery under section 3 (3) by an attempt to cause serious physical injury to V would be a question for the trier of fact.

Under present Oregon law robbery, either armed or unarmed, can only be consummated through an assault plus a taking of property from the person assaulted. The proposed Article will change the law in this regard, because the language of section 1 is broad enough to cover instances in which property is taken from someone other than the person threatened. For example: A forces V to telephone his wife and direct her to take money from V's safe and deliver it at a named time and place to A's accomplice. Under the traditional "person or presence" test this probably would not be robbery, but will constitute robbery under section 1 (2). Furthermore, the Commission's proposal eliminates the apparent existing requirement that the assault be

directed at the victim of the robbery. (See, Merrill v. Gladden, supra, at 464). The language "use or threatens the immediate use of physical force upon another person" encompasses the type of case in which the force or threat is directed at someone other than the owner of the property. A forces V to open the store safe by threatening to harm V's employe if V refuses. As noted by the Michigan revisers, the important considerations should be whether the actor by the threat he uses intends to coerce the owner into parting with his property and whether under the circumstances the threat is or might be effective.

It will not be necessary, either, to direct the threat or force toward a person "present" in order to commit robbery. Included within the ambit of the proposed revision are situations such as this: A enters V's store at the same time A's accomplice, B, forces his way into V's home. B telephones V and threatens immediate harm to his family unless V opens the store safe for A.

NOTE ON ASSAULTS:. The Draft would repeal part of ORS 163.270 relating to assault with intent to rob. The preliminary draft on Assault and related offenses contains no "assault with intent to commit" provisions since an assault with intent to commit another offense will, in every case constitute an attempt to commit the greater offense. Consequently, the remainder of the statute covering assault with intent to commit rape or mayhem, as well as that part of ORS 163.280 on assault with intent to kill will be dealt with as attempts to commit the particular offense.

ORS 163.330, "train robbery and assault of passenger or member of crew", also would be repealed and no comparable provision retained, inasmuch as train robbery does not appear to present any special problem in this day and age requiring separate treatment apart from any other types of robbery or assault. This represents the view taken by the American Law Institute:

"A more difficult question is posed by the fairly common statutes penalizing with special severity robbery or burglary of banks or trains. Here are particularly desirable and well-defended prizes, presumably chosen as targets by the most desperate and well-organized criminals. On the other hand, one reads of pathetic attempts of clumsy amateurs to rob banks, and the criteria which would lead to designating bank robbery for special treatment take us logically on to building and loan companies, credit unions, express companies, paymasters, post offices, jewelry stores, and truck loads of whisky, silk, or other valuable commodities. It is difficult if not impossible to draft an acceptable legislative definition of this category of unusually tempting victims. This, plus the fact that most states get along without special laws on the subject, supports our judgment against making exceptional provision here." (MPC, T.D. No. 11, p. 72 (1960).)

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 222.1. Robbery.

(1) Robbery Defined. A person is guilty of robbery if, in the course of committing a theft, he:

- (a) inflicts serious bodily injury upon another; or
- (b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or
- (c) commits or threatens immediately to commit any felony of the first or second degree.

An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

(2) Grading. Robbery is a felony of the second degree, except that it is a felony of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury.

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Text of New York Revised Penal Law

Section 160.00. Robbery; defined

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

Section 160.05. Robbery in the third degree

A person is guilty of robbery in the third degree when he forcibly steals property.

Robbery in the third degree is a class D felony.

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

Section 160.10. Robbery in the second degree

A person is guilty of robbery in the second degree when he forcibly steals property and when he is aided by another person actually present.

Robbery in the second degree is a class C felony.

Section 160.15. Robbery in the first degree

A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

1. Causes serious physical injury to any person who is not a participant in the crime; or
2. Is armed with a deadly weapon; or
3. Uses or threatens the immediate use of a dangerous instrument.

Robbery in the first degree is a class B felony.

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Text of Michigan Revised Criminal Code

Section 3301. Definition of Terms

(1) The definitions contained in section 3201 are applicable in this chapter unless the context otherwise requires.

(2) "In the course of committing a theft" embraces acts which occur in an attempt to commit or the commission of theft, or in flight after the attempt or commission.

Section 3305. Robbery in the First Degree

(1) A person commits the crime of robbery in the first degree if he violates section 3307 and is armed with a deadly weapon or dangerous instrument.

(2) Possession then and there of an article used or fashioned in a manner to lead any person who is present reasonably to believe it to be a deadly weapon or dangerous instrument, or any verbal or other representation by the defendant that he is then and there so armed, is prima facie evidence under subparagraph (1) that he was so armed.

Text of Michigan Revised Criminal Code (Cont'd)

(3) Robbery in the first degree is a Class A felony.

Section 3306. Robbery in the Second Degree

(1) A person commits the crime of robbery in the second degree if he violates section 3307 and is aided by another person actually present.

(2) Robbery in the second degree is a Class B felony.

Section 3307. Robbery in the Third Degree

(1) A person commits the crime of robbery in the third degree if in the course of committing a theft he:

(a) Uses force against the person of the owner or any person present with intent to overcome his physical resistance or physical power of resistance; or

(b) Threatens the imminent use of force against the person of anyone who is present with intent to compel acquiescence to the taking of or escaping with the property.

(2) Robbery in the third degree is a Class C felony.

Section 3310. Claim of Right not a Defense

No person may submit in defense against a prosecution for robbery in any of its degrees that there was no theft because the taking was under a claim of right; claim of right is not a defense under this chapter.

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